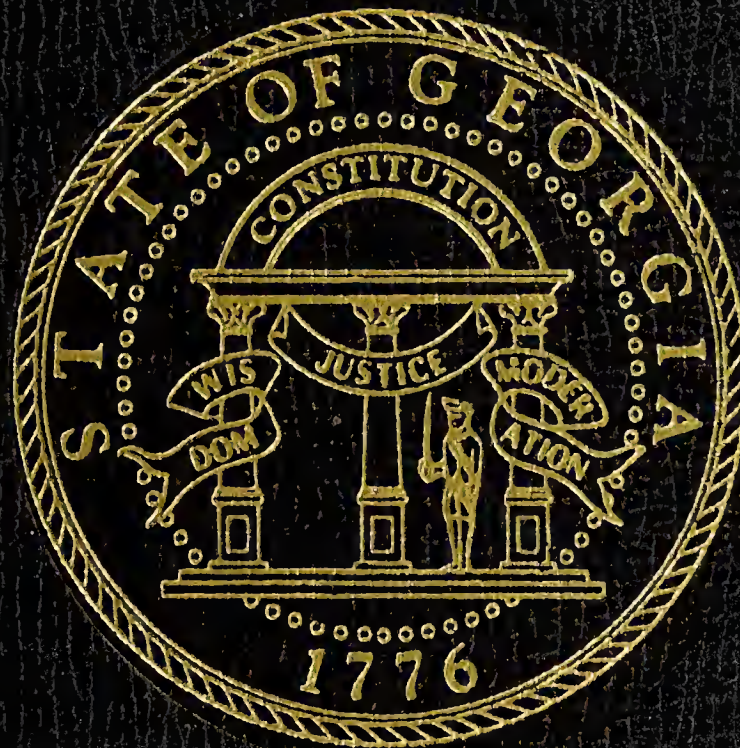


**OFFICIAL CODE
OF
GEORGIA**

ANNOTATED



VOLUME 2

Constitution of the State of Georgia
2016 Edition

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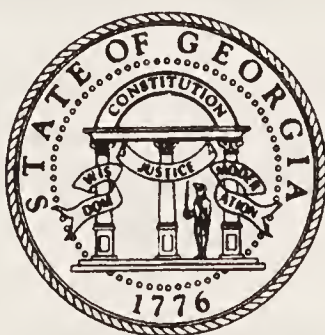
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With Provision for Subsequent Pocket Parts

Prepared by

The Code Revision Commission
The Office of Legislative Counsel
and
The Editorial Staff of LexisNexis®



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Constitution of the State of Georgia

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and the Georgia Appeals Reports

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OFFICE OF SECRETARY OF STATE

*I, Brian P. Kemp, Secretary of State of the State of Georgia, do
hereby certify that*

the statutory portion of the Official Code of Georgia Annotated contained
in this volume is a true and correct copy of such material as enacted by
the General Assembly of Georgia; all as same appear of file and record in
this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed
the seal of my office, at the Capitol, in the City of Atlanta, this
30th day of June, in the year of our Lord Two Thousand and
Sixteen and of the Independence of the United States of
America the Two Hundred and Fortieth.



B. P. Kemp

Brian P. Kemp, Secretary of State

Preface

This volume contains the text of the Constitution of Georgia, which was ratified by the voters of the state at the general election held November 2, 1982, with amendments ratified since that date.

The effective date of the Constitution is July 1, 1983. Based on this effective date, reference will be made to “the 1983 Constitution” (or, in abbreviated form, “Ga. Const. 1983”) throughout this volume and throughout all future Code Supplements and replacement volumes.

The 1983 Constitution was drafted under the supervision of the Select Committee on Constitutional Revision, created by Ga. L. 1977, p. 1528 and consisting of the Governor, the Lieutenant Governor, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, the Chief Judge of the Court of Appeals, the Attorney General, the Chairman of the Judiciary Committee of the Senate, the Chairman of the Judiciary Committee of the House of Representatives, and a trial judge appointed by the Speaker Pro Tempore of the House of Representatives. The Select Committee appointed separate article committees, consisting of members reviewing individual articles of the Constitution and submitting recommended revisions to the Select Committee and then to the General Assembly. The final proposed Constitution was set forth at Ga. L. 1981, Ex. Sess., p. 143 and, following the incorporation of amendments to the proposed Constitution at the 1982 Session (Ga. L. 1982, p. 2551), was submitted to the electorate for approval. After such approval was given, the special commission created pursuant to Article XI, Section I, Paragraph V of the new Constitution incorporated the general amendment which was also approved by the voters at the 1982 general election (see Article I, Section II, Paragraph IX) and delivered the final document to the Secretary of State on March 1, 1983.

In contrast to the 1976 Constitution, which was primarily an editorial revision of the 1945 Constitution and its amendments, the document approved at the 1982 general election represents a comprehensive substantive revision of the Constitution of Georgia. In order to maintain the reference value of this Constitution volume, the editorial staff of the publisher has reviewed all annotations deemed to be of continued relevance, and rearranged the annotations so that they appear under the most appropriate Paragraphs of the 1983 Constitution. Where a given provision of the 1976 Constitution has been revised so that one or more annotations previously appearing under that provision may no longer be wholly pertinent to the corresponding provision of the 1983 Constitution, editor’s notes have been written to describe the former language or to cite the specific constitutional provision, or both, under which the case or cases were decided.

For the purpose of assisting the user in locating the disposition of provisions of the 1976 Constitution in the 1983 Constitution, tables of corresponding provisions have been included following the table of contents of this volume and have also been included in the 1998 Edition of Volume 41, the Tables volume. In addition, cross reference notes are included under the text of each Paragraph indicating the corresponding provisions of that Paragraph in the 1976 Constitution. Users are strongly urged to retain their copies of prior Volume 2 for possible reference purposes.

This 2007 Edition contains three appendices which list amendments of local application to the 1976 Constitution, to the 1945 Constitution, and to the 1877 Constitution, respectively. As provided in Article XI, Section I, Paragraph IV of the 1983 Constitution, each of these local amendments will stand repealed on July 1, 1987, unless specifically continued in force by local law, ordinance, or resolution. As these local laws, ordinances, and resolutions are enacted and set forth, they will be indexed by locality and by Constitution in the pocket part supplement to Volume 42, the Index to Local and Special Laws and General Laws of Local Application. This volume contains all laws specifically codified in the Constitution of Georgia, by the General Assembly through the 2016 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through May 6, 2016. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; John Marshall Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice; American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2014, 2015, and 2016 Sessions of the General

Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2014 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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1976 Constitution to 1983 Constitution

This table compares each Paragraph of the 1976 Constitution to its respective Paragraph or Paragraphs of the 1983 Constitution of Georgia. A reference to "None" in the 1983 Constitution column indicates that the given Paragraph of the 1976 Constitution has no comparable provision in the 1983 Constitution.

1976 Constitution			1983 Constitution			1976 Constitution			1983 Constitution		
Art.	Sec.	Para.				Art.	Sec.	Para.			
I	I	I	A. I, § I, ¶ I						A. III, § VI, ¶ II		
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I	I	IX	A. I, § I, ¶ XII			II	II	III	A. II, § II, ¶ I		
I	I	X	A. I, § I, ¶ XIII			II	II	IV	A. II, § II, ¶ I		
I	I	XI	A. I, § I, ¶ XI, XIV			II	III	I	None		
			A. I, § I, ¶ XV			II	III	II	A. II, § II, ¶ III		
I	I	XII	A. I, § I, ¶ XV			II	III	III	A. II, § II, ¶ III		
I	I	XIII	A. I, § I, ¶ XVI			II	III	IV	A. II, § II, ¶ I		
I	I	XIV	A. I, § I, ¶ XVII			II	III	V	None		
I	I	XV	A. I, § I, ¶ XVIII			III	I	I	A. III, § I, ¶ I		
I	I	XVI	A. I, § I, ¶ XIX			III	I	I	A. III, § II, ¶ I, II		
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I	I	XXIII	A. I, § I, ¶ XXVI			III	IV	III	A. III, § III, ¶ III		
I	I	XXIV	A. I, § I, ¶ XXVII						A. III, § III, ¶ IV		
I	I	XXV	A. I, § I, ¶ XXVIII			III	V	I	A. III, § II, ¶ V		
I	II	I	A. I, § II, ¶ I			III	V	II	A. III, § II, ¶ V		
I	II	II	A. I, § II, ¶ II			III	V	III	A. III, § IV, ¶ I		
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I	II	IX	A. I, § I, ¶ VII			III	V	X	A. III, § IV, ¶ VII		
I	II	X	A. I, § II, ¶ VII								
I	II	XI	A. I, § II, ¶ VIII			III	V	XI	A. III, § IV, ¶ VIII		
I	II	XII	None								
I	II	XIII	None			III	V	XII	A. III, § IV, ¶ IX		
I	III	I	A. I, § III, ¶ II			III	V	XIII	A. III, § IV, ¶ X		

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III	VIII	IV	None			IV	VII	II	A. XI, § I, ¶ I		
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III	IX	III	A. III, § VIII, ¶ I, II			V	I	IV	A. II, § II, ¶ II		
III	IX	IV	A. III, § VIII, ¶ I, II			V	I	V	None		
III	IX	V	A. III, § VIII, ¶ I, II			V	I	VI	A. V, § I, ¶ III		
III	IX	VI	A. III, § IX, ¶ VI			V	I	VII	A. V, § I, ¶ IV		
III	X	I	A. III, § IX, ¶ I			V	I	VIII	A. V, § I, ¶ V		
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III	X	V	A. III, § IV, ¶ IV						A. IV, § II, ¶ II		
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VI	II	VI	None						A. V, § III, ¶ II		
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VI	IV	III	A. VI, § IV, ¶ I			VI	XVI	II	None		
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VIII	IV	I	A. VIII, § IV, ¶ I						A. IX, § III, ¶ I		
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VIII	IV	III	A. VIII, § VII, ¶ I			IX	VII	I	A. IX, § II, ¶ IX		
VIII	V	I	A. VIII, § V, ¶ I			IX	VII	II	A. IX, § V, ¶ I, IV, V		
VIII	V	II	A. VIII, § V, ¶ II, IV			IX	VII	III	A. IX, § V, ¶ VI		
VIII	V	III	None			IX	VII	IV	None		
VIII	V	IV	A. VIII, § V, ¶ V			IX	VII	V	A. IX, § V, ¶ V		
VIII	V	V	A. VIII, § V, ¶ III, IV			IX	VII	I	A. IX, § V, ¶ IV		
VIII	V	VI	A. VIII, § V, ¶ I			IX	VIII		A. IX, § VI, ¶ I, II		
			A. VIII, § IV, ¶ I						A. IX, § I, ¶ IV		
			A. VIII, § VI, ¶ I			IX	VIII	II	A. IX, § VI, ¶ III, IV		
VIII	V	VII	A. VIII, § V, ¶ IV			IX	VIII	III	A. IX, § V, ¶ III		
VIII	VI	I	A. VIII, § II, ¶ I			IX	VIII	IV	A. IX, § V, ¶ III		
VIII	VI	II	A. VIII, § IV, ¶ I			IX	VIII	V	A. IX, § V, ¶ VI		
VIII	VII	I	A. VIII, § VI, ¶ I			X	I	I	A. III, § X, ¶ I		
VIII	VII	II	A. VIII, § VI, ¶ II			X	I	II	A. III, § X, ¶ I, V		
VIII	VII	I	A. VII, § I, ¶ I			X	I	III	A. III, § X, ¶ I, III		
VIII	IX	I	A. VIII, § V, ¶ VII			X	I	IV	A. III, § X, ¶ IV		
IX	I	I	A. IX, § I, ¶ I, II			X	I	V	A. III, § X, ¶ II		
IX	I	II	A. IX, § I, ¶ II			X	II		A. VIII, § VI		
IX	I	III	A. IX, § I, ¶ II			X	II	I	A. VIII, § VII, ¶ I		
IX	I	IV	A. IX, § I, ¶ II			X	II	II	A. VIII, § VII, ¶ I		
IX	I	V	A. IX, § I, ¶ II			X	II	III	A. III, § XI, ¶ I, I		
IX	I	VI	None			X	II	IV	A. XI, § I, ¶ I		
IX	I	VII	A. IX, § I, ¶ I			X	II	V	A. XI, § I, ¶ I		
IX	I	VIII	A. IX, § I, ¶ III			X	II	VI	A. VIII, § VI, ¶ I		
IX	I	IX	A. IX, § I, ¶ III			X	II	VII	A. VIII, § VII, ¶ I		
IX	I	X	A. IX, § I, ¶ III			X	II	VIII	A. VIII, § VII, ¶ I		
IX	I	XI	A. IX, § I, ¶ II			X	II	IX	A. III, § IX, ¶ II		
IX	II	I	A. IX, § II, ¶ I			X	II	X	A. VIII, § VII, ¶ I		

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1976 Constitution			1983 Constitution	1976 Constitution			1983 Constitution
Art.	Sec.	Para.		Art.	Sec.	Para.	
X	II	XI	A. VIII, § VII, ¶ I	X	II	IV	None
X	II	XII	A. III, § VI, ¶ II	XI	I	V	A. XI, § I, ¶ III
X	II	XIII	A. VIII, § VII ¶ I	XII	I	I	A. X, § I, ¶ IV
X	II	XIV	A. VIII, § VII, ¶ IV	XII	I	II	A. X, § I ¶ IV
X	II	XV	A. VIII, § VII, ¶ I	XII	I	III	A. X, § I ¶ V
X	I	I	None	XII	I	IV	A. X, § I ¶ VI
X	I	II	None	XIII	I	I	A. XI, § I ¶ I
X	II	III	None	XIII	I	II	A. XI, § I, ¶ IV
				XIII	I	III	A. XI, § I, ¶ V
				XIII	I	IV	A. XI, § I ¶ VI

Comparative Table Two

1983 Constitution to 1976 Constitution

This table compares each Paragraph of the 1983 Constitution to its respective Paragraph or Paragraphs of the 1976 Constitution of Georgia A reference to “None” in the 1976 Constitution column indicates that the given Paragraph of the 1983 Constitution has no comparable provision in the 1976 Constitution.

1983 Constitution			1976 Constitution			1983 Constitution			1976 Constitution		
Art.	Sec.	Para.				Art.	Sec.	Para.			
Preamble			Preamble			I	III	III	A. I, §	III, ¶	II
I	I	I	A. I, §	I, ¶	I	II	I	I	A. II, §	I, ¶	I
I	I	II	A. I, §	II, ¶	III	II	I	II	A. II, §	I, ¶	¶ I,
I	I	III	A. I, §	I, ¶	II				II		
I	I	IV	A. I, §	I, ¶	II				A. II, §	II, ¶	II
I	I	V	A. I, §	I, ¶	II	II	I	III	A. II, §	II, ¶	I
I	I	VI	A. I, §	I, ¶	II	II	II	I	A. II, §	II, ¶	III,
I	I	VII	A. I, §	II, ¶	II				IV		
I	I	VIII	A. I, §	I, ¶	II				A. II, §	III, ¶	IV
I	I	IX	A. I, §	I, ¶	II				A. VI, §	II, ¶	III
I	I	X	A. I, §	I, ¶	II	II	II	II	A. V, §	I, ¶	IV
I	I	XI	A. I, §	I, ¶	II	II	II	III	A. II, §	II, ¶	I
			A. I, §	I, ¶	II				A. II, §	III, ¶	II,
			A. VI, §	IV, ¶	II	II	II	IV	A. I, §	IV, ¶	I
			A. VI, §	XV, ¶	II	III	I	I	A. III, §	I, ¶	I
			—	III	II	III	II	I	A. III, §	II, ¶	I
I	I	XII	A. I, §	I, ¶	II	III		II	A. III, §	III, ¶	I
I	I	XIII	A. I, §	I, ¶	II	III	II	II	A. III, §	II, ¶	I
I	I	XIV	A. I, §	I, ¶	II	III	II	II	A. III, §	III, ¶	I
I	I	XV	A. I, §	I, ¶	II	III	II	III	A. III, §	II, ¶	II
I	I	XVI	A. I, §	I, ¶	II	III	II	IV	A. III, §	V, ¶	VII
I	I	XVII	A. I, §	I, ¶	II	III	II	V	A. III, §	V, ¶	I, II
I	I	XVIII	A. I, §	I, ¶	II	III	III	I	A. III, §	IV, ¶	I
I	I	XIX	A. I, §	I, ¶	II	III	III	II	A. III, §	IV, ¶	II
I	I	XX	A. I, §	I, ¶	II	III	III	III	A. III, §	IV, ¶	III
I	I	XXI	A. I, §	I, ¶	II	III	IV	I	A. III, §	V, ¶	III,
I	I	XXII	A. §	I, ¶	II	III			VI		
I	I	XXIII	A. I, §	I, ¶	II	III	IV	II	A. III, §	V, ¶	IV
I	I	XXIV	A. I, §	I, ¶	II	III	IV	III	A. III, §	V, ¶	V
I	I	XXV	A. I, §	I, ¶	II	III	IV	IV	A. III, §	IV, ¶	III
I	I	XXVI	A. I, §	I, ¶	II	III	IV	V	A. III, §	V, ¶	VIII
I	I	XXVII	A. I, §	I, ¶	II	III	IV	VI	A. III, §	V, ¶	IX
I	I	XXVIII	A. I, §	I, ¶	II	III			A. V, §	II, ¶	III
I	II	I	A. I, §	II, ¶	II	III	IV	VII	A. III, §	V, ¶	X
I	II	II	A. I, §	II, ¶	II	III	IV	VIII	A. III, §	V, ¶	XI
I	II	III	A. I, §	II, ¶	II	III	IV	IX	A. III, §	V, ¶	XII
I	II	IV	A. I, §	II, ¶	II	III	IV	X	A. III, §	V, ¶	XIII
I	II	V	A. I, §	II, ¶	II	III	IV	XI	None		
I	II	VI	A. I, §	II, ¶	II	III	V	I	A. III, §	VII, ¶	I,
I	II	VII	A. I, §	II, ¶	II				II		
I	II	VIII	A. I, §	II, ¶	II	III		II	A. III, §	VII, ¶	
I	II	IX	A. VI, §	V, ¶	II				VIII		
I	III	I	A. I, §	III, ¶	II						
I	III	II	A. I, §	III, ¶	II						

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III	V	IV	A. III, § VII, ¶ XII			III	IX	VI	A. III, § IX, ¶ VI		
III	V	V	A. III, § VII, ¶ VII			III	IX	VII	A. III, § X, ¶ VII		
III	V	VI	A. III, § VII, ¶ V, VI			III	IX	VIII	A. VII, § II, ¶ III		
III	V	VII	A. III, § X, ¶ II			III	X	I	A. III, § X, ¶ VIII		
III	V	VIII	A. III, § VII, ¶ III			III	X	II	A. X, § I, ¶ I — III		
III	V	IX	A. III, § VII, ¶ IX			III	X	III	A. X, § I, ¶ V		
III	V	X	A. III, § VII, ¶ X			III	X	IV	A. X, § I, ¶ III		
III	V	XI	A. III, § VII, ¶ XI			III	X	V	A. X, § I, ¶ IV		
III	V	XII	A. V, § II, ¶ VII			IV	I	I	A. X, § I, ¶ II		
III	V	XIII	A. III, § VII, ¶ X			IV	I	I	A. IV, § I, ¶ I		
III	V	XIV	A. V, § II, ¶ VI			IV	II	I	A. IV, § II, ¶ I		
III	VI	I	None			IV	II	II	A. IV, § II, ¶ I		
III	VI	II	A. III, § VIII, ¶ I			IV	III	I	A. V, § II, ¶ II		
III	VI		A. I, § III, ¶ I			IV	III	II	A. IV, § VI, ¶ I		
			A. III, § VIII, ¶ IIIA			IV	IV	I	A. IV, § VI, ¶ II		
			A. III, § XI, ¶ I			IV	V	I	A. IV, § VIII, ¶ I		
			—			IV	VI	I	A. IV, § V, ¶ I		
			IV			IV	VII	I	A. IV, § IV, ¶ I		
			A. III, § XII, ¶ I						A. IV, § I, ¶ I		
			A. IV, § VII, ¶ II						A. IV, § II, ¶ I		
			A. IV, § VIII, ¶ II, III						A. IV, § IV, ¶ I		
III	VI	III	A. X, § II, ¶ XII						A. IV, § V, ¶ I		
III	VI	IV	A. III, § VIII, ¶ II, III						A. IV, § VIII, ¶ I		
III	VI	V	A. I, § II, ¶ VII						A. IV, § I, ¶ I		
III	VI		A. IX, § V, ¶ I, II						A. IV, § IV, ¶ I		
III	VI		A. III, § VIII, ¶ V, VI, VIII — X						A. IV, § V, ¶ I		
III	VI	VI	A. III, § VIII, ¶ VII, XII						A. IV, § VII, ¶ I		
III	VII	I	A. III, § VI, ¶ I						A. IV, § I, ¶ I		
III	VII	II	A. III, § VI, ¶ II						A. IV, § II, ¶ I		
III	VII	III	A. III, § VI, ¶ III						A. IV, § IV, ¶ I		
III	VIII	I	A. III, § IX, ¶ I						A. IV, § V, ¶ I		
			—						A. IV, § VI, ¶ I		
III	VIII	II	A. III, § IX, ¶ I						A. V, § II, ¶ II		
			—						A. V, § II, ¶ I		
			V						A. V, § II, ¶ VI, VII		
III	IX	I	A. III, § X, ¶ I						A. V, § II, ¶ III		
III	IX	II	A. III, § X, ¶ III, V						A. V, § II, ¶ III		
			A. X, § II, ¶ IX						A. V, § II, ¶ III		
III	IX	III	A. III, § X, ¶ IV						A. IV, § II, ¶ I		
III	IX	IV	A. III, § X, ¶ V						A. IV, § IV, ¶ I		
									A. IV, § V, ¶ I		
									A. IV, § VI, ¶ I		
									A. V, § II, ¶ IV		
									A. V, § III, ¶ I		
									A. V, § II, ¶ V		
									A. V, § II, ¶ VIII		
									A. V, § III, ¶ I		
									A. VI, § X, ¶ I		
									A. V, § III, ¶ IV		
									A. VI, § XIII, ¶ I		

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V	III	III	A. V, § III, ¶ II			VI	VII	I	A. VI, § II, ¶ III, VIII		
V	III	IV	A. VI, § X, ¶ II						A. VI, § III, ¶ I		
V	IV		A. V, § IV, ¶ I						—		
VI	I	I	A. VI, § I, ¶ I						III		
			A. VI, § IV, ¶ XI						A. VI, § VI, ¶ III		
			A. VI, § VI, ¶ I						A. VI, § VII, ¶ I, III		
			A. VI, § VII, ¶ I								
VI	I	II	A. VI, § I, ¶ II			VI	VII	II	A. VI, § II, ¶		
VI	I	III	A. VI, § III, ¶ I						VIII		
			A. VI, § IV, ¶ IX, X						A. VI, § VII, ¶ I		
									A. VI, § XIII, ¶ I		
VI	I	III	A. VI, § XIII, ¶ II			VI	VII	III	A. VI, § II, ¶ III, VIII		
VI	I	IV	A. I, § I, ¶ VIII						A. VI, § III, ¶ III		
			A. VI, § IV, ¶ II, V, VI			VI	VII	IV	A. VI, § II, ¶ III, VIII		
VI		IV	A. VI, § VII, ¶ II						A. VI, § III, ¶ III		
			A. VI, § IX, ¶ I			VI	VII	V	A. VI, § II, ¶		
VI	I	VI	A. VI, § III, ¶ I						VIII		
			A. VI, § IV, ¶ VIII						A. VI, § VII, ¶ I		
			A. VI, § VI, ¶ I			VI	VII	VI	A. VI, § XII, ¶ I		
			A. VI, § VII, ¶ I						A. VI, § XIII, ¶ III		
VI	I	VII	A. VI, § I, ¶ II			VI	VII	VII	A. VI, § VII, ¶ III		
			A. VI, § III, ¶ I						A. VI, § XIII, ¶ III		
			A. VI, § VII, ¶ I						A. VI, § VII, ¶		
			A. VI, § XVI, ¶ I						III		
VI	I	VIII	A. VI, § II, ¶ IV			VI	VII	VIII	A. VI, § VII, ¶ III		
VI	I	IX	None						A. VI, § XIII, ¶ III		
VI	II	I	A. VI, § XIV, ¶ I						A. VI, § XIII, ¶ III		
VI	II	II	A. VI, § XIV, ¶ II						A. VI, § XI, ¶ I, II		
VI	II	III	A. VI, § XIV, ¶ III			VI	VIII	I	A. VI, § XII, ¶ I, II		
VI	II	IV	A. VI, § XIV, ¶ IV						A. VI, § XIII, ¶ I		
									A. VI, § XIII, ¶ I		
VI	II	V	A. VI, § XIV, ¶ V			VI	VIII	II	None		
VI	II	VI	A. VI, § XIV, ¶ VI			VI	IX	I	A. VI, § I, ¶ II		
									A. VI, § VII, ¶ I		
VI	II	VII	None						A. VI, § II ¶ V		
VI	II	VIII	A. VI, § XIV, ¶ VII			VI	IX	II	A. VI, § IV, ¶ XI		
						VI	X	I	A. VI, § VII, ¶ I		
VI	III	I	A. VI, § VI, ¶ II						None		
			A. VI, § VII, ¶ II			VI	X	II	A. VII, § I, ¶ I		
VI	IV	I	A. VI, § IV, ¶ I, III, IV			VII	I	I	A. VII, § I, ¶ II		
						VII	I	II	A. VII, § I, ¶ III		
VI	V		A. VI, § II, ¶ VIII			VII	I	III	A. VII, § I, ¶ IV		
VI	V	V	A. VI, § II, ¶ IV			VII	II	I	A. VII, § I, ¶ IV		
VI	VI	I	A. VI, § II, ¶ I, II, VII			VII	II	II	A. VII, § I, ¶ IV		
						VII	II	III	A. VII, § I, ¶ IV		
						VII	II	IV	A. VII, § I, ¶ IV		
VI	VI	II	A. VI, § II, ¶ IV			VII	III	I	A. VII, § II, ¶ I		
VI	VI	III	A. VI, § II, ¶ IV			VII	III	II	A. VII, § II, ¶ II, III		
VI	VI	IV	A. VI, § II, ¶ VII						A. VII, § II, ¶ IV		
VI	VI	V	A. VI, § II, ¶ IV			VII	IV	I	A. VII, § III, ¶ I		
VI	VI	VI	A. VI, § II, ¶ VIII			VII	IV	II	A. VII, § III, ¶ I		

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			A. IX, § VI, ¶ I			IX	II	II	A. IX, § III, ¶ I		
VII	IV	IV	A. III, § X, ¶ V			IX	II	III	A. IX, § IV, ¶ II		
			A. VII, § III, ¶ I			IX	II	IV	A. IX, § IV, ¶ II		
VII	IV	V	A. VII, § III, ¶ I			IX	II	VI	A. IX, § V, ¶ IV		
VII	IV	VI	A. XII, § III, ¶ II			IX	II	VI	A. IX, § IV, ¶ II		
VII	IV	VII	A. XII, § III, ¶ III						A. IX, § V, ¶ III		
VII	IV	VIII	A. VII, § III, ¶ IV			IX	II	VII	A. IX, § IV, ¶ II, IV		
			A. VII, § III, ¶ V			IX	I	V			
VII	IV	IX	A. VII, § III, ¶ VI			IX	II	VIII	A. IX, § IV, ¶ III		
VII	IV	X	A. VII, § III, ¶ VI			IX	II	IX	A. IX, § VI, ¶ II		
			None			IX	III	I	A. IX, § IV, ¶ II		
VII	IV	XI	None						A. IX, § VI, ¶ I		
VIII	I	I	A. VIII, § I, ¶ I			IX	III	II	A. IX, § IV, ¶ I		
			A. VIII, § VIII, ¶ I			IX	IV	I	A. VII, § I, ¶ III		
VIII	II	I	A. VIII, § II, ¶ I						A. IX, § VI, ¶ I, II		
			A. VIII, § VI, ¶ I			IX	IV	II	A. IX, § V, ¶ I, II		
VIII	III	I	A. VIII, § III, ¶ I			IX	IV	III	A. IX, § V, ¶ I II		
VIII	IV	I	A. VIII, § IV, ¶ I			IX	V	I	A. IX, § VII, ¶ I		
			A. VIII, § V, ¶ VI			IX	V	II	None		
			A. VIII, § VI, ¶ I			IX	V	III	A. IX, § VIII, ¶		
VIII	V	I	A. VIII, § V, ¶ I, VI						III, IV		
			A. VIII, § V, ¶ II			IX	V	IV	A. IX, § VII, ¶ I, V		
VIII	V	II	A. VIII, § V, ¶ V						A. IX, § VII, ¶ I, IV		
VIII	V	III	A. VIII, § V, ¶ II, V			IX	V	V	A. IX, § VII, ¶ II		
VIII	V	IV	A. VIII, § V, ¶ IV						A. IX, § VIII, ¶ V		
VIII	V	V	A. VIII, § VI, ¶			IX	V	VI	None		
VIII	V	VII	A. VIII, § IX, ¶ I			IX	VI	VII	A. IX, § VIII, ¶ I		
VIII	VI	I	A. VIII, § V, ¶ VI			IX	VI	II	A. IX, § VIII, ¶ I		
			A. VIII, § VIII, ¶ I			IX	VII	III	A. IX, § VIII, ¶ II		
VIII	VI	II	A. VIII, § VII, ¶ II						A. IX, § VIII, ¶ II		
			None			IX	VI	V	None		
VIII	VI	III	A. X, § II			X	I	I	A. XII, § I, ¶ I		
VIII	VII		A. VIII, § IV, ¶ III			X	I	II	A. XII, § I, ¶ I		
VIII	VII	I	A. X, § II, ¶ I, II, VI-VIII, X, XI, XIII-XV			X	I	III	A. XII, § I, ¶ I		
			A. X, § II, ¶ XIV			X	I	IV	A. XII, § I, ¶ II		
VIII	VII	II	A. X, § II, ¶ XIV			X	I	V	A. XII, § I, ¶ III		
VIII	VII	III	A. VIII, § IV, ¶ II			X	I	VI	A. XII, § I, ¶ IV		
VIII	VII	IV	A. IX, § I, ¶ I, VII			XI	I	I	A. IV, § III, ¶ I		
IX	I	I	A. IX, § I, ¶ I-V						IV, § VII, ¶ I		
			XI						A. X, § II, ¶		
IX	I	II	A. IX, § I, ¶ I						III-V		
			VIII-X						A. XIII, § I, ¶ I		
IX	I	III	None						None		
						XI	I	II	A. XI, § I, ¶ X		
IX	I	IV				XI	I	III	A. IX, § VIII, ¶ I		
									A. XIII, § I, ¶ II		
						XI	I	V	A. XIII, § I, ¶ III		
						XI	I	VI	X, XIII, § I, ¶ IV		

CONSTITUTION OF THE STATE OF GEORGIA

Article

- I. Bill of Rights.
- II. Voting and Elections.
- III. Legislative Branch.
- IV. Constitutional Boards and Commissions.
- V. Executive Branch.
- VI. Judicial Branch.
- VII. Taxation and Finance.
- VIII. Education.
- IX. Counties and Municipal Corporations.
- X. Amendments to the Constitution.
- XI. Miscellaneous Provisions.

Law reviews. — For article, “The Early Georgia Constitution,” see 16 Ga. B.J. 273 (1954). For article, “The Georgia Constitution of 1861,” see 19 Ga. B.J. 474 (1957). For article, “Interpreting the Georgia Constitution Today,” see 10 Mercer L. Rev. 219 (1959). For article, “Georgia’s Constitution of 1777,” see 24 Ga. B.J. 485 (1962). For article advocating revision of the 1945 Constitution, see 3 Ga. St. B.J. 287 (1967). For article outlining the nu-

merous amendments to the 1945 Georgia Constitution, see 5 Ga. St. B.J. 331 (1969). For article discussing the “void-from-inception” doctrine as applied to statutory law in Georgia, see 8 Ga. L. Rev. 101 (1973). For article, “An Overview of the New Georgia Constitution,” see 35 Mercer L. Rev. 1 (1983). For article, “E Pluribus — Constitutional Theory and State Courts,” see 18 Ga. L. Rev. 165 (1984).

JUDICIAL DECISIONS

Requirements for raising question as to constitutionality of law. — In order to raise a question as to the constitutionality of a “law,” at least three things must be shown: (1) the statute or the particular part or parts of the statute which the party would challenge must be stated or pointed out with fair precision; (2) the provisions of the Constitution, which it is claimed have been violated must be clearly designated; and (3) how the statute, or some designated part of it,

violates such constitutional provision. *Lockaby v. City of Cedartown*, 151 Ga. App. 281, 259 S.E.2d 683 (1979).

When charge as to unconstitutionality of statute too indefinite. — Any charge as to unconstitutionality of a statute, failing to state how the statute violates the specified provisions of the Constitution, is too indefinite to invoke any ruling upon the constitutionality of the statute. *Jordan v. State*, 172 Ga. 857, 159 S.E. 235 (1931).

CONSTITUTION OF THE STATE OF GEORGIA

PREAMBLE

To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, relying upon the protection and guidance of Almighty God, do ordain and establish this Constitution.

Law reviews. — For 1906 address, “The Lawyer in Government,” see 41 Mercer L. Rev. 601 (1990).

JUDICIAL DECISIONS

Cited in *Clabough v. Rachwal*, 176 Ga. App. 212, 335 S.E.2d 648 (1985).

ARTICLE I.

BILL OF RIGHTS

Section

- I. Rights of Persons.
- II. Origin and Structure of Government.
- III. General Provisions.
- IV. Marriage.

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JUDICIAL DECISIONS

Vicarious criminal liability unconstitutional. — Vicarious criminal liability in misdemeanor cases which involves as punishment a fine and not imprison-

ment violates due process. *Davis v. City of Peachtree City*, 251 Ga. 219, 304 S.E.2d 701 (1983).

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SECTION I.

RIGHTS OF PERSONS

Paragraph	Paragraph
I. Life, liberty, and property.	list of witnesses; compulsory process.
II. Protection to person and property; equal protection.	XV. Habeas corpus.
III. Freedom of conscience.	XVI. Self-incrimination.
IV. Religious opinions; freedom of religion.	XVII. Bail; fines; punishment; arrest, abuse of prisoners.
V. Freedom of speech and of the press guaranteed.	XVIII. Jeopardy of life or liberty more than once forbidden.
VI. Libel.	XIX. Treason.
VII. Citizens, protection of.	XX. Conviction, effect of.
VIII. Arms, right to keep and bear.	XXI. Banishment and whipping as punishment for crime.
IX. Right to assemble and petition.	XXII. Involuntary servitude.
X. Bill of attainder; ex post facto laws; and retroactive laws.	XXIII. Imprisonment for debt.
XI. Right to trial by jury; number of jurors; selection and compensation of jurors.	XXIV. Costs.
XII. Right to the courts.	XXV. Status of the citizen.
XIII. Searches, seizures, and warrants.	XXVI. Exemptions from levy and sale.
XIV. Benefit of counsel; accusation;	XXVII. Spouse’s separate property.
	XXVIII. Fishing and hunting.
	XXIX. Enumeration of rights not denial of others.

Law reviews. — For article, “Lobbying in the Shadows: Religious Interest Groups in the Legislative Process,” see 64 Emory L.J. 1041 (2015).
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the Fourth Amendment: A Call for Legislative Reform in Georgia to Implement Collection of Arrestees’ DNA,” see 32 Ga. St. U.L. Rev. 513 (2016).

Paragraph I. Life, liberty, and property.

No person shall be deprived of life, liberty, or property except by due process of law.

1976 Constitution. — Art. I, Sec. I, Para. I.

Cross references. — Deprivation of liberty and property interests by due process generally, U.S. Const., amends. 5 and 14, Ga. Const. 1983, Art. I, Sec. I, Para. II,

and § 1-2-6. Actions and remedies for deprivation of liberty: habeas corpus, Ga. Const. 1983, Art. I, Sec. I, Para. XV. Actions and remedies for deprivation of property: just compensation, Ga. Const. 1983, Art. I, Sec. III, Paras. I and II, and § 22-1-6. Deprivation of liberty by due process: detention of a child, § 15-11-18. False imprisonment, § 16-5-41. Arrest of persons generally, T. 17, C. 4. Deprivation of life by due process, § 17-10-33. Deprivation of property by due process: attachment, T. 18, C. 3. Garnishment, T. 18, C. 4. Prescription and adverse possession, § 44-5-160 et seq. False arrest, § 51-7-1. Property damages, §§ 51-9-1 and 51-10-1.

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(1976), see 25 Emory L.J. 983 (1976). For comment on a nuisance-abatement statute applied to authorize prior restraint on exhibition of unnamed films in the future as violative of the federal Constitution in *Universal Amusement Co. v. Vance*, 587 F.2d 159 (5th Cir. 1978), probable jurisdiction noted, 442 U.S. 928, 99 S. Ct. 2857, 61 L. Ed. 2d 295 (1979), aff'd, 445 U.S. 308, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980), see 13 Ga. L. Rev. 1076 (1979). For comment on *Reeves, Inc. v. Kelley*, 586 F.2d 1230 (8th Cir. 1978), vacated and remanded, 441 U.S. 939, 99 S. Ct. 2155, 60 L. Ed. 2d 1041 (1979), as to whether a state acting in a proprietary capacity as an interstate seller is restricted by the commerce clause, see 13 Ga. L. Rev. 1086 (1979). For comment on *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979), see 31 Mercer L. Rev. 375 (1979). For comment on *Rogers v. Medical Ass'n*, 244 Ga. 151, 259 S.E.2d 85 (1979), invalidating Georgia statute requiring Governor's appointments to Composite State Board of Medical Examiners be made solely from nominees submitted by state medical society as an unconstitutional delegation of legislative authority to a private organization, see 29 Emory L.J. 1183 (1980). For state constitutional law symposium, see 27 Ga. St. B.J. 158 (1991). For comment, "I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships," see 59 Emory L.J. 259 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NECESSITY FOR NOTICE AND HEARING

STATUTORY NOTICE OF PROSCRIBED CONDUCT

POLICE POWER — GENERALLY

POLICE POWER — BUSINESS

POLICE POWER — PROPERTY

1. IN GENERAL

2. TAKING PROPERTY FOR PUBLIC USE

3. TAXATION

4. ZONING

SELECTION OF JURIES

APPLICATION

1. IN GENERAL

2. ATTORNEYS
3. EMPLOYMENT RELATIONSHIPS AND EMPLOYEES
4. FAMILY ISSUES
5. RIGHT OF PRIVACY
6. TAXATION

CRIMINAL CASES

1. IN GENERAL
2. PRE-TRIAL
3. TRIAL
4. JURY ISSUES
4. SPECIFIC CRIMES
5. SENTENCING
6. APPEALS

General Consideration

Due process of law means the administration of general laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the subject matter, and proceeding upon notice and hearing. *Norman v. State*, 171 Ga. 527, 156 S.E. 203 (1930); *Dependable Ins. Co. v. Gibbs*, 218 Ga. 305, 127 S.E.2d 454 (1962); *Shoemaker v. Whitlock*, 226 Ga. 771, 177 S.E.2d 677 (1970).

“Due process of law” means that man should be tried in accordance with law of the land. *Lamar v. Prosser*, 121 Ga. 153, 48 S.E. 977 (1904); *Frank v. State*, 142 Ga. 741, 83 S.E. 645, 1915D L.R.A. 817, writ of error denied, 235 U.S. 694, 35 S. Ct. 208, 59 L. Ed. 429 (1914); *Brooks v. State*, 178 Ga. 784, 175 S.E. 6 (1934).

This section is safeguard against arbitrary power. *Cutsinger v. City of Atlanta*, 142 Ga. 555, 83 S.E. 263, 1915B L.R.A. 1097, 1916C Ann. Cas. 280 (1914).

Personal jurisdiction. — Because a seller sued an Illinois limited liability company (LLC) on an open account, long-arm jurisdiction over the LLC under the “transacting business” section of O.C.G.A. § 9-10-91(1) was reasonable and comported with due process. The LLC initiated the relationship with the seller and handled payment, the goods were delivered in Georgia to a Georgia apartment complex controlled by a related Georgia entity, and there was a long course of dealing between the parties. *Home Depot Supply, Inc. v. Hunter Mgmt., LLC*, 289 Ga. App. 286, 656 S.E.2d 898 (2008).

Discovery procedures of O.C.G.A. § 17-16-1 et seq. do not violate due process. — Amended discovery procedure of O.C.G.A. § 17-16-1 et seq. does not violate due process, as it imposes reciprocal discovery upon the state; any difference in the scope of mitigating evidence and the scope of non-statutory aggravating evidence is too minimal to be of constitutional significance on the question of reciprocity of discovery. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

Identification of specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Tucker v. Caldwell*, 608 F.2d 140 (5th Cir. 1979).

State action involved in denial of due process. — For something to constitute a denial of equal protection of the law as guaranteed by the Fourteenth Amendment and due process under the federal and state constitutions, state action must be involved. *Walker v. State*, 220 Ga. 415, 139 S.E.2d 278 (1964), rev’d on other grounds, 381 U.S. 355, 85 S. Ct. 1557, 14 L. Ed. 2d 681 (1965).

Due process of law is denied when an arm of the state acts directly against an individual’s property and deprives the individual of it without notice or an oppor-

General Consideration (Cont'd)

tunity to be heard. Thus, the requirements of “state” action can rarely be satisfied when the action is taken by one not a state official. *Reinertsen v. Porter*, 242 Ga. 624, 250 S.E.2d 475 (1978).

State cannot be deemed guilty of violation of due process simply because of court error. — State cannot be deemed guilty of a violation of the due process clause of its constitution, or of the due process clause of the federal constitution, simply because one of its courts while acting within its jurisdiction has made erroneous rulings or decisions. In such a case a party is left to the appropriate remedies for the correction of errors in judicial proceedings. *Norman v. State*, 171 Ga. 527, 156 S.E. 203 (1930).

Grand jury report properly expunged. — Trial court properly expunged a grand jury presentment of statements unnecessary to the purpose sought to be accomplished by the report that cast reflections of misconduct in office upon a public officer and impugned the officer’s character; the remainder of the report was properly filed and published as the grand jury report was in the nature of a general presentment in which the grand jury took note of alleged excessive overtime for county employees, which was within the province of the grand jury, and its limited remaining criticisms came within the ambit of O.C.G.A. §§ 15-12-71(b) and (c), and 15-12-80 as they did not appear to be criticisms of misconduct in office or impugned character. *In re July-August, 2003 DeKalb County Grand Jury*, 265 Ga. App. 870, 595 S.E.2d 674 (2004).

Due process principles extend to every proceeding which may deprive person of life, liberty, or property. — Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property, a fortiori the finding of a bureau chief or a government department head ruling cannot do so, consistently with the guarantees embodied in the constitutions of this state and the United States. The protective principles summed up in these due process clauses extend to every proceeding which may deprive a person of life,

liberty, or property, whether the process be judicial, administrative, or executive in its nature. *Zachos v. Huie*, 195 Ga. 780, 25 S.E.2d 806 (1943).

Law may not be legally applied so as to deprive person of rights, privileges, and immunities. — A law, even though fair and constitutional on its face, may not legally be applied so as to deprive any person of rights, privileges, and immunities under the Constitution of Georgia and the United States. *Walker v. State*, 220 Ga. 415, 139 S.E.2d 278 (1964), rev’d on other grounds, 381 U.S. 355, 85 S. Ct. 1557, 14 L. Ed. 2d 681 (1965).

Construction under state and federal due process provisions may differ. — The fact that the United States Supreme Court may construe the Fourteenth Amendment as not imposing a particular limitation would not prevent this court from giving a different construction to the Georgia due process clause and holding that under this clause the limitation does exist. *National Mtg. Corp. v. Suttles*, 194 Ga. 768, 22 S.E.2d 386 (1942).

Greater protection than federal due process. — The higher due process standard imposed by the due process clause of the Georgia Constitution requires that an agency present “sufficient justification” for its decisions. *Suber v. Bulloch County Bd. of Educ.*, 722 F. Supp. 736 (S.D. Ga. 1989).

The due process clause of the Georgia Constitution, while mirroring the language of the due process clause of the Fourteenth Amendment, affords greater protection than does federal due process. *Suber v. Bulloch County Bd. of Educ.*, 722 F. Supp. 736 (S.D. Ga. 1989).

Equal protection. — Driver’s equal protection challenge to O.C.G.A. § 40-5-22(c)(2) failed as the statute did not create a suspect class or impact a fundamental right and there was a rational basis to create a class of driver’s license applicants whose out-of-state licenses were suspended or revoked; the classification bore a direct relation to the strong governmental interests in protecting the public from drivers whose licenses had been revoked for driving under the influence and in preventing license shopping by nonresidents with revoked

out-of-state licenses. *Roberts v. Burgess*, 279 Ga. 486, 614 S.E.2d 25 (2005).

Driver's equal protection challenge to O.C.G.A. § 40-5-22(c)(7) failed because a driver applied for a Florida license, the driver was voluntarily subjected to that state's laws relating to the issuance of licenses; Florida validly suspended the driver's license and neither Georgia nor Florida was precluded from taking into account offenses that occurred in another state in deciding whether to issue or revoke an already issued operator's license. *Roberts v. Burgess*, 279 Ga. 486, 614 S.E.2d 25 (2005).

Litigant's right to fair trial when there are contested issues of fact. — When there are contested issues of fact no litigant has any constitutional right to have a verdict in the litigant's favor; the litigant has only the right to a fair trial under which the jury returns a verdict for that party, plaintiff or defendant, whom it believes entitled thereto. That is due process. *YMCA v. Bailey*, 112 Ga. App. 684, 146 S.E.2d 324 (1965), cert. denied, 385 U.S. 868, 87 S. Ct. 131, 17 L. Ed. 2d 95 (1966).

It cannot be said the doctrine of interspousal immunity is unconstitutional, as a matter of due process or equal protection. *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

Civil sanctions. — Imposition of fines and penalties on members of an association of taxicab owners in the form of suspension or revocation of their certificates of public necessity and convenience for infractions of taxicab regulations by their drivers did not violate substantive due process because the civil sanctions were a valid exercise of the police power; the city was authorized to find that in the legitimate interest of promoting and protecting the public safety, subjecting the members to civil sanctions for infractions committed by their drivers was a reasonably necessary and less onerous alternative than the imposition of vicarious criminal liability. *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 281 Ga. 342, 638 S.E.2d 307 (2006).

Civil contempt order in divorce case. — A civil contempt order in a di-

vorice case requiring a husband to pay \$1,500 to the wife for each day that passed without him paying the wife insurance proceeds pursuant to an oral order did not violate due process; a trial court could sua sponte raise an issue of contempt, and although the order to pay the proceeds was oral, the order was not ineffective as a matter of law, as the husband was well aware that the payment of the proceeds would be at issue and that the trial court would decide the matter without a jury. *Chatfield v. Adkins-Chatfield*, 282 Ga. 190, 646 S.E.2d 247 (2007).

Claimant must act in timely manner. — If a claimant has a remedy provided by law, under which the claimant can assert a claim within a reasonable time, then the claimant has a "day in court." If the claimant fails to assert it within such time, then the claimant, not the law, is at fault. *Berry v. Siskin*, 128 Ga. App. 3, 195 S.E.2d 255 (1973).

Standing to raise question of constitutionality. — One cannot raise the question of constitutionality of a statute, or of the action of an administrative agency acting under statutory power, as violative of constitutional rights, unless the interest or rights of such complaining party are affected by the statute or the action of the agency. *West v. Housing Auth.*, 211 Ga. 133, 84 S.E.2d 30 (1954).

Framing of question as to constitutionality of statute. — When question as to constitutionality of statute is properly raised by attacking specific Code sections as denying the defendant equal protection and due process of law as guaranteed by the Constitution of Georgia and the Fourteenth Amendment of the federal Constitution, and the answer clearly points out wherein the statute violates the constitutional provisions, the court cannot refuse to consider the question merely because it fails to point out the exact location of the due process and the equal protection clauses in the Constitutions. *Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954).

Counties are not persons as against state within meaning of constitutional provision guaranteeing due process to all persons. *Bibb County v. Hancock*, 211 Ga. 429, 86 S.E.2d 511 (1955).

General Consideration (Cont'd)

Due process does not require action against defendant be brought in county of defendant's residence. Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962).

Legislation that proof of fact constitutes prima-facie evidence of main fact in issue valid if rational connection. — State legislation declaring that proof of one fact or a group of facts shall constitute prima-facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. Reid v. Perkerson, 207 Ga. 27, 60 S.E.2d 151 (1950).

Statute purporting to determine conclusive evidence void as unauthorized invasion of court function. — Insofar as former Civil Code 1910, § 1790, purported to make an official analysis of fertilizers by the state chemist conclusive evidence, it was an unauthorized invasion of the functions of the courts, and is void as violative of this paragraph, because it is an unauthorized attempt to legislate the truth of facts upon which the rights of parties are made to depend in judicial investigations. Southern Cotton Oil Co. v. Raines, 171 Ga. 154, 155 S.E. 484 (1930).

Final judgment concerning nonresident juveniles. — When nonresident juveniles are ordered after the adjudicatory hearing to be transferred to the juvenile court authorities of another state, the judgment is final and dismissal of the appeal as not being from a final judgment constitutes deprivation of constitutional due process. G.W. v. State, 233 Ga. 274, 210 S.E.2d 805 (1974).

O.C.G.A. § 40-6-391(a)(4) is not void for vagueness and not violative of the Fourteenth Amendment of the United States Constitution or the due process clause of the Constitution of the State of Georgia. Scott v. Walker, 253 Ga. 695, 324 S.E.2d 187 (1985) (percentage by weight of alcohol in driver's blood).

Access to courts. — The 1987 amendment to O.C.G.A. § 9-3-73, which altered tolling provisions otherwise applicable to tort claims by injured minors in cases in which tort claims arose from health care professionals' malpractice, did not violate a brain-damaged child's right to equal protection or right of access to the courts. Smith v. Cobb County-Kennestone Hosp. Auth., 262 Ga. 566, 423 S.E.2d 235 (1992).

Although a court may in some circumstances issue sua sponte dismissals pursuant to its inherent authority recognized in O.C.G.A. § 15-6-9(8), a blanket prefiling order entered outside of a pending suit, imposing restrictions on the pro se right of access, may not be issued without a hearing on the court's contemplated action. In re Carter, 235 Ga. App. 551, 510 S.E.2d 91 (1998).

Abstention by federal courts. — Since Georgia decisional law extends due process protections beyond what federal due process alone affords, abstention by federal courts is warranted with regard to Georgia due process claims involving provisions which have never been construed by Georgia courts. Fields v. Rockdale County, 785 F.2d 1558 (11th Cir.), cert. denied, 479 U.S. 984, 107 S. Ct. 571, 93 L. Ed. 2d 575 (1986).

Child testimony statute not vague. — O.C.G.A. § 24-3-16 does not violate the due process clause of Ga. Const. 1983, Art. I, Sec. I, Para. I on its face and is not void for vagueness and uncertainty. Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200 (1992).

County homestead tax exemptions did not violate due process. — County homestead exemptions from ad valorem and education taxes did not violate due process or equal protection because they were rationally related to the legitimate government interests of the encouragement of neighborhood preservation, continuity, and stability, and the protection of reliance interest of existing homeowners, and the limits placed on the exemptions were not arbitrary. Blevins v. Dade County Bd. of Tax Assessors, 288 Ga. 113, 702 S.E.2d 145 (2010).

Privatization of probation services. — In a suit brought by misdemeanor defendants challenging the privatization of

probation services under O.C.G.A. § 42-8-100(g)(1), the Georgia Supreme Court agreed with the trial court that § 42-8-100(g)(1) was not unconstitutional on the statute's face and did not offend due process or equal protection nor condone imprisonment for debt. *Sentinel Offender Svcs., LLC v. Glover*, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

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S.E.2d 825 (1966); *Howard v. State*, 222 Ga. 525, 150 S.E.2d 834 (1966); *Slowik v. Knorr*, 222 Ga. 669, 151 S.E.2d 726 (1966); *Givens v. Dutton*, 222 Ga. 756, 152 S.E.2d 358 (1966); *Wilson v. State*, 223 Ga. 531, 156 S.E.2d 446 (1967); *Abercrombie v. Ledbetter-Johnson Co.*, 116 Ga. App. 376, 157 S.E.2d 493 (1967); *Ward v. Big Apple Super Mkts. of Bolton Rd., Inc.*, 223 Ga. 756, 158 S.E.2d 396 (1967); *Tuggle v. Manning*, 224 Ga. 29, 159 S.E.2d 703 (1968); *Wallace v. State*, 224 Ga. 255, 161 S.E.2d 288 (1968); *Lingo v. State*, 224 Ga. 333, 162 S.E.2d 1 (1968); *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 403, 162 S.E.2d 333 (1968); *Bryan v. State*, 224 Ga. 389, 162 S.E.2d 349 (1968); *Hogan v. Atkins*, 224 Ga. 358, 162 S.E.2d 395 (1968); *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968); *Crumley v. Head*, 225 Ga. 246, 167 S.E.2d 651 (1969); *Douglas County v. Abercrombie*, 119 Ga. App. 727, 168 S.E.2d 870 (1969); *Ballard v. Smith*, 225 Ga. 416, 169 S.E.2d 329 (1969); *Bugden v. Bugden*, 225 Ga. 413, 169 S.E.2d 337 (1969); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969); *City of Atlanta v. Royal Peacock Social Club, Inc.*, 225 Ga. 474, 169 S.E.2d 807 (1969); *Carroway v. Stynchcombe*, 225 Ga. 586, 170 S.E.2d 396 (1969); *Chaffin v. State*, 225 Ga. 602, 170 S.E.2d 426 (1969); *Reese v. State*, 121 Ga. App. 189, 173 S.E.2d 351 (1970); *Rogers v. McDonald*, 226 Ga. 329, 175 S.E.2d 25 (1970); *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970); *Bradfield v. Hospital Auth.*, 226 Ga. 575, 176 S.E.2d 92 (1970); *American Liberty Ins. Co. v. Sanders*, 122 Ga. App. 407, 177 S.E.2d 176 (1970); *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971); *Laidler v. Smith*, 227 Ga. 759, 182 S.E.2d 891 (1971); *Southern Ry. v. Insurance Co. of N. Am.*, 228 Ga. 23, 183 S.E.2d 912 (1971); *Alexander v. State*, 228 Ga. 179, 184 S.E.2d 450 (1971); *Fryer v. Stynchcombe*, 228 Ga. 576, 186 S.E.2d 885 (1972); *Hart v. Columbus*, 125 Ga. App. 625, 188 S.E.2d 422 (1972); *DeKalb County v. Empire Distributions, Inc.*, 229 Ga. 497, 192 S.E.2d 346 (1972); *Pitts v. GMAC*, 231 Ga. 54, 199 S.E.2d 902 (1973); *Payne v. State*, 231 Ga. 755, 204 S.E.2d 128 (1974); *Dill v. Dill*, 232 Ga. 231, 206 S.E.2d 6 (1974); *Cunningham v. State*, 232 Ga. 416, 207 S.E.2d 48 (1974); *Beavers v. State*, 132 Ga. App. 94, 207 S.E.2d 550 (1974); *Williams v. Georgia Power Co.*, 233 Ga. 517, 212 S.E.2d 348 (1975); *Doran v. Home Mart Bldg. Ctrs., Inc.*, 233 Ga. 705, 213 S.E.2d 825 (1975); *Houser v. State*, 234 Ga. 209, 214 S.E.2d 893 (1975); *Pace v. City of Atlanta*, 135 Ga. App. 399, 218 S.E.2d 128 (1975); *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975); *Revels v. Tift County*, 235 Ga. 333, 219 S.E.2d 445 (1975); *Tucker Door & Trim Corp. v. Fifteenth St. Co.*, 235 Ga. 727, 221 S.E.2d 433 (1975); *Orkin v. State*, 236 Ga. 176, 223 S.E.2d 61 (1976); *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976); *Tyree v. First Nat'l Bank*, 236 Ga. 740, 225 S.E.2d 435 (1976); *Gibson v. State*, 236 Ga. 874, 226 S.E.2d 63 (1976); *Street v. State*, 237 Ga. 307, 227 S.E.2d 750 (1976); *Tribble v. Knight*, 238 Ga. 84, 231 S.E.2d 68 (1976); *McCorquodale v. Stynchcombe*, 239 Ga. 138, 236 S.E.2d 486 (1977); *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241 (1977); *Cannon v. Georgia Farm Bureau Mut. Ins. Co.*, 240 Ga. 479, 241 S.E.2d 238 (1978); *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 240 Ga. 743, 242 S.E.2d 69 (1978); *Fayetteville-85 Assocs. v. Samas, Inc.*, 241 Ga. 119, 243 S.E.2d 887 (1978); *Shaw v. State*, 241 Ga. 308, 245 S.E.2d 262 (1978); *Williams v. Byrd*, 242 Ga. 80, 247 S.E.2d 874 (1978); *Lott Inv. Corp. v. Gerbing*, 242 Ga. 90, 249 S.E.2d 561 (1978); *Lambert v. City of Atlanta*, 242 Ga. 645, 250 S.E.2d 456 (1978); *Anderson v. Little & Davenport Funeral Home*, 242 Ga. 751, 251 S.E.2d 250 (1978); *Ferrell v. State*, 149 Ga. App. 405, 254 S.E.2d 404 (1979); *Corn v. Hopper*, 244 Ga. 28, 257 S.E.2d 533 (1979); *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800, 262 S.E.2d 106 (1979); *Allstate Beer, Inc. v. Julius Wile Sons & Co.*, 479 F. Supp. 605 (N.D. Ga. 1979); *Huskins v. State*, 245 Ga. 541, 266 S.E.2d 163 (1980); *Stewart v. State*, 246 Ga. 70, 268 S.E.2d 906 (1980); *Newsome v. Richmond County*, 246 Ga. 300, 271 S.E.2d 203 (1980); *Austin v. McNeese*, 156 Ga. App. 533, 275 S.E.2d 79 (1980); *West v. Sprayberry*, 247 Ga. 306, 275 S.E.2d 654 (1981); *Walter E. Heller &*

Co. v. Aetna Bus. Credit, Inc., 158 Ga. App. 249, 280 S.E.2d 144 (1981); Stoker v. Wood, 161 Ga. App. 110, 289 S.E.2d 265 (1982); State Farm Mut. Auto. Ins. Co. v. Bates, 542 F. Supp. 807 (N.D. Ga. 1982); Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 297 S.E.2d 250 (1982); Brown v. Wetherington, 250 Ga. 682, 300 S.E.2d 680 (1983); Chancellor v. State, 165 Ga. App. 365, 301 S.E.2d 294 (1983); Kemp v. Spradlin, 250 Ga. 829, 301 S.E.2d 874 (1983); State v. Roberson, 165 Ga. App. 727, 302 S.E.2d 591 (1983); Stone Mt. Game Ranch, Inc. v. Hunt, 570 F. Supp. 238 (N.D. Ga. 1983); Johnson v. State, 179 Ga. App. 467, 346 S.E.2d 903 (1986); Parker v. State, 256 Ga. 363, 349 S.E.2d 379 (1986); O'Kelley v. Hospital Auth., 256 Ga. 373, 349 S.E.2d 382 (1986); Sims v. City of Toccoa, 256 Ga. 368, 349 S.E.2d 385 (1986); Bowen v. City of Columbus, 256 Ga. 462, 349 S.E.2d 740 (1986); Thomas v. State, 180 Ga. App. 685, 350 S.E.2d 253 (1986); State v. Grant, 257 Ga. 123, 355 S.E.2d 646 (1987); Popple v. Popple, 257 Ga. 98, 355 S.E.2d 657 (1987); Dawson v. State, 186 Ga. App. 718, 368 S.E.2d 367 (1988); Jones v. Automobile Ins. Co., 698 F. Supp. 226 (N.D. Ga. 1988); Quiller v. Bowman, 262 Ga. 769, 425 S.E.2d 641 (1993); Consol. Gov't of Columbus v. Barwick, 274 Ga. 176, 549 S.E.2d 73 (2001); Huff v. State, 274 Ga. 110, 549 S.E.2d 370 (2001); Dorsey v. State, 251 Ga. App. 640, 554 S.E.2d 278 (2001); Cherokee County v. Greater Atlanta Homebuilders Ass'n, 255 Ga. App. 764, 565 S.E.2d 925 (2002); In re Harris, 289 Ga. App. 334, 657 S.E.2d 259 (2008); WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269 (2012).

Necessity for Notice and Hearing

Nothing short of notice of proceeding and opportunity to be heard in opposition thereto will satisfy due process clause of the state Constitution. Keenan v. Hardison, 245 Ga. 599, 266 S.E.2d 205 (1980).

Because the trustees for the property at issue, a parcel of property used for religious purposes, never received notice of a tax sale concerning the property, their due process rights were violated, making the sale of that property void. Marathon Inv.

Corp. v. Spinkston, 281 Ga. 888, 644 S.E.2d 133 (2007).

Fundamental idea of “due process of law” is that of “notice” and “hearing.” City of Macon v. Ries, 179 Ga. 320, 176 S.E. 21 (1934), overruled on other grounds, Derrick v. Campbell, 219 Ga. 795, 136 S.E.2d 381 (1964); Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962); Mulcay v. Murray, 219 Ga. 747, 136 S.E.2d 129 (1964); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971).

As matter of right when one's property rights involved. — Due process of law, as guaranteed by this paragraph of the Constitution, includes notice and hearing as a matter of right when one's property rights are involved. Sikes v. Pierce, 212 Ga. 567, 94 S.E.2d 427 (1956); Atlantic Ref. Co. v. Spears, 214 Ga. 126, 103 S.E.2d 547 (1958); Dansby v. Dansby, 222 Ga. 118, 149 S.E.2d 252 (1966); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971); Hamilton v. Edwards, 245 Ga. 810, 267 S.E.2d 246 (1980).

Citizen must be afforded hearing before condemned. — The fundamental idea in “due process of law” is that of “notice” and “hearing.” It means that the citizen must be afforded a hearing before the citizen is condemned. There must be a hearing first, and judgment can be rendered only after trial. Citizens' & Contractors' Bank v. Maddox, 175 Ga. 779, 166 S.E. 227 (1932); City of Macon v. Ries, 179 Ga. 320, 176 S.E. 21 (1934), overruled on other grounds, Derrick v. Campbell, 219 Ga. 795, 136 S.E.2d 381 (1964); Morman v. Board of Educ., 218 Ga. 48, 126 S.E.2d 217 (1962).

Under due process clause without notice and opportunity to be heard, there is no jurisdiction to pass judgment. Citizens' & Contractors' Bank v. Maddox, 175 Ga. 779, 166 S.E. 227 (1932).

Valid, binding judgment cannot be set aside without notice and opportunity for hearing. — Due process requires that a valid and binding judgment cannot be set aside without notice and opportunity for a hearing being afforded the party in whose favor the judgment was rendered. Citizens' & Contractors' Bank v. Maddox, 175 Ga. 779, 166 S.E. 227 (1932).

Necessity for Notice and Hearing (Cont'd)

Statute complies with due process if the statute provides for notice and hearing as right. — A statute complies with constitutional provisions as to due process if the statute provides for notice and hearing as a matter of right, either in express terms, or by necessary implication. *Robitzsch v. State*, 189 Ga. 637, 7 S.E.2d 387 (1940); *Kirton v. Biggers*, 232 Ga. 223, 206 S.E.2d 33 (1974).

Notice and hearing not matter of grace. — The benefit of notice and a hearing required by due process before judgment is not a matter of grace, but is one of right. *Citizens' & Contractors' Bank v. Maddox*, 175 Ga. 779, 166 S.E. 227 (1932).

Medical malpractice claims. — In a medical malpractice action brought by a married couple, it was error for the trial court to dismiss the claims against two defendants because it found that the couple had abused the civil litigation process; nothing indicated that the couple had been given notice that the trial court intended to dismiss their claims for this reason, and Georgia law did not authorize a dismissal on this basis. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

Requirements of due process are satisfied if a citizen has reasonable notice and opportunity to be heard, and to present a claim or defense, with due regard to the nature of the proceeding and the character of the rights which may be affected by it. *Hancock v. Board of Tax Assessors*, 226 Ga. 570, 176 S.E.2d 102 (1970).

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Hamilton v. Edwards*, 245 Ga. 810, 267 S.E.2d 246 (1980).

Due process concerns were satisfied by a trial court's order, which announced that a hearing would be held "to allow final

argument as to whether" the land should be partitioned or sold and which directed the parties to be "prepared to present all evidence on all issues"; the order was clearly adequate to inform a minority owner that the trial court intended the proceedings to be a final hearing and that a ruling would be issued thereafter. *Talmadge v. Elson Props.*, 279 Ga. 268, 612 S.E.2d 780 (2005).

When required notice allows or requires act or response within certain time. — When notice is required by law to be given to a party who has the right or is required to in some way act or respond to the notice within a prescribed period of time, the date of the notice must run from the date of its receipt unless there is an express statutory provision to the contrary. *Hamilton v. Edwards*, 245 Ga. 810, 267 S.E.2d 246 (1980).

Statute upheld if persons accorded notice and hearing applicable to cases of similar nature. — A statute does not violate due process of law if all persons to whom the statute applies are accorded notice and a hearing applicable to all cases of a similar nature. *Southern Ry. v. Overnite Transp. Co.*, 223 Ga. 825, 158 S.E.2d 387 (1967).

Procedural due process of law does not require "preseizure" hearing in cases of contraband condemnation. *Tant v. State*, 247 Ga. 264, 275 S.E.2d 312 (1981).

Forfeiture provision affords adequate notice and hearing to comport with due process. — O.C.G.A. § 16-13-49 affords adequate notice and adequate hearing so as to comport with due process of law as required by the federal Constitution and the Georgia Constitution. *Tant v. State*, 247 Ga. 264, 275 S.E.2d 312 (1981).

The fact that the owner of property sought to be condemned under O.C.G.A. § 16-13-49 had adequate notice and an opportunity for hearing is apparent from the facts of the owner's timely filing of a response to the condemnation petition and the owner's presentation of oral testimony at the hearing. *Tant v. State*, 247 Ga. 264, 275 S.E.2d 312 (1981).

Notice by publication under § 48-4-46. — It is not presumed that the

General Assembly intended to enable a tax sale purchaser to forego any methods of notice of foreclosure of the right to redeem which might be required by the due process clause, and the words “for any reason” in O.C.G.A. § 48-4-46(c) are construed to mean that notice by publication is permissible only if a sheriff’s inability to effect personal service satisfies the constitutional mandate of due process. *Hamilton v. Renewed Hope, Inc.*, 277 Ga. 465, 589 S.E.2d 81 (2003).

In post-seizure cases only reasonable notice and reasonably fair opportunity for hearing before forfeiture required. — All that procedural due process of law requires in “post-seizure” cases is notice and a hearing at which the owner or other party having an interest to be protected can appear and present a claim to the property being condemned. Any stipulated period of time as notice is not constitutionally required. All that is required by due process of law is that the affected party have reasonable notice and a reasonably fair opportunity for a hearing before the vehicle or other property is forfeited for a violation of the law. *Tant v. State*, 247 Ga. 264, 275 S.E.2d 312 (1981).

Whether or not one is deprived of fundamental right to fair hearing depends upon facts of each case. *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975).

Overlap in judicial and prosecutory functions not per se violative of due process. — It is not unusual at administrative type hearings to have considerable overlap in judicial and prosecutory functions. Such is not per se violative of due process. *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975).

When due process denied. — If a body vested with a duty to make judgments has unlawfully delegated that responsibility to another, or if the inseparation of judicial and prosecutory functions engenders a biased hearing, due process is denied. *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975).

Banning expert from testifying. — In a medical malpractice action, the trial court was required to afford an expert notice and an opportunity to be heard before imposing the sanction of banning

the expert from testifying. *Whitley v. Piedmont Hosp., Inc.*, 284 Ga. App. 649, 644 S.E.2d 514 (2007), cert. denied, 2007 Ga. LEXIS 626, 651 (Ga. 2007).

Notice to and hearing of valid license holder required before revocation of license. — The holder of a valid license which has been properly issued may enjoin its revocation and the interference with the holder’s lawful business thereunder in the absence of notice and a hearing. *Rose v. Grow*, 210 Ga. 664, 82 S.E.2d 222 (1954).

Statutory procedure for garnishments comports with due process. — Constitutional due process requirements are adequately met by the judicial supervision and notice to the defendant mandated by the statutory procedure for garnishments. Garnishment of wages to satisfy alimony orders or judgments meets the demands of due process. *Black v. Black*, 245 Ga. 281, 264 S.E.2d 216 (1980).

When notice and hearing implied. — Act providing for removal of commissioners of roads and revenues of a named county, by the judge of the superior court or the ordinary (now judge of the probate court) after investigation of charges preferred by 25 qualified voters, or by the judge of the superior court after such investigation when charges are made by the grand jury, did not violate the due process clause of either the state or the federal Constitution for lack of requirement as to notice and hearing, in view of the provision that the judge or the ordinary to whom the complaint was presented should cause an investigation to be made of such charges, “at which investigation the accused shall have the benefit of counsel, if desired,” since the provision quoted implied such requirement as to notice and hearing. *Robitzsch v. State*, 189 Ga. 637, 7 S.E.2d 387 (1940).

Notice of hearing presumed sufficient. — After a trial court indicated that the court sent a notice of a combined rescheduled hearing on a construction manager’s motion for summary judgment and a hearing on the issue of unliquidated damages to a condominium owner, it was presumed that such notice was sent and received in compliance with O.C.G.A.

Necessity for Notice and Hearing (Cont'd)

§§ 9-11-5(b) and 9-11-6(d), and the owner's mere contention that the owner did not receive notice of the hearing was not controlling and did not satisfy the owner's burden of showing that notice was in fact not received; accordingly, the owner's claim that the owner did not appear at the hearing because notice was insufficient lacked merit, due process was met, and the judgment entered from the hearing was affirmed. *Blue Stone Lofts, LLC v. D'Amelio*, 268 Ga. App. 355, 601 S.E.2d 719 (2004).

Due process clause does not guarantee to state citizen any particular form or method of state procedure. *Hancock v. Board of Tax Assessors*, 226 Ga. 570, 176 S.E.2d 102 (1970).

Constitutional validity of any chosen method of service may be defended on the ground that it is in itself reasonably certain to inform those affected or, when conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. *Benton v. Modern Fin. & Inv. Co.*, 244 Ga. 533, 261 S.E.2d 359 (1979).

Notice of process reasonably certain to inform excused when persons missing or unknown. — As examples of conditions which would not permit notice of process reasonably certain to inform and which would therefore excuse the use of a form of service falling below this standard, the United States Supreme Court cited "the case of persons missing or unknown." *Benton v. Modern Fin. & Inv. Co.*, 244 Ga. 533, 261 S.E.2d 359 (1979).

Service of process insufficient. — Service upon a spouse against whom a temporary protective order had been granted under the Georgia Family Violence Act was insufficient. The original service provided the spouse with no notice of the allegations, and service upon the spouse as the spouse left a hearing in the case was improper under the rule insulating a party in attendance upon the trial of a case from service of process. *Loiten v. Loiten*, 288 Ga. App. 638, 655 S.E.2d 265 (2007).

Out of state ex parte proceeding not given effect. — When the putative father of an illegitimate child sought and obtained a decree of a Tennessee court declaring him to be the father of such child and creating the relationship of parent and child between the petitioner and the child, the decree showing on its face that it was an ex parte proceeding, it will not be given effect in this state as against the mother when she was not made a party in the proceeding, was not served, did not appear and plead, or otherwise waive service or consent to such decree or have notice thereof, as it was violative of the due process clauses of the state and federal Constitutions. *Day v. Hatton*, 210 Ga. 749, 83 S.E.2d 6 (1954).

Authorization of suit against non-residents in residence when cause arose not violative of due process. — Georgia Laws, 1957, p. 649, § 1, which authorizes a suit against any person who is a bona fide resident of another state and who was a resident of this state when the cause of action related to a vehicular accident arose, is not violative of this section of the Georgia Constitution and the Fourteenth Amendment of the United States Constitution. *Crowder v. Ginn*, 248 Ga. 824, 286 S.E.2d 706 (1982).

Jurisdiction over nonresident under long arm statute. — Under the long arm statute, jurisdiction over a nonresident exists on the basis of transacting business in this state if the nonresident has purposefully done some act or consummated some transaction in this state, if the cause of action arises from or is connected with such act or transaction, and if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

The long arm statute contemplates that jurisdiction shall be exercised over nonresident parties to the maximum extent permitted by procedural due process. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

Showing of nonresident's "minimum contact" with forum state. — In order to satisfy the constitutional requirement of procedural due process, it must be

shown that the nonresident defendant has some “minimum contact” with the forum state so as to make the state’s exercise of jurisdiction over the defendant reasonable. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

Sufficient connection between defendant and forum state and reasonable notice to defendant. — The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought and a sufficient connection between the defendant and the forum state as to make it fair to require defense of the action in the forum. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

Since a husband did not present any evidence demonstrating a lack of personal jurisdiction, there was nothing to refute the wife’s showing that the parties’ only marital domicile in the United States was Georgia and that the husband had come back to Georgia several times in an attempt to reconcile; therefore, the trial court erred in dismissing the divorce for lack of personal jurisdiction. *Walters v. Walters*, 277 Ga. 221, 586 S.E.2d 663 (2003).

Sufficient connection if suit based on contract with substantial connection with state. — It is sufficient for purposes of due process that a suit is based on a contract which has substantial connection with that state. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state; the exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. *Hollingsworth v. Cunard Line*, 152 Ga. App. 509, 263 S.E.2d 190 (1979).

Hearing implies right to support allegations by argument and proof. — The hearing required by due process in its essence implies that one who is entitled to

it shall have the right to support one’s allegations by argument and proof. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934), overruled on other grounds, *Derrick v. Campbell*, 219 Ga. 795, 136 S.E.2d 381 (1964).

If plaintiff had hearing complying with state law, no deprivation of due process. — The point that petitioner was unconstitutionally deprived of any due process right lost all its force when the plaintiff admitted that the plaintiff had a hearing, which complied with state law, before the plaintiff’s property was destroyed to abate a nuisance. *Stephens v. City of Ellijay*, 171 Ga. 612, 156 S.E. 253 (1930).

Local rules providing defendant is to appear for trial one hour from the time the court notified the defendant by telephone to appear provide for reasonable notice and opportunity to be heard and are not constitutionally defective. *Archer v. Monroe*, 165 Ga. App. 724, 302 S.E.2d 583 (1983).

Defendant waived due process argument by actually appearing and failing to object. — In an action in which defendant claimed that defendant’s due process rights under Ga. Const. 1983, Art. I, Sec. I, Para. I were violated when defendant was not given written notice of the intention to terminate defendant from the drug court program, defendant waived the issue by failing to object and by appearing at the hearing. *Andrews v. State*, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

Statutory Notice of Proscribed Conduct

Statute must be definite and certain in its provisions to be valid, and when it is so vague and indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, it violates the first essential of due process of law. *City of Atlanta v. Southern Ry.*, 213 Ga. 736, 101 S.E.2d 707 (1958).

Constitution does not require impossible standards of statutory clarity, and does not require more than that the language convey sufficiently definite warning as to the proscribed conduct when measured by common understand-

Statutory Notice of Proscribed Conduct (Cont'd)

ing and practices. If a statute is so designed that persons of ordinary intelligence who would be law abiding can tell what conduct must be to conform to its requirements and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness. *Watts v. State*, 224 Ga. 596, 163 S.E.2d 695 (1968).

Statute must convey sufficiently definite warning as to proscribed conduct. — Due process only requires that a statute convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Jones v. State*, 219 Ga. 848, 136 S.E.2d 358, cert. denied, 379 U.S. 935, 85 S. Ct. 330, 13 L. Ed. 2d 345 (1964); *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975); *Constantino v. State*, 243 Ga. 595, 255 S.E.2d 710, cert. denied, 444 U.S. 940, 100 S. Ct. 293, 62 L. Ed. 2d 306 (1979).

When uncertainty in statute amounts to denial of due process. — Uncertainty in a statute which will amount to a denial of due process of law is not the difficulty of ascertaining whether close cases fall within or without the prohibition of the statute, but whether the standard established by the statute is so uncertain that it cannot be determined with reasonable definiteness that any particular act is disapproved. *Mixon v. State*, 226 Ga. 869, 178 S.E.2d 189 (1970).

Sufficient definiteness of criminal statute. — A criminal statute that defines a crime with sufficient definiteness to enable one familiar with the acts made criminal to determine when the statute is being violated is not void as offending the Fourteenth Amendment of the Constitution of the United States, or this section of the Constitution of Georgia. *Farrar v. State*, 187 Ga. 401, 200 S.E. 803 (1939); *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975).

Appellant, a juvenile, was not entitled to the dismissal of two counts of street gang activity based on the juvenile's assertion that O.C.G.A. § 16-15-4(a) failed

to inform ordinary citizens of what associations with a criminal street gang were prohibited under the statute; the statute required that a defendant's association with a group be active and include the commission of an enumerated offense under O.C.G.A. § 16-15-13(1), and that provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct. *In re K.R.S.*, 284 Ga. 853, 672 S.E.2d 622 (2009).

Even in penal statutes, due process requires only certainty and definiteness for common understanding act forbidden. — Even in statutes penal in nature, due process only requires that they be of such certainty and definiteness as would enable a person of ordinary intelligence to comprehend that the particular act the person proposes to do is forbidden by the statute. *Campbell v. J.D. Jewell, Inc.*, 221 Ga. 543, 145 S.E.2d 569 (1965).

With application not as strict with respect to civil statutes. — Application of due process with respect to vagueness and uncertainty is not applied as strictly to civil statutes as to those penal in nature. The rule is that a statute may be too vague and uncertain to be capable of enforcement as a penal statute and yet may be sufficiently certain to set forth a rule of civil conduct. *Campbell v. J.D. Jewell, Inc.*, 221 Ga. 543, 145 S.E.2d 569 (1965); *Willis v. Jackson*, 148 Ga. App. 432, 251 S.E.2d 341 (1978).

Vagueness challenges to statutes not involving First Amendment freedoms must be examined in light of facts of the case at hand. *State v. Hudson*, 247 Ga. 36, 273 S.E.2d 616 (1981).

Statutory crime of reckless conduct sufficiently definite. — Former Code 1933, § 26-2910 (see now O.C.G.A. § 16-5-60) was sufficiently definite to give a person of ordinary intelligence fair notice that such conduct was forbidden by the statute. *Horowitz v. State*, 243 Ga. 441, 254 S.E.2d 828 (1979).

Statutory crime of possession of marijuana with intent to distribute not indefinite. — O.C.G.A. § 16-13-30(j)(1), prohibiting possession of marijuana with intent to distribute, is not vague and uncertain, and does not violate

due process. *Walker v. State*, 261 Ga. 739, 410 S.E.2d 422 (1991).

Standard for lawyer's conduct not vague or overbroad. — The standard providing that a lawyer shall not without just cause to the detriment of the lawyer's client willfully abandon or willfully disregard a legal matter entrusted to the lawyer, or so continuously neglect a legal matter as to be tantamount or equivalent to willfulness is not unconstitutionally vague or overbroad. *In re Sliz*, 246 Ga. 797, 273 S.E.2d 177 (1980).

Revocation of liquor license. — That part of the Jasper, Ga., Alcoholic Beverages Ordinance that authorized license revocation for any legal violation that the city council determined to have occurred violated due process principles and could not stand; there were no limits on the council's discretionary revocation authority and no "ascertainable standards" to guide or limit the grounds for the council's decision. *Folsom v. City of Jasper*, 279 Ga. 260, 612 S.E.2d 287 (2005).

Interim ethics rule not void for vagueness. — Good and sufficient cause standard in Interim Ethics Rules 505-2-.03(1)(o), Ga. Comp. R. & Regs. r. 505-2-.03(1)(o), which permitted suspension or revocation of an educator's certificate, was not void for vagueness as it gave a School Superintendent notice that the Superintendent's decision to bypass the sheriff's department and brandish a firearm and threaten a suspect of criminal activity on a public highway during school hours could constitute "good and sufficient cause" for the suspension of an educator certificate. *Prof'l Stds. Comm'n v. Alberson*, 273 Ga. App. 1, 614 S.E.2d 132 (2005).

Provision relieving surety of liability after final judgment not void for uncertainty. — Although former Code 1933, § 27-904 (see now O.C.G.A. § 17-6-31) failed to describe the procedure by which the surety may be relieved after final judgment, it was not on this account void for uncertainty and indefiniteness as it named the court in which the relief must be had as being the same court rendering the final judgment, and made it mandatory for that court to relieve the surety, thus requiring the court to act in

such manner as a court may properly act to effectually grant such relief, and to the extent that the act was silent, the provisions of former Code 1933, § 3-105 (see now O.C.G.A. § 9-2-3) may be resorted to. *Fields v. Arnall*, 199 Ga. 491, 34 S.E.2d 692 (1945).

Sufficient definiteness of "place of amusement" to be basis of criminal prosecution. — The words "place of amusement" in former Act forbidding establishment of certain businesses outside municipal limits without obtaining a license from municipal authorities were not so vague and indefinite that they could not be made the basis of a criminal prosecution. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Statutory prohibition of harassing phone calls comports with due process. — Ga. L. 1968, p. 1249, § 1 and Ga. L. 1968, p. 9, § 1 (see now O.C.G.A. §§ 16-11-39.1 and 46-5-21), which prohibit telephone calls for the purpose of harassing, are clear and can be readily understood by people of ordinary intelligence seeking to avoid their violation, and therefore these sections are not unconstitutionally vague or broad and do not violate due process. *Constantino v. State*, 243 Ga. 595, 255 S.E.2d 710, cert. denied, 444 U.S. 940, 100 S. Ct. 293, 62 L. Ed. 2d 306 (1979).

Vagueness of ordinance forbidding disorderly conduct. — An ordinance forbidding "anyone to engage in or do anything that is disorderly, either by words or unbecoming conduct at any place on any street, alley, park, or any place where such disorderly conduct may be seen or heard by any person in any said city," is too vague and indefinite to be the basis for the infliction of corporal punishment, such as service on a city chain gang, or the imposition of a fine as an alternative. *Griffin v. Smith*, 184 Ga. 871, 193 S.E. 777 (1937).

Definition and determination of alimony comports with due process. — Because the legislative intent was clear and the statute provided "fair notice" of its meaning, former Code 1933, § 30-201 (see now O.C.G.A. § 19-6-1) did not violate the due process clause of the state or federal Constitution. *Davenport v. Davenport*,

Statutory Notice of Proscribed Conduct (Cont'd)

243 Ga. 613, 255 S.E.2d 695 (1979).

Statute proscribing inducement to parents to part with children. — The terms of O.C.G.A. § 19-8-24, making it unlawful to directly or indirectly hold out an inducement to parents to part with children, were sufficiently clear to apprise defendant that offering an automobile to a parent in exchange for physical custody or control of the child was proscribed. *Douglas v. State*, 263 Ga. 748, 438 S.E.2d 361 (1994).

Terms “nuisance” and “offensive.” — Term “nuisance” itself had a definite and determined meaning in the law, and was not indefinite, vague, or uncertain; furthermore, the term “offensive” did not render a nuisance standard unconstitutionally vague; thus, *Glynn County, Ga., Ordinance § 2-16-237* was not unconstitutionally vague. *Stanfield v. Glynn County*, 280 Ga. 785, 631 S.E.2d 374 (2006).

For involuntary mental hospital commitment clear and convincing standard of proof required. — Precepts of due process require a clear and convincing standard of proof in a civil proceeding to commit an individual to a mental hospital involuntarily. *Pitts v. State*, 151 Ga. App. 691, 261 S.E.2d 435 (1979).

Trial court had for the court’s consideration the evidence of numerous prior commitments for psychiatric treatment, evidence that following release from such structured treatment defendant had suffered decompensation and had often become violent and aggressive toward others or the defendant personally when not undergoing a regular course of treatment and medication, even though the state did not affirmatively offer it or any additional evidence at the release hearing. *Pitts v. State*, 151 Ga. App. 691, 261 S.E.2d 435 (1979).

Statutory method of determining lunacy and appointing guardian comport with due process. — In view of the express requirement as to formal examination by inspection of a person alleged to be a lunatic, the statute prescrib-

ing the method of determining an issue of lunacy, and providing for the appointment of a guardian of one adjudged to be a lunatic, does not violate the due process clause of the state or the federal Constitution in that it fails to provide for any notice to the person alleged to be insane. *Georgia R.R. Bank & Trust Co. v. Liberty Nat’l Bank & Trust Co.*, 180 Ga. 4, 177 S.E. 803 (1934).

Legislation may require judiciary to provide definitions. — One of the traditional functions of courts is to interpret and construe legislative enactments. There is no due process prohibition on the enactment of legislation which requires definitions to be provided by the judiciary. *Bell v. Barrett*, 241 Ga. 103, 243 S.E.2d 40 (1978).

Court’s duty to adopt construction of law sustaining constitutionality when capable of two constructions. — When a statute or an ordinance is capable of two constructions, constitutional under one construction and unconstitutional under the other, it is the duty of the court to adopt that construction which will sustain the statute’s constitutionality. *City of Newnan v. Atlanta Laundries, Inc.*, 174 Ga. 99, 162 S.E. 497, appeal dismissed, 286 U.S. 526, 52 S. Ct. 495, 76 L. Ed. 1269 (1932).

Higher court’s appeal order improperly dismissed. — Superior court erred in dismissing appellant’s appeal without allowing the appellant an opportunity to be heard, in contravention of an order of the Court of Appeals and resulting in the violation of the appellant’s right to due process. *Walton v. State*, 207 Ga. App. 787, 429 S.E.2d 158 (1993).

DUI offenses. — Trial court did not err in denying defendant’s motion to quash the uniform traffic citation even though the citation did not specify whether defendant was being charged with DUI under O.C.G.A. § 40-6-391(a)(1), known as “less safe DUI” or under O.C.G.A. § 40-6-391(a)(5), known as “per se DUI” since those provisions were not separate offenses but were merely alternative ways to prove the offense of DUI; however, the trial court did violate defendant’s procedural due process rights to present evidence by telling the state to stick to prov-

ing “per se DUI” because the trial court indicated to defendant that it was not going to require defendant to defend against a “less safe DUI” charge even though it later clarified that the resulting conviction was for “less safe DUI.” *Rigdon v. State*, 270 Ga. App. 217, 605 S.E.2d 903 (2004).

Police Power — Generally

Regulation for promotion of public welfare under police power. — While the maxim *salus populi suprema lex* cannot be used as a mere pretext for the curtailment of constitutional safeguards still, when the maxim does apply, it acts as a limitation on the rights of the individual which otherwise would be beyond the power of the legislature to regulate or circumscribe. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Principle of laws passed under inherent police power. — When a law is attacked on the ground that it deprives a citizen of liberty or property without due process of law, the underlying principle of laws passed under the inherent police power of the government is that it is the duty of each citizen to use one’s property and exercise one’s rights and privileges with due regard to the personal and property rights of others. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Due process clause not designed to interfere with police power. — Due process clauses of the state and federal Constitutions were not designed to interfere with the police power of the state. *Davis v. Stark*, 198 Ga. 223, 31 S.E.2d 592 (1944).

Municipal ordinances must be reasonable; the limitations of the power of a city council in this regard are not to be measured by the more extensive powers of the state legislature. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Municipal ordinances cannot be oppressive or unfairly discriminate. — Ordinances cannot be oppressive or unreasonable, nor can they unfairly discriminate in favor of one citizen or of one class against another. *De Berry v. City of*

La Grange, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

Construction of ordinance imposing liability on property owners for injuries to third persons. — If a city ordinance can be taken and construed as meaning that the owner of any improved or vacant premises of whatever character and size, within the limits of the city, becomes instantly liable for injuries to third persons on account of and from the moment any trash, banana peeling, ice, snow, or what not falls upon the abutting sidewalk, without fault or knowledge on the part of such owner, it would manifestly be a rule so harsh and unconscionable as would render such municipal ordinance unconstitutional and void as violative of this paragraph. *Ellis v. Southern Grocery Stores, Inc.*, 46 Ga. App. 254, 167 S.E. 324 (1933).

Prohibition on scalping tickets comports with due process. — By prohibiting the practice of “scalping” tickets, Ga. L. 1970, p. 172 and Ga. L. 1973, p. 196 was reasonably related to a proper legislative objective and consequently did not violate the due process clause of either the state or federal Constitution. The statute puts all sports fans on an equal footing in the race to the ticket window. *State v. Major*, 243 Ga. 255, 253 S.E.2d 724 (1979).

Statutes concerning illegality of possession of marijuana not violative of due process. — State has no right, under the guise of exercising police power, to invade the personal rights and liberty of the individual citizen by legislation which has no reasonable relation to a legitimate state purpose. If marijuana is a perfectly harmless substance, then its possession cannot constitutionally be made criminal. If marijuana is a dangerous drug, the state has a right to make its sale and use criminal. Marijuana is not demonstrated to be such a harmless substance that the legislature has no right to make its sale and possession criminal. *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974).

Classification of cocaine as narcotic drug not violative of due process. — Classification of cocaine by the legislature as a narcotic drug, when there is scientific evidence to the contrary, does

Police Power — Generally (Cont'd)

not violate the due process and equal protection clauses of the United States and Georgia Constitutions. *Robinson v. State*, 244 Ga. 15, 257 S.E.2d 523 (1979).

Right of legislature to make reasonable classifications of persons and things for purpose of legislation is clearly recognized by all authorities. The mere fact that legislation is based on a classification and is made to apply to certain persons and not to others does not affect its validity, if it is so made that all persons subject to its terms are treated alike under like circumstances and conditions. When provisions operate uniformly upon all minors who are employed under such circumstances as to come under the Workers' Compensation Act, who are 18 years of age or over, and who are not mentally incompetent or physically incapable of earning a livelihood, the fact that they do not apply to all minors, that is, all persons below the age of 21 years, in no way affects the validity of the statute under the provisions of the Constitution. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Basis for statutory classification must relate to legislative purpose. — When provisions of statute require hotels and inns charging \$2.00 per day or more to provide outside fire escapes and make violation a misdemeanor, the amount charged the guests has no conceivable relation to the danger of fire, the danger the law seeks to avoid. The basis for statutory classification must relate in some degree to the purpose of the legislation; and the classification here is arbitrary, rendering the law unconstitutional. *Geele v. State*, 202 Ga. 381, 43 S.E.2d 254 (1947).

Justification for legislative classification and regulation of business. — Classification of businesses into different classes for legislative regulation is not justified by a mere difference in the nature or character of two businesses. A right of classification arises on behalf of the general public if a business is affected with a great public interest in which all of the citizens of the state are concerned and injury will result to the general public

unless regulatory control is applied. *Harrison v. Hartford Steam Boiler Inspection & Ins. Co.*, 183 Ga. 1, 187 S.E. 648 (1936), rev'd on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

Discriminatory requirement for business certificate. — Georgia Law 1937, p. 748, § 12 is discriminatory against individuals not connected with a partnership or corporation, since the individual would not be allowed to engage in the plumbing or steamfitting business without obtaining the certificate provided for by the Act, whereas a partnership or corporation would have the right to engage in either of the businesses if one person holding a certificate is connected with the partnership or corporation, whether or not that person is supervising the plumbing or steamfitting work done. *Jenkins v. Manry*, 216 Ga. 538, 118 S.E.2d 91 (1961).

No reasonable basis for discrimination between classes of persons. — There is no reasonable basis for requiring examination and licensing of plumbing and steamfitters who are not employees of public utility corporations, and exempting employees of public utility corporations operating in the territory covered by the Act. This is an unjust discrimination between classes of persons and renders the proviso in Ga. L. 1937, p. 748, § 16-A unconstitutional and void, as a violation of the due process clauses of the state and federal Constitutions. *Jenkins v. Manry*, 216 Ga. 538, 118 S.E.2d 91 (1961).

Arbitrary declaration that home solicitors constitute nuisance and are subject to punishment violates due process. — To arbitrarily declare, without qualification, that every solicitor who goes to a private home to try to conduct an otherwise perfectly legal business is a nuisance and subject to fine or imprisonment is an unreasonable interference with one's normal legal rights, and is without due process of law. *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

When Act purporting to amend city charter is void, ordinances adopted pursuant thereto are unenforceable. — Georgia Law 1951, p. 3074, which purported to amend city's charter, was too

vague, indefinite, and uncertain in meaning to be enforced by the courts and was therefore void; and being so, the ordinances which the city adopted pursuant thereto were unsupported by charter authority and therefore unenforceable. *City of Atlanta v. Southern Ry.*, 213 Ga. 736, 101 S.E.2d 707 (1958).

Need to specify what ordinance violates in order to raise question of constitutionality. — In prosecution for violation of city code provision making it unlawful to possess a lottery ticket, demurrer (now motion to dismiss) on constitutional grounds which does not specify by chapter number, section number or paragraph number, or in any other manner identify what law or constitutional provision it is contended is violated by the ordinance attacked is entirely too vague and general to raise any question as to the constitutionality of the ordinance insofar as it might contravene the due process clauses of the state and federal Constitutions. *Smith v. City of Albany*, 97 Ga. App. 731, 104 S.E.2d 488 (1958).

Officer empowered to order owner away from burning building. — Under the police power, a deputy sheriff is authorized to go upon private property and direct the owner to move back from a burning building. *Veit v. State*, 182 Ga. App. 753, 357 S.E.2d 113 (1987).

Police Power — Business

Right to transact business within realms or bounds not contrary to public health, safety, morals, or policy is property right, and a citizen's business is entitled to protection against discriminatory or prohibitive legislation. *Jones v. City of Atlanta*, 51 Ga. App. 218, 179 S.E. 922 (1935).

Trade regulation in exercise of police power within power of General Assembly. — It is within the power of the General Assembly, in the proper exercise of the police power of the state, to regulate certain trades or occupations, and not regulate others, unless the regulations are so unreasonable and extravagant that the property or personal rights of the citizen are unnecessarily and arbitrarily interfered with, without due process of law.

Berta v. State, 223 Ga. 267, 154 S.E.2d 594 (1967).

Business regulations void when without reasonable or substantial relation to general welfare. — Georgia Law 1937, p. 280, establishing a state board of photographic examiners, and providing, among other things, that except as to stated classes, persons desiring to engage in the business of photography or photofinishing must stand an examination and thereby qualify as to competency, ability, and integrity, and denouncing as a crime a violation of any of the terms of the Act, is unconstitutional and void as an exercise of the police power. The prescribed regulations are imposed upon a lawful business, and considered as a whole do not bear any reasonable or substantial relation to the public health, safety, or morality, or other phase of the general welfare. *Bramley v. State*, 187 Ga. 826, 2 S.E.2d 647 (1939).

Municipal bylaws and ordinances undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulation, there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business or use and enjoy property. *Borough of Atlanta v. Kirk*, 175 Ga. 395, 165 S.E. 69 (1932).

If the facts and evidence before the municipal body at the time of passing the ordinance would authorize the exercise by that body of a discretion in passing or refusing to pass the ordinance, then a court should not declare the ordinance unreasonable, arbitrary, and void merely because the court should take the view that it would be best for the public that the ordinance should not be enforced. *Borough of Atlanta v. Kirk*, 175 Ga. 395, 165 S.E. 69 (1932).

Legislature may pass reasonable cemetery regulations. — In the exercise of the police power of the state, and in order to promote the public health and well-being, the legislature may pass reasonable regulations as to the establishment and operation of cemeteries. *Arling-*

Police Power — Business (Cont'd)

ton Cem. v. Bindig, 212 Ga. 698, 95 S.E.2d 378 (1956).

Legislative power to regulate professions. — Portion of Act regulating the practice of dentistry which defines the making or repairing of appliances usable on teeth or as teeth, unless ordered by a licensed dentist as part of the practice of dentistry, did not violate this provision. Holcomb v. Johnston, 213 Ga. 249, 98 S.E.2d 561 (1957).

Contract bidding process. — Bidding insurer's summary judgment motion was properly granted as to its substantive due process claim against a county as the county's decision to throw out the entire bidding process was rational in light of the taint caused by a consultant's lack of a counselor's license under O.C.G.A. §§ 33-23-1.1 and 33-23-4. Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 637 S.E.2d 763 (2006), cert. denied, No. S07C0306, 2007 Ga. LEXIS 214 (Ga. 2007).

What due process requires prior to professional board's decision to initiate proceedings against professional. — When an investigator was attempting to gain information concerning a doctor's fitness to practice medicine, due process did not require at this stage of the matter that the doctor be informed of the nature of the charges that have been made to the board or the names of the doctor's accusers, nor was the doctor denied due process because the doctor was not permitted to participate in selecting the documents to be collected by the investigator or to participate in the deliberations prior to the decision to initiate proceedings against the doctor. Gilmore v. Composite State Bd. of Medical Exmrs., 243 Ga. 415, 254 S.E.2d 365 (1979).

"Fair Trade Act" unconstitutional for violation of due process. — Georgia Law 1953, Nov.-Dec. Sess., p. 549, permitting a manufacturer under guise of protecting the manufacturer's property rights in a trade name and trademark to control the price of the manufacturer's product through the channels of trade into the hands of the ultimate consumer and into the hands of persons with whom the

manufacturer had no contractual relationship violated the due process clause of the state Constitution. Cox v. GE Co., 211 Ga. 286, 85 S.E.2d 514 (1955).

Legislature empowered to regulate personal contracts in insurance industry. — The business of insurance is so far affected with a public interest as to justify legislative regulation. It is within the power of the legislature to regulate the personal contracts involved in such business. Harrison v. Hartford Steam Boiler Inspection & Ins. Co., 183 Ga. 1, 187 S.E. 648 (1936), rev'd on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

Ordinance requiring ice cream sellers to secure board of health permit comports with due process. — The provisions of the ordinance requiring those selling ice cream in a city to secure a permit from the board of health of that city is not unreasonable, unlawful, or void under state laws and the state Constitution. The health and physical welfare of many citizens would be endangered if milk products were not free from all infection. Wright v. Richmond County Dep't of Health, 182 Ga. 651, 186 S.E. 815 (1936).

Municipal ordinance prohibiting sales during certain times at certain place valid under police power. — A municipal ordinance providing that it shall be illegal "for any person, firm, or corporation to sell or offer for sale any goods, wares, merchandise, pamphlets, magazines, maps, or other article of value, on any Saturday between the hours of 12 Noon and 9 P.M. on any of the following congested sidewalks of said city," designating certain sidewalks and providing a penalty therefor, is a valid and reasonable regulation for public safety and convenience, under the police power of the city. It was not error to deny an injunction after plaintiffs sought to enjoin enforcement of the ordinance against them, on the grounds that the magazines sold and offered for sale were devoted to religious subjects, and advocated the adoption of a particular form of religion, the distribution of which was a part of their religious belief, and urged that to prohibit the sale of the magazines would be in violation of their rights of religious freedom under the

state and federal Constitutions. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Ordinance prohibiting pinball machine business not violative of due process. — Ordinance prohibiting the owning, maintaining, or operating of pinball machines and the like, authorized under the general welfare clause of the charter of the municipality enacted in pursuance of the police power of the state, is not violative of the due process of law clauses of the federal and state Constitutions, for any reason assigned, or void on the ground of unreasonableness, merely because the effect of the ordinance is to destroy and confiscate the business and property of the petitioner (distributing and leasing novelty machines used for pleasure and skill only), whereas other articles of pleasure and skill are not included in the ordinance. *Woodward v. City of Lithonia*, 191 Ga. 234, 11 S.E.2d 476 (1940).

Ordinance imposing occupational tax on linen rental service not violative of state or federal due process clause. *National Linen Serv. Corp. v. City of Gainesville*, 181 Ga. 397, 182 S.E. 610 (1935).

License to sell malt beverages is privilege, not absolute right. — The refusal of a license to sell malt beverages did not deprive the petitioner of life, liberty, or property as the sale of malt beverages is declared to be a privilege, and denial of a license did not deprive the petitioner of anything to which the petitioner had an absolute right. *Harbin v. Holcomb*, 181 Ga. 800, 184 S.E. 603 (1936).

License charge imposed by ordinance not deprivation of property without due process. — License charge imposed by ordinance on dairies, defined as those milking more than six cows, was not void as depriving petitioners of property without due process, nor as denying them the full enjoyment of their rights. *Rossman v. City of Moultrie*, 189 Ga. 681, 7 S.E.2d 270 (1940).

When ordinance fixing graduated scale of license fees violative of due process. — A municipal ordinance which uses the gross sales of the preceding year

as a basis on which to fix a graduated scale of license fees for meat markets, and makes no provision for fees for meat markets not in business the preceding year, is unconstitutional in that it is discriminatory and violates the due process and equal protection clauses of the state and federal Constitutions. *Elder v. Smith*, 188 Ga. 65, 2 S.E.2d 670 (1939).

Ordinance requiring laundry license applicant to give bond not unreasonable. — An ordinance which requires the applicant for a laundry license to give a bond when articles are taken from a city for the purpose of laundering is not arbitrary and unreasonable, and is not in conflict with the due process clause of the state Constitution or U.S. Const., amend. 14. *City of Newnan v. Atlanta Laundries, Inc.*, 174 Ga. 99, 162 S.E. 497, appeal dismissed, 286 U.S. 526, 52 S. Ct. 495, 76 L. Ed. 1269 (1932).

Act prohibiting operation of public dance halls without license and permission to operate is not unconstitutional as denying “due process of law” or “equal protection of laws.” *Poss v. Norris*, 197 Ga. 513, 29 S.E.2d 705 (1944).

Failure of Act granting power to license to provide for review does not make it unconstitutional. — Even though an Act granting power to license occupations may not make provision for an appeal, this will not prevent a citizen who has been wronged by an arbitrary or capricious exercise of the power from seeking aid from the courts to protect the citizen from oppression, and the failure of the Act to provide for a review does not make it unconstitutional. *Jenkins v. Manry*, 216 Ga. 538, 118 S.E.2d 91 (1961).

Laws impairing vested rights violate due process but first in field gets no monopoly protection. — The due process clauses of the state and federal Constitutions prohibit the enactment of a law which would impair vested rights, but do not inure to a person, first in the field, a monopoly in any line of business. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948).

Constitutional guarantee of due process forbids action that curtails free competition or impairs value of private property. — Any statute which

Police Power — Business (Cont'd)

deprives a free citizen of the right to agree upon a price which the citizen will accept for the citizen's private property robs the citizen of the most valuable element of that property and renders private ownership a farce and is consequently unconstitutional. *Cox v. GE Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955), adopting the specially concurring opinion in *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951).

Protection of property right to contract and to agree on price. — The right to contract, and for the seller and purchaser to agree upon a price, is a property right protected by the due process clause of the Constitution, and unless it is a business "affected with a public interest," the General Assembly is without authority to abridge that right. *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951).

Though reasonable sale and distribution regulations allowable under police power. — As a health measure, reasonable regulations may be enacted by the legislature, applying to sale and distribution of milk under the police power of the state; but provision to fix the price takes from the seller and purchaser the right to agree upon the price of their choice. *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951).

General Assembly can authorize price fixing in business "affected with public interest". — Before the General Assembly can authorize price fixing without violating the due process clause of the Constitution, among other requirements, it must be done in a business or where property involved is "affected with a public interest"; and the milk industry does not come within that scope. *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951).

"Affected with a public interest" defined. — For an industry or any particular business to become "affected with a public interest," its business or its property must be so applied to the public as to authorize the conclusion that it has been devoted to a public use and thereby its use, in effect, granted to the public. *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951).

Milk Control Law price fixing provision violated due process. — Georgia Law 1937, p. 247, formerly codified as former Code 1933, § 42-523 et seq., insofar as it provided for board to fix the prices of milk, was in violation of the due process clause of the state Constitution. *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951).

Ordinance can vary utility service rates according to territory. — An ordinance which provides that rates for water service shall be higher in territory outside the corporate limits is not unconstitutional and void as denying "due process" and "equal protection" under the federal and state Constitutions. *Barr v. City Council*, 206 Ga. 753, 58 S.E.2d 823 (1950).

Ordinance increasing rates and fixing higher rates for nonresident water users not violative of due process. — When the city has the right under the city's charter to furnish water to resident and nonresident users, and to classify the rates for such service, an ordinance increasing the rates and fixing rates for nonresident users higher than for resident users, is not violative of the due process and equal protection clauses of the federal and state Constitutions. *Messenheimer v. Windt*, 211 Ga. 575, 87 S.E.2d 402 (1955).

Protection of complainant's rights when rates fixed by Public Service Commission are confiscatory. — When in a case properly brought it is shown that telephone rates fixed by Public Service Commission are confiscatory and protection by a court of equity is sought to prevent a violation of the due process provisions of the state and federal Constitutions, the court is required to adjudicate the question and to render a judgment that will afford the complainant full protection of its constitutional rights. *Southern Bell Tel. & Tel. Co. v. Georgia Pub. Serv. Comm'n*, 203 Ga. 832, 49 S.E.2d 38 (1948).

Rate set by commission must reach point of confiscation for utility to show legally protected interest. Georgia Power Co. v. Allied Chem. Corp., 233 Ga. 558, 212 S.E.2d 628 (1975).

Public utility has standing to challenge rate schedule on ground that

schedule is so low that it is confiscatory and denies the utility substantive due process. *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

Requiring extension of existing power lines beyond carrier's public service commitment violates due process. — To require extension of existing power lines beyond the scope of the carrier's commitment to the public service is taking of property in violation of due process. *Georgia Pub. Serv. Comm'n v. Georgia Power Co.*, 182 Ga. 706, 186 S.E. 839 (1936).

Empowering county authorities to control and regulate establishment of businesses not violative of due process. — Georgia Law 1937, p. 624 providing that no person should establish a public dance hall, boxing or wrestling arena, or amusement place, tourist camps, and barbecue stands, for money or profit, outside the limits of incorporated towns or cities of a certain minimum population without first obtaining the permission of the commissioners or other authority in charge of such counties, and conferring authority on them to grant or refuse such permission for such time or under such regulations as they might deem proper for the public good, to levy a license or occupational tax on those endeavors and to provide punishment for a violation of the Act was not violative of the due process and equal protection clauses of the state and federal Constitutions, or the constitutional provisions vesting legislative power in the General Assembly. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Operation of service at reduced price at and for educational institution not taking without due process. — Operation of the laundry and dry cleaning service at reduced prices in an educational institution for the benefit of students and persons connected with the school, by the Board of Regents of the University System, did not constitute the taking, by the defendants for the state, of private property of the petitioners without due process of law, in violation of this paragraph and U.S. Const., amend. 5. *Villyard v. Regents of Univ. Sys.*, 204 Ga.

517, 50 S.E.2d 313 (1948).

When denial of application for operation of taxicabs violated due process. — Petition alleging compliance with all the requirements of a city ordinance for the operation of taxicabs, denial of application for permit to operate taxicabs though no objection was made that applicant had not complied with the requirements of the ordinance, and that such denial was without legal justification or excuse, was arbitrary, illegal and capricious and an abuse of discretion, depriving the applicant of due process of law, and that because of denial of the permit the petitioner is deprived of the right to pursue the petitioner's chosen livelihood and suffers pecuniary loss for which the petitioner cannot be compensated in damages, states a cause of action for mandamus to compel city officials to issue a permit. *McWhorter v. Settle*, 202 Ga. 334, 43 S.E.2d 247 (1947).

Business license tax. — A catchall category of "agent or agency not specifically mentioned" following a list of specifically covered occupations was sufficient description to include the occupation of using a talking cat to obtain economic benefits on the streets of the city. *Miles v. City Council*, 551 F. Supp. 349 (S.D. Ga. 1982), *aff'd*, 710 F.2d 1542 (11th Cir. 1983).

Gasoline distributor. — O.C.G.A. § 10-1-234, which prohibits a gasoline distributor from selling gasoline to another distributor at distributor prices, violates Ga. Const. 1983, Art. I, Sec. I, Para. I in that it seeks to regulate a business not affected with a public interest. *Batton-Jackson Oil Co. v. Reeves*, 255 Ga. 480, 340 S.E.2d 16 (1986).

O.C.G.A. § 10-1-233(6), which restricts changes in management of gasoline dealers, is unconstitutional under the due process clause of the Georgia constitution in that it purports to regulate an industry not affected with a public interest. *O'Brien v. Union Oil Co.*, 699 F. Supp. 1562 (N.D. Ga. 1988).

Plumbers. — Former subparagraph (e)(2)(A) of O.C.G.A. § 43-14-8 was unconstitutional insofar as it denied to formerly locally licensed plumbers the rights extended to formerly state-licensed plumb-

Police Power — Business (Cont'd)

ers. *Waller v. State Constr. Indus. Licensing Bd.*, 250 Ga. 529, 299 S.E.2d 554 (1983) (decided prior to 1983 amendment of § 43-14-8).

Pawnbrokers. — *Gwinnett County, Ga.*, Ord. No. 82-11 served the public purpose of impeding the sale of stolen property, and its requirements were reasonably necessary to achieve that end and did not unduly oppress pawnbrokers; thus, it did not violate a pawnbroker's due process rights. *Pawnmart, Inc. v. Gwinnett County*, 279 Ga. 19, 608 S.E.2d 639 (2005).

Police Power — Property**1. In General**

This paragraph is violated when defendant is deprived of property by execution without hearing. *Smith v. Brown*, 96 Ga. 274, 23 S.E. 849 (1895); *City Council v. King*, 115 Ga. 454, 41 S.E. 661 (1902); *Shippen Bros. Lumber Co. v. Elliott*, 134 Ga. 699, 68 S.E. 509 (1910); *Gaulden v. Wright*, 140 Ga. 800, 79 S.E. 1125 (1913).

Judicial supervision over proposed temporary deprivation of property, and notice and opportunity for early preliminary hearing after deprivation are necessary to guard against mistaken and illegal deprivations of property. This is true even when the victim of the deprivation is an alleged judgment debtor. *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699, 240 S.E.2d 171 (1977).

Person not deprived of property without due process by erroneous state court decision after hearing. — When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of property without due process of law. *Gilmore v. Mutual Benefit Life Ins. Co.*, 179 Ga. 267, 175 S.E. 681 (1934).

Ordinance is unconstitutional if city board of commissioners given arbitrary authority to grant permits. — An ordinance is constitutionally defective if it grants to the board of commissioners of a city the arbitrary authority to grant a

permit to dig a well to some and to refuse others by prescribing no rule or guide by which it may be impartially executed and which will preclude partiality. *City of Hawkinsville v. Clark*, 135 Ga. App. 875, 219 S.E.2d 577 (1975).

Though municipality may make reasonable rules and regulations and may require permits. — While a municipality may make reasonable rules and regulations for the protection, safety, and health of its citizens and may require permits for the exercise of its power of regulation, the grant or refusal of a permit to dig a well cannot be left to arbitrary discretion. *City of Hawkinsville v. Clark*, 135 Ga. App. 875, 219 S.E.2d 577 (1975).

Distinction between use of eminent domain and use of police power is that the former involves the taking of property because it is needed for public use while the latter involves the regulation of the property to prevent its use in a manner detrimental to the public interest. *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979).

Property interest in government job. — When it is determined by the duly elected city officials that the best interest of the public can be served by discontinuing certain procedures for reassignment or rehiring employees, the public interest overrides whatever property interest the individual employees have. *City of Atlanta v. Mahony*, 162 Ga. App. 5, 289 S.E.2d 250 (1982).

Employment did not implicate substantive due process concerns. — School district employee's allegation of termination of employment did not implicate substantive due process concerns. *Palmer v. Stewart County Sch. Dist.*, No. 4:04-CV-21 (CDL), 2005 U.S. Dist. LEXIS 35511 (M.D. Ga. June 17, 2005).

No property interest in accessing Georgia Port Authority terminal. — Truck driver's claim that truck driver was improperly barred from an authority's terminal was properly dismissed because the driver failed to show an enforceable property interest for purposes of due process and eminent domain jurisprudence. *Gambell v. Ga. Ports Auth.*, 276 Ga. App.

115, 622 S.E.2d 464 (2005).

Regulation of game fish in private ponds proper. — While ownership of fish in private ponds is a property right, it is not an absolute and unqualified right, and is bound by the limitation that it must always yield to the state's power to regulate and preserve for the public good. Thus, O.C.G.A. § 27-4-74 (sale, purchase, transportation, etc. of game fish generally), which functions to protect the stocks of fish swimming freely in waters of this state, is a proper exercise of the police power. *Maddox v. State*, 252 Ga. 198, 312 S.E.2d 325, cert. denied, 469 U.S. 820, 105 S. Ct. 93, 83 L. Ed. 2d 39 (1984).

Moratorium on commercial development and building permit standards violated due process. — County board of commissioners' building permit resolution and "moratorium" resolution on commercial development did not provide sufficient objective standards to meet due process requirements since the resolutions allowed the board absolute discretion to grant or deny permission for construction for commercial uses with no standards whatsoever to control that discretion nor did they provide any notice to applicants of the criteria for the issuance of a permit; therefore, the resolutions were void because they improperly allowed uncontrolled discretion by the board in granting or denying a permit application and were too vague, indefinite, and uncertain to be enforceable. *Davidson Mineral Properties, Inc. v. Monroe County*, 257 Ga. 215, 357 S.E.2d 95 (1987).

2. Taking Property for Public Use

Sovereign's taking citizen's property must be for public purpose with just and adequate compensation. — The right of the sovereign in the property of the citizen is hedged by two fundamental safeguards — the taking must be for a public purpose, and it must be attended by just and adequate compensation. This includes every species of property in which the individual has a right of ownership, whether real or personal, corporeal or incorporeal. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

In order to determine the value of land taken by a transportation department that contained deposits of kaolin, the proper method was not to multiply the number of units of kaolin by a fixed, projected royalty per unit, as the kaolin had to be valued separately from the land, and it was impossible to determine what the kaolin was worth until it was removed from the earth and processed, so this method would result in improper speculation. *DOT v. Bacon Farms, L.P.*, 270 Ga. App. 862, 608 S.E.2d 305 (2004).

When land taken by a transportation department contained deposits of kaolin and a buffer zone was required around the land actually taken, from which kaolin could not be mined, the resulting consequential damages to the land's owner were not determined from the value of the kaolin that would be "lost" as a result of the buffer zone, because the proper measure of damages was the difference between the fair market value of the remainder before the taking and the fair market value of the remainder after the taking. *DOT v. Bacon Farms, L.P.*, 270 Ga. App. 862, 608 S.E.2d 305 (2004).

Owner not entitled to hearing on necessity or expediency of taking. — The necessity or expediency of taking property for public use is a legislative question upon which the owner is not entitled to a hearing under the due process clause of U.S. Const., amend. 14 and the same clause of the Constitution of this state. *Miles v. Brown*, 223 Ga. 557, 156 S.E.2d 898 (1967).

Neither legislature nor municipality authorized to take private property without notice to owner of hearing before condemnation. — Neither the General Assembly of this state, nor any municipality thereof, has authority to suspend the due process clauses of the federal and state Constitutions and to provide for the destruction of private property without notice to the owner of the time and place of hearing, prior to any judgment of condemnation. *City of Atlanta v. Aycock*, 205 Ga. 441, 53 S.E.2d 744 (1949).

Notice to nonresident owners of property to be condemned violative of due process. — The portion of Ga. L.

Police Power — Property (Cont'd)**2. Taking Property for Public Use (Cont'd)**

1957, p. 387, § 10 (see now O.C.G.A. § 22-2-107) which purports to provide for posting, publishing, and mailing notices to known nonresident owners of property to be condemned offends U.S. Const., amend. 14 and this paragraph in that it denies due process by not naming anyone to post, publish, or mail the notice therein referred to. *Ray v. Mayor of Athens*, 221 Ga. 73, 143 S.E.2d 386 (1965) (decided prior to amendment by Ga. L. 1966, p. 388, § 1, which designated the sheriff or the sheriff's deputy as responsible for posting and publishing the notice).

Statutory provisions for notice in absence of someone to execute them amount to no requirement of notice. *Ray v. Mayor of Athens*, 221 Ga. 73, 143 S.E.2d 386 (1965) (decided prior to amendment by Ga. L. 1966, p. 388, § 1, which designated the sheriff or the sheriff's deputy as responsible).

Slum clearance project not taking of private property in violation of due process. — The slum clearance project inaugurated by virtue of Art. 1, Ch. 3, T. 8 and Art. 2, Ch. 3, T. 8 does not involve the taking of private property in violation of the due process clause of the state Constitution or of U.S. Const., amend. 14. *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938).

Outdoor Advertising Control Act, O.C.G.A. § 32-6-70, is a proper exercise of the police powers, as it provides for compensation for property rights in signs which were lawfully in existence on its effective date. *DOT v. Shiflett*, 251 Ga. 873, 310 S.E.2d 509 (1984).

Comprehensive sign ordinance providing for removal of nonconforming signs effected an unconstitutional taking of private property without just and adequate compensation. *Lamar Adv. of S. Ga., Inc. v. City of Albany*, 260 Ga. 46, 389 S.E.2d 216 (1990).

Citizens may maintain nuisance suits against the state under the constitutional prohibition against taking or damaging private property for public purposes. *DOT v. Bonnett*, 257 Ga. 189, 358 S.E.2d 245 (1987).

Waiver of sovereign immunity when county creates nuisance amounting to inverse condemnation.

— Nuisance suits for injunction and damages can be maintained against a county under the constitutional provisions against taking or damaging private property for public purposes. Therefore, the Constitution provides for a waiver of sovereign immunity when a county creates a nuisance which amounts to an inverse condemnation. *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235 (1978).

A county, unlike a municipality, is not generally liable for creating nuisances. *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235 (1978).

Municipalities liable for nuisance damaging property and health hazards. — A municipality, whether exercising its governmental or its ministerial functions, is liable for creating a nuisance which damages property and imposes health hazards. *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235 (1978).

Ordinance (Ga. L. 1913, p. 893) providing for abatement of public nuisances by city is not violative of paragraph. *Curtis v. Town of Helen*, 171 Ga. 256, 155 S.E. 202 (1930).

Claims concerning reasonable certainty of continuing nuisance amounting to unlawful taking of property to be heard. — When it is alleged, inter alia, that the construction, maintenance, and operation of an airport in a residential area and the flights of airplanes in connection therewith will constitute a continuing nuisance, will cause the residents irreparable and constantly recurring damages, and will amount to an unlawful taking of their properties without due process of law in violation of the state and federal Constitutions, a motion by the defendants to dismiss the complaint on the basis that it fails to state a claim and that it is anticipatory of future conditions is properly overruled by the trial court. *Camp v. Warrington*, 227 Ga. 674, 182 S.E.2d 419 (1971).

City commissioners authorized to abolish city roadways provided city liable for damages. — Neither charter

amendment providing that city commissioners should have authority in their discretion to close up and abolish any city street, road, or alley, or part, thereof, provided that the city should be liable for damages to any property right of any person occasioned by the exercise of such powers, nor ordinance adopted pursuant thereto, was violative of the due process clauses of the state and federal Constitutions. *Jones v. City of Decatur*, 189 Ga. 732, 7 S.E.2d 730 (1940).

County decision to acquire land with no effect on abutting landowners' rights. — A mere decision by the governing body of a county to acquire land for an authorized public purpose, without more, in no way affects the constitutionally protected property rights of abutting landowners, and does not trigger due process considerations of personal notice because there was no deprivation of property in any cognizable sense. *Lindsey v. Guhl*, 237 Ga. 567, 229 S.E.2d 354 (1976).

When other land uses cannot be considered in valuation in condemnation case. — It is error in a condemnation case to charge that the jury might, in estimating the value of the land taken, consider other uses to which the land might be devoted when there is no evidence authorizing the jury to find that it was suitable for any use other than that to which it was devoted at the time of the taking or from which a reasonable inference of suitability for other uses might be drawn. *State Hwy. Dep't v. Howard*, 110 Ga. App. 373, 138 S.E.2d 597 (1964).

Owner not entitled to recover business loss damages. — In a condemnation action, partial summary judgment was properly granted in favor of the Georgia Department of Transportation because an owner was unable to recover losses for business damages since the evidence showed that the owner was not actually conducting a business on the condemned land, despite the fact that a lease agreement between the owner and a lessee gave the owner some control over the business operations of a service station and store located on the property. *Davis Co. v. DOT*, 262 Ga. App. 138, 584 S.E.2d 705 (2003).

3. Taxation

Legislative power to impose income tax. — The right to impose an income tax is an inherent right of the people and there is nothing in the Constitution of this state which denies to the legislature the power to impose an income tax if it is levied without infringing some provision of that instrument. *Owens-Illinois Glass Co. v. Oxford*, 216 Ga. 316, 116 S.E.2d 293 (1960).

When corporation utilized state services. — Having accepted and utilized valuable state services, the corporation cannot consistently contend or successfully assert under the facts that its property (the taxes collected) has been taken from it in violation of the due process clause of Georgia's Constitution. *Owens-Illinois Glass Co. v. Oxford*, 216 Ga. 316, 116 S.E.2d 293 (1960).

State cannot tax property over which it has no territorial jurisdiction. — For a state to undertake to tax property over which it has no territorial jurisdiction is a violation of the due process clauses of the federal and state Constitutions. It would be a taking of property without due process of law. *Davis v. Penn Mut. Life Ins. Co.*, 198 Ga. 550, 32 S.E.2d 180, 160 A.L.R. 778 (1944), later appeal, 201 Ga. 821, 41 S.E.2d 406, cert. denied, 331 U.S. 829, 67 S. Ct. 1353, 91 L. Ed. 1844 (1947).

Any effort to tax property wholly beyond jurisdiction would be in violation of due process clause embodied in the U.S. Const., amend. 14, as well as the similar provision of the state Constitution. *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Due process not violated because property owners subjected to taxation by Act extending municipal boundaries. — Act extending municipal boundaries does not violate the constitutional guarantee of due process of the law because it subjects property owners in the area annexed to taxation by the municipality; nor does it deny to such property

Police Power — Property (Cont'd)**3. Taxation (Cont'd)**

owners equal protection of the law within the meaning of U.S. Const., amend. 14. *Lee v. City of Jesup*, 222 Ga. 530, 150 S.E.2d 836 (1966), cert. denied, 386 U.S. 993, 87 S. Ct. 1307, 18 L. Ed. 2d 337 (1967).

An Act which subjected a landowner to municipal taxation by including property within the corporate limits of a municipality did not violate the landowner's rights under this paragraph. As noted in *White v. City of Atlanta*, 134 Ga. 532, 68 S.E. 103 (1910), a resident of a city receives certain corresponding benefits and should share the responsibility of the municipal burdens. *Schneider v. City of Folkston*, 207 Ga. 434, 62 S.E.2d 177 (1950).

Unequal benefit did not violate due process. — County's approval of a tax assessment of each property in the county in order to pay for medical care for indigent patients did not violate due process and equal protection under U.S. Const., amends. 5 and 14 and under Ga. Const. 1983, Art. I, Sec. I, Paras. I and II even though not all taxpayers benefitted; the question of the benefit to each taxpayer was for the legislature except in extraordinary cases, and the instant case was not extraordinary. *Greene County Bd. of Comm'rs v. Higdon*, 277 Ga. App. 350, 626 S.E.2d 541 (2006).

Review of ordinances imposing occupational taxes. — The constitutionality and legality of an occupation tax is to be judged by its effect upon dealers generally, and is not to be construed as unreasonable because it is prohibitive upon certain financially weak persons; only those laws imposing occupation taxes the general operation of which is confiscatory and oppressive are to be declared unconstitutional. *Solomons v. Mayor of Savannah*, 183 Ga. 631, 189 S.E. 230 (1936).

That a seller, in order to obtain business at a distant city and compete with its local laundries, subjects the seller to unusual expense and makes little profit under adverse conditions, does not afford a basis for declaring arbitrary, prohibitory, confiscatory, and void an ordinance imposing an occupational tax as applied to a business

which admittedly is in its infancy. *National Linen Serv. Corp. v. City of Gainesville*, 181 Ga. 397, 182 S.E. 610 (1935).

Graduated business tax based on reasonable classification comports with due process. — Provisions of a city ordinance imposing a graduated tax on those persons using vehicles on the streets for business purposes in addition to the business tax required of them, and also levying a graduated tax for doing business on the streets upon carriers for hire, was not violative of U.S. Const., amend. 14, Sec. 1 or this paragraph. The city ordinance did not make unreasonable and arbitrary classifications. *Solomons v. Mayor of Savannah*, 183 Ga. 631, 189 S.E. 230 (1936).

Ordinance imposing graduated license tax on right to operate butcher shops and retail groceries reasonable revenue measure. — Ordinance imposing a license tax on the right to operate butcher shops and retail grocery stores, classified according to a graduated scale based on the number of meat blocks, or value of stock and fixtures, respectively, and number of hours operated, and applicable to all persons operating businesses of the designated classes within the city, was a reasonable revenue measure, and not violative of former Code 1933, §§ 2-102 and 2-103 (see now Ga. Const. 1983, Art. I, Sec. I, Paras. I and II), and U.S. Const., amend. 14, Sec. 1. *Ard v. City of Macon*, 187 Ga. 127, 200 S.E. 678 (1938).

Maintenance Tax Act of 1937 not void because of classifications for taxation purposes. — Georgia Law 1937, pp. 155-167 was not void as violative of the equal protection or due process clauses of the state Constitution or the due process clause of the federal Constitution merely because, for taxation purposes, it classified carriers for hire and carriers not for hire separately, and charged different amounts for each class, or because it set up subclassifications based on the manufacturer's rated capacity of the vehicles used and fixed different rates of tax accordingly. *Dixie-Ohio Express Co. v. State Revenue Comm'n*, 186 Ga. 228, 197 S.E. 887 (1938), aff'd, 306

U.S. 72, 59 S. Ct. 435, 83 L. Ed. 495 (1939).

When municipality's refusing conducting of business violative of due process. — An Act allowing a municipality to refuse the conduct of a business, irrespective of its compliance with any regulations adopted for the proper exercise of such business, is violative of Ga. Const. 1933, Art. I, Sec. I, Paras. II and III (see now Ga. Const. 1983, Art. I, Sec. I, Paras. I and II), unless a business may be held to be a nuisance per se. *Jones v. City of Atlanta*, 51 Ga. App. 218, 179 S.E. 922 (1935).

Act taxing operation of motor-trucks for hire, but exempting persons hauling farm products exclusively not violative of due process. — The tax imposed on those operating motor-trucks or trailers for transportation of freight for hire with exclusion of haulers of farm produce, livestock, and fertilizers exclusively (Ga. L. 1927, p. 56, § 2, Para. 75A) did not violate Ga. Const. 1877, Art. I, Sec. I, Para. I (see now Ga. Const. 1983, Art. I, Sec. II, Para. I), U.S. Const., amend. 14, Sec. 1, or this paragraph. Exemption from operation of a tax is allowable when the exemption is not arbitrary and is based upon some good reason. *Southern Transf. Co. v. Harrison*, 171 Ga. 358, 155 S.E. 338 (1930).

Nonresident's intangible property taxable if integral part of local business. — Intangible property of a nonresident may be taxed in this state, consistently with U.S. Const., amend. 14 and the similar or due process clause of the Constitution of Georgia, if it is so used as to become an integral part of some local business conducted by the nonresident or the nonresident's agent. *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Credits or accounts receivable of nonresident corporation engaged in business in Georgia taxable. — When a nonresident corporation engaged in business in this state becomes the owner of accounts receivable arising out of the business conducted in this state, such credits or accounts receivable have a tax situs in the county wherein such business

is conducted, notwithstanding that the orders taken for merchandise sold in this state are filled, the shipments made, the credit of the customers passed upon, and the books of account kept, at a point without the State of Georgia. *Colgate-Palmolive-Peet Co. v. Davis*, 196 Ga. 681, 27 S.E.2d 326 (1943).

Tax enforceable on nonresident corporation's accounts receivable with situs in municipality where business conducted. — When a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of due process or equal protection of the law in the state and federal Constitutions. *Parke, Davis & Co. v. City of Atlanta*, 200 Ga. 296, 36 S.E.2d 773 (1946).

Jurisdiction to tax intangible credits when no business situs is involved is in state of domicile of creditor and not of the debtor. *Davis v. Penn Mut. Life Ins. Co.*, 198 Ga. 550, 32 S.E.2d 180, 160 A.L.R. 778 (1944), later appeal, 201 Ga. 821, 41 S.E.2d 406, cert. denied, 331 U.S. 829, 67 S. Ct. 1353, 91 L. Ed. 1844 (1947).

Loans with situs for ad valorem taxation in county where loan business conducted. — In a suit by a nonresident insurance company against county taxing officials to enjoin enforcement of assessments and executions for state and county taxes based on credits existing in the company's favor as a result of loans made by it on county real estate before the taxable period, but remaining unpaid during the period of taxation, the evidence showed without dispute that the loans had a situs for ad valorem taxation in the county in question where the loan business was conducted, so that to tax them in the county would not violate the due process clause of either the state or federal Constitution. *Northwestern Mut. Life Ins. Co. v. Suttles*, 201 Ga. 84, 38 S.E.2d 786 (1946), cert. denied, 329 U.S. 801, 67 S. Ct. 490, 91 L. Ed. 685 (1947).

Nonresident corporation conducting loan business in Georgia within

Police Power — Property (Cont'd)**3. Taxation (Cont'd)**

its taxing power. — Since a nonresident life insurance company employed a loan agent in Georgia on a salary basis to solicit and submit applications for loans and make reports concerning applicants and the proffered security in a fixed office or place of business in the state leased in the agent's own name, with the rent paid by the company through reimbursement to the agent on expense account, and in all negotiations in reference to loans the company dealt with applicants by communications passing through the agent as its agent, with the notes and security deeds prepared in the home office and sent to the agent for execution by applicants in Georgia, and, after their return to and approval in the home office, checks were mailed to the agent for delivery to applicants in Georgia, so that all loan contracts were thus finally executed in Georgia, and where as many as 19 long-term loans were so made during continuous existence of such agency, the company in making such loans was conducting a loan business in Georgia, and thus came within its taxing power, as to property derived from or used in such business. Hence, the credits arising from such loans had a situs for ad valorem taxation in Georgia where the loan business was conducted so that to tax them would not violate the due process clause of either the state or the federal Constitution. *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Taxation of domesticated foreign corporation's intangibles that acquired business situs outside state, and on which the corporation had paid franchise taxes out of the state, did not violate due process clauses of the state and federal Constitutions. *National Linen Serv. Corp. v. Thompson*, 103 Ga. App. 786, 120 S.E.2d 779 (1961).

Law recognizes right and power of municipal government to make reasonable classifications of subjects for taxation and to make subclassifications of such classes. But it does not permit an arbitrary classification, the basis for

which has no reasonable relationship to the purpose for which classification is made. *Elder v. Smith*, 188 Ga. 65, 2 S.E.2d 670 (1939).

Classification of oleomargarine with tax on one class valid. — Former statute (Ga. L. 1935, p. 81) which placed oleomargarine containing generally any fat or oil ingredient in one class, and oleomargarine containing oleo oil from cattle, oleo stock from cattle, oleo stearine from cattle, neutral lard from hogs, peanut oil, pecan oils, corn oil, cottonseed oil, soy bean oil or milk fat in another class, and imposed an excise tax on sale or exchange of first class, but no such tax on the sale or exchange of oleomargarine composed of any of the ingredients named in the second class, was reasonable and did not constitute an arbitrary and discriminatory classification, nor violate any property right to deal in oleomargarine. *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936).

Phrase "doing business" within corporate tax provisions not violative of due process. — The phrase "doing business" within Ga. L. 1978, p. 309, § 2 (see now O.C.G.A. §§ 48-7-31 (corporate income tax) and 48-13-72 (corporate net worth tax)), which means any activity or transactions for the purpose of financial profit or gain, does not violate the due process requirement of either U.S. Const., amend. 14 or this paragraph. *Chattanooga Glass Co. v. Strickland*, 244 Ga. 603, 261 S.E.2d 599 (1979).

Provision for taxpayer's affidavit of illegality to tax execution and hearing comports with due process. — Former Code 1933, § 92-7301 (see now O.C.G.A. § 48-3-1), which provided that a taxpayer may tender an affidavit of illegality when any writ of execution for payment of taxes was issued and provided for a hearing in order to determine whether the tax was legally due, was not violative of the due process clause of the state Constitution or of the Constitution of the United States. *Hicks v. Stewart Oil Co.*, 182 Ga. 654, 186 S.E. 802 (1936).

Ordinances making tax assessment for street improvement a lien upon the property is not violative of this paragraph. *Baugh v. City of LaGrange*,

161 Ga. 80, 130 S.E. 69 (1925).

Legislature can grant municipality power to make improvements and assess cost against abutting land. — An Act of the legislature granting charter power to a municipality to make public improvements such as sidewalks and street paving, and by special assessment and execution against the abutting land collect the cost therefor, does not deprive the owner of due process of law when the Act also permits the owner of such land to file an affidavit of illegality and thereby contest the reasonableness or the lawfulness of the assessment before payment is finally required. *Lockridge-Rogers Lumber Co. v. City of E. Point*, 214 Ga. 255, 104 S.E.2d 228 (1958).

Section of city charter which empowers it to assess the actual cost of laying or constructing a sewer line along one of its streets against the abutting property on each side of the street and which also permits the owner of such land to file an affidavit of illegality contesting the assessment, does not offend the due process clauses of the state and federal Constitutions, even though it permits the city to assess the cost without prior notice to the owner of such land and without first affording such owner an opportunity to be heard respecting the reasonableness or lawfulness of the assessment. *Lockridge-Rogers Lumber Co. v. City of E. Point*, 214 Ga. 255, 104 S.E.2d 228 (1958).

City's legislative authority to pave street and to assess company using street within taxing and police power. — *City of Decatur*, under the Constitution and general law of Georgia, and under the city's charter and the amendments thereof, had legislative authority to pave the city's streets and to assess a portion of the costs of such improvement against the street railway company occupying and using, with the consent of the city, the paved street, irrespective of the benefit to the company. The authority came within both the taxing and the police power reserved in the state. *Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32 (1935), *aff'd sub nom Georgia Ry. & Elec. Co. v. City of Decatur*, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).

Due process argument untimely when no legal action instituted to prevent paving. — When a city, in conformity to legislative authority and the city's ordinances, paved and incurred the expense of paving a street occupied by a street railway company, and when the company, with knowledge that the city intended, in conformity to the city's charter and ordinances, to charge the company with a part of the expense of such paving, stood by and saw the paving done and the expense incurred without instituting any legal action to prevent the paving, it was thereafter too late for the company to avoid payment on the ground that enforcement of the assessment would deprive the company of its property in violation of the due process clauses of the state and federal Constitutions. *Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32 (1935), *aff'd sub nom Georgia Ry. & Elec. Co. v. City of Decatur*, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).

When property owner estopped from questioning assessment for improvement as confiscatory and void. — When a city has obtained jurisdiction to make an assessment against an abutting property owner's property for the purpose of paving a street, and all the provisions and requirements of the special Act authorizing such assessment have been complied with by the city, and the abutting property owner has been given fair opportunity to object to the street improvement and the assessment against the owner's property therefor, but fails to object and then stands by and sees the street paving improvements made at an expense to the city, without entering any objection thereto, the owner is then estopped to raise the question that the assessment was confiscatory and void in that the assessment deprived the owner of property in violation of the due process clause of the state and federal Constitutions, although under the facts of the case this point would have been good and could have been sustained had the point been raised in time. *City of Waycross v. Harrell*, 59 Ga. App. 615, 1 S.E.2d 681 (1939).

Fixing of cigar and cigarette prices by statute did not comport with due process. — Former Code 1933,

Police Power — Property (Cont'd)**3. Taxation (Cont'd)**

§ 92-2204(h) was held unconstitutional as being violative of this paragraph because fixing of prices of cigars and cigarettes by statute was not a reasonable means to the legitimate end of collecting tobacco taxes. *Strickland v. Rio Stores, Inc.*, 243 Ga. 600, 255 S.E.2d 714 (1979) (decided before repeal by Ga. L. 1980, p. 10, § 37).

Former Georgia bank share tax scheme constitutional. — The 1975 Georgia bank share tax scheme did not subject banks to a tax classification that was so “palpably arbitrary” or “invidious” as to run afoul of the constitutional equal protections of the equal protection clause of the United States Constitution and the due process clauses of the United States and Georgia Constitutions. *Roberts v. Gunter*, 251 Ga. 276, 304 S.E.2d 369 (1983).

Statute creating special districts for the purpose of implementing a hotel/motel tax did not violate state and federal constitutional due process and equal protection guarantees. *Youngblood v. State*, 259 Ga. 864, 388 S.E.2d 671 (1990).

4. Zoning

Police power to zone to prevent future use not subject to question or requirement for compensation. — The police power of the state to zone property to prevent the property’s use for certain purposes in the future, as distinguished from the taking or damaging in respect to a use already in existence, is not open to question, and does not require the payment of any compensation. *National Adv. Co. v. State Hwy. Dep’t*, 230 Ga. 119, 195 S.E.2d 895 (1973).

Local government zoning power exercisable through different ordinances at different times affecting different areas. — Municipalities and counties which have had conferred upon them the power to zone property cannot always at one and the same time enact such a comprehensive scheme of zoning and planning as will particularly describe and embrace every piece of property by metes and bounds in the entire area of the

county or municipality; but when reasonably and fairly done, such power may be exercised by the enactment of different ordinances affecting different areas at different times. *Taylor v. Shetzen*, 212 Ga. 101, 90 S.E.2d 572 (1955).

When zoning ordinance is clearly unconstitutional. — A zoning ordinance in which no language appears providing for hearing and notice of hearing to the property affected thereby is clearly in contravention to the constitutional requirements of due process, and is therefore unconstitutional and void. *Bell v. Studdard*, 220 Ga. 756, 141 S.E.2d 536 (1965).

It is prerequisite to validity of municipal ordinance that notice be given and an opportunity for a hearing be accorded to anyone who has an interest or property right in the property which may be affected by the zoning regulation. *Sikes v. Pierce*, 212 Ga. 567, 94 S.E.2d 427 (1956).

City’s zoning ordinance restricting mobile homes to mobile home parks and subdivisions was not preempted by the National Manufactured Housing and Safety Standards Act of 1974, 42 U.S.C. § 5401 et seq., because the city did not infringe on the federal government’s control over safety and construction standards for mobile homes; thus, a mobile home owner, who was affected by such an ordinance, did not suffer a violation of substantive due process rights. *King v. City of Bainbridge*, 276 Ga. 484, 577 S.E.2d 772, cert. denied, 540 U.S. 876, 124 S. Ct. 228, 157 L. Ed. 2d 138 (2003).

Zoning is subject to constitutional prohibition against taking private property without just compensation. *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975).

Justification necessary for zoning classification. — As the individual’s right to the unfettered use of the individual’s property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality, or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable.

Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975).

For unlawful confiscation to occur, requiring that the zoning be voided, it is not necessary that the property be totally useless for the purposes classified. When the damage to the owner is significant and is not justified by the benefit to the public, the zoning must be voided. Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975).

If the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, the regulation is confiscatory and void. Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975).

Application of zoning ordinance unreasonable when change of circumstances since passage. — Evidence as to change of condition and circumstances since passage in 1939 of ordinance zoning the defendants' property for residential and agricultural purposes because of uses of the property adjacent to or near the defendants' property, was sufficient to warrant the conclusion that to apply the provisions of the ordinance of 1939 to the property of the defendants would render such ordinance arbitrary and unreasonable. Humthlett v. Reeves, 212 Ga. 8, 90 S.E.2d 14 (1955).

Determination made under circumstances and conditions at time of case. — In determining the reasonableness of an ordinance based upon statutory authority, such determination must be made under the circumstances and conditions of the case at the present time, and not contemporaneous with the passage of the original ordinance. Humthlett v. Reeves, 212 Ga. 8, 90 S.E.2d 14 (1955).

With burden of proof on property owner. — When it is claimed that a zoning ordinance is unreasonable as to a particular tract of property, or that a change of conditions has rendered the ordinance unreasonable when applied to the particular property, the burden is on the owner of such property to produce sufficient evidence from which the court can make findings of fact and law such as would justify a holding as a matter of law that the ordinance is arbitrary and unreasonable; there must be a showing of an

abuse of discretion on the part of the zoning authority, and that there has been an unreasonable and unwarranted exercise of the police power. Humthlett v. Reeves, 212 Ga. 8, 90 S.E.2d 14 (1955).

Diminution of value alone resulting from a zoning classification does not constitute an unconstitutional deprivation. Gradous v. Board of Comm'rs, 256 Ga. 469, 349 S.E.2d 707 (1986).

Police power may not be exerted arbitrarily or unreasonably. — A statute valid as to one set of facts may be invalid as to another, and a statute valid when enacted may become invalid by a change in the conditions to which it is applied; the police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. Humthlett v. Reeves, 212 Ga. 8, 90 S.E.2d 14 (1955).

Court of equity justified in restraining enforcement because of particular unreasonable application. — A zoning ordinance may in its general aspects be valid, and yet, as to a particular state of facts involving a particular parcel of real estate, be so clearly arbitrary and unreasonable as to result in confiscation, thereby justifying the interposition of a court of equity to restrain its enforcement. Humthlett v. Reeves, 212 Ga. 8, 90 S.E.2d 14 (1955).

When application completely deprives owner of beneficial use of property, attack on validity of regulation sustained. — A zoning ordinance must not infringe the constitutional guaranties of national or state Constitutions by invading personal or property rights unnecessarily or unreasonably; and if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of the owner's property by precluding all uses, or the only use to which it is reasonably adapted, an attack upon the validity of the regulation, as applied to the particular property involved, will be sustained. Humthlett v. Reeves, 212 Ga. 8, 90 S.E.2d 14 (1955).

Circumstances under which zoning ordinances have been held invalid, as applied to certain specific property, fall into three general classes: (1) when a small parcel of property is zoned for resi-

Police Power — Property (Cont'd)**4. Zoning (Cont'd)**

dential purposes, when it is entirely surrounded by commercial or business enterprises; (2) when property zoned for residential use is entirely unsuited for residential purposes; or (3) when the purpose of the ordinance is not to protect the public health, safety, morals, or general welfare. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Churches subject to reasonable regulations, but absolute zoning exclusion from residential area generally invalid. — Generally, any zoning ordinance that absolutely excludes churches from a residential area is invalid under constitutional guarantees. Churches are, however, subject to reasonable regulation both referring to property in the zone generally and to churches specifically, provided the regulations are reasonable and contain some standards. *Rogers v. Mayor of Atlanta*, 110 Ga. App. 114, 137 S.E.2d 668 (1964).

City not authorized to refuse property owner's permit for construction conforming to building regulations. — The Act of the General Assembly granting to the City of Albany power to regulate garages and filling stations and other businesses (Ga. L. 1923, pp. 412, 416), to license them only in localities as may be least offensive to the public, and to revoke the license when they prove dangerous and injurious to health, is in conflict with the due process clause as found in this paragraph, and is also in conflict with Ga. Const. 1877, Art. I, Sec. III, Para. I (see now Ga. Const. 1983, Art. I, Sec. III, Paras. I, II), which provides for compensation for private property taken or damaged for public purposes, insofar as the Act is interpreted by the public officials of the City of Albany to authorize a refusal of a permit sought by an owner of property to construct a filling station which conforms in every way to the building regulations of the city. *Reynolds v. Brosnan*, 170 Ga. 773, 154 S.E. 264 (1930).

When denial of building permit not deprivation of owner's property. — The denial of a permit to the owner of a residence lot to erect thereon a filling

station, when the lot is located in a district zoned by ordinance exclusively for residences, apartments, churches, hospitals, schools, and hotels, is not a deprivation of the owner's property within the meaning of the due process clauses of the Constitution of this state and of U.S. Const., amend. 14, especially when a lot has been improved and used for residential purposes long before the passage of such ordinance. *Howden v. Mayor of Savannah*, 172 Ga. 833, 159 S.E. 401 (1931).

In a declaratory judgment action brought by a developer against a county seeking to invalidate an ordinance which required denial of the developer's land disturbance permit based on two soil-related ordinance violations existing, the judgment in favor of the developer was upheld on appeal with regard to the developer's claim for damages under 42 U.S.C. § 1983, for alleged violations of the developer's equal protection rights in the county's enforcement of the ordinance. The trial court properly determined that the developer was not required to prove a valid property right with regard to the developer's equal protection challenge; the trial court properly awarded attorney fees to the developer under O.C.G.A. § 13-6-11 as the jury was authorized to award the attorney fees as an element of the damages it awarded on the developer's federal equal protection claim, regardless of whether the developer could prevail on any state law claim for damages; but the trial court erred by failing to address the merits of the developer's petition for a declaratory judgment since the overall enforceability of the ordinance, which was still the law, was not rendered moot by the withdrawal notice. *Fulton County v. Legacy Inv. Group, LLC*, 296 Ga. App. 822, 676 S.E.2d 388 (2009).

Notice of hearing required on rezoning matter before county governing authority. — A party must have due and legal notice of the hearing on the matter of rezoning before the county governing authority, the body which can rezone land and thereby deprive a party of the party's property rights. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Notice by publication proper and adequate. — Notice by publication of a rezoning hearing to be held by a governing authority of a county is proper and adequate insofar as the requirements of procedural due process and equal protection are concerned. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Notice not required for preliminary hearing before planning commission. — Defective notice or lack of notice of the preliminary hearing before the planning commission, which cannot rezone property so as to deprive a party of the party's property rights, is not violative of procedural due process or equal protection. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

The amendment of a zoning ordinance accomplished pursuant to defective notice is without any legal force or effect, and the party requesting the amendment does not acquire any additional rights in its property due to the invalid amendment of the zoning ordinance. *Yost v. Fulton County*, 256 Ga. 324, 348 S.E.2d 638 (1986).

Rezoning not violative of due process when notice and hearing. — When proper notice is given and an actual hearing is had, the rezoning of property does not violate the due process provision of the Constitution. *Atlantic Ref. Co. v. Spears*, 214 Ga. 126, 103 S.E.2d 547 (1958).

Actual notice not required. — Landowner's procedural due process rights under the U.S. Constitution and the Georgia Constitution were not violated because, although the landowner did not receive actual notice of a cellular-tower application for the adjacent property, the evidence showed that notice was sent to the landowner's record address by way of certified mail. The county did not have a duty under the zoning ordinance in effect at the time to ensure that the landowner received actual notice. *Sanders v. Henry County*, No. 11-13717, 2012 U.S. App. LEXIS 14560 (11th Cir. July 17, 2012) (Unpublished).

Basis for review of zoning classifications. — The only basis for judicial

review of zoning classifications is when classification is arbitrary and unreasonable. Classification by zoning ordinance does not violate due process when it does not appear that all permitted uses are impossible. *Riddle v. Waller*, 127 Ga. App. 399, 193 S.E.2d 895 (1972).

Standard for review of constitutionality of state land use regulations. — See *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979).

Prerequisite requiring hearing before local zoning authority. — When a landowner alleged having a vested right in the manner in which the owner's property had been zoned, which would have allowed the owner to build the owner's proposed project, the owner was obligated to bring that claim before the local zoning authority before a trial court had jurisdiction to consider it. Since the owner had not brought that claim before the zoning authority, the owner's petition for a writ of mandamus to compel that authority to issue the owner the permit desired was properly dismissed. *Cooper v. Unified Gov't of Athens-Clarke County*, 277 Ga. 360, 589 S.E.2d 105 (2003).

City ordinance sufficiently definite. — Trial court did not err in granting a city summary judgment in a lessee's declaratory judgment action seeking an order declaring that City of Forest Park, Ga., Ordinance § 9-8-45 was unconstitutional because the ordinance was sufficiently definite so that a person of ordinary intelligence need not guess at its meaning; although the lessee contended that the phrase "without limitation of the generality of the foregoing" opened the definition of "public sidewalk" to include any space that the city later wished to assert fell under the ordinance, the specification of parking spaces and other areas intended for public travel did not permit the interpretation the lessee contended. *Braley v. City of Forest Park*, 286 Ga. 760, 692 S.E.2d 595 (2010).

Selection of Juries

Standards of intelligence, uprightness, and experience for jurors are not violative of the Constitution. *White v. State*, 230 Ga. 327, 196 S.E.2d

Selection of Juries (Cont'd)

849, appeal dismissed, 414 U.S. 886, 94 S. Ct. 222, 38 L. Ed. 2d 134 (1973).

Defendant may not complain of exclusion from jury of distinct class to which the defendant does not belong. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Jurors' employment status held as race-neutral strikes. — Appeals court rejected the defendant's challenge to the state's use of peremptory jury strikes against two prospective jurors due to their unemployment, as this raised questions about their community commitment, a valid and accepted concern, and held such strikes to be race-neutral and free of discriminatory intent; further, a second juror was properly stricken on the basis of that juror's unemployment, and not because the juror was a homemaker, and the record showed that the state struck a white juror on the basis of the juror's periodic unemployment. *Hodge v. State*, 287 Ga. App. 750, 652 S.E.2d 634 (2007).

When jury commissioners remiss as matter of law. — Proportional representation of sufficient groups within the county is not required. However, when the evidence shows that in three major identifiable groups (sex, race, and age), women are 91.2 percent underrepresented in the grand jury pool and 69.7 percent in the traverse or petit jury pool; blacks are 49.5 percent underrepresented in the grand jury pool and 61.7 percent in the traverse or petit jury pools, coupled with the uncontroverted evidence from the jury commissioners that proportionally there are as many upright and intelligent women as men, blacks as whites, and young adults as those over 30 years of age, the conclusion that as a matter of law the jury commissioners were remiss in the execution of their statutory duties in compiling a jury list composed of "a fairly representative cross section of the intelligent and upright citizens of the county" is well-founded. *Gould v. State*, 131 Ga. App. 811, 207 S.E.2d 519, aff'd in part and rev'd in part, 232 Ga. 844, 209 S.E.2d 312 (1974).

Defendant has initial burden of proving existence of systematic ra-

cial exclusion in selection of jurors. *Sullivan v. State*, 225 Ga. 301, 168 S.E.2d 133 (1969), vacated on other grounds, 408 U.S. 935, 92 S. Ct. 2854, 33 L. Ed. 2d 749 (1972).

No inference arises because no member of defendant's race on jury trying defendant. — The arbitrary, systematic, and purposeful exclusion of members of defendant's race from the defendant's jury cannot be inferred merely from the fact that no one of that race is on such jury. *Heard v. State*, 210 Ga. 523, 81 S.E.2d 467 (1954).

Nonwhite defendant not entitled to racially mixed jury with members of defendant's race. — A black, or member of any other race, who is on trial is not entitled to a mixed jury composed of members of the defendant's own race and members of the white race; no such right to a mixed jury is guaranteed by the due process and equal protection clauses of either the Constitution of the United States or of this state. *Heard v. State*, 210 Ga. 523, 81 S.E.2d 467 (1954).

Once prima-facie case of racial exclusion made, burden shifts. — Once a prima-facie case of racial exclusion in the selection of jurors is made, the burden shifts to the prosecution to disprove the existence of racial exclusion. *Sullivan v. State*, 225 Ga. 301, 168 S.E.2d 133 (1969), vacated on other grounds, 408 U.S. 935, 92 S. Ct. 2854, 33 L. Ed. 2d 749 (1972).

Use of peremptory strikes to exclude African-Americans. — The defendant was not denied due process of the law on the ground that the state used all of its peremptory strikes to exclude African-Americans from a petit jury. *Avery v. State*, 174 Ga. App. 116, 329 S.E.2d 276 (1985).

State proffered race-neutral reasons for exercising its peremptory strikes to strike four African-American women, which included: a possible familiarity with defendant's mother, a camaraderie with a witness in another trial in which both prosecutors participated, a concern that a prospective juror would have difficulty understanding the scientific evidence, inattention during voir dire, a possible preoccupation with a child at home, and sleeping during voir dire. *Rakestrau v. State*, 278 Ga. 872, 608 S.E.2d 216 (2005).

Appeals court rejected the defendant's claim that the state committed a Batson violation in peremptorily striking two jurors, as: (1) the state's reasons in striking the first juror appeared concrete and race-neutral and any question of doubt was decided in favor of the state, given the great deference to the determination that the state's reason was not so wholly fantastic as to be pretextual; and (2) a second juror was properly stricken based on evidence that the juror worked nights, appeared to be extremely fatigued, and actually slept through portions of the voir dire. *Woolfolk v. State*, 282 Ga. 139, 644 S.E.2d 828 (2007).

Action of jury invalid when impaneling not in compliance with law. — When the impaneling of a jury is not in compliance with law, the jury as a body is not competent to act, and its action is invalid. *Allen v. State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964).

Sufficient race-neutral reasons existed for state's peremptory strikes. — While the defendant made out a prima facie case of racial discrimination regarding the state's use of three peremptory strikes, because sufficient race-neutral reasons existed for those strikes, the defendant's rights were not violated. *LeMon v. State*, 290 Ga. App. 527, 660 S.E.2d 11 (2008).

State cannot deliberately exclude identifiable, distinct groups from jury lists. — A defendant is not constitutionally entitled to a venire or jury roll of any particular composition, but U.S. Const., amend. 14, equal protection and due process clause, and U.S. Const., amend. 6, right to a jury trial, do require that the state not deliberately and systematically exclude identifiable and distinct groups from their jury lists. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Burden is upon defendant to demonstrate that a particular class was the subject of discrimination in the jury selection procedures. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Threshold question that must be answered by the defendant is whether the particular class constitutes an identifiable and distinct class for purposes of a jury

challenge based on U.S. Const., amend. 14. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

In determining whether particular discrepancy is substantial or significant, some allowance may be made for the imprecision of the jury selection process and the operation of constitutionally inoffensive factors such as exemptions from jury duty based on occupation. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

In order to establish prima-facie case of discrimination, the defendant must demonstrate that there exists a substantial disparity between the proportion of blacks chosen for jury duty and the proportion of blacks in the eligible population and that the selection procedures themselves are not racially neutral. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

To shift burden of proof. — Statistical evidence establishing that blacks are underrepresented, together with evidence that the jury selection procedures are not racially neutral, establishes a prima-facie case of invidious racial discrimination thus shifting the burden of proof to the state. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Batson challenge properly rejected. — Defendant's Batson challenge was properly rejected as the state gave racially neutral reasons for its strikes, including that a juror's recollection abilities were called into question and that the juror had to care for a dependent aunt, that a juror's son had recently been prosecuted for a driving under the influence charge, and that a juror was a social worker; defendant failed to show purposeful discrimination. *Flanders v. State*, 279 Ga. 35, 609 S.E.2d 346 (2005).

Complaint of exclusion of blacks from jury requires timely challenge. — In the absence of a timely challenge to the grand jury or the traverse jury, the complaint of exclusion of blacks therefrom is not reviewable. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Failure to object at trial waives objection. — An objection on the grounds of systematic racial exclusion on grand jury should have been presented in a proper

Selection of Juries (Cont'd)

way at the trial, and upon failure to do so it is to be considered as waived and does not present a ground for habeas corpus. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

In order for defendant's motion to quash the indictment and challenge to the array of the grand jurors to be entertained by the trial court, it must be made prior to the return of the indictment or the defendant must show that the defendant had no knowledge, either actual or constructive, of such alleged illegal composition of the grand jury prior to the time the indictment was returned; otherwise, the objection is deemed to be waived. *Sanders v. State*, 235 Ga. 425, 219 S.E.2d 768 (1975).

Correctional officers. — It is not error to refuse to dismiss for cause correctional officers. *Kent v. State*, 179 Ga. App. 131, 345 S.E.2d 669 (1986).

Comment by court during voir dire. — When, in ruling on a voir dire question, the trial court stated that "The defendant is the one that's injected race into the case. The state hasn't," and defendant argued that the comment put a chill on the voir dire process, denying the defendant an opportunity to get a racially unbiased jury in denial of the defendant's due process rights, it was held that the record did not show either that the court's comment somehow abridged the scope or effectiveness of the defendant's voir dire questions or that the court's comment prejudiced the minds of the jurors against the defendant. *Walker v. State*, 258 Ga. 443, 370 S.E.2d 149 (1988).

Juror's statement of impartiality. — Because defendant waived an objection to the trial court's ruling on the scope of defendant's cross-examination of a witness by failing to object, and because a juror stated that the juror could be fair and impartial when hearing the case, the trial court did not abuse the court's discretion in denying defendant's motion for a new trial. *Pinckney v. State*, 285 Ga. 458, 678 S.E.2d 480 (2009).

Application**1. In General**

Service on registered agent of corporation. — The method of service properly authorized under former § 14-2-62(b) (see now O.C.G.A. § 14-2-504) is not subject to constitutional attack because it is in itself reasonably certain to inform those affected and is not substantially less likely to bring home notice than other of the feasible and customary substitutes. *Frazier v. HMZ Property Mgt., Inc.*, 161 Ga. App. 195, 291 S.E.2d 4 (1982).

O.C.G.A. § 40-6-120 was unconstitutionally vague. — In light of the conflict in the language of O.C.G.A. § 40-6-120(a)(2), a person of common intelligence could not determine with reasonable definiteness that the statute prohibits the making of a left turn into the right lane of a multi-lane roadway. Accordingly, § 40-6-120(a)(2) is too vague to be enforced against a driver of a vehicle making a left turn into a multi-lane roadway that lacks official traffic-control devices directing the driver into which lane to turn and is, therefore, unconstitutional under the due process clauses of the Georgia and United States Constitutions. *McNair v. State*, 285 Ga. 514, 678 S.E.2d 69 (2009).

Patients had no constitutional right to dialysis treatment. — Trial court did not err in granting a clinic's motion under O.C.G.A. § 9-11-12(b)(6) to dismiss for failure to state a claim the patients' action alleging that the closure of the clinic violated the due process clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. I, Para. I, because the patients had no constitutional right to the dialysis treatment; even if the patients depended for their lives upon the free dialysis treatment the patients voluntarily received from the clinic for several years, the patients were not forced by any state-imposed restriction to become dependent, and the patients acquired no constitutional right to continue to receive the treatment. *Andrade v. Grady Mem'l Hosp. Corp.*, 308 Ga. App. 171, 707 S.E.2d 118 (2011).

Process for commitment to state mental institution comports with due process. — Former Code 1933, § 27-1503 (see now O.C.G.A. § 17-7-131) afforded a person due process of the laws prior to a final order committing the person to a state mental institution whether or not the person is committed temporarily to a state mental institution for evaluation. *Skelton v. Slaton*, 243 Ga. 426, 254 S.E.2d 704 (1979).

Release from state mental institution. — The provisions of former Code 1933, § 27-1503 (see now O.C.G.A. § 17-7-131) disallowing the filing of another application for release until one year has elapsed from the denial of the last preceding application and allowing release only upon court order did not offend current concepts of due process or equal protection of the laws. *Skelton v. Slaton*, 243 Ga. 426, 254 S.E.2d 704 (1979).

Inquiry into sanity of person at time of acquittal must be conducted so as to afford person due process of laws. *Skelton v. Slaton*, 243 Ga. 426, 254 S.E.2d 704 (1979).

Sheriff can be held liable on bond for acts of deputies outside presence and without knowledge. — To hold sheriff liable on the sheriff's bond for the acts of the sheriff's deputies committed outside the sheriff's presence and without the sheriff's knowledge is not a violation of the due process clauses of the state and federal Constitutions, notwithstanding the fact that the sheriff does not have unlimited power in discharging or removing deputies. *Standard Sur. & Cas. Co. v. Johnson*, 74 Ga. App. 823, 41 S.E.2d 576 (1947).

Statutory liability for failure to report what is not known violates due process. — Section providing that a section foreman shall be liable for double the value of the stock killed by the railroad upon the foreman's failure to post the required notice, not only makes the foreman liable for the failure to report that of which the foreman has knowledge, but goes beyond this to subject the foreman to a liability for failing to report the killing of stock of which the foreman has no knowledge. This is a clear violation of the due

process clause regardless of the fact that the penalty shall be recovered in the manner provided by law for the collection of other claims. *Buchanan v. Heath*, 210 Ga. 410, 80 S.E.2d 393 (1954).

Statute holding automobile owner liable for operator's negligence violates due process. — Georgia Laws 1955, p. 454, clearly violates the due process clause of both the federal and state Constitutions, for the reason that it makes the owner of a motor vehicle liable if the vehicle is being used in the prosecution of the business or for the benefit of the owner, even though operated without notice to the owner or without the owner's knowledge and without the owner's consent, express or implied. To hold this statute constitutional would be to hold a party liable for the negligent conduct of another, even though a trespasser were operating the vehicle against the express orders of the owner, and irrespective of how careful or free from negligence the owner was, the only condition being that it be operated for the benefit of the owner. *Frankel v. Cone*, 214 Ga. 733, 107 S.E.2d 819 (1959), overruled on other grounds, *Lott Inv. Corp. v. Gerbing*, 242 Ga. 90, 249 S.E.2d 561 (1978).

County's sanitary landfill and fee schedules were not violative of due process or equal protection clauses of the United States and Georgia Constitutions. *City of Covington v. Newton County*, 243 Ga. 476, 254 S.E.2d 855 (1979).

"Property" defined. — The term property comprehends not only the thing possessed, but also, in strict legal parlance, means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy, and dispose of property, and the corresponding right to exclude others from the use. Therefore, no physical invasion damaging to the property need be shown; only an unlawful interference with the right of the owner to enjoy possession. Thus, increased noise and odors may result in an inverse condemnation of property by interfering with the use and enjoyment of land and endangering health. *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235 (1978).

Private property safeguarded. — The Constitution of this state, by repeated

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declarations, leaves no room for doubt but that it intends to place around private property the same safeguards with which it shields life and liberty. *Cox v. GE Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955) adopting the specially concurring opinion in *Harris v. Duncan*, 208 Ga. 561, 67 S.E.2d 692 (1951).

With property owner's right to sell. — The unshackled right to sell one's own property for a lawful use is within itself property protected by the state Constitution and is beyond the reach of legislative impairment. The state Constitution forbids destruction, taking, or impairing of private property by any state bureau under any pretended legislative powers. *Gray v. Georgia Real Estate Comm'n*, 209 Ga. 301, 71 S.E.2d 645 (1952).

Georgia Real Estate Commission is wholly without power to require the owner of land to procure a license before selling the land or to otherwise interfere with the complete freedom of such owner in the sale of the owner's own land. *Gray v. Georgia Real Estate Comm'n*, 209 Ga. 301, 71 S.E.2d 645 (1952).

Pledging political subdivision's power was not taking of property without due process. — Under Ga. L. 1975, p. 107, § 1 (see now O.C.G.A. T. 46, C. 3, Art. 3), the pledging of the full faith and credit and taxing power of the political subdivisions does not constitute a taking of property without due process of law. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Public office is public trust or agency and is not property of incumbent thereof, and when the incumbent is suspended from such office, the incumbent is not deprived of any property. *Felton v. Huie*, 178 Ga. 311, 173 S.E. 660 (1933).

Redistricting attempts for school board members. — While voting rights and the right to run for public office are core constitutional rights, an attempted deprivation of constitutional or statutory rights is not the same as an actual deprivation. Furthermore, incurring legal fees to vindicate rights does not itself establish that those rights were violated. Thus, the

plaintiff, a school board member, pursuing attempted violations of the plaintiff's right to run and hold a designated seat in a predefined district, could not succeed as an injunction in another lawsuit and failure of preclearance interfered with the implementation of the efforts of the defendants, the local voting registrars; since the attempt to deprive the plaintiff of the plaintiff's constitutional rights did not succeed, neither can the plaintiff's lawsuit succeed. *Cook v. Randolph County*, 573 F.3d 1143 (11th Cir. 2009).

Legislative limitation of recoverable damages after tort committed not deprivation of property without due process. — The fact that alleged libelous articles were published before the adoption of an Act limiting the plaintiff's previously existing right to recover punitive damages did not render the law unconstitutional as violating federal and state provisions against the deprivation of property without due process of law. *Kelly v. Hall*, 191 Ga. 470, 12 S.E.2d 881 (1940).

Limitation on motor vehicle liability insurance benefits held constitutional. — The limitation on income benefits in former O.C.G.A. § 33-34-4(a)(2)(B) and (a)(2)(C), as construed by the Supreme Court and the Court of Appeals, establishes a constitutionally permissible classification reasonably related to the purposes of the no-fault Act. *Leonard v. Preferred Risk Mut. Ins. Co.*, 247 Ga. 574, 277 S.E.2d 675 (1981).

Hospital authority with standing to attack constitutionality of state law. — A hospital authority or a private corporation has standing by statute to attack state law on the grounds that it violates the due process and equal protection clauses of the Georgia Constitution. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982).

County or municipal corporation created by legislature without standing to invoke due process argument against legislature. — A county or municipal corporation, created by the legislature, does not have standing to invoke the equal protection and due process clauses of the state or federal Constitution in opposition to the legislature. *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978).

Due process rights granted by university bulletin. — A provision in a private university bulletin to the effect that no student shall be dismissed without “due process” does not contractually obligate an educational institution to provide the full range of constitutional due-process protections enjoyed by students at tax-supported institutions, but only those procedures specifically provided for in the bulletin itself. *Life Chiropractic College, Inc. v. Fuchs*, 176 Ga. App. 606, 337 S.E.2d 45 (1985).

State’s interest did not outweigh patient’s right to refuse treatment. — Hospital patient who was incapable of spontaneous respiration was entitled to declaratory relief permitting the patient to turn off a ventilator, which would result in the patient’s death, since the state’s interest in preserving life did not outweigh the patient’s right to refuse medical treatment. *State v. McAfee*, 259 Ga. 579, 385 S.E.2d 651 (1989).

Administering sedative was inseparable from right to refuse medical treatment. — When hospital patient sought to have ventilator turned off, which would cause the patient’s death, the patient’s right to have a sedative administered before the ventilator was disconnected was inseparable from the patient’s right to refuse medical treatment. *State v. McAfee*, 259 Ga. 579, 385 S.E.2d 651 (1989).

Grant of official immunity to state employee providing medical services. — Grant of official immunity from a malpractice suit to a state-employed doctor based on the patient’s status as a Medicaid patient did not violate the constitutional rights of the patient’s parents, as the due process and equal protection clauses of the U.S. and Georgia Constitutions protected only rights, and a waiver of sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., was merely a privilege. *Porter v. Guill*, 298 Ga. App. 782, 681 S.E.2d 230 (2009).

Garnishment may reach out-of-state wages. — Allowing garnishment of wages earned wholly outside this state is not an unconstitutional extension of the laws of this state to a debt created outside the

geographical limits of this state, thus depriving the garnishee of due process. *United Merchants & Mfrs., Inc. v. Citizens & S. Nat’l Bank*, 166 Ga. App. 468, 304 S.E.2d 552 (1983).

Charitable immunity doctrine does not constitute a violation of the equal protection or due process clauses of the federal or state constitutions. *Ponder v. Fulton-DeKalb Hosp. Auth.*, 256 Ga. 833, 353 S.E.2d 515, cert. denied, 484 U.S. 863, 108 S. Ct. 181, 98 L. Ed. 2d 134 (1987).

Provisions of the Tort Reform Act, O.C.G.A. § 51-12-5.1, relating to punitive damages, violated the due process and equal protection clauses of the federal and state constitutions, violated the excessive fines provisions of both constitutions, and violated the double jeopardy provision of the Fifth Amendment to the federal constitution. *McBride v. GMC*, 737 F. Supp. 1563 (M.D. Ga. 1990).

When Governor wishes to remove incumbent constitutional officer for abandonment, notice and hearing are required for due process. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

Judgment creditor without right to deprive debtor of property without due process. — The mere fact that a creditor has obtained a judgment does not give the creditor a right to enforce that judgment by depriving the alleged judgment debtor of property without due process of law. *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699, 240 S.E.2d 171 (1977).

Trial court deprived garnisher of due process. — The trial court deprived the garnisher of due process in failing to afford a hearing on setting aside default and the propriety of modifying the amount of judgment. *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699, 240 S.E.2d 171 (1977).

Before public utility service cut off, consumer to be given opportunity to be heard. — In Georgia, it is entirely constitutional to provide for cutting off water for failure to pay at stated times the rates therefor, provided only that a consumer cannot be deprived of an opportunity to, in good faith, present any reason why the consumer ought not to be re-

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quired to pay and have the consumer's claim adjudicated, providing the consumer insures the city or other party furnishing water against loss; this applies equally to charges for sewer services. *Liner v. City of Rossville*, 213 Ga. 756, 101 S.E.2d 753 (1958).

Postjudgment garnishment law is not unconstitutional for lack of due process. It meets the requirement of judicial supervision and notice. *Morgan v. Morgan*, 156 Ga. App. 726, 275 S.E.2d 673 (1980).

Abandoned motor vehicle provisions violative of due process. — Due process of law includes notice and hearing as a matter of right when one's property rights are involved; Ga. L. 1977, p. 253 required notice prior to sale of abandoned motor vehicles, but made no provision for a judicial hearing as a matter of right on issues in controversy either prior to or following the sale of the vehicle. Due process does not permit such procedure. The Act dealing with abandoned motor vehicles violated due process under the state and federal Constitutions. *Gore v. Davis*, 243 Ga. 634, 256 S.E.2d 329 (1979).

Foreclosure on automobile. — Vehicle owner was denied due process when the trial court entered a default judgment against it, as the evidence showed that the wrecker company that was attempting to foreclose on its lien on the vehicle which the wrecker company found abandoned did not provide notice of the foreclosure action to the vehicle owner since the wrecker company sent notice of that action to the wrong address in a state other than that in which the vehicle owner was located. *Mitsubishi Motors Credit of Am., Inc. v. Robinson & Stephens, Inc.*, 263 Ga. App. 168, 587 S.E.2d 146 (2003).

Failure to provide a corporation that was the original owner of a car with notice of a foreclosure proceeding involving the car was a due process violation that was tantamount to a lack of personal jurisdiction; thus, the foreclosure judgment was void under O.C.G.A. § 9-12-16. *Mitsubishi Motors Credit of Am., Inc. v. Sheridan*, 286 Ga. App. 791, 650 S.E.2d

357 (2007), cert. denied, No. S07C1842, 2007 Ga. LEXIS 751 (Ga. 2007).

Charter assessment provision violative of due process because no notice or hearing on property valuation. — The municipal charter of Dublin, Georgia, provides that the value for taxation of all real and personal property in the city subject to taxation shall be determined by three disinterested freeholders of the city, to be elected annually by the mayor and board of aldermen, who shall take an oath to assess all property in the city at a fair market value to the best of their skill and knowledge. In case any property holder or taxpayer is dissatisfied with any assessment so made by the assessors, the taxpayer may appeal to the mayor and board of aldermen, who shall review the assessment and whose decision thereon shall be final. As the charter provision in question failed to provide for notice to the taxpayer and afford as a matter of right a hearing before the assessors on the question as to valuation of the property, and as the hearing provided for by the ordinance was a mere matter of grace, such provision of the charter is repugnant to the due process clauses of the state and federal Constitutions. *Swinson v. City of Dublin*, 178 Ga. 323, 173 S.E. 93 (1934).

Review of Department of Natural Resources decisions. — Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq., and O.C.G.A. § 12-2-1 govern the procedure for judicial review of final decisions of the Department of Natural Resources; since the party seeking review failed to make a timely request therefor, affirmance of the final decision of the Department violated neither equal protection nor due process. *Nix v. Long Mtn. Resources, Inc.*, 262 Ga. 506, 422 S.E.2d 195 (1992).

A hearing on an application for a certificate of public convenience and necessity, whether granted or denied, is not a judicial or quasi-judicial proceeding to which due process rights applicable in such proceedings attach. *RTC Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 165 Ga. App. 539, 301 S.E.2d 896 (1983).

Summary suspension of driver's license prior to hearing with no provi-

sion for automatic stay pending appeal was not violative of due process clauses of the United States Constitution and the Georgia Constitution. *Williams v. Cofer*, 246 Ga. 344, 271 S.E.2d 486 (1980).

Due process rights applicable to hearing on suspension of driver's license for refusal to submit to breath analysis test, see *Hardison v. Fayssoux*, 168 Ga. App. 398, 309 S.E.2d 397 (1983).

License revocation order upheld when driver afforded sufficient due process. — Administrative decision disqualifying a driver from driving a commercial motor vehicle for life based on the refusal to submit to state-administered chemical testing and a prior conviction for driving under the influence was upheld, as the arresting officer informed the driver that the driver could lose that driver's license to drive upon refusing to submit to chemical testing, and the requirements of due process did not require the arresting officer to inform the driver of all the consequences of refusing to submit to chemical testing. Moreover, the driver requested and received a hearing under O.C.G.A. § 40-5-67.1(g)(1). *Chancellor v. Dozier*, 283 Ga. 259, 658 S.E.2d 592 (2008).

Appeal from suspension of driver's license. — Even though the defendant elected to first pursue an administrative appeal of a driver's license suspension to the Department of Public Safety and was unsuccessful in that effort, the defendant was still entitled to file an appeal in the superior court under O.C.G.A. § 40-5-66, at which the defendant could receive a meaningful hearing upon request and, accordingly, the defendant was not denied the right to procedural due process. *Miles v. Shaw*, 272 Ga. 475, 532 S.E.2d 373 (2000).

Trial judge's inappropriate conduct of injunction hearing required reversal. — Conduct resulting in reversible error was committed by a trial judge during an injunction hearing involving the alleged fraudulent refinancing of church property since the judge was found to have attempted to procure evidence and elicit testimony, conducted ex parte communications, and not afforded the parties the opportunity to offer evidence, give

argument, or otherwise present the parties' respective cases. Further, the trial judge erred by determining that one defendant committed criminal contempt without giving that defendant an opportunity to respond to or defend against the trial judge's determination that the defendant's testimony was untruthful. *Cousins v. Maced. Baptist Church of Atlanta*, 283 Ga. 570, 662 S.E.2d 533 (2008).

In a petition for declaratory judgment and an injunction against the defendants seeking use and control of a church, the trial court erred in entering final judgment in favor of the defendants because the trial court's conduct at the final hearing deprived the plaintiff of the plaintiff's right to due process since the trial court prohibited the plaintiff from presenting witnesses and evidence to support the plaintiff's claims that it owned the church; and, at multiple times during the final hearing, counsel for the plaintiff asked to present witnesses, but the trial court did not permit counsel to do so, instead limiting the hearing to argument from counsel and testimony from a defense witness and an unsworn defendant. *Thomas v. Johnson*, 329 Ga. App. 601, 765 S.E.2d 748 (2014).

2. Attorneys

Disbarment of attorney. — Attorney who was legally charged and convicted of a crime involving moral turpitude and then disbarred under Standard 66, Rule 4-102, Rules and Regulations of the State Bar of Georgia, was properly afforded due process. *Rehberger v. State*, 269 Ga. 576, 502 S.E.2d 222 (1998).

Georgia Board of Bar Examiners did not violate due process when it recalculated the scores only of those applicants who initially failed the bar examination by dropping a question; the applicant's allegation, premised on the supposition that those who initially passed the exam would have failed if they were regraded without taking into account the question, was not supported by the record and, even if it were, the applicant could not show harm because the applicant was graded twice and failed both times. In the *Matter of Hedge*, 279 Ga. 241, 610 S.E.2d 519 (2005).

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Attorney's due process rights violated in contempt proceeding. — Attorney's alleged contumacious conduct during the course of a death penalty case constituted an indirect contempt, and the attorney was entitled, among other things, to reasonable notice of the charges, to counsel of the attorney's own choosing, and to the opportunity to call witnesses; since the attorney was not given these opportunities when the contempt hearing was held at the end of the day of the death penalty trial, the attorney's contempt hearing did not comply with due process and furthermore, the trial judge could preside over the contempt hearing as the conduct was not directed toward the judge and the judge did not react to the conduct in such manner as to become involved in the controversy. *Ramirez v. State*, 279 Ga. 13, 608 S.E.2d 645 (2005).

Although a judge informed an attorney of the conduct found to be criminally contemptuous, because the judge not only refused to afford that attorney an opportunity to be heard, but also became involved in the controversy, the criminal contempt finding entered against the attorney had to be reversed. *In re Hatfield*, 290 Ga. App. 134, 658 S.E.2d 871 (2008).

3. Employment Relationships and Employees

Application of Workers' Compensation Law to public employees comports with due process. — Former Code 1933, § 114-109 (see now O.C.G.A. § 34-9-3) was not invalid as being in violation of the due process clauses of the state and federal Constitutions, nor did the law deny to the defendant the equal protection of the laws. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932).

Constitutionality of employment security provisions. — The fact that an employee is entitled to benefits based on employment by the hospital bears a substantial relationship to the purpose of the Employment Security Law. Compulsory contributions for employment security, like many other taxes, are payable without regard to fault; and it follows that

employee's eligibility for benefits and the hospital authority's resulting liability do not offend the due process clause of Georgia's Constitution. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982).

Effect of state remedies redressing deprivation of procedural due process. — School employee who was improperly dismissed did not have a claim for damages under 42 U.S.C. § 1983 when the employee was reinstated in the employee's job with back pay as the result of state remedies that redressed any procedural due process deprivation that the employee suffered. *Atlanta City Sch. Dist. v. Dowling*, 266 Ga. 217, 466 S.E.2d 588 (1996), cert. denied, 519 U.S. 812, 117 S. Ct. 59, 136 L. Ed. 2d 21 (1996).

Seniority among railway workers is fundamentally and wholly contractual, does not arise from mere employment, and is not an inherent, natural, or constitutional right. *Lamon v. Georgia S. & Fla. Ry.*, 212 Ga. 63, 90 S.E.2d 658 (1955).

Employee rights under contract do not extend beyond its life. — An employee has no inherent right to seniority in service; and if seniority arises only out of contract, such rights created and arising under the contract do not extend beyond its life when it has been legally terminated. *Lamon v. Georgia S. & Fla. Ry.*, 212 Ga. 63, 90 S.E.2d 658 (1955).

But violation or misapplication of existing bargaining agreement deprives employee of protectible rights. — Violation or misapplication of an existing bargaining agreement, as by preferring an employee with less seniority over another with greater seniority when the employee is still in service of the employer under the contract, deprives the employee of the employee's seniority rights, and such seniority rights, which are property rights, will be protected in the courts. *Lamon v. Georgia S. & Fla. Ry.*, 212 Ga. 63, 90 S.E.2d 658 (1955).

Right to follow one's profession, business, or occupation, or to labor is valuable property right, protected by the Constitution and laws of the state, subject only to such restrictions as the government may impose for the welfare and safety of society. *Horne v. Skelton*, 152

Ga. App. 654, 263 S.E.2d 528 (1979).

An evidentiary hearing subsequent to discharge of city employees meets the requirements of due process of law as it regards their property right in continued employment. *City of Atlanta v. Mahony*, 162 Ga. App. 5, 289 S.E.2d 250 (1982).

Author or inventor has property right in product of mental labors, even though such product is not patentable. The right has been recognized at common law independently of copyright or letters patent. *Monumental Properties of Ga., Inc. v. Frontier Disposal, Inc.*, 159 Ga. App. 35, 282 S.E.2d 660 (1981).

Exclusivity of property right in unpatented product. — A property right in the unpatented product is only exclusive until it becomes the property of the public by being placed on the market. *Monumental Properties of Ga., Inc. v. Frontier Disposal, Inc.*, 159 Ga. App. 35, 282 S.E.2d 660 (1981).

Right to accept private employment. — A person's right to work, namely the right to accept employment from private firms and individuals, is protected by the state due process clause. *State v. McMillan*, 253 Ga. 154, 319 S.E.2d 1 (1984).

The right of a person retired from state employment to accept employment from private firms and individuals cannot be abridged unless the law which abridges it furthers or protects some governmental interest which outweighs the intrusion upon personal liberty and property rights. *State v. McMillan*, 253 Ga. 154, 319 S.E.2d 1 (1984).

Specialty training for physicians. — Public hospital bylaw requiring specific postgraduate specialty training or residency in order for physicians to be eligible for admission to the medical staff did not transgress the equal protection or due process rights of osteopathic physicians. *Silverstein v. Gwinnett Hosp. Auth.*, 861 F.2d 1560 (11th Cir. 1988).

Immunity granted employers in the workers' compensation act does not violate the due process and equal protection provisions of the state and federal constitutions. *Georgia Dep't of Human Resources v. Joseph Campbell Co.*, 261 Ga.

822, 411 S.E.2d 871 (1992).

Failure of an employee to appeal discharge within the time required by the employer's personnel policy precluded employee from obtaining mandamus for a violation of due process. *Camden County v. Haddock*, 271 Ga. 664, 523 S.E.2d 291 (1999).

Due process denied if city employee discharged before notice and hearing prescribed by charter. — When tenure is created by an Act which provides for notice and a hearing before discharge, failure to give the notice and accord the city fire department employee the right to be heard amounts to a denial of due process of law. *Mulcay v. Murray*, 219 Ga. 747, 136 S.E.2d 129 (1964).

Evidentiary hearing subsequent to discharge of county employee meets requirements of due process of law. *Brownlee v. Williams*, 233 Ga. 548, 212 S.E.2d 359 (1975).

Delay in holding hearing on public employee's appeal of termination. — As a former police officer failed to show prejudice from a two-year delay in holding a hearing on the officer's appeal of the officer's termination, and the evidence supported the civil service board's decision to uphold the officer's dismissal, the delay of the appeal did not violate the officer's due process rights under Ga. Const. 1983, Art. I, Sec. I, Para. I. *Glass v. City of Atlanta*, 293 Ga. App. 11, 666 S.E.2d 406 (2008).

When municipal police officer was not granted hearing prior to initial discharge, but was granted a trial type hearing on the officer's appeal before the personnel review board when the officer was confronted by the witnesses and afforded the opportunity to cross examine the witnesses and to offer evidence in the officer's own behalf, due process was not violated. *In re Wiggins*, 144 Ga. App. 707, 242 S.E.2d 290 (1978).

Notice required for discharged public employees protected by merit system legislation. — Due process requires that public employees protected by merit system legislation be notified specifically and in detail of the reasons for their discharge prior to their hearing. *Sheppard v. DeKalb County Merit Council*, 144 Ga.

Application (Cont'd)**3. Employment Relationships and Employees (Cont'd)**

App. 115, 240 S.E.2d 316 (1977).

No requirement employee be given hearing whenever superior's decision might affect employment. — There is no requirement under the due process provisions of the state Constitution that an employee be given a hearing on every decision made by a superior which might have an effect on the employee's employment. *Brown v. State Merit Sys. of Personnel Admin.*, 245 Ga. 239, 264 S.E.2d 186 (1980).

Civil employment which allows termination only "for cause" creates expectation of continued employment that is constitutionally protected. *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980).

Parties to employment contract not subject to Georgia law unless contract made or actual work done in state. — Under former Code 1933, § 114-110 (see now O.C.G.A. § 34-9-7), the state acquires jurisdiction only by the act of the parties in coming within the state to execute a contract of employment. In the absence of the making of a contract within the state where no work thereunder in the state is required, the parties thereto could not be subjected to the terms of the Georgia law; for to do so would be to deny to them due process of law, as guaranteed by the state and federal Constitutions. *Cramer v. American Mut. Liab. Ins. Co.*, 77 Ga. App. 236, 47 S.E.2d 925 (1948) (decided under former Code 1933, § 114-110 prior to amendment by Ga. L. 1972, p. 929, § 2).

Workers' Compensation Act as voluntary statute. — Former Code 1933, § 114-117 (see now O.C.G.A. § 34-9-106) providing for judgment in superior court based upon a memorandum of agreement approved by, or award of, the Department of Industrial Relations (now the Board of Workers' Compensation) is not violative of the due process clauses of the state and federal Constitutions though it does not provide for notice of, or hearing on, the proceedings in the superior court. The Workers' Compensation Act is a voluntary or elective statute. Generally, an attack on

such a statute on the grounds that it denies due process of law is not sustained by the courts because the complaining party voluntarily submitted to the terms of the statute and cannot complain if usual forms of legal process are denied the party under the statute. *Taylor v. Woodall*, 183 Ga. 122, 187 S.E. 697 (1936).

Suspension or discharge of police officer. — Due process required that police detective receive proper notice of the behavior for which the detective was suspended or discharged. *Byrd v. City of Atlanta*, 683 F. Supp. 804 (N.D. Ga. 1988).

Discharge of at-will employee. — School district employee's claim that a termination based on race discrimination violated procedural due process rights survived summary judgment; although the employee was an at-will employee with no contract, genuine issues of material fact existed as to whether the employee was entitled to notice and a hearing to answer charges of misconduct. *Palmer v. Stewart County Sch. Dist.*, No. 4:04-CV-21 (CDL), 2005 U.S. Dist. LEXIS 35511 (M.D. Ga. June 17, 2005).

Lawsuits and workers' compensation proceedings. — Every party to a lawsuit (or a workers' compensation proceeding) must be afforded the opportunity to be heard and to present a claim or defense, i.e., to have a day in court. *Hart v. Owens-Illinois, Inc.*, 165 Ga. App. 681, 302 S.E.2d 701 (1983).

Adequate notice found. — Employer received adequate notice of a workers' compensation hearing under O.C.G.A. § 34-9-102(a) when the employer's notice of the hearing was returned as undeliverable, the employer's president and part owner was subpoenaed to appear at the hearing, the mailing address of the employer was the same as the address of another business and that business's notice was not returned, the employer did not challenge the notice provided to the other business, and the employer failed to maintain a current notice on file with the Georgia State Board of Workers' Compensation as was required by O.C.G.A. § 34-9-102(i), which satisfied due process and focused on the mailing of the notice, rather than its receipt. *High Voltage Vending, LLC v. Odom*, 266 Ga. App. 537,

597 S.E.2d 428 (2004).

Term “employing unit” within employment security law certain enough for purposes of due process. — Ga. L. 1937, p. 806 (employing unit) is not so vague and indefinite as not to be enforceable consistently with due process in that it provides no basis for imposing the tax or contribution other than the unbridled discretion of the administrator. *Jeffreys-McElrath Mfg. Co. v. Huiet*, 196 Ga. 710, 27 S.E.2d 385 (1943).

Even though contractor might have to contribute twice upon each employee’s wages. — Ga. L. 1937, p. 806 is not lacking in due process because its enforcement could result in compelling the contractor, upon whom the burden ultimately falls, to contribute twice upon the wages of each employee, if perchance the contractor should devote a portion of a day to the performance of one contract, and the remainder to the performance of another. *Jeffreys-McElrath Mfg. Co. v. Huiet*, 196 Ga. 710, 27 S.E.2d 385 (1943).

Employing unit without control of amount of wages and without first-hand knowledge. — The fact that the employing unit has no control over the amount of the wages and may have no first-hand knowledge of the amount does not render the statute invalid as violating the principle of due process as to such party. *Jeffreys-McElrath Mfg. Co. v. Huiet*, 196 Ga. 710, 27 S.E.2d 385 (1943).

At-will employee not denied due process. — Because a terminated university registrar was an at-will employee, the registrar had no property interest in the registrar’s job and no due process claim. Moreover, by appealing directly to an administrative law judge, the registrar was afforded a full and fair hearing, fulfilling state and federal due process requirements. *Bd. of Regents of the Univ. Sys. of Ga. v. Hogan*, 298 Ga. App. 454, 680 S.E.2d 518 (2009).

4. Family Issues

Calling father as adverse witness in termination proceedings. — Juvenile court did not err in a parental rights termination proceeding pursuant to O.C.G.A. § 15-11-94 when it allowed paternal grandparents who petitioned for

permanent custody of their grandchildren to call the father as an adverse witness, subject to cross-examination pursuant to O.C.G.A. § 24-9-81, as there was no due process violation of the father’s rights pursuant to U.S. Const., amend. 14 and Ga. Const. 1983, Art. I, Sec. I, Para. I. In the Interest of D.J., 279 Ga. App. 355, 631 S.E.2d 427 (2006).

Termination of custody proceedings. — Parents were not denied due process after evidence of psychosexual evaluations and allegations of sexual abuse, molestation, and sexual abuse by the children against other children were admitted in a termination of parental rights trial, despite the petition’s lack of allegations of sexual misconduct, as: (1) the trial court based the court’s findings of parental inability on the parents’ failure to comply with the case plan, especially their continued failure to obtain stable employment and suitable housing; (2) neither parent was accused of sexually abusing the children; (3) evidence of past sexual abuse was relevant to establish the complex psychological problems of the two older children, to demonstrate the special needs of those children, and to expose the danger that reunification would pose; and (4) as some of the children’s psychological problems were attributable to their victimization, evidence as to that issue could not have surprised the parents. In the Interest of M.E.S., 263 Ga. App. 132, 587 S.E.2d 282 (2003).

Parent’s presence at deprivation hearing. — Parent was not denied due process on the ground that the parent was not present at the deprivation hearings in which the trial court declared the parent’s three children to be deprived because deprivation proceedings and parental rights termination proceedings are separate and distinct, and a termination proceeding is not the proper time to assert error in the deprivation proceedings; further, the parent failed to show that the parent was harmed as a result of any alleged violation of due process since there was overwhelming evidence supporting the termination of the parent’s parental rights. In the Interest of M.S., 279 Ga. App. 254, 630 S.E.2d 856 (2006), overruled on other grounds, *In re J.M.B.*, 296 Ga. App. 786, 676 S.E.2d 9 (2009).

Application (Cont'd)**4. Family Issues (Cont'd)**

Refusal to consider equal protection argument at hearing in deprivation. — In a deprivation proceeding when the parents were ordered to pay part of the costs for services mandated under their case plan, there was no due process violation in refusing to consider parents' equal protection argument. Due process did not guarantee a litigant the right to have all of the litigants' arguments considered at a particular hearing. In the Interest of P.N., 291 Ga. App. 512, 662 S.E.2d 287 (2008).

Determination of divorcing parties' rights by judge or jury comports with due process. — O.C.G.A. § 19-5-17, providing for determination of rights and disabilities of the parties by the jury or the judge, as the case may be, is not violative of the due process and equal protection clauses of the state and federal Constitutions. Gary v. Johnson, 210 Ga. 686, 82 S.E.2d 651 (1954) (decided prior to amendment by Ga. L. 1960, p. 1024, § 1 and Ga. L. 1979, p. 466, § 5).

This paragraph does not mandate pretrial discovery in proceedings to terminate parental rights. In re L.L.W., 141 Ga. App. 32, 232 S.E.2d 378 (1977); Ray v. Department of Human Resources, 155 Ga. App. 81, 270 S.E.2d 303 (1980).

Father's protectible interest in having child bear parental surname as customary is not property right within meaning of due process. Fulghum v. Paul, 229 Ga. 463, 192 S.E.2d 376 (1972).

Payment of costs of blood tests in paternity actions. — Trial court's denial of a putative father's request to require the state to make pretrial payment of the costs of blood tests to determine paternity effectively denied the putative father access to blood test evidence and amounted to a violation of due process. Peterson v. Moffitt ex rel. Dep't of Human Resources, 253 Ga. 253, 319 S.E.2d 449 (1984).

Action for termination of parental rights. — Juvenile court did not violate a parent's constitutional rights to due process under Ga. Const. 1983, Art. I, Sec. I, Para. I, by denying the parent's motions to

secure the parent's presence at the termination hearing and for a continuance; while the parent was in prison, an attorney was appointed to represent the parent at the hearing, and the parent did not specify how the parent suffered harm by not attending the hearing, and therefore, the parent showed no reversible error. In the Interest of B.L.H., 259 Ga. App. 482, 578 S.E.2d 143 (2003).

Due process requires that, prior to the termination of parental rights, a parent receive notice and an opportunity to be heard, but there is no constitutional entitlement mandating a parent's right to appear personally at the termination of parental rights hearing; a trial court did not err in refusing the parent's request to be transported from the prison where the parent was serving a sentence to court for the termination hearing. In the Interest of S.R.B., 270 Ga. App. 466, 606 S.E.2d 655 (2004).

By not raising the issue below, a mother in a termination of parental rights case waived her arguments that the trial court violated equal protection and due process by not determining whether her mental health concerns affected her ability to complete the specific goals in her case plan; moreover, there was uncontradicted evidence that despite her mental health problems, the mother understood the case plan, appreciated its requirements, and could have completed it, but did not do so, and the mother testified that she was able both physically and mentally to care for the child. In the Interest of H.M., 287 Ga. App. 418, 651 S.E.2d 527 (2007).

In a termination of parental rights proceeding, as a parent had numerous opportunities to establish a life independent of that parent's abusive spouse, the parent's due process claim that the abusive spouse was the biggest obstacle preventing reunification lacked merit. In the Interest of D.O.R., 287 Ga. App. 659, 653 S.E.2d 314 (2007).

Foster children have right to counsel in deprivation and termination-of-parental rights (TPR) proceedings under the due process clause of the Georgia Constitution. Kenny A. v. Perdue, 356 F. Supp. 2d 1353 (N.D. Ga. 2005).

Grandparent visitation statute unconstitutional. — O.C.G.A. § 19-7-3, the

grandparent visitation statute, is unconstitutional because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized. *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769 (1995).

Parental rights proceedings. — Putative father's due process rights under Ga. Const. 1983, Art. I, Sec. I, Para. I were not violated by a determination that he had received proper notice of his case plan, as his claim that he was not notified was contradicted by testimony from the caseworker that the father in fact received proper notification, and the issue of credibility was within the trial court's determination. *In the Interest of T.A.M.*, 280 Ga. App. 494, 634 S.E.2d 456 (2006).

Parent unsuccessfully argued that the parent's due process rights under Ga. Const. 1983, Art. I, Sec. I, Para. I were violated because the parent's parental rights were terminated despite the fact that the parent never received a copy of the case plan; the parent was unable to establish harm, as the parent was incarcerated, and the parent's crimes, including holding the children hostage and threatening to kill them, were so egregious as to justify termination. *In the Interest of B.D.*, 281 Ga. App. 725, 637 S.E.2d 123 (2006).

Delay in issuing order on child visitation/support issue. — Eight-month delay between the trial of a child support and visitation question and entry of the final order did not deny a father his right to procedural due process under the Fourteenth Amendment of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. I, in part because the father filed a post-trial, pre-judgment motion requiring the trial court's time and attention. *Coppedge v. Coppedge*, 298 Ga. 494, 783 S.E.2d 94 (2016).

Spouse whose assets are subject to garnishment under alimony judgment was accorded procedural due process by the fact that the affidavit for garnishment was approved by a judge before the summons of garnishment issued, under former Code 1933, § 46-102 (see now O.C.G.A. § 18-4-61), and by the fact that the spouse received timely notice

on the garnishment, under former Code 1933, § 46-105 (see now O.C.G.A. § 18-4-64), as well as an early hearing on the spouse's traverse in accordance with former Code 1933, § 46-401 (see now O.C.G.A. § 18-4-93). *Antico v. Antico*, 241 Ga. 294, 244 S.E.2d 820 (1978).

Paternity action costs payment. — It is a violation of due process for the state to require a putative father to pay the costs of a blood test for the purpose of determining paternity when no hearing has been conducted on the merits of the case. *Boone v. State, Dep't of Human Resources ex rel. Carter*, 250 Ga. 379, 297 S.E.2d 727 (1982).

5. Right of Privacy

Right of privacy guaranteed. — The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this state both by the Constitutions of the United States and the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law. *McDaniel v. Atlanta Coca-Cola Bottling Co.*, 60 Ga. App. 92, 2 S.E.2d 810 (1939).

Right of privacy does not embrace right to possess dangerous drugs. *Blincoe v. State*, 231 Ga. 886, 204 S.E.2d 597 (1974).

Public interest in privacy may be subordinated and clandestine surveillance allowed. — When the police have reasonable cause to believe that public toilet stalls are being used in the commission of crime, and when the police confine their activities to the times when such crimes are most likely to occur, the police are entitled to institute clandestine surveillance, even though the police do not have probable cause to believe that the particular persons whom they may thus catch in flagrante delicto have committed or will commit the crime. The public interest in its privacy must, to that extent, be subordinated to the public interest in law enforcement. *Mitchell v. State*, 120 Ga. App. 447, 170 S.E.2d 765 (1969).

Right of privacy in sexual activities. — Right of privacy under Ga. Const. 1983, Art. I, Sec. I, Para. I, prohibited the

Application (Cont'd)**5. Right of Privacy** (Cont'd)

state from prosecuting defendant for fornication under O.C.G.A. § 16-6-18 after defendant and defendant's girlfriend, both age 16 and of legal age to consent to sex under O.C.G.A. § 16-6-3(a), engaged in private, unforced, non-commercial sex. In re J.M., 276 Ga. 88, 575 S.E.2d 441 (2003).

Defendant's right to privacy not violated when sexual battery victim under age of consent. — Because the 13-year-old victim in a sexual battery case was under the age when the victim could legally consent to sexual conduct, prosecution of the defendant did not violate the defendant's right to privacy for consensual touching within the context of their boyfriend/girlfriend relationship. Engle v. State, 290 Ga. App. 396, 659 S.E.2d 795 (2008), overruled on other grounds, Watson v. State, 297 Ga. 718, 777 S.E.2d 677(2015).

Standing to challenge Medicaid reimbursement for medically necessary abortion. — The trial court erroneously dismissed a complaint filed by certain medical providers, alleging violations of the Georgia Constitution on privacy and equal protection grounds, and holding that the medical providers lacked third-party standing to assert a claim on behalf of their Medicaid-eligible patients, as: (1) the medical providers properly asserted an injury in fact insofar as they had a direct financial interest in obtaining state funding to reimburse them for the cost of abortion services provided to Medicaid-eligible women, and have alleged that they performed, and will continue to perform, medically necessary abortions for which they will not be reimbursed under Georgia's Medicaid program; and (2) the relationship between the medical providers and their patients made them uniquely qualified to litigate the constitutionality of the state's action interfering with a woman's decision to terminate a pregnancy. Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 651 S.E.2d 36 (2007).

Nonparty medical records. — In a suit alleging medical malpractice and re-

lated claims, the trial court properly held that nonparty medical records were subject to discovery. Although personal medical records were protected by Georgia's constitutional right of privacy, the trial court's order afforded the nonparty patients with notice and an opportunity to object to the disclosure and also provided for further review to determine the scope of discovery. *Ussery v. Children's Healthcare of Atlanta, Inc.*, 289 Ga. App. 255, 656 S.E.2d 882 (2008).

State prisoner on hunger strike has right of privacy to be protected from unwarranted intrusions on the prisoner's person even though calculated to preserve the prisoner's life. When the prisoner is not mentally incompetent or has dependents who rely on the prisoner for their livelihood, the prisoner has a right to refuse medical treatment. *Zant v. Prevatte*, 248 Ga. 832, 286 S.E.2d 715 (1982).

Prisoners' right of privacy not violated by extraction of saliva for DNA profiling. — Although prisoners retain a right to bodily privacy under Ga. Const. 1983, Art. I, Sec. I, Para. I, the extraction of saliva required by O.C.G.A. § 24-4-60 (see now O.C.G.A. § 35-3-160) did not violate that right because the statute promotes law enforcement, and is narrowly tailored to promote that purpose by requiring DNA profiling on a limited population of incarcerated felons and forbidding release of DNA profiles except for law enforcement purposes. *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005).

Injured party's invasion of privacy claim failed as the injured party signed an agreement authorizing a nurse and other home health care agency nurses to care for the party in the party's home and to communicate with the injured party's insurance company if necessary in order to receive proper payment; the injured party could not maintain an action for invasion of privacy based on the very actions that the injured party authorized the agency and its nurses to take. *Canziani v. Visiting Nurse Health Sys.*, 271 Ga. App. 677, 610 S.E.2d 660 (2005).

6. Taxation

Tax law need not provide for re-hearing. *Vestel v. Edwards*, 143 Ga. 368, 85 S.E. 187 (1915); *Martin v. Pollock*, 144 Ga. 605, 87 S.E. 793 (1916).

During tax assessment process taxpayer must have opportunity to be heard. — The assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. Somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and this notice must be provided as an essential part of the statutory provisions, and not awarded as a mere matter of favor or grace. A denial of this right is a failure to afford due process of law within the intention of the federal and state Constitutions. *Pullman Co. v. Suttles*, 187 Ga. 217, 199 S.E. 821 (1938).

Notice and opportunity to be heard before property tax assessment final comported with due process. — Georgia Law 1918, p. 232, providing for assessment for taxation of unreturned or grossly undervalued property, or property assessed at a figure grossly below its true value, is not unconstitutional as violating the due process and equal protection clauses of the state and federal Constitutions for the reason that it fails to provide for a hearing before assessment by the tax receiver, since it does provide for notice to the claimed delinquent, with opportunity to be heard by a suit in equity both as to excessiveness and taxability, before the assessment shall become final. *Hardin v. Reynolds*, 189 Ga. 534, 6 S.E.2d 328 (1939).

Taxpayer must have notice in time to contest proceeding before tax becomes absolute lien or liability. — It has been shown that there are differences between proceedings for the levy and collection of taxes and judicial proceedings. As to what constitutes notice and opportunity to be heard, in compliance with this requirement of due process, no general rule can be laid down which will cover all cases. The general rule which may be laid down as applicable to all cases is that the taxpayer must have the notice in time to contest the proceeding before the tax be-

comes an absolute lien on the taxpayer's property or before it becomes the taxpayer's absolute personal liability. *Simmons v. Newton*, 178 Ga. 806, 174 S.E. 703 (1934).

Taxpayer must have notice and opportunity to contest validity and amount of tax. — Due process of law requires that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the validity of a tax and the amount thereof, by giving the taxpayer the right to appear for that purpose at some stage of the proceedings. *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934), overruled on other grounds, *Derrick v. Campbell*, 219 Ga. 795, 136 S.E.2d 381 (1964).

Criminal Cases

1. In General

Guarantees to person charged with crime. — This paragraph guarantees to a person charged with crime, before the person can be called upon to answer, the right to be informed so plainly that the nature of the offense charged may be easily understood by the jury and that the accused will be enabled to prepare a defense. The legislature cannot authorize an accusation to be amended during the trial in a matter of substance, any more than it could authorize such an amendment of an indictment when the defendant is prejudiced by the amendment. *Sutton v. State*, 54 Ga. App. 349, 188 S.E. 60 (1936).

Registration requirements for homeless sex offenders unconstitutionally vague. — Address registration requirement of O.C.G.A. § 42-1-12 is unconstitutional under the due process clause of the United States and Georgia constitutions on vagueness grounds as applied to homeless sex offenders who possess no street or route address for their residence. *Santos v. State*, 284 Ga. 514, 668 S.E.2d 676 (2008).

Vicarious criminal liability unconstitutional. — Vicarious criminal liability in misdemeanor cases which involves as punishment a fine and not imprisonment violates due process. *Davis v. City of Peachtree City*, 251 Ga. 219, 304 S.E.2d 701 (1983).

Criminal Cases (Cont'd)**1. In General (Cont'd)**

When person indicted has been afforded due process. — When one indicted has had full opportunity, under the Constitution and laws of the state, to defend one's case in the courts of the state having jurisdiction thereof, in person, by attorney, or both, according to established constitutional rules of procedure one has been afforded due process of law. *Shoemake v. Whitlock*, 226 Ga. 771, 177 S.E.2d 677 (1970).

Despite the defendant's claim that reversible error was premised on the state's failure to comply with the required notice upon filing two charges of felony theft by taking, as the indictment failed to specifically allege either that the value of the items stolen exceeded \$500, or that the items were motor vehicles, Georgia law did not establish two classifications for theft by taking crimes, but a determination as to the felony or misdemeanor status of a charge was based on the value of the property taken; moreover, because the defendant failed to furnish the appellate court with a transcript, it was left with no other alternative but to presume the trial judge properly considered the evidence in imposing sentence. *Conley v. State*, 281 Ga. App. 841, 637 S.E.2d 438 (2006), cert. denied, No. S07C0315, 2007 Ga. LEXIS 67 (Ga. 2007).

Due process requires that criminal defendant have right to counsel at critical stages. — The mandate of U.S. Const., amend. 6, that every accused in a criminal prosecution has the right to the assistance of counsel for a defense at every critical stage of the case as an essential component of due process in a trial in a state court compels every agency of government concerned with the operation of the courts to acknowledge the necessity for and implement the means by which this necessary public purpose must be accomplished. The provisions of Georgia's Constitution make the same demand. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Justice involves delicate judgment based on circumstances of each case. — To accommodate the sound administra-

tion of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. *State v. Madden*, 242 Ga. 637, 250 S.E.2d 484 (1978).

Failure to deny charges does not raise presumption of acknowledgment of guilt. — An accused who is taken into custody cannot be presumed to acknowledge guilt just because the accused does not deny the charges. *Emmett v. State*, 243 Ga. 550, 255 S.E.2d 23 (1979).

Right to testify as witness is personal right and is an adjunct or portion of the fundamental concept of freedom and liberty protected by Ga. Const. 1945, Art. I, Sec. I, Para. III (see now Ga. Const. 1983, Art. I, Sec. I, Para. I) and Ga. Const. 1945, Art. I, Sec. I, Para. IV (see now Ga. Const. 1983, Art. I, Sec. I, Para. XII). *Carter v. Seaboard Coast Line R.R.*, 392 F. Supp. 494 (S.D. Ga. 1974).

When court under no obligation to appoint counsel for accused. — If the accused has means to employ counsel, and is out upon bond, and has opportunity to secure counsel, and neglects or refuses to do so, the court is under no obligation or duty to appoint counsel to represent the accused. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Defendant cannot neglect procuring counsel. — A defendant must be afforded the benefit of counsel, and this includes time sufficient for counsel to prepare for trial, but when the defendant was apprised of the charge against the defendant at a previous term of court and personally fails or neglects to procure counsel or ask the court to do so for the defendant there is no error in refusing a request for additional time on the ground that counsel has personally had insufficient time to prepare the defense. *Bradshaw v. State*, 132 Ga. App. 363, 208 S.E.2d 173 (1974).

When representation by counsel comports with due process. — When counsel, representing a defendant in a criminal case, is a member of the bar in good standing and, in representing a client in the trial of a case, gives the counsel's complete loyalty to the client, serves the client in good faith to the best of the

counsel's ability, and counsel's service is of such a character as to preserve the essential integrity of the proceedings in a court of justice, the requirements of due process within U.S. Const., amend. 14 and this paragraph are met. *Hill v. Balkcom*, 213 Ga. 58, 96 S.E.2d 589 (1957); *Bolick v. State*, 127 Ga. App. 542, 194 S.E.2d 302 (1972).

Right to counsel is right to effective counsel, not errorless counsel, and not counsel charged ineffective by hindsight. The defendant is entitled to counsel reasonably likely to render and the rendering of reasonably effective assistance. *Rosser v. State*, 156 Ga. App. 463, 274 S.E.2d 812 (1980).

Defense counsel did not provide ineffective assistance of counsel by failing to file a motion to suppress because the fact that defendants were in a police car during the show-ups did not taint the identifications obtained and there was no evidence that the victims knew that defendants were in handcuffs; further, there was nothing unfair in the officer's statements to the victims. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Mere passage of time in criminal trial is not enough, without more, to constitute denial of due process. *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976).

Constitutional right to a speedy trial did not require granting of defendant's motion for discharge and acquittal since, inter alia, all but a couple of months of the time defendant was incarcerated before trial was attributable to service of other sentences, there was no evidence of the defendant's anxiety and concern, and there was no evidence that the defendant's defense was impaired as none of the witnesses who testified at the first trial were allegedly unavailable. *Weldon v. State*, 262 Ga. App. 782, 586 S.E.2d 452 (2003).

Defendant failed to establish a due process violation for a 20 year delay in the prosecution of a murder case against the defendant because the defendant failed to show either that the delay actually prejudiced the defense or that the prosecution deliberately delayed the case to gain a tactical advantage, both of which show-

ings were needed to prevail on that claim; while several witnesses died in the intervening years and some evidence was missing, this hindered the prosecution as much as the defendant. *Holton v. State*, 280 Ga. 843, 632 S.E.2d 90 (2006).

While the length of the delay in bringing the appeal, 15 years, was excessive, the delay did not violate the defendant's due process rights since the delay was largely attributable to the defendant, the defendant failed to show that the defendant asserted the defendant's appellate rights for much of the 15-year period at issue, and the defendant failed to show actual prejudice to the defendant's ability to assert arguments on appeal. *Payne v. State*, 289 Ga. 691, 715 S.E.2d 104 (2011).

When confessions can be introduced in evidence against defendant.

— When evidence shows that confessions were voluntarily made and were not induced by another by hope of award or fear of punishment, or when it is an issue of fact as to whether the confessions were properly obtained, the defendant is not denied due process of law, as guaranteed by the state and federal Constitutions, by their introduction in evidence against the defendant. *Claybourn v. State*, 190 Ga. 861, 11 S.E.2d 23 (1940).

Four factors relevant for consideration of whether speedy trial has been had: length of delay, reason for delay, prejudice to the defendant, and waiver by the defendant. *Mays v. State*, 229 Ga. 609, 193 S.E.2d 825 (1972).

When substantially all delay attributable to defendant's conduct. —

There is no violation of due process in respect to a speedy trial when substantially all of the delay in bringing the defendant to trial appears to be directly or indirectly attributable to the conduct of the defendant. *Mays v. State*, 229 Ga. 609, 193 S.E.2d 825 (1972).

Since the issue of a seven-year trial delay was addressed previously, denial of a motion to dismiss was proper as the court properly found defendant was not prejudiced by a nine-month trial delay and lacked diligence finding witnesses. *Brannen v. State*, 262 Ga. App. 719, 586 S.E.2d 383 (2003).

Criminal Cases (Cont'd)**1. In General (Cont'd)**

Conviction upon a charge not made would be sheer denial of due process. — *Rowe v. State*, 166 Ga. App. 836, 305 S.E.2d 624 (1983).

2. Pre-Trial

No due process violation with delay in indictment and arrest. — Superior court did not err in failing to dismiss the indictment on the ground that the delay in the defendant's arrest and indictment violated the defendant's rights to due process under the Fifth and Fourteenth Amendments and Ga. Const. 1983, Art. I, Sec. I, Para. I, because neither actual prejudice nor deliberate adverse action on the part of the state had been shown; the defendant was not in custody during the period in question. *Higgenbottom v. State*, 290 Ga. 198, 719 S.E.2d 482 (2011).

Delay in arrest did not warrant dismissal. — When error was asserted because the trial court refused to grant the defendant's motion to dismiss the defendant's indictment made on the grounds of a violation of due process because there was a 55-day delay between the commission of the offense and the defendant's arrest and it was argued that because of the delay the defendant could not remember the date of the alleged offense for which the defendant might have been able to provide an alibi defense, this was held not enough in itself to justify dismissing the indictment. *Croom v. State*, 165 Ga. App. 676, 302 S.E.2d 598 (1983).

Charge must allege all necessary elements of crime. — Juvenile court erred in adjudicating the juvenile delinquent on the ground that the juvenile violated the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1, as the state's delinquency petition did not allege an essential element of the offense, namely, the predicate acts upon which the "pattern of criminal gang activity" was based; accordingly, the juvenile's procedural due process rights were violated when the juvenile court adjudicated delinquency based on that offense, as the insufficiency in the state's petition meant the juvenile was denied the juve-

nile's due process rights because of an inability to prepare an adequate defense. *In the Interest of E.S.*, 262 Ga. App. 768, 586 S.E.2d 691 (2003).

Provision for substitute counsel may be justified at lineup. — Although the right to counsel at a lineup usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel. *Summerville v. State*, 226 Ga. 854, 178 S.E.2d 162 (1970).

Indictment must identify victim, if known. — When the defendant was charged by indictment with crimes against a minor victim who was identified by initials only, the court found that such was insufficient because the defendant was entitled to be charged by an indictment in perfect form; failure to identify the victim with a full name, if known, violated the defendant's constitutional rights to due process under Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 5, as well as the defendant's double jeopardy rights under Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5. *Sellers v. State*, 263 Ga. App. 144, 587 S.E.2d 276 (2003).

No fatal variance between indictment and proof. — Fact that an indictment charged the defendant with aggravated assault and battery by slicing the victim's neck with a knife, but the evidence showed the defendant used a box cutter, did not constitute a fatal variance between the indictment and the proof, because the defendant was sufficiently informed of the charges and faced no danger of further prosecution arising out of the incident. *Lawson v. State*, 278 Ga. App. 852, 630 S.E.2d 131 (2006).

Due process requires dismissal of indictment when preindictment delay causes substantial prejudice to defendant. — Although there is no constitutional right to a speedy indictment or arrest, the due process clause requires dismissal of an indictment if it is shown at trial that preindictment delay caused substantial prejudice to defendant's rights with respect to the events occurring prior to indictment. *State v. Madden*, 242 Ga. 637, 250 S.E.2d 484 (1978).

Due process not denied by district attorney's role as calendar clerk for arraignments. — Internal Operating Procedure 2000-3 of the Appalachian Judicial Circuit, under which a district attorney set the time for a defendant's arraignment for aggravated assault and related charges in a road rage incident, did not violate the defendant's right to due process by precluding a challenge to the validity of the notice of arraignment; the defendant filed pre-trial motions related to that very issue and presented arguments during a hearing on the matter. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Subpoena of personal medical records in criminal case. — In the absence of waiver and without notice to the accused or an opportunity to object, it is not "appropriate" under O.C.G.A. § 24-9-40 for the state in a criminal case to subpoena a defendant's own personal medical records which are then in the possession of a physician, hospital, or health care facility. *King v. State*, 272 Ga. 788, 535 S.E.2d 492 (2000).

Right to preservation of evidence. — Defendant's due process rights were not violated by the failure of the investigating officer to preserve the physical evidence of a child molestation as defendant failed to show that the officer's failure to preserve the evidence was in bad faith. *Ingram v. State*, 262 Ga. App. 304, 585 S.E.2d 211 (2003).

In light of the fact that the defendant was afforded the opportunity to cross-examine the victim at the rape trial, there was no error in the trial court's refusal to dismiss the case based on the ground that police had lost or destroyed a videotape containing the victim's initial statement to the police. *Robbins v. State*, 277 Ga. App. 843, 627 S.E.2d 810 (2006).

Absent evidence that the state acted in bad faith in failing to preserve potentially exculpatory evidence, and because blood evidence found on a flashlight used by the victim to hit the defendant in the head after being stabbed was not material, but was cumulative of other evidence showing the undisputed fact that the state never denied that the victim hit the defendant in the head with the flashlight, and indeed

offered testimony that the victim struck the defendant with enough force to knock the defendant to one knee, the defendant's due process rights were not violated; hence, the trial court did not err in denying a mistrial based on the defendant's allegation that the state failed to preserve potentially exculpatory evidence. *Lonergan v. State*, 281 Ga. 637, 641 S.E.2d 792 (2007).

The trial court's order dismissing an indictment charging the defendant with rape, incest, aggravated child molestation, and child molestation on grounds that the state improperly failed to preserve lab samples taken from the victim was reversed because the defendant failed to show that the failure was the result of bad faith on the part of the state or the police, and the value of the sample to the defendant was only potentially exculpatory. *State v. Brady*, 287 Ga. App. 626, 653 S.E.2d 72 (2007).

There was no merit to a defendant's claim that due process had been violated because the state allowed a car in which a shooting took place to be sold from an impound lot before the car could be tested for fingerprints and other evidence. The defendant did not argue that the state had acted in bad faith, and the record did not show bad faith. *Lockheart v. State*, 284 Ga. 78, 663 S.E.2d 213 (2008).

As there was no showing that a videotape of a criminal incident and crime scene had "apparent exculpatory value" because the images were small, distorted, and non-identifiable, and the state did not act in bad faith when the state failed to preserve the tape, dismissal of an indictment against the defendant due to the state's failure to preserve the videotape was error. *State v. Brawner*, 297 Ga. App. 817, 678 S.E.2d 503 (2009).

Trial court erred by dismissing criminal charges against the defendant because the master DVD recording of the traffic stop that led to the defendant's arrest was destroyed when an investigator reformat- ted the DVD while attempting to get the DVD to play. The destruction of the master DVD was not a due process violation because the lost evidence was at best potentially exculpatory and there was no showing of bad faith on the part of the

Criminal Cases (Cont'd)**2. Pre-Trial (Cont'd)**

state. *State v. McNeil*, 308 Ga. App. 633, 708 S.E.2d 590 (2011).

Trial court is not obligated to appoint state-paid psychiatrist to evaluate a defendant even though a special plea of insanity has been filed. *Blankenship v. State*, 247 Ga. 590, 277 S.E.2d 505 (1981), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L. Ed. 2d 152 (1988), overruled on other grounds, *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993) and, overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

Trial court did not err in denying a defendant's request as an indigent for funds to engage a psychologist to assist in the defense when the defendant had not shown that the defendant's sanity at the time of the offense would likely be a significant factor at trial. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

When denial of continuance or postponement unconstitutional abuse of discretion. — When facts show that court-appointed attorney was wholly unprepared for trial, after retained counsel withdrew on the date of trial from case, and the court denied the motion for continuance or postponement, this was an unconstitutional abuse of discretion. *Smith v. State*, 215 Ga. 362, 110 S.E.2d 635 (1959).

Denial of continuance not error when co-counsel present and defendant uninjured. — When none of the statutory requirements necessary for the granting of a continuance were put forth by co-counsel when the case was called, and there was no showing that the defendant was injured by the absence of lead counsel, there was no merit in the complaint that the trial court erred in denying the defendant's motion for continuance because of the absence of counsel and that the defendant had been denied a Sixth Amendment right to counsel and a Fifth Amendment right to due process as guaranteed by the state and federal Constitutions. *Blair v. State*, 166 Ga. App. 434, 304 S.E.2d 535 (1983).

Procedures used by county in appointing attorneys for indigent de-

fendants did not violate due process when, in the event the public defender's office was unavailable, attorneys were appointed from an alphabetical list in an equitable manner and special considerations were given in death penalty cases. *Lewis v. State*, 255 Ga. 101, 335 S.E.2d 560 (1985).

Burden of persuasion as to venue. — Although the jury charge was taken from poorly drafted legislation, it did not violate the defendants' right to due process of law by improperly shifting the burden of persuasion regarding venue to the defendants. *Napier v. State*, 276 Ga. 769, 583 S.E.2d 825 (2003).

Because a police officer testified that the defendant sold methamphetamine from the defendant's residence, the state met the state's burden of proving beyond a reasonable doubt that venue of the crimes charged was properly in the county in which the defendant was tried; therefore, the trial court properly denied the defendant's motion for a new trial. *Borders v. State*, 299 Ga. App. 100, 682 S.E.2d 148 (2009).

Court required to make findings on Mandarin Chinese speaker's competency to stand trial without interpreter. — Trial court erred in denying a defendant's motion for new trial based on the defendant's contention that the defendant did not understand the proceedings because an interpreter was not provided to the defendant without making findings; there was sufficient evidence to raise a question as to whether the defendant, whose native language was Mandarin Chinese, was competent to be tried without an interpreter, and the trial court was required to make findings as to the defendant's competency on the record. *Ling v. State*, 288 Ga. 299, 702 S.E.2d 881 (2010).

Criminal Procedure Discovery Act constitutional. — Because the Criminal Procedure Discovery Act (O.C.G.A. § 17-16-1 et seq.) provides for reciprocal discovery in criminal felony cases with any imbalance favoring the defendant, it does not violate the due process clause of the United States or Georgia Constitutions. *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999).

Prosecutor may not suppress material evidence favorable to the ac-

cused, whether or not a request for such information is made or an in-camera inspection conducted. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984).

Defendant was entitled to be informed of the identity of a confidential informant under Brady, only if the informant was the individual seen accessing defendant's car and was not a mere tipster. *Johnson v. State*, 274 Ga. App. 282, 617 S.E.2d 252 (2005), *rev'd on other grounds*, 280 Ga. 511, 630 S.E.2d 377 (2006); *vacated, in part*, 283 Ga. App. 630, 642 S.E.2d 340 (2007).

Not every nondisclosure of exculpatory information is error; rather, when the omitted evidence was not specifically requested, nondisclosure is error only if the omitted evidence creates a reasonable doubt that did not otherwise exist. *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234 (1983), *aff'd*, 252 Ga. 418, 314 S.E.2d 210 (1984).

Defendant was not denied a fair trial because the state improperly withheld a post-arrest videotaped interview of a co-defendant; after review of both the co-defendant's trial testimony and the co-defendant's testimony from the videotaped interview, there was no evidence which would have likely resulted in a different outcome at trial, as at all times, contrary to defendant's contentions, the co-defendant denied ownership of the marijuana. *Morgan v. State*, 263 Ga. App. 32, 587 S.E.2d 177 (2003).

To establish constitutional violation for denial of motion for discovery of exculpatory material the defendant has the burden of showing that any of the information allegedly withheld improperly was favorable to the defendant, and that the withholding in any way denied the defendant a fair trial. *Lewis v. State*, 166 Ga. App. 428, 304 S.E.2d 531 (1983).

Defendant's right to exculpatory evidence. — Violations of defendant's due process right to a fair trial arise with the discovery, after trial, of information which had been known to the prosecution but unknown to the defense, or the trial court's failure to order disclosure of materially exculpatory evidence; but the state

is under no constitutional or procedural obligation to allow unrestricted discovery and, despite the defendant's ignorance of what is in the state's file, the defendant's right to exculpatory evidence is met by the duty on the state, with or without request, to produce it. *Barnes v. State*, 157 Ga. App. 582, 277 S.E.2d 916 (1981).

Defendant was not denied defendant's constitutional right to due process by the state's failure to secure exculpatory evidence since the defendant failed to identify any potential evidence that was not investigated or developed by the state; mere speculation that there may be exculpatory evidence was insufficient to show a due process violation. *Cameron v. State*, 262 Ga. App. 296, 585 S.E.2d 209 (2003).

There was no Brady violation when the information the defendant sought became available at trial; moreover, the defendant had not shown a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed. *Jackson v. State*, 284 Ga. App. 619, 644 S.E.2d 491 (2007), *cert. denied*, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

Defendant did not establish Brady violation. — A Brady violation was not established since the defendant knew the identity of a confidential informant (CI) before trial and that the CI had made a deal with the prosecution, had included the CI on the defense's witness list, and introduced evidence of the CI's indictment for drug trafficking. Even assuming, *arguendo*, that the defendant was not aware of all the circumstances surrounding the deal before trial, the defendant did not show that earlier disclosure would have benefitted the defendant and that any delay deprived the defendant of a fair trial. Therefore, the defendant was not entitled to a mistrial based on a Brady violation. *Alford v. State*, 293 Ga. App. 512, 667 S.E.2d 680 (2008).

Under Brady, a defendant did not show that the state agreed to any sort of deal with an accomplice witness in exchange for the witness's testimony. To the extent that the witness or the witness's counsel hoped that the witness's testimony would later benefit the witness, their subjective hopes were not evidence that a deal ex-

Criminal Cases (Cont'd)**2. Pre-Trial (Cont'd)**

isted; there was no evidence that the prosecutor encouraged the witness or the witness's lawyer to believe that the witness would benefit from testifying against the defendant; and the fact that the state ultimately cooperated with counsel's efforts to reduce the witness's sentence did not prove that the state and the witness had a deal prior to the defendant's trial. *Varner v. State*, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Rights not violated when evidence given to insurance company. — Defendant's due process rights were not violated by the state's turning over of a vehicle to co-defendant's insurance company since the state did not destroy or fail to preserve the alleged exculpatory evidence. *King v. State*, 262 Ga. App. 37, 584 S.E.2d 652 (2003).

Suppression of material evidence favorable to accused violative of due process. — The suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Wallin v. State*, 248 Ga. 29, 279 S.E.2d 687 (1981).

Forcing prisoner into lineup with other prisoners not violation of due process. — Even though the constitutional provision that no person shall be compelled to give testimony, or do acts, tending to incriminate that person, is to be liberally construed in favor of the accused, forcibly causing a prisoner to take a position in prison in line with other prisoners, there passively to remain while the prisoner is being inspected by the alleged victims for identification as the perpetrator of the crimes, is not in contravention of the rights secured to the prisoner under such provision of the Constitution, nor would the fact that the prisoner had been illegally arrested and imprisoned alter this ruling. *Meriwether v. State*, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

Identification procedure not overly suggestive. — Identification procedure was not impermissibly suggestive since it

was only after the officer had already been given the name of the individual from whom the officer had purchased cocaine that the officer viewed a photograph of the defendant to confirm that the defendant was in fact that individual. Thus, the photograph did not result in the officer's identification of the defendant as the suspect, but merely corroborated that the suspect had been properly identified to the officer as the defendant. *Hunter v. State*, 202 Ga. App. 195, 413 S.E.2d 526 (1991).

A photographic lineup was not impermissibly suggestive when all six photographs depicted people of the same race, gender, and general age range as the defendant, with similar hairstyles and facial hair; the defendant's orientation to the camera was the same as that of several other photographs; the head shots in several of the pictures were similar to that of the defendant; and all of the pictures had slightly different backgrounds. It could not be assumed that the fact that the defendant's picture was in the center of the top row gave it greater prominence. *Russell v. State*, 288 Ga. App. 372, 654 S.E.2d 185 (2007).

Photographic lineup was not impermissibly suggestive even though defendant was the only suspect who was thin and had red hair as three of the six photographs were of men with red hair, the officer did not suggest to the witnesses that defendant was the perpetrator, but simply read the standard form to them and asked them to look at the pictures, all of the men pictured were approximately the same age, the witnesses identified defendant immediately when shown the lineup, and the witnesses both identified defendant at trial. *Standfill v. State*, 267 Ga. App. 612, 600 S.E.2d 695 (2004).

Trial court did not err by failing to suppress an out-of-court identification of defendant by a witness, even though the witness was told that defendant was in the photo line-up; the witness had already identified defendant by name and the photo identification was intended as confirmation that defendant was the person identified by name, not as an independent identification. *Jackson v. State*, 279 Ga. 449, 614 S.E.2d 781 (2005).

Victim's in-court identification of defen-

dant was not tainted by an impermissibly suggestive photo identification as the victim got a good look at defendant during the crime from seven or eight feet away in good lighting, recognized defendant the next day, and picked defendant out of a photo array before hearing any improper comments; further, at trial, the victim was “100 percent, absolutely sure” of the in-court identification. *Graham v. State*, 273 Ga. App. 187, 614 S.E.2d 815 (2005).

Identification of defendant was not impermissibly suggestive as the procedure used did not lead the identifier to the identification of defendant; the identifier immediately and with certainty identified defendant from a photo lineup and was not told the name of defendant until after the photo was chosen. *Graham v. State*, 273 Ga. App. 187, 614 S.E.2d 815 (2005).

In-court identification procedure was not impermissibly suggestive since a detective did not tell the victim that the suspect was going to be in the courtroom on the day in question, and since, before allowing the victim to look into the courtroom, the detective made sure that defendant did not stand out among the other people in the courtroom. *Doublette v. State*, 278 Ga. App. 746, 629 S.E.2d 602 (2006).

Trial court erred in granting a defendant’s motion to suppress a photographic identification as the two steps of the test for determining whether a photographic identification was admissible were erroneously conflated since, without ruling on whether the lineup procedure was impermissibly suggestive, the trial court applied the totality of the circumstances factors and ruled that the victim’s identification was without any substantial factual basis; thereafter, the trial court again applied the totality of the circumstances factors and found that there was a substantial likelihood of misidentification of the defendant as the intruder. *State v. Norton*, 280 Ga. App. 657, 634 S.E.2d 810 (2006).

Defendant’s identification in a line-up was not unduly suggestive in violation of due process under Ga. Const. 1983, Art. I, Sec. I, Para. I, and defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to file a

motion to suppress the line-up identification; the testimony regarding the line-up established that the defendant was not showing gold teeth, that all of the participants held their numbers in the same place while the victims separately identified the defendant, and that the officers used no suggestive techniques during the line-up. *Robinson v. State*, 281 Ga. App. 76, 635 S.E.2d 380 (2006).

Defendant’s motion to suppress two photographic identifications was properly denied as the defendant did not make a sufficient showing as to how the differences in the defendant’s photos would have rendered the lineups or procedures suggestive. *Waters v. State*, 281 Ga. 119, 636 S.E.2d 538 (2006).

A photographic lineup where the defendant was the only person wearing a hooded sweatshirt was not impermissibly suggestive because there was no evidence that the perpetrator had been wearing a hooded sweatshirt. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Because: (1) victim’s identification of defendant was based upon independent memory which victim fairly accurately recalled in developing the composite sketch; (2) there was independent basis for victim’s identifications; and (3) there was no substantial likelihood of misidentification under these circumstances, the trial court did not err in admitting the identification evidence and the trial court’s finding that there was no likelihood of misidentification was supported by the record. *Price v. State*, 289 Ga. App. 763, 658 S.E.2d 382 (2008).

Trial court did not err in concluding that one-on-one show-up identification was reliable despite any possible suggestion implied by officers when they told the victim that they had found the person that robbed the victim and were seeking a warrant; victim had adequate opportunity to view the robber at the scene in adequate lighting, the robber even demanded that the victim stop looking at the robber, clothing matching that of the robber matched clothing found in the defendant’s apartment, and length of time between the crime and confrontation was less than two hours. *Ford v. State*, 289 Ga. App. 865, 658 S.E.2d 428 (2008).

Criminal Cases (Cont'd)**2. Pre-Trial (Cont'd)**

Photographic lineup was not impermissibly suggestive because the defendant was the only one pictured with an open mouth, revealing gold teeth, and the victim had identified the perpetrator as having bottom gold teeth. It was not readily apparent that the defendant's top teeth, the only ones visible, were gold, and apart from the defendant's mouth being open slightly, the lineup depicted people with similar skin color, hair, and overall appearance. *Varner v. State*, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Photographic array was not impermissibly suggestive. The people in the lineup had facial features similar to the defendant's, and at least three had slanted eyes; the fact that the defendant's picture was smaller, lighter in color, grainier, and less focused and the fact the defendant's head was more tilted did not make the array impermissibly suggestive; and the defendant failed to explain how the "full-face" lineup conducted here (as opposed to a lineup obscuring all facial features other than the eyes) was impermissibly suggestive. *Pinkins v. State*, 300 Ga. App. 17, 684 S.E.2d 275 (2009).

Photograph array and physical lineup not overly suggestive. — Since the victim had ample opportunity to observe the defendant at the time of an armed robbery and kidnapping and the identification procedure used was to present the victim with certain photographs from which the victim tentatively identified the defendant, and subsequently, upon the arrest of the defendant, the victim identified the defendant from a physical lineup, the lineup was not unnecessarily suggestive, and even if it was suggestive, did not create a substantial likelihood of irreparable misidentification. Thus, considering the totality of the circumstances, there was no likelihood of misidentification so as to offend due process. *Lee v. State*, 165 Ga. App. 549, 301 S.E.2d 906 (1983).

Claimed violation of due process in conduct of pretrial confrontation depends on totality of circumstances. — A one-on-one showup, without more, does

not necessarily violate due process. The primary evil to be avoided is the substantial likelihood of irreparable misidentification. *Daniel v. State*, 150 Ga. App. 798, 258 S.E.2d 604 (1979).

For purposes of identification, accused may not be taken and placed within framework of scene of crime, for identification within the coordinating, incriminating circumstances of the scene. *Meriwether v. State*, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

Showup found reliable. — Although one-on-one showups are inherently suggestive, the identification need not be excluded as long as the identification was reliable notwithstanding any suggestive procedure under all the circumstances, including consideration of the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Thus, the trial court did not err in denying defendant's motion to suppress an out-of-court showup identification by the manager of a store who identified defendant as the shoplifter of several store items given that: (1) the manager had a good opportunity to view defendant in the store parking lot as defendant was leaving with the items; (2) the manager quickly gave a physical identification to another store and defendant was soon observed in an apparent attempt to shoplift at the other store; and (3) the manager from the first store then positively identified defendant for the police at the scene within 30 minutes of the original shoplifting incident, all of which indicated that the identification was reliable. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Showup identification was reliable when the identifying victim clearly saw the attacker, as the lights were on and they were 25 inches apart when they struggled, the victim correctly identified defendant, the showup occurred shortly after the crime, and the victim was certain of defendant's identification both in and out of court. *Patterson v. State*, 274 Ga. App. 341, 618 S.E.2d 81 (2005).

Eyewitness identifications were not impermissibly suggestive as the police did not instruct armed robbery victims to identify a defendant at the showup but advised the victims that they would be asked if they could identify two individuals arrested in connection with another incident; the identifications, even if they had been suggestive, were reliable as the parking lot where the incident occurred was well-lit and the showup procedure occurred shortly after the robberies. *Billingsley v. State*, 294 Ga. App. 661, 669 S.E.2d 699 (2008).

Motion to suppress out-of-court identification erroneously granted. — Defendants' motion to suppress an out-of-court identification of each of them pursuant to a single photograph showup was improperly granted because, in denying defendants' motion to suppress an in-court identification by the same person, the trial court effectively ruled that, based on further evidence of the identifying individual's knowledge of defendants, the trial court might determine that any suggestive out-of-court identification procedures would not render the in-court identification unreliable or subject to a substantial likelihood of misidentification; since the standard for permitting the identifying individual to make an in-court identification of defendants was the same as the standard for permitting the state to offer evidence of the identifying individual's out-of-court identification, the trial court erred by suppressing evidence of the out-of-court identification. *State v. Hattney*, 279 Ga. 88, 610 S.E.2d 44 (2005).

In-court identification. — Even assuming that the pre-trial identification procedures were improperly suggestive, a victim's and a witness's in-court identifications were admissible because they were based on their independent recollections of the incident since the victim testified in court that the victim was 100 percent certain the defendant was the robber and that the victim's identification of the defendant was based on recognizing the defendant from the incident and the witness testified that the witness was certain the defendant was the person running with the gun on the day of the incident. *Boatwright v. State*, 281 Ga.

App. 560, 636 S.E.2d 719 (2006).

Booking photographs. — Admission of a booking photograph was not irrelevant or so impermissibly suggestive that there was a substantial likelihood of mistaken identification in violation of the due process clause of U.S. Const., amend. 14 or Ga. Const. 1983, Art. I, Sec. I, Para. I since the witness testified that the witness could not identify defendant in court as defendant had grown a beard, grown a long ponytail, and was heavier than at the time of the incident, but the witness was able to identify the person in the booking photograph; thus, the photograph was relevant to identify defendant, and to show how defendant appeared at the time of the crime. *Horner v. State*, 257 Ga. App. 12, 570 S.E.2d 94 (2002).

Letter voluntarily written by prisoner not product of "custodial interrogation." — A letter voluntarily written by a prisoner to a stranger to the proceedings which comes to the attention of the state through its power to maintain discipline in its detention facilities and not at the request of or by subterfuge of the state (i.e., not a custodial statement) is not the product of "custodial interrogation" and thus is a part of the work product of the state not subject to compelled discovery, except to the extent that such letter may be exculpatory and subject to disclosure under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *Franklin v. State*, 166 Ga. App. 375, 304 S.E.2d 501 (1983).

Submitting to blood-alcohol tests. — Since, under the Constitution of Georgia, the state may constitutionally take a blood sample from a defendant without the defendant's consent, O.C.G.A. §§ 40-5-55 and 40-6-392 grant, rather than deny, a right to a defendant by providing for refusal to take such a test. *Allen v. State*, 254 Ga. 433, 330 S.E.2d 588 (1985).

The choice provided to a DUI defendant under Georgia law — submitting to a blood-alcohol test or refusing to submit, with resultant sanctions — is not so painful, dangerous, or severe, or so violative of religious beliefs, that no choice actually exists, and does not amount to compulsion on behalf of the state or a violation of due

Criminal Cases (Cont'd)**2. Pre-Trial (Cont'd)**

process. *Allen v. State*, 254 Ga. 433, 330 S.E.2d 588 (1985).

Preservation of breath sample used in auto-intoximeter test not required.

— Neither the federal nor the state constitutional guarantee of due process requires the state to preserve a sample of the breath used in the administration of the auto-intoximeter test. *Hopper v. State*, 175 Ga. App. 358, 333 S.E.2d 201 (1985).

Admissibility of breath test results.

— Officers' testimony that blood alcohol breath test machines were functioning properly, had been inspected, that no pieces or components were missing, that the officers performed all required tests, and that they prepared the instruments in accordance with their training showed substantial compliance with the required procedures, and admission of the test results was proper; defendants' arguments that the breath test results should have been inadmissible because the machines registered increasing blood alcohol concentration readings as a person continued to blow into them went to the weight of the evidence, which was for the trial court to determine. *Whittaker v. State*, 279 Ga. App. 148, 630 S.E.2d 560 (2006).

Trial court properly denied the defendant's amended motion for a new trial, holding that the administration of breath tests pursuant to Ga. Comp. R. & Regs. 92-3-.06(12)(b) did not violate the due process clause under both U.S. Const., amend. 5 or Ga. Const. 1983, Art. I, Sec. I, Para. I, given that: (1) the claim was raised for the first time in the new trial motion, and was thus untimely; (2) the defendant had an alternative remedy under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq.; (3) the defendant failed to show that the Division of Forensic Sciences (DFS) eliminated meaningful procedures for conducting breath tests when it promulgated the rule; and (4) the techniques and methods approved by DFS were sufficient to ensure fair and accurate testing. *Palmaka v. State*, 280 Ga. App. 761, 634 S.E.2d 883 (2006).

The trial court did not err in denying

the defendant's motion in limine to suppress the results of a state-administered breath test, as an officer's implied consent warning was substantively accurate so as to allow the defendant to make an informed decision about whether to consent to the test, and solely referred to the defendant's privilege to drive within the state of Georgia with a Georgia driver's license, and not the defendant's Pennsylvania license; further, the officer's initial statement was nothing more than an attention-grabbing preface, and as such did not constitute a substantive change that altered the meaning of the implied consent notice thereafter recited to the defendant. *McHugh v. State*, 285 Ga. App. 131, 645 S.E.2d 619 (2007).

Court of appeals did not err in reversing an order granting the defendant's motion to suppress evidence of the state's breath test results because the procedures followed by the state comported with the fundamental fairness required by due process; the police officer delivered to the defendant the required implied consent notice in an accurate and timely manner, thereby informing the defendant of the right to an independent test under O.C.G.A. § 40-6-392(a)(3), and thus, the state was under no constitutional duty to immediately inform the defendant of the results of the state-administered breath test. *Padidham v. State*, 291 Ga. 99, 728 S.E.2d 175 (2012).

No due process violation because hard choices on intoxication testing.

— State's failure to immediately inform a defendant of the results of the state-administered test does not create a situation where the defendant is left with no, or so little information, that he or she is denied any meaningful choice in violation of due process; driving under the influence defendants must determine, often under difficult and stressful circumstances, whether to request an independent test, and that the choice may be difficult does not render it fundamentally unfair and this fact alone does not support a due process claim. *Padidham v. State*, 291 Ga. 99, 728 S.E.2d 175 (2012).

Results of field sobriety tests. — Suppression of field sobriety tests was probably denied since the defendant: (1)

was not in custody for the purposes of Miranda when asked to perform the tests; (2) did not make any statement or take any overt act which would have caused a reasonable person to believe that the encounter was anything more than a temporary detention; and (3) voluntarily submitted to the tests. *McDevitt v. State*, 286 Ga. App. 120, 648 S.E.2d 481 (2007).

Trial court has discretion to order or allow psychiatric examination. —

Trial judge has the inherent power to order a psychiatric examination, but the refusal to do so will not be reversed unless it is shown that the want of an examination would infringe upon the defendant's right to a fair trial as guaranteed by the Georgia Constitution. *Williams v. Newsome*, 254 Ga. 714, 334 S.E.2d 171 (1985).

Medical expert investigator's notes from homicide scene were not a "written scientific report" within the purview of former O.C.G.A. § 17-7-211 and did not have to be furnished to defendant upon the latter's request. *Pierce v. State*, 209 Ga. App. 366, 433 S.E.2d 641 (1993).

Applying four-part Barker speedy trial test. — While the trial court was authorized to conclude that the "lead officer" in the prosecution against the defendant was a material and necessary witness who was unavailable for 14 months while the defendant's case was pending, and thus a continuance during that period was proper under O.C.G.A. § 17-8-31, despite the fact that no explanation was given for the remainder of the delay, given that the defendant failed to prove any of the other *Barker v. Wingo* factors in determining whether a speedy trial violation occurred, the defendant's motion to dismiss the indictment on speedy trial grounds was properly denied. *Bell v. State*, 287 Ga. App. 300, 651 S.E.2d 218 (2007), cert. denied, No. S08C0031, 2007 Ga. LEXIS 811 (Ga. 2007).

Defendant's speedy trial right under the Sixth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) was not violated when the defendant was arrested in 1998, indicted in 1999, and tried in 2004. Part of the delay was caused by the defendant's mistaken release; defense counsel shared responsibility for the delay; the defendant

had not asserted the right to a speedy trial until the day before the commencement of the defendant's first trial; there was no oppressive pretrial incarceration because the defendant had been incarcerated for only four or five months; and the death of a witness was not prejudicial because the witness's identification of a person fleeing the crime scene as someone other than the defendant did not preclude the possibility that the defendant was the other person seen running from the scene and because counsel evidently regarded the deceased witness's observations as harmful to the defense. *Smith v. State*, 284 Ga. 17, 663 S.E.2d 142 (2008).

Trial court erred in denying a defendant's motion to dismiss an indictment since there was a four-year delay between the defendant's arrest and the trial court's denial of the defendant's speedy trial motion, and the trial court failed to address the reason for the lengthy delay and failed to make even a bare conclusion about how the Barker factors balanced against each other. *Watkins v. State*, 315 Ga. App. 708, 727 S.E.2d 539 (2012).

Denial of motion to sever. — Because a second of two defendants failed to show the presence of any confusion engendered by the number of defendants or the law, the defenses were not antagonistic, and accomplice testimony against the first defendant did not involve or incriminate the second defendant, the trial court did not abuse its discretion in denying the second defendant's motion to sever the trial from that of the first defendant; hence, the second defendant failed to show that the court's refusal to sever caused prejudice or a due process violation. *Williams v. State*, 280 Ga. 584, 630 S.E.2d 370 (2006).

Trial court properly denied the defendant's motion to sever a joint trial, as: (1) each of the co-defendants was jointly charged with the same offenses, and the offenses were committed simultaneously; (2) there was no danger of confusion as to the law and evidence applicable to each, as virtually all of the evidence tended to show their joint guilt; (3) severance was not required solely because each of the three defendants shared the same last name; and (4) the defenses were complimentary, not antagonistic, in that all ar-

Criminal Cases (Cont'd)**2. Pre-Trial (Cont'd)**

gued that the State had charged the wrong men and had failed to prove its case. Hence, the defendant failed in the burden of showing prejudice and a denial of due process. *Adkins v. State*, 281 Ga. 301, 637 S.E.2d 714 (2006).

The denial of the defendant's motion to sever the defendant's trial from that of a codefendant did not deny the defendant a fair trial; the defendant had not shown harm caused by the failure to sever, and the defendant did not point to any testimony or other evidence introduced at the joint trial that could not have been introduced against the defendant in a separate trial. *Jackson v. State*, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

3. Trial

Denial of motion for mistrial did not deny defendant fair trial. — Because the trial court issued a prompt curative instruction in response to an alleged improper vouching of the victim by a police lieutenant and took corrective measures to ensure that the jury could follow those corrective measures, the court did not deny the defendant a right to a fair trial by denying a motion for a mistrial based upon that testimony. *Cortez v. State*, 286 Ga. App. 170, 648 S.E.2d 488 (2007).

While the trial court did not necessarily rebuke the prosecutor, because it did give curative instructions informing the jury that a cell phone used in the state's closing argument was not evidence, the demonstration was not to be considered, and the demonstration was completely irrelevant to the case, the defendant was not entitled to a mistrial as a result; further, the appeals court agreed with the trial judge that the improper demonstration did not prejudice the defendant because enough other evidence existed for the jury to come to its conclusion without relying on the improper demonstration. *Cook v. State*, 287 Ga. App. 81, 650 S.E.2d 757 (2007), cert. denied, 2008 Ga. LEXIS 127 (Ga. 2008).

Single, one-word reference to a previous trial, which reference occurred as a result of confusion as to which pretrial hearing defense counsel was referring, did not make a mistrial essential to the preservation of a defendant's right to a fair trial. Accordingly, the trial court did not abuse the court's discretion when the court denied the mistrial motion. *Smith v. State*, 284 Ga. 17, 663 S.E.2d 142 (2008).

Bifurcated proceedings. — Trial court did not deprive the first and second defendants of due process under Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 5 in failing to sever, pursuant to O.C.G.A. § 17-8-4, their trials in a case involving the three defendants, who were allegedly involved in a conspiracy; because each defendant was implicated by each defendant's own statement, the defendants failed to show how they were prejudiced by the joint trial, and there was no showing of antagonistic defenses. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Defendant's conviction was affirmed as trying the issues of guilt and sentence before the same jury in bifurcated proceedings was not unconstitutional. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Due process not denied when evidence was admissible as prior inconsistent statement. — Defendant was not denied due process when the trial court admitted hearsay testimony of a detective regarding statements made by a co-conspirator after the co-conspirator denied remembering the crime or giving the police any information; the testimony was admissible as substance evidence under the prior inconsistent statement exception to the hearsay rule. *Robinson v. State*, 278 Ga. 31, 597 S.E.2d 386 (2004).

Criminal defendant cannot be denied opportunity to have expert examine critical evidence. — Fundamental fairness is violated when a criminal defendant on trial for the defendant's liberty is denied the opportunity to have an expert of the defendant's choosing, bound by appropriate safeguards imposed by the United States Supreme Court, examine a

piece of critical evidence whose nature is subject to varying expert opinion. *United States v. Gaultney*, 606 F.2d 540 (5th Cir. 1979), modified, 615 F.2d 642 (5th Cir. 1980), rev'd on other grounds, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

Similar crimes evidence. — When a defendant was charged with violating O.C.G.A. § 16-8-60(b), the admission of similar crimes evidence did not violate due process; evidence that following the defendant's arrest on the Georgia charge, the defendant had been arrested in Florida for possession of illegally reproduced recordings was appropriate for showing scheme and course of conduct, and the Florida act was sufficiently similar to the Georgia charges. *Hayward-El v. State*, 284 Ga. App. 125, 643 S.E.2d 242 (2007).

Defendant not prohibited from challenging state's evidence. — Defendant's claim that the defendant was denied due process because the state used "false evidence" to convict the defendant failed because the defendant was not prevented in any way from challenging the state's evidence that the defendant contended was incorrect, evidence regarding the use of cell phone records to show location, and the defendant chose not to challenge the evidence. *Davis v. State*, 292 Ga. 90, 734 S.E.2d 401 (2012).

Refusal to disclose informant's identity. — Trial court did not err in refusing the defendant's request to disclose the identity of a confidential informant in order to support an entrapment defense, as the defendant was unable to present an arguably persuasive case regarding the lack of a predisposition to commit the crime, based specifically on: (1) a discussion with a detective about the impending drug sale; (2) the defendant's act of displaying a weapon considered to be protection against a robbery; and (3) the defendant's act of coordinating the movements of the numerous participants in the large-scale transaction the defendant was a part of; hence, no due process violation resulted. *Griffiths v. State*, 283 Ga. App. 176, 641 S.E.2d 169 (2006).

Right to testify not violated. — Defendant's constitutional right to testify in the defendant's own behalf was not vio-

lated. The trial court established that the defendant knew that the defendant had the right to testify if the defendant wanted to but elected not to after consulting with defense counsel. *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

Cross-examination. — Even if the state violated the defendant's due process rights in asking whether the victim's death was accidental on cross-examination, any error was harmless, based on the overwhelming evidence that the victim's injuries were not accidental. *Thomas v. State*, 281 Ga. 550, 640 S.E.2d 255 (2007).

When the defendant's conviction or acquittal is dependent upon identification of substance as contraband, due process of law requires that analysis of the substance not be left completely within the province of the state; but the defendant does not have an absolute, unqualified right to examine such evidence. *Emmett v. State*, 243 Ga. 550, 255 S.E.2d 23 (1979).

Trial court's comments on evidence. — Claim that defendant's rights to due process under Ga. Const. 1983, Art. I, Sec. I, Para. I and to effective assistance of counsel under Ga. Const. 1983, Art. I, Sec. I, Para. XIV were violated by the trial court's comments on the evidence allegedly in violation of O.C.G.A. § 17-8-57, failed; three of the comments were permissible because they were merely reflecting grounds for sustaining objections, another comment was not erroneous because the witness was permitted to answer the question over the state's objection, the trial court's questioning of victims was permissible because the questions were attempts to clarify the children's testimony, and any error by the expert in bolstering the testimony of certain witnesses was a self-induced error. *Zepp v. State*, 276 Ga. App. 466, 623 S.E.2d 569 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

No denial or abridgment of constitutionally secured right. — Since the petitioner was not forced to go to trial without counsel; and the petitioner did not ask for counsel; and the petitioner was

Criminal Cases (Cont'd)**3. Trial (Cont'd)**

not denied the opportunity to procure counsel; and nothing done by the trial court forbade the petitioner from securing counsel or obtaining the benefit thereof, there was no denial, or even an abridgment, of any right secured to the petitioner by the Constitution of Georgia and that of the United States. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Conviction reversed due to level of certainty of eyewitness identification instruction. — Defendant's armed robbery conviction was reversed as the only evidence implicating the defendant was the testimony of the two victims identifying the defendant as the perpetrator and as it was error to give the jury the pattern instruction stating that the jury could consider the level of certainty of the victims in their identification of defendant as the perpetrator of the crimes in evaluating the reliability of the identifications; one of the victims was unable to pick the defendant's photo in a photo array and the other victim was able to describe to police the weapon used in the crimes but was unable to give any physical characteristics of the perpetrator. *Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (2005) (Unpublished).

It is not necessary for preservation of due process that defendant personally waive right to jury trial. *Little v. Stynchcombe*, 227 Ga. 311, 180 S.E.2d 541 (1971).

Constitutional right to jury trial may be waived by proceeding to trial without demanding jury. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Speedy trial. — The trial court did not abuse the court's discretion in granting the defendants' motions to dismiss the charges filed against the defendants because the court was authorized to find that, as the result of the state's negligence, both of the defendants were subjected to an extraordinarily long delay in being brought to trial, that the defendants were not dilatory in asserting their right to a speedy trial, and that, as a result of the delay, their ability to defend against the belated murder charge was prejudiced. *State v. White*, 282 Ga. 859, 655 S.E.2d 575 (2008).

Trial according to procedures applicable to all similar cases not denial of due process. — When a citizen is accorded a trial in a court of justice according to the modes of procedure applicable to all cases of a similar kind, it cannot be said that the citizen has been denied "due process of law." *Hicks v. State*, 196 Ga. 671, 27 S.E.2d 307 (1943).

In the trial of accused for rape, the assistant solicitor-general (now district attorney) in the concluding argument made the statement, "anything less than the death penalty would be a mockery," and when counsel for the accused promptly stated, "We object to that, and ask for a mistrial in this case," and when the court denied that motion by stating, "I will strike the word 'mockery' and tell the jury to put it out of their minds," the court did not err in refusing to declare a mistrial. There was no violation of the rights of the accused under the due process clause of the Constitution of this state, or under the provisions that the accused be given a trial "by an impartial jury." *Hicks v. State*, 196 Ga. 671, 27 S.E.2d 307 (1943).

Due process requires state to prove beyond reasonable doubt every essential element of crime charged. *Avery v. State*, 138 Ga. App. 65, 225 S.E.2d 454, rev'd on other grounds, 237 Ga. 865, 230 S.E.2d 301 (1976).

Defendant's right to be present not violated. — Delivery of two notes from the jurors in defendant's absence, did not violate the defendant's right to be present, as the allegedly improper communications were not prejudicial to defendant; one response dealt with a jury charge, which was not a critical stage of the trial, and the second was a denial of access to transcripts to the jury and an exhortation to rely upon their recollection of the evidence, which was harmless; a bailiff did not improperly relay information to the jurors, but instead only relayed the information that was expressly authorized by the trial court. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Because the trial transcript failed to support the defendant's claim that the trial court erroneously ordered the defendant be excluded from the courtroom dur-

ing a critical stage of the proceeding, and in front of the jury, and given what transpired during the brief period that the defendant was absent from the courtroom, no due process violation occurred. *Arnold v. State*, 284 Ga. App. 598, 645 S.E.2d 68 (2007).

Trial court did not violate a defendant's right to be present when the court responded to two jury questions, one asking if the crime was a misdemeanor or a felony, the other asking if there would be leniency considerations. The trial court responded only that these were not matters for the jury's consideration, and the court formulated the court's response in the presence of trial counsel. *Engle v. State*, 290 Ga. App. 396, 659 S.E.2d 795 (2008), overruled on other grounds, *Watson v. State*, 297 Ga. 718, 777 S.E.2d 677(2015).

Adequate accommodation for defendant's hearing loss. — Defendant's claim of a due process violation because the defendant's hearing impairment prevented the defendant from comprehending the witnesses' testimony was properly rejected. The trial court accommodated the defendant by moving the defendant closer to the witness stand and obtaining a hearing device for the defendant to use, and the defendant's conduct during the trial and statements to defense counsel indicated that the defendant was able to understand the testimony. *Neugent v. State*, 294 Ga. App. 284, 668 S.E.2d 888 (2008).

Appellant's constitutional right of cross-examination and confrontation of witnesses under U.S. Const., amend. 6, Ga. Const. 1945, Art. I, Sec. I, Para. V (see now Ga. Const. 1983, Art. I, Sec. I, Para. XIV), and this paragraph was not violated when the court allowed as evidence the recorded radio voice transmission of the deceased victim made while proceeding to the scene of the homicide, because it was allowed only for the purpose of explaining conduct to the satisfaction of the jury and not for the purpose of proving any fact. *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 431 (1972).

Because defendant was provided a full opportunity for confrontation regarding the victim's prior out-of-court statements,

the trial court did not err in admitting a police investigator's hearsay evidence. *Gartrell v. State*, 272 Ga. App. 726, 613 S.E.2d 226 (2005).

Standard of materiality to be used by the trial judge in determining whether material exculpatory evidence has been suppressed (either when deciding whether the judge must perform an in camera inspection or when refusing such evidence after examining it and then analyzing its significance again in the context of the full trial, which is the better method of determining materiality) is the same as that which applies on appeal, since absent a constitutional violation there is no breach of the prosecutor's constitutional duty to disclose. *Barnes v. State*, 157 Ga. App. 582, 277 S.E.2d 916 (1981).

Admission of child's hearsay. — Child molestation and aggravated child molestation convictions were upheld on appeal, as a videotaped statement from the victim accusing the defendant of requiring the victim to place the defendant's penis in the victim's mouth was corroborated by another witness; hence, the defendant was not denied due process and the Child Hearsay Statute, O.C.G.A. § 24-3-16, did not require corroboration of child hearsay. *Simpson v. State*, 282 Ga. App. 456, 638 S.E.2d 900 (2006).

Confrontation rights were violated, but admission of hearsay evidence was harmless, given the overwhelming evidence of the defendant's guilt, the fact that the victim's taped account of the argument between the defendant and the defendant's wife was cumulative to, and corroborative of, the defendant's own testimony, and as the erroneously admitted hearsay evidence did not contribute to the verdict. *Delgado v. State*, 287 Ga. App. 273, 651 S.E.2d 201 (2007).

Identification of victims not a violation of the right to a fair trial. — During a defendant's trial for aggravated assault and other charges arising out of a road rage incident, the defendant's right to a fair trial was not violated when the children who were in a car at which the defendant allegedly pointed a gun were brought into the courtroom so that their parent could identify them; even if the demonstration was irrelevant, it was not

Criminal Cases (Cont'd)**3. Trial (Cont'd)**

so prejudicial as to violate the right to a fair trial, and moreover, any error was rendered harmless when two of the three children testified at trial and were cross-examined by the defendant's counsel. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Right to present evidence in support of defense. — Defendant was properly denied the right to a new trial under O.C.G.A. § 5-5-23, based on defendant's claim that trial counsel rendered ineffective assistance of counsel, as defendant failed to show that the outcome of the criminal trial would have differed if trial counsel had acted in another manner; moreover, defendant's claims lacked merit, in that defendant's constitutional right, under Ga. Const. 1983, Art. I, Sec. I, Para. I, to present evidence of the victim's prior violent acts was contingent upon defendant's showing that the evidence was relevant to defendant's claim of justification, which defendant failed at showing because there was an eyewitness and medical evidence that defendant shot the victim numerous times in the back. *Robinson v. State*, 277 Ga. 75, 586 S.E.2d 313 (2003).

Trial court erred in denying the defendant's motion for an expert witness at the state's expense, and motion for a continuance so that such expert could review the state's DNA evidence, because without such an expert, the defendant was left with no favorable evidence, and the failure to appoint an expert rendered a trial unfair. *Dingler v. State*, 281 Ga. App. 721, 637 S.E.2d 120 (2006).

When co-defendant presents no defense, no prejudice. — When the defendant, to obtain a new trial for a denial of severance, must show prejudice and a denial of due process, but when the defendant argues the defendant was prejudiced in that the defendant's defense was inconsistent with that of the co-defendant, the co-defendant's defense cannot be inconsistent with the defendant's when the co-defendant presented no evidence. *Ramplsey v. State*, 166 Ga. App. 521, 304 S.E.2d 574 (1983).

Use of electronic device is subject to supervision of trial judge who may take reasonable measures to assure that the use of the device does not interfere with the dignity, order, and decorum of the court. *Davey v. City of Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974).

Trial judge's arbitrary denial of use of recording device as work product denies due process. — For the trial judge to arbitrarily deny use by counsel or a party of a microphonic recording device as a work product for their personal use in a possible retrial or appeal of the case is a denial of due process. *Davey v. City of Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974).

Presence of the defendant at defendant's trial is a condition of due process to the extent that a fair and just hearing would be thwarted by the defendant's absence; however, when the defendant is involuntarily absent from the court at the time the jury agrees upon a verdict there is no violation of the defendant's rights if there was no interference with the jury's deliberations, since the defendant has no right to be present while the jury is in seclusion or deliberation. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

No concomitant right of absence. — Criminal defendant's right to be present at the defendant's trial does not include a concomitant right of absence. *Lewis v. State*, 164 Ga. App. 549, 297 S.E.2d 303 (1982).

Electronic restraint device on defendant during trial was permissible. — Trial court's utilization on defendant of an electronic restraint device as a security measure during trial was not error since the device was shielded from the jury's view and the defendant failed to show that the defendant was harmed by its use. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

No violation of defendant's fair trial rights when shackles were used at trial. — There was no error by a trial court's denial of a defendant's request to have leg shackles removed during the trial as the shackles could not be seen by the jurors, the trial court took additional

measures to ensure that the jurors were unaware of the shackles, and consideration was given to appropriate circumstances; the shackles were not shown to interfere with the defendant's ability to have a fair trial. *Council v. State*, 297 Ga. App. 96, 676 S.E.2d 411 (2009).

Defendant not deprived of due process because involuntarily absent during jury deliberation and reaching of verdict. — The verdict and sentence in a murder case was not void upon the ground that the accused was involuntarily absent from the court during deliberations of the jury, and at the time the jury reached their verdict since the defendant was present in the courtroom at the time the verdict was published. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Waiver of right to test constitutionality of statute making wife incompetent witness for husband. — When, in the trial of a criminal case, the defendant offers his wife as a witness in his behalf and, on objection by the state, her testimony is rejected on the ground that she is not competent or compellable to testify for or against her husband; and when thereafter the objection is withdrawn by the state, and the defendant allowed to introduce his wife, and he refuses to do so, he will be considered as having waived the right to test the constitutionality of the statute making the wife an incompetent witness for her husband on the ground that he waived that right by his refusal to use his wife as a witness in his behalf when he was given an opportunity to do so. *Williams v. State*, 69 Ga. App. 863, 27 S.E.2d 54 (1943).

Failure to object to exclusion of defendant's parents during child victim's testimony. — Because the defendant failed to object to the exclusion of the defendant's parents from the courtroom, and the failure did not amount to plain error, the appeals court rejected the defendant's contentions on appeal that O.C.G.A. § 17-8-54 was violated, as was the defendant's right to public trial; moreover, the appeals court declined to extend the plain error doctrine to the instant facts. *Delgado v. State*, 287 Ga. App. 273,

651 S.E.2d 201 (2007).

Retrial did not violate due process. — Retrial on child molestation charge did not violate due process, given the legislature's clear intention to prosecute sexual intercourse only as statutory rape. *Maynard v. State*, 290 Ga. App. 403, 659 S.E.2d 831 (2008).

Admission of defendant's taped telephone conversation not improper. — Admission of the defendant's secretly-taped telephone conversation with a coconspirator did not violate due process guarantees; the elicitation of the defendant's unguarded response to a perceived confidante regarding the circumstances of the crimes in which they had both participated was clearly designed to procure an unfiltered, genuine statement from the defendant. Further, absent any evidence that the police investigative techniques were designed to induce the slightest hope of benefit or fear of injury, the resulting statements were not rendered involuntary. *Thorpe v. State*, 285 Ga. 604, 678 S.E.2d 913 (2009).

4. Jury Issues

Failure to object to jury. — Because the defense counsel only sought to have a juror removed before the second day of a three-day jury trial based on that juror's acquaintance with three state witnesses, did not ask the jury pool questions related to such information during voir dire, and did not move for a mistrial when the issue arose during trial, the defendant waived any claim that a Sixth Amendment right to a jury trial was violated, and the trial court was not required to grant a mistrial, sua sponte; moreover, because the excused juror was not questioned about any familiarity with the witnesses during voir dire, that juror's selection to sit on the panel was not the result of any concealment or misleading statements. *Artega v. State*, 282 Ga. App. 751, 639 S.E.2d 634 (2006).

Eyewitness identification pattern jury instruction cannot be endorsed. — In light of the scientifically documented lack of correlation between a witness's certainty in the witness's identification of the perpetrator of a crime and the accuracy of that identification and the critical importance of accurate jury instructions,

Criminal Cases (Cont'd)**4. Jury Issues (Cont'd)**

the pattern instruction authorizing jurors to consider the witness's certainty in his or her identification as a factor to be used in deciding the reliability of that identification cannot be endorsed. *Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (2005) (Unpublished).

Replacement of trial judge after jury charged. — A defendant failed to show that due process was violated when because of an emergency, the trial judge who heard the case and charged the jury was replaced by a different judge who accepted the verdict. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Jury charge on reliability of identification testimony was harmless error. — Jury charge that provided that a witness's level of certainty could be considered in assessing the reliability of identification testimony was harmless error as: (1) the identification witness was not the victim, viewed the crimes in daylight, already knew the defendant, recognized the defendant's gold teeth, and identified the defendant in a photographic lineup by the defendant's street name; (2) there was significant corroborating evidence, including a first witness's testimony that the defendant intended to kill the victim and the testimony of two other witnesses; and (3) the jury was accurately instructed as to the state's burden of proving the defendant's identity and the possibility of mistaken identification. *Woodruff v. State*, 281 Ga. 235, 637 S.E.2d 391 (2006).

It is not necessary for preservation of due process that defendant personally waive right to jury trial. *Little v. Stynchcombe*, 227 Ga. 311, 180 S.E.2d 541 (1971).

Constitutional right to jury trial may be waived by proceeding to trial without demanding jury. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Jury must be informed of agreement between prosecutor and alleged accomplice whose testimony is crucial. — Due process mandates that the jury be informed of any understanding or agreement reached between the prosecutor and an alleged accomplice, on whose

testimony the state's case depends. *Williams v. State*, 151 Ga. App. 683, 261 S.E.2d 430 (1979).

Jury instruction to conform to indictment. — During a defendant's trial for aggravated assault and other charges arising out of a road rage incident, the trial court's failure to give a jury instruction regarding immunity or leniency granted to witnesses did not violate O.C.G.A. § 17-8-57 or the defendant's due process rights; although the trial court began to give the instruction and stopped after a few words, the failure to provide the entire charge was not error because there was no evidence that any witness who testified at trial had been granted immunity or leniency. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Jury charge did not deprive defendant of alibi defense or fair trial right. — Given that the exact date the charged child molestation offense was alleged to have been committed was not stated as a material allegation in the indictment, the trial court did not erroneously instruct the jury that the indicted offenses could be proven to have occurred at any time within the statute of limitations, as the defendant failed to show either the deprivation of an alibi defense or a right to a fair trial resulted by issuing the instruction. *Brown v. State*, 287 Ga. App. 857, 652 S.E.2d 807 (2007), cert. denied, No. S08C0393, 2008 Ga. LEXIS 154 (Ga. 2008).

Jurors' visit to crime scene. — In a vehicular homicide prosecution, unauthorized visits to the accident scene by some jurors did not mandate a new trial because the jurors' unanimous affidavits stated that the visits had no effect upon their verdict. *Hurston v. State*, 278 Ga. App. 472, 629 S.E.2d 18 (2006).

Jurors as convicted felons. — Although the state notified the defendant and the trial court soon after trial that two jurors were convicted felons, because there was no evidence establishing the identity of either juror, documenting the convictions, or showing that either had not had their rights restored, the defendant's due process rights were not violated; thus, denial of a motion for new trial on this ground was proper. *Jones v.*

State, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

Jury instruction to conform to indictment. — Giving instruction on an entire Code section that defined a crime in two ways, when the indictment alleged that defendant committed the crime in only one way, was misleading and violated due process without a limiting instruction directing the jury to consider only whether defendant committed the crime as charged in the indictment. *Dukes v. State*, 265 Ga. 422, 457 S.E.2d 556 (1995).

Allen charge was not fatally defective because, although the Allen charge contained some inaccurate language and the fact that the jury spent less than an hour deliberating after the charge was given did not prove coercion; it was not an abuse of discretion to deny defendant's motion for a new trial as it was just as likely that the jury reached a verdict quickly after the Allen charge due to a fresh perspective after a night away from deliberations. *Graham v. State*, 273 Ga. App. 187, 614 S.E.2d 815 (2005).

Valid waiver of trial by jury. — Because the state presented sufficient extrinsic evidence showing that the defendant knowingly and voluntarily waived a jury trial, even though this evidence conflicted with the defendant's later testimony at the hearing on the motion for a new trial, the trial court did not err in denying the defendant a new trial. *Davis v. State*, 287 Ga. App. 783, 653 S.E.2d 107 (2007).

4. Specific Crimes

Offense of defrauding or obtaining property from state, county, or public officer not violative of due process. — It is an indictable offense in this state for any person to cheat and defraud the state of any of its money or other property by using any deceitful means or artful practice. It is a felony for any officer, servant or other person in any public department, station or office of government of this state to embezzle, steal, secrete, or fraudulently take and carry away any money or other property or effects belonging to the state. Hence, to defraud or obtain property from the state, county, or a public officer is clearly a substantive penal offense in this

state, which does not offend the due process clause of the Constitution of the United States or the due process provision of Georgia's Constitution. *Rollins v. State*, 215 Ga. 437, 111 S.E.2d 63 (1959).

Sexual intercourse between minors. — Charges that the 13-year-old defendant violated the fornication statute, O.C.G.A. § 16-6-18, by having sexual intercourse with the defendant's 17-year-old step-brother did not violate Georgia's right to privacy since the defendant did not have the legal capacity to decide whether to engage in sexual intercourse. *In the Interest of L.A.N.*, 276 Ga. App. 477, 623 S.E.2d 682 (2005).

O.C.G.A. § 16-10-20 was not unconstitutionally vague under Ga. Const. 1983, Art. I, Sec. I, Para. I, as: (1) the statute gave a defendant ample notice of the prohibited conduct; (2) the statute also provided sufficient objective standards to those who were charged with enforcing it; and (3) a defendant's act was made criminal when a false statement was made, without regard to the result of that act, and the fact that application of the statute's standards sometimes required an assessment of the surrounding circumstances to determine if the statute was violated, did not render it unconstitutional. *Banta v. State*, 281 Ga. 615, 642 S.E.2d 51 (2007).

O.C.G.A. § 20-2-690.1 is not unconstitutionally vague because the statute clearly punished the unjustified failure to send a child for whom one was responsible to school. *Pitts v. State*, 293 Ga. 511, 748 S.E.2d 426 (2013).

O.C.G.A. § 16-17-1 et seq. not void for vagueness. — The trial court did not err in rejecting both the defendants' equal protection and vagueness challenges to O.C.G.A. § 16-17-1 et seq., after the defendants were charged with violating O.C.G.A. § 16-17-2, as both the defendants as in-state lenders, were not similarly situated with out-of-state banks designated in O.C.G.A. § 16-17-2(a)(3), and hence were subject to state regulation restricting high interest rates on loans, whereas the out-of-state banks were not; the Georgia legislature had a rational basis for creating a class based on those in-state payday lenders who were subject

Criminal Cases (Cont'd)**4. Specific Crimes (Cont'd)**

to state regulation, and moreover the prohibition against payday loans in whatever form transacted, was sufficiently definite to satisfy due process standards. *Glenn v. State*, 282 Ga. 27, 644 S.E.2d 826 (2007).

Marijuana statute did not create mandatory presumption of guilt. — O.C.G.A. § 16-13-2(b) did not violate due process by creating a mandatory presumption of guilt. The court interpreted the statute as the court had before to render the statute valid and to carry out the legislative intent of establishing that possession of an ounce or less of marijuana was a misdemeanor. *In the Interest of D.H.*, 285 Ga. 51, 673 S.E.2d 191 (2009).

Exclusionary sperm test not required in rape trial. — In a rape trial, the fact that an exclusionary sperm test (which purportedly classifies sperm into particular blood groupings for identification purposes) was not performed is not grounds for reversal, and due process does not require the performance of the test. *Gray v. State*, 151 Ga. App. 684, 261 S.E.2d 402 (1979).

Contempt. — Because a property owner was held in criminal contempt for violation of a six-month protective order in favor of a neighbor, but the owner was not given notice of the contempt allegations prior to the hearing on the matter, the owner's due process rights under Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 14 were violated; as there was no evidence that the owner waived the issue, reversal of the contempt order was required. *Knapp v. Cross*, 279 Ga. App. 632, 632 S.E.2d 157 (2006).

Opportunity to be heard required when act of criminal contempt not in court's presence. — When a criminal contempt act is not in the court's immediate presence, due process requires that the accused be given an opportunity to be heard. *Martin v. Waters*, 151 Ga. App. 149, 259 S.E.2d 153 (1979); *McDaniel v. State*, 202 Ga. App. 409, 414 S.E.2d 536 (1992).

Hearing not required if contempt committed in presence of court. — When a direct contempt is committed in the presence of the court, the offender is

not entitled as a matter of right to a hearing before the court; the court may act on the court's own knowledge of the facts and proceed to impose punishment for the contempt; or the court may in the court's discretion allow a hearing; the refusal to allow a hearing does not deprive the defendant of the due process of law guaranteed by the state and federal Constitutions. *Garland v. State*, 99 Ga. App. 826, 110 S.E.2d 143 (1959), later appeal, 101 Ga. App. 395, 114 S.E.2d 176 (1960); *Martin v. Waters*, 151 Ga. App. 149, 259 S.E.2d 153 (1979).

Proof beyond reasonable doubt required in criminal contempt prosecution. — It is a denial of a defendant's right of due process of law under the federal and state constitutions and O.C.G.A. § 24-4-5 to fail to require proof beyond a reasonable doubt in a criminal contempt prosecution, because the result of such a conviction is to deny the contemner liberty and the levy of a penal fine. *In re Crane*, 253 Ga. 667, 324 S.E.2d 443 (1985).

5. Sentencing

Penalty under O.C.G.A. § 16-13-30.1 upheld. — O.C.G.A. § 16-13-30.1, which subjects a defendant to a greater penalty for the sale of a non-controlled substance than for the sale of some controlled substances, does not violate due process. *Thompson v. State*, 254 Ga. 393, 330 S.E.2d 348 (1985).

Death penalty for codefendant not proven to have directly committed murderous act. — Since the defendant was not only present but active and participating throughout the commission of kidnapping, rape, murder and aggravated assault of which the defendant was convicted, imposition of the death penalty was not excessive or disproportionate to the penalty imposed in similar cases even though it was not established whether the defendant or the codefendant fired the gunshots which killed the victim. *Johnson v. Zant*, 249 Ga. 812, 295 S.E.2d 63 (1982).

When evidence inadmissible under evidentiary rule admissible in capital case in mitigation of punishment. — Constitution requires that evidence which would be inadmissible under an evidentiary rule must not automatically

be excluded if tendered in a capital case in mitigation of punishment: the potentially mitigating influence of the testimony must be weighed against the harm resulting from the violation of the evidentiary rule. In close cases, the doubt should be resolved in favor of admissibility. *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979), overruled on other grounds, *Satterfield v. State*, 248 Ga. 538, 285 S.E.2d 3 (1981); *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993), overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

New date of execution entered without defendant's presence did not violate due process. — Although it was necessary for the defendant to have been present in court when the original sentence of execution was pronounced, as well as during other proceedings throughout the trial, in the absence of waiver, no violation of due process appears when the attack is not on the original sentence, but merely on an order fixing a new date of execution, entered without the presence of the defendant at that time, which became necessary after the date fixed in the original sentence had passed by reason of a supersedeas pending the determination of a writ of error in this court. Setting a new date of execution is not a new sentence of defendant as to which the judge has no discretion, but merely setting the time. *Fowler v. Grimes*, 198 Ga. 84, 31 S.E.2d 174, cert. denied, 323 U.S. 784, 65 S. Ct. 266, 89 L. Ed. 626 (1944).

Order of trial judge fixing new date for execution of sentence after original date has passed is not void because the defendant is involuntarily absent and has not waived or authorized anyone else to waive the defendant's right to be present at the time and place of resentencing, and the passage of such order is not violative of the plaintiff's rights under the several provisions of the state and federal Constitutions. *McBurnett v. Balkcom*, 207 Ga. 452, 62 S.E.2d 180 (1950).

Defendant not denied due process because assigned to formerly appropriate commission, not successor. — Fact that trial court in sentencing the defendant assigned the defendant or ordered the defendant delivered to the

Prison Commission, which has been abolished, instead of assigning the defendant or ordering the defendant delivered to the Board of Corrections, which succeeded to the powers and duties of the Commission, while not technically in the proper form, is not such an irregularity as is hurtful to any right of liberty nor is it such a defect as to vitiate the sentence and deprive the defendant of due process of law under either the state or federal Constitutions. *Dixon v. State*, 83 Ga. App. 227, 63 S.E.2d 278 (1951).

Convicted defendant not denied due process when telephone use prohibited but right to hearing granted.

— There was no denial of due process when a defendant was prohibited from making outgoing phone calls after the defendant's conviction when the defendant was granted the right to a hearing upon the ruling and since the defendant failed to show in what manner the defendant's access to counsel was unduly restricted, or to show any harm flowing from the alleged restriction. *Wilson v. State*, 151 Ga. App. 501, 260 S.E.2d 527 (1979).

Mandatory life imprisonment for second drug conviction. — O.C.G.A. § 16-13-30, providing mandatory life imprisonment for a second drug conviction, does not violate due process or equal protection based on statistical evidence as to the high percentage of African-Americans serving life sentences for drug offenses, nor because it creates an irrational sentencing scheme. *Stephens v. State*, 265 Ga. 356, 456 S.E.2d 560, cert. denied, 516 U.S. 849, 116 S. Ct. 144, 133 L. Ed. 2d 90 (1995).

Defendant must have notice and opportunity to be heard regarding possible violation of terms of sentence. — To deprive a defendant of liberty upon the theory that the defendant has violated any of the rules and regulations prescribed in a suspended or probated sentence without giving the defendant a notice and opportunity to be heard upon the question of whether or not the defendant has violated such rules and regulations, would be to violate one of the fundamentals of our system of jurisprudence that a person shall not be deprived of a person's liberty without due process of

Criminal Cases (Cont'd)
5. Sentencing (Cont'd)

law, which includes notice and an opportunity to be heard. *Lester v. Foster*, 207 Ga. 596, 63 S.E.2d 402 (1951).

Increasing time served on remand. — On remand, it was error for the trial court to increase the amount of time the defendant was to serve and to threaten to increase the time once again if the defendant took another appeal. Due process required that vindictiveness play no part in the sentence a defendant received. *Schlanger v. State*, 297 Ga. App. 785, 678 S.E.2d 190 (2009), cert. denied, No. S09C1542, 2010 Ga. LEXIS 127 (Ga. 2010).

Due process in sentencing. — Defendant was not denied due process in sentencing because the record indicated that the trial judge did not rely on the victim's apparently false testimony in imposing the sentence, but relied on the severity of the crime. *Stephenson v. State*, 261 Ga. App. 402, 582 S.E.2d 492 (2003).

Defendant's sentences on guilty pleas to the state's amended accusation were not illegal and defendant's due process rights were not violated by imposition of sentences as a recidivist; defendant was served with the amended accusation, was present at the guilty plea hearing when the prosecutor announced that the state was proceeding on the amended accusation and then set forth factual bases consistent with the amended accusation, and defendant did not file a demurrer or seek a continuance but confirmed that defendant understood all charges and then entered pleas of guilty. *Payne v. State*, 276 Ga. App. 577, 623 S.E.2d 668 (2005).

Probation revocation. — The notice given to a defendant that the defendant violated probation by committing robbery was sufficient notice that the defendant violated probation by committing the lesser included offense of theft by taking based on the same facts; under these circumstances, the defendant could not reasonably contend for due process purposes that the defendant was not aware of the grounds on which revocation was sought or that the defendant's ability to prepare a defense was compromised. *Franklin v.*

State, 286 Ga. App. 288, 648 S.E.2d 746 (2007).

Statutory aggravating circumstance. — Defendant's death sentence was affirmed as the defendant's death sentence was based upon at least one valid statutory aggravating circumstance, even though the notice of the statutory aggravating circumstances upon which the state intended to rely was not filed until the first day of voir dire; one of the statutory aggravating circumstances relied upon by the state and found by the jury, that the murder was committed while the defendant was engaged in a kidnapping with bodily injury, was alleged in the indictment, and the defendant was on sufficient actual notice for due process purposes of the kidnapping statutory aggravating circumstance. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Vindictive sentencing not found. — Reinstatement of the defendant's original sentence after the defendant objected to a modification of that sentence was not a vindictive sentencing decision, since the original sentence had never been held constitutionally invalid. *Williams v. State*, 277 Ga. App. 841, 627 S.E.2d 808 (2006).

When revocation of suspended sentence not denial of due process. — Since it appears that full notice and hearing were afforded and that the defendant was represented by counsel both in the original trials and the subsequent revocation proceedings, the revocation of a suspended sentence is not a denial of due process. *Cross v. State*, 128 Ga. App. 774, 197 S.E.2d 853 (1973).

Even if the grand jury entered a "No Bill" as to a charge against the defendant for criminal damage to property in the second degree and the trial judge in the hearing concerning revocation of probation found "criminal trespass," there was no violation of the due process guarantee bestowed upon defendant by U.S. Const., amends. 5, 14 and the Constitution of this state. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Revocation of the bond of a person charged with stalking lies within the discretion of the trial judge; however, be-

cause a bond revocation involves the deprivation of one's liberty, the decision must comport with at least minimal state and federal due process requirements. *Hood v. Carsten*, 267 Ga. 579, 481 S.E.2d 525 (1997).

Due process requirements can be satisfied in unified revocation hearing. — The failure of a trial court to afford a probationer a preliminary hearing to establish probable cause to conduct a revocation of probation hearing followed by an evidentiary show cause hearing does not violate due process. A probationer's constitutional rights are fully protected in a single dispositional trial. *Wilson v. State*, 152 Ga. App. 695, 263 S.E.2d 691 (1979), cert. denied, 449 U.S. 847, 101 S. Ct. 133, 66 L. Ed. 2d 57 (1980).

Application of "slight evidence" rule did not deny defendant due process in probation revocation. — When the defendant received written notice of the claimed violation of probation, the disclosure of the evidence against the defendant, an opportunity to be heard in person and to present witnesses and document evidence, and the right to confront and cross-examine adverse witnesses, heard by a neutral and detached judicial officer with a written statement by the fact finder as to the evidence relied on and reasons for revoking probation, application of the "slight evidence" rule did not deny the defendant due process and equal protection. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Establishment of defendant's guilt beyond reasonable doubt not necessary for revocation of probation. — The benefit and protection afforded under the due process and equal protection clauses of the state and federal Constitutions have not been violated in that the establishment of a defendant's guilt beyond a reasonable doubt is not necessary to justify the revocation of a sentence of probation. *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Parole revocation not part of criminal prosecution. — Supreme Court of Georgia in *Johnson v. State*, 240 Ga. 526, 242 S.E.2d 53 (1978), affirming *Johnson v. State*, 142 Ga. App. 124, 235 S.E.2d 550 (1977), adopted the language of the Su-

preme Court of the United States in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), which is as follows: "The revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. ... Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Mingo v. State*, 155 Ga. App. 284, 270 S.E.2d 700 (1980).

Change of a tentative parole date by the state parole board did not constitute the revocation of a grant of parole entitling defendant to minimum requirements of due process. *Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275 (1996), cert. denied, 517 U.S. 1108, 116 S. Ct. 1329, 134 L. Ed. 2d 480 (1996).

Presumption of vindictiveness did not apply to sentence. — When the defendant was convicted of aggravated assault, burglary, theft by taking, and carrying a concealed weapon, the trial court properly imposed a 111 year sentence of imprisonment, which was within the statutory limits and which was the maximum possible. The presumption of vindictiveness was absent when a trial court imposed a greater penalty after trial than the court would have after a guilty plea; furthermore, the trial court explained that the court imposed the sentence because the defendant's actions were life-threatening, because the jury convicted the defendant of entering the dwelling with intent to commit murder, because the defendant's actions against one victim, the defendant's parent, had escalated from the defendant's previous misdemeanor crimes against the parent, and because the defendant displayed no remorse. *Townes v. State*, 298 Ga. App. 185, 679 S.E.2d 772 (2009).

6. Appeals

Ineffectiveness of counsel not shown. — Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial be-

Criminal Cases (Cont'd)**6. Appeals (Cont'd)**

cause: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, and comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

Postconviction delay caused no actual prejudice. — Aggravated assault indictment was improperly dismissed because a defendant's due process rights were not violated by a seven-year delay in granting the defendant's motion for a new trial after the defendant was convicted; the delay was presumptively prejudicial, no reasonable explanation was provided, and the defendant asserted the right to a prompt disposition, but the defendant did not show actual prejudice resulting from the delay by demonstrating that the death of a witness, the unavailability of other witnesses, or the fading of memories prejudiced the defense in a new trial. *Threatt v. State*, 282 Ga. App. 884, 640 S.E.2d 316 (2006).

Defendant was not entitled to relief based on a claim that the twelve year delay caused by appointed counsel's failure to pursue the defendant's post-conviction appeals violated the defendant's due process rights, because the delay was due solely to the actions of the defendant's previous appellate counsel and the defendant failed to show prejudice. *Hargrove v. State*, 291 Ga. 879, 734 S.E.2d 34 (2012).

Ten year postconviction delay caused no actual prejudice. — While the 10-year delay between the defendant's conviction and the appellate hearing was an inordinate delay and the defendant attempted to assert an appeal during the delay, the delay did not violate the defendant's right to due process because the defendant failed to show prejudice. *Brinkley v. State*, 320 Ga. App. 275, 739 S.E.2d 703 (2013).

Burden on defendant to show how case materially prejudiced. — Due process requires that there be no suppression by the state of evidence in its files favorable to the accused; this does not mean there is a burden on the state to open its file for general inspection by the defendant; an in camera inspection of the prosecution's file by the judge is sufficient, and the defendant has the burden of showing how the defendant's case has been materially prejudiced. *Howell v. State*, 157 Ga. App. 451, 278 S.E.2d 43 (1981).

Delay in filing transcript. — Defendant was not deprived of defendant's due process rights by a seven-month delay in the filing of the transcript as defendant did not show that the delay impacted defendant's ability to adequately present defendant's appeal or impaired any defense that defendant might have had. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Harm resulting from missing portions of transcript must be shown. — Defendant's general allegation of prejudice resulting from omission of portions of trial transcript due to mechanical malfunction was insufficient absent a specific showing of harm. *Kelly v. State*, 174 Ga. App. 424, 330 S.E.2d 165 (1985).

Delay in preparing transcript. — Although a four-year delay occurred in preparing the trial transcript in defendant's criminal trial, that mere passage of time was not enough to constitute a denial of due process; indeed, the defendant could not show prejudice as a result of the delay. *Glenn v. State*, 279 Ga. 277, 612 S.E.2d 478 (2005).

Standard for evaluation of evidence in state criminal trial is of sufficiency of evidence. — The standard by which this court must evaluate the evidence in a state criminal trial to determine whether the petitioner has been accorded constitutional due process was recently reformulated by the Supreme Court of the United States; instead of determining whether or not there is "any evidence" to support the petitioner's conviction, the court must now go further and satisfy itself that the evidence in the record could reasonably support a finding of

guilt beyond a reasonable doubt; the question, therefore, is not a question of the presence of evidence in the record but of the sufficiency of that evidence. *Holloway v. McElroy*, 474 F. Supp. 1363 (M.D. Ga. 1979), *aff'd*, 632 F.2d 605 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S. Ct. 3319, 69 L. Ed. 2d 398 (1981), *overruled on other grounds*, *Baker v. Montgomery*, 811 F.2d 55 (11th Cir. 1987).

Remedy of writ of habeas corpus when defendant denied due process in trial. — Writ of habeas corpus is the appropriate remedy only when the court was without jurisdiction in the premises, or when it exceeded its jurisdiction in passing sentence by virtue of which the party is imprisoned, or when the defendant in the defendant's trial was denied due process of law, in violation of U.S. Const., amend. 14 and this paragraph. *Balkcom v. Parris*, 215 Ga. 122, 109 S.E.2d 48 (1959).

Use of writ of habeas corpus. — A person in custody under a sentence in a misdemeanor case is not entitled to be discharged on a writ of habeas corpus, on the ground that the person was denied the right to be tried by a jury, merely because the trial judge determined the case without a jury when the act governing the procedure of the court in which the person was tried contains a provision that a jury trial be had when demanded by the accused, and no demand therefor was made. *Clarke v. Cobb*, 195 Ga. 633, 24 S.E.2d 782 (1943).

Since the writ of habeas corpus cannot be used merely as a substitute for a writ of error or other remedial procedure to correct errors of law, of which the defendant had an opportunity to utilize, no question as to guilt or innocence or as to any irregularity can be so raised, unless it was such as to render the judgment wholly void. *White v. George*, 195 Ga. 465, 24 S.E.2d 787 (1943).

Discharge under writ of habeas corpus, after conviction, cannot be granted unless the judgment is absolutely void; as when the convicting court was without jurisdiction, or when the defendant in the defendant's trial was denied due process of law, in violation of U.S. Const., amend.

14, Sec. 1 and the state Constitution. *White v. George*, 195 Ga. 465, 24 S.E.2d 787 (1943).

Writ of habeas corpus was properly denied when the contention that the plaintiff in error was denied certain constitutional rights, including due process of law, because of the refusal to continue the case was decided on the motion for new trial adversely to the contentions of the plaintiff in error. *Starr v. Balkcom*, 209 Ga. 680, 75 S.E.2d 5 (1953).

Preservation for review. — When a due process issue a defendant raised on appeal was not raised in the trial court, the claim presented nothing for appellate review. *Franklin v. State*, 286 Ga. App. 288, 648 S.E.2d 746 (2007).

When representation by counsel comports with due process. — Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

Failure to provide a speedy appeal. — Defendant's state and federal due process rights were not violated by the lack of a speedy appeal as: (1) there was no evidence that the eight-year delay in filing the notice of appeal was due to the state or to defendant's counsel; (2) since the post-trial motions for new trial filings were pro se, the inference was that defendant desired to proceed without counsel and without appealing; (3) defendant failed to show prejudice from the delay as the appeal was without merit; and (4) defendant's attempt to show prejudice based on the death of trial counsel was rejected as trial counsel testified at the new trial hearing. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

OPINIONS OF THE ATTORNEY GENERAL

Notice and hearing before administrative agency required before action to revoke license. — The due process clauses of U.S. Const., amend. 14, and this paragraph require notice and a hearing before an administrative agency before any action may be taken to revoke a license; this constitutional requirement must be met, even though the act granting the right to revoke the license provides for an appeal to the superior court. 1958-59 Op. Att’y Gen. p. 1.

It is necessary that law under which administrative hearings are conducted prescribe notice and hearing, and it is not sufficient that a notice and hearing are given, even though not required by law. 1958-59 Op. Att’y Gen. p. 1.

Industries’ requiring environmental protection division personnel to sign waivers of liability is unreasonable restriction on police power. —

Requiring environmental protection division personnel to sign waivers of liability for industries for injuries to person or property sustained while on premises for the purpose of carrying out their duties of inspection constitutes an unreasonable restriction on the state’s police power and any such waiver is not binding on EPD personnel because of a lack of valid consideration. 1976 Op. Att’y Gen. No. 76-121.

Use of inactive railroad right-of-way as trail. — Under the Interstate Commerce Commission (ICC) procedures, a railroad may enter into an agreement which allows interim trail use of an inactive right-of-way, without triggering reversionary interests under state law; absent such agreement, upon approval of abandonment by the ICC, state law determines the nature, scope and duration of the interest held by the railroad. 1992 Op. Att’y Gen. No. U92-11.

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§§ 725, 777, 780. 16C C.J.S., Constitutional Law, §§ 1883, 1890.

ALR. — Constitutionality and applicability of curative provisions of taxing statutes where sale is irregular, 5 ALR 164.

Constitutionality of statute or ordinance providing for destruction of animals, 8 ALR 67.

Constitutionality of statute requiring railroad to construct and maintain private crossing, 12 ALR 227.

Constitutionality of regulations as to milk, 18 ALR 235; 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243; 155 ALR 1383.

Constitutionality of statute for cumulative penalty for delay in paying claim, 26 ALR 1200.

Constitutionality of statute regulating the time of payment of wages, 26 ALR 1396.

Constitutionality of statutes relating to insurance contracts made and to be performed out of state, upon property or life within state, 32 ALR 636.

Inclusion in assessment for public improvement of amount to cover delinquent

cies as contrary to constitutional guaranties, 40 ALR 1352; 42 ALR 1185.

Constitutionality of statutes or ordinances making one fact presumptive or prima-facie evidence of another, 51 ALR 1139; 86 ALR 179; 162 ALR 495.

Power to impose tax on estate in respect to property transferred in contemplation of death or by a conveyance intended to take effect in possession or enjoyment at death, 52 ALR 1091.

Constitutionality of statute in relation to oleomargarine or other substitute for butter, 53 ALR 474.

Validity of statute or ordinance in relation to doors, 53 ALR 920.

Constitutionality of provisions of Workmen's Compensation Law applicable to public officers or employees, 53 ALR 1290.

Constitutionality of statute fixing minimum rate of speed at which carrier may transport special kinds of freight, 55 ALR 1296.

Constitutionality of statutes providing for lien on motor vehicles inflicting damage to person or property, 61 ALR 655.

Right of exclusion from or discrimination against patrons of library, 64 ALR 304.

Extraterritorial effect of confiscation of property and nationalization of corporations, 65 ALR 1494; 139 ALR 1209.

Tax on automobile, or on its use, for cost of road or street construction, improvement, or maintenance, 68 ALR 200.

Constitutionality of statute which permits consideration of enhanced value of lands not taken, in fixing compensation for property taken or damaged in exercise of eminent domain, 68 ALR 784.

Constitutionality, construction, and applicability of statute making refusal to pay for commodities a criminal offense, 76 ALR 1338.

Constitutionality, construction, and applicability of statutes relating to service of process on unincorporated association, 79 ALR 305.

Rights and responsibilities, civil or criminal, of police officers in respect of examination of persons under arrest ("third degree"), 79 ALR 457.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 82 ALR 345; 116 ALR 209; 132 ALR 91; 139 ALR 673.

Constitutionality of statute relating to taxation of state banks or stock therein as affected by inapplicability of statute to national banks or national bank stock, 82 ALR 874; 83 ALR 1441.

Constitutionality, construction, and effect of legislation for protection of bank depositors or relief of banks or building and loan associations in need of cash or cash resources, 82 ALR 1025.

Validity of license law which requires security for payment of debts by licensee, 84 ALR 640; 101 ALR 827.

Constitutionality, construction, and effect of statute relating specifically to rights, remedies, and obligations of parties to sale of farm machinery, 87 ALR 290.

Power to require filing of schedule of prices as a condition of license for a business or profession, 87 ALR 519.

Constitutionality, construction, application, and effect of statute requiring judicial approval before issuance or sale of municipal or county bonds or obligations, 87 ALR 706; 102 ALR 90.

Constitutionality of statute which predicates criminality upon repute or reputation, 92 ALR 1228.

Constitutionality of statute changing rights of withdrawing members of building and loan association, 98 ALR 82; 133 ALR 1493.

Constitutionality of statutes providing for refund of taxes illegally or erroneously exacted, 98 ALR 284.

Constitutionality of statutes and validity of regulations relating to optometry, 98 ALR 905; 22 ALR2d 939.

Damages resulting from temporary conditions incident to a public improvement as a taking or damaging within constitutional provisions, 98 ALR 956.

Validity of statute or ordinance regulating barbers, 98 ALR 1088.

Power to remove public officer without notice and hearing, 99 ALR 336.

Power of state to extend its taxing power by its definition of residence or its declared policy of domesticating foreign corporations, 100 ALR 1216.

Validity of license statute or ordinance which discriminates against nonresidents, 112 ALR 63.

Constitutionality of crop insurance statutes, 113 ALR 739.

Constitutionality of statutory provisions relating to current taxes on tax delinquent property, 113 ALR 1092.

Obstruction or diversion of, or other interference with, flow of surface water as taking or damaging property within constitutional provision against taking or damaging without compensation, 128 ALR 1195.

Constitutionality, construction, and application of statutes or governmental projects for improvement of housing conditions (slum clearance), 130 ALR 1069; 172 ALR 966.

Constitutionality, construction, and application of statute authorizing condemnation of property by cross action, 130 ALR 1226.

Substituted service, service by publication, or service out of state in action in personam against resident or domestic corporation, as contrary to due process of law, 132 ALR 1361.

Constitutionality, construction, and application of statutes designed to prevent or limit control of retail liquor dealers by manufacturers, wholesalers, or importers, 136 ALR 1238.

Right of privacy, 138 ALR 22; 57 ALR2d 634; 57 ALR3d 16.

Retrospective statute subjecting interests of trust beneficiaries to claims of creditors, 151 ALR 1417.

Validity of provision of statute or ordinance that requires vacation of premises which do not comply with building or sanitary regulations, upon notice to that effect, without judicial proceeding, 153 ALR 849.

Constitutionality, construction, and application of statute or contract regarding deduction from, or adjustment of, wages in respect of defective workmanship, 153 ALR 866.

Validity of commercial rent control legislation as applied to preexisting leases, 162 ALR 202.

Constitutionality of statutes or ordinances making one fact presumptive or prima-facie evidence of another, 162 ALR 495.

Applicability (constitutional or otherwise) to interstate passengers of statute requiring segregation of passengers according to race or color, 165 ALR 589.

Validity of zoning law as affected by limitation of area zoned (partial or "piece-meal" zoning), 165 ALR 823.

Effect of, and remedies for, exclusion of eligible class of persons from jury list in civil case, 166 ALR 1422.

Condemnation of materials for highway or other public or quasi-public works, 172 ALR 131.

Condemnation of land by public authority, to provide hunting and fishing, 172 ALR 174.

Discrimination between property within and that outside municipality or other governmental district as to public service or utility rates, 4 ALR2d 595.

Federal Housing and Rent Act of 1947 and amendments, 10 ALR2d 249.

Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 ALR2d 447.

Constitutionality, construction, and application of statutory provisions respecting persons who may prepare tax returns for others, 10 ALR2d 1443.

Absence of accused during making of tests or experiments as affecting admissibility of testimony concerning them, 17 ALR2d 1078.

Pretrial requirement that suspect or accused wear or try on particular apparel as violating constitutional rights, 18 ALR2d 796.

Requiring submission to physical examination or test as violation of constitutional rights, 25 ALR2d 1407.

Right to cut off water supply because of failure to pay sewer service charge, 26 ALR2d 1359.

Validity of municipal ordinance prohibiting house-to-house soliciting and peddling without invitation, 35 ALR2d 355.

Prejudicial effect of trial court's denial, or equivalent, of counsel's right to argue case, 38 ALR2d 1396.

Validity of minimum wage statutes relating to private employment, 39 ALR2d 740.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 ALR2d 789.

Prejudicial effect of argument or comment that accused, if acquitted on ground of insanity, would be released from institution to which committed, 44 ALR2d 978.

Validity of statute or ordinance providing for destruction of dogs, 56 ALR2d 1024.

Conviction of lesser offense as bar to prosecution for greater on new trial, 61 ALR2d 1141.

Conviction from which appeal is pending as bar to another prosecution for same offense, 61 ALR2d 1224.

Continuance of criminal case because of illness of accused, 66 ALR2d 232.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 ALR2d 1453.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

Criminal trial of deaf, mute, or blind person, 80 ALR2d 1084.

Conviction of criminal offense without evidence as denial of due process of law, 80 ALR2d 1362.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 84 ALR2d 1288; 15 ALR4th 1127; 88 ALR4th 711; 10 ALR Fed. 185; 115 ALR Fed. 381; 119 ALR Fed. 589.

Admissibility on issue of value of real property of evidence of sale price of other real property, 85 ALR2d 110.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 ALR2d 326.

Transiently occupied room in hotel, motel, or roominghouse as within provision forbidding unreasonable searches and seizures, 86 ALR2d 984.

Right to file briefs in trial court, 86 ALR2d 1233.

Prayers in public schools, 86 ALR2d 1304.

Zoning: changes, repairs, or replacements in continuation of nonconforming use, 87 ALR2d 4; 57 ALR3d 419; 10 ALR4th 1122.

Right to counsel in insanity or incompetency adjudication proceedings, 87 ALR2d 950.

Validity and construction of statute or ordinance requiring or prohibiting posting or other publication of price of commodity or services, 89 ALR2d 901; 80 ALR3d 740.

Right, without judicial proceeding, to arrest and detain one who is, or is suspected of being, mentally deranged, 92 ALR2d 570.

Furnishing free textbooks to sectarian school or student therein, 93 ALR2d 986.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof, 97 ALR2d 549.

Constitutional aspects of procedure for determining voluntariness of pretrial confession, 1 ALR3d 1251; 132 ALR Fed. 415.

Procedural due process requirements in proceedings involving applications for admission to bar, 2 ALR3d 1266.

Accused's right to assistance of counsel at or prior to arraignment, 5 ALR3d 1269.

Scope and extent and remedy or sanctions for infringement, of accused's right to communicate with his attorney, 5 ALR3d 1360.

Indefiniteness of automobile speed regulations as affecting validity, 6 ALR3d 1326.

Modern status of doctrine of res judicata in criminal cases, 9 ALR3d 203.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 ALR3d 462.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 ALR3d 738.

Validity of consent to search given by one in custody of officers, 9 ALR3d 858.

Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adult, 9 ALR3d 1391.

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct, 12 ALR3d 1448.

Right of publisher of newspaper or magazine, in absence of contractual obligation, to refuse publication of advertisement, 18 ALR3d 1286.

Right of attorney appointed by court for indigent accused to, and court's power to award, compensation by public, in absence of statute or court rule, 21 ALR3d 819.

Failure of state prosecutor to disclose existence of plea bargain or other deals with witness as violating due process, 12 ALR6th 267.

Violation of federal constitutional rule (*Griffin v. California*) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 ALR3d 1093; 32 ALR4th 774.

Absence of judge from courtroom during trial of civil case, 25 ALR3d 637.

Validity and effect of gift for charitable purposes which excludes otherwise qualified beneficiaries because of their race or religion, 25 ALR3d 736.

Construction and application, as to isolated acts or transactions, of state statutes or rules of court predicated in personam jurisdiction over nonresidents or foreign corporations upon the doing of an act, or upon doing or transacting business or "any" business, within the state, 27 ALR3d 397.

Validity and construction of gun control laws, 28 ALR3d 845.

Right to assistance by counsel in administrative proceedings, 33 ALR3d 229.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction, 34 ALR3d 16.

Applicability, in proceedings under statutes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 34 ALR3d 939.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused, 34 ALR3d 1313.

Funds in hands of his attorney as subject of attachment or garnishment by client's creditor, 35 ALR3d 1094.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

Validity and construction of statutes or ordinances regulating telephone answering services, 35 ALR3d 1430.

Legality of voluntary nontherapeutic sterilization, 35 ALR3d 1444.

Rights between landlord and tenant as affected by zoning regulations restricting contemplated use of premises, 37 ALR3d 1018.

Discrimination on basis of illegitimacy

as denial of constitutional rights, 38 ALR3d 613.

Racial discrimination in punishment for crime, 40 ALR3d 227.

"Fruit of the poisonous tree" doctrine excluding evidence derived from information gained in illegal search, 43 ALR3d 385.

Propriety of requiring accused to give handwriting exemplar, 43 ALR3d 653.

Validity and construction of statute or ordinance requiring land developer to dedicate portion of land for recreational purposes, or make payment in lieu thereof, 43 ALR3d 862.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail instalment sales contract, 45 ALR3d 1233.

Validity of municipal ordinance imposing income tax or license upon nonresident in taxing jurisdiction (commuter tax), 48 ALR3d 343.

Residential swimming pool as nuisance, 49 ALR3d 545.

Validity of statutory provision for commitment to mental institution of one acquitted of crime on ground of insanity without formal determination of mental condition at time of acquittal, 50 ALR3d 144.

Relief to owner of motor vehicle subject to state forfeiture for use in violation of narcotics laws, 50 ALR3d 172.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 ALR3d 548.

Necessity of alleging in indictment or information limitation-tolling facts, 52 ALR3d 922.

Validity of statute establishing or authorizing minimum price schedules for barbers, 54 ALR3d 916.

Zoning: right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by difficulties unrelated to governmental activity, 56 ALR3d 14.

Zoning: right to resume nonconforming

use of premises after involuntary break in the continuity of nonconforming use caused by governmental activity, 56 ALR3d 138.

Validity and application of provisions governing determination of residency for purpose of fixing fee differential for out-of-state students in public college, 56 ALR3d 641.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 ALR3d 948.

Validity of regulations restricting size of free-standing advertising signs, 56 ALR3d 1207.

Waiver or loss of right of privacy, 57 ALR3d 16.

Zoning: right to repair or reconstruct building operating as nonconforming use, after damage or destruction by fire or other casualty, 57 ALR3d 419.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 ALR3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 ALR3d 581.

Validity and construction of curfew statute, ordinance, or proclamation, 59 ALR3d 321; 83 ALR4th 1056.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Garageman's lien: modern view as to validity of statute permitting sale of vehicle without hearing, 64 ALR3d 814.

Court's presentence inquiry as to, or consideration of, accused's intention to appeal, as error, 64 ALR3d 1226.

Salting for snow removal as taking or damaging abutting property for eminent domain purposes, 64 ALR3d 1239.

Constitutionality of automobile and aviation guest statutes, 66 ALR3d 532.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member, 66 ALR3d 1018.

Constitutional restrictions on nonattorney acting as judge in criminal proceeding, 71 ALR3d 562.

Disqualification of judge, justice of the peace, or similar judicial officer for pecu-

niary interest in fines, forfeitures, or fees payable by litigants, 72 ALR3d 375.

Drug addiction or related mental state as defense to criminal charge, 73 ALR3d 16.

Validity and construction of statutory provision relating to jurisdiction of court for purpose of divorce for servicemen, 73 ALR3d 431.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance, 73 ALR3d 725.

Validity and construction of statute or ordinance requiring return deposits on soft drink or similar containers, 73 ALR3d 1105.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

Pretrial preventive detention by state court, 75 ALR3d 956.

Validity, under state law, of self-help repossession of goods pursuant to UCC § 9-503, 75 ALR3d 1061.

Constitutionality of statutory provision requiring reimbursement of public by child for financial assistance to aged parents, 75 ALR3d 1159.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Validity and construction of state or local regulation prohibiting off-premises advertising structures, 81 ALR3d 486.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR3d 564.

Validity of state or local regulation dealing with resale of tickets to theatrical or sporting events, 81 ALR3d 655.

Mandatory retirement of public officer or employee based on age, 81 ALR3d 811.

Validity, construction, and application of statutes making it a criminal offense to mistreat or wrongfully dispose of dead body, 81 ALR3d 1071.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of envi-

ronmental pollution statute, 81 ALR3d 1258.

Modern status: right of peace officer to use deadly force in attempting to arrest fleeing felon, 83 ALR3d 174.

Validity, construction, and effect of Uniform Alcoholism and Intoxication Treatment Act, 85 ALR3d 701.

Statute expressly allowing alimony to wife, but not expressly allowing alimony to husband, as unconstitutional sex discrimination, 85 ALR3d 940.

Regulation of private detectives, private investigators, and security agencies, 86 ALR3d 691.

Accused's right to discovery or inspection of records of prior complaints against, or similar personnel records of, peace officer involved in the case, 86 ALR3d 1170.

State laws prohibiting sex discrimination as violated by dress or grooming requirements for customers of establishments serving food or beverages, 89 ALR3d 7.

Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement, 89 ALR3d 864.

Disruptive conduct of accused in presence of jury as ground for mistrial or discharge of jury, 89 ALR3d 960.

Zoning: building in course of construction as establishing valid nonconforming use or vested right to complete construction for intended use, 89 ALR3d 1051.

Use of abbreviation in indictment or information, 92 ALR3d 494.

Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 ALR3d 696.

Validity of zoning ordinances prohibiting or regulating outside storage of house trailers, motor homes, campers, vans, and the like, in residential neighborhoods, 95 ALR3d 378.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 ALR3d 225.

Prohibition, under state civil rights laws, of racial discrimination in rental of privately owned residential property, 96 ALR3d 497.

Unsuitability of powerline or other-

wise, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Validity, construction, and application of interstate agreement on detainers, 98 ALR3d 160.

Validity of statutory classifications based on population — zoning, building, and land use statutes, 98 ALR3d 679.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 ALR3d 997.

Zoning regulations prohibiting or limiting fences, hedges, or walls, 1 ALR4th 373.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 ALR4th 674.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 ALR4th 1112.

Seizure of property as evidence in criminal prosecution or investigation as compensable taking, 44 ALR4th 366.

Judicial power to order discontinuance of life-sustaining treatment, 48 ALR4th 67.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 ALR4th 367.

Paternity proceedings: right to jury trial, 51 ALR4th 565.

Validity, construction, and effect of state statutes restricting political activities of public officers or employees, 51 ALR4th 702.

Statute prohibiting reckless driving: definiteness and certainty, 52 ALR4th 1161.

Statutes authorizing removal of body parts for transplant: validity and construction, 54 ALR4th 1214.

Change in area or location of nonconforming use as violation of zoning ordinance, 56 ALR4th 769.

AIDS infection as affecting right to attend public school, 60 ALR4th 15.

Addition of another activity to existing nonconforming use as violation of zoning ordinance, 61 ALR4th 724.

Change in volume, intensity, or means of performing nonconforming use as violation of zoning ordinance, 61 ALR4th 806.

Change in type of activity of nonconforming use as violation of zoning ordinance, 61 ALR4th 902.

Alteration, extension, reconstruction, or repair of nonconforming structure or structure devoted to nonconforming use as violation of zoning ordinance, 63 ALR4th 275.

Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 ALR4th 638.

“Guilty but mentally ill” statutes: validity and construction, 71 ALR4th 702.

Nonconsensual treatment of involuntarily committed mentally ill persons with neuroleptic or antipsychotic drugs as violative of state constitutional guaranty, 74 ALR4th 1099.

Validity, construction, and effect of juvenile curfew regulations, 83 ALR4th 1056.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 ALR4th 931.

Parent’s child support liability as affected by other parent’s fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 ALR5th 337.

Propriety of telephone testimony or hearings in prison proceedings, 9 ALR5th 451.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee, 20 ALR5th 229.

Activities in preparation for building as establishing valid nonconforming use or vested right to engage in construction for intended use, 38 ALR5th 737.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 ALR5th 423.

Availability and scope of punitive damages under state employment discrimination law, 81 ALR5th 367.

Failure of state prosecutor to disclose exculpatory photographic evidence as violating due process, 93 ALR5th 527.

Failure of state prosecutor to disclose fingerprint evidence as violating due process, 94 ALR5th 393.

Constitutionality of state statutes banning distribution of sexual devices, 94 ALR5th 497.

Failure of state prosecutor to disclose exculpatory ballistic evidence as violating due process, 95 ALR5th 611.

Failure of state prosecutor to disclose exculpatory medical reports and tests as violating due process, 101 ALR5th 187.

Failure of state prosecutor to disclose pretrial statement made by crime victim as violating due process, 102 ALR5th 327.

Federal constitutional right to bear arms, 37 ALR Fed. 696.

Constitutionality of regulation or policy governing prayer, meditation, or “moment of silence” in public schools, 110 ALR Fed. 211.

Substitution, under Rule 24c of Federal Rules of Criminal Procedure, of alternate juror for regular juror before jury retires to consider verdict in federal criminal case, 115 ALR Fed. 381.

Construction and application of 18 USCS § 922(e), prohibiting delivery of firearms to common carrier, 125 ALR Fed. 613.

Equal protection and due process clause challenges based on racial discrimination — Supreme Court cases, 172 ALR Fed. 1.

Equal protection and due process clause challenges based on sex discrimination — Supreme Court cases, 178 ALR Fed. 25.

Voluntary nature of confession as affected by appeal to religious beliefs, 20 ALR6th 479.

Failure of state prosecutor to disclose exculpatory tape recorded evidence as violating due process, 24 ALR6th 1.

What constitutes “custodial interrogation” at hospital by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — suspect injured or taken ill, 25 ALR6th 379.

What constitutes “custodial interrogation” of juvenile by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at police station or sheriff’s office, 26 ALR6th 451.

Application of stigma — plus due process claims to education context, 41 ALR6th 391.

Construction and application of consent-once-removed doctrine, permit-

ting warrantless entry into residence by law enforcement officers for purposes of effectuating arrest or search where confidential informant or undercover officer enters with consent and observes criminal activity or contraband in plain view, 50 ALR6th 1.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — weapons, 53 ALR6th 81.

Failure of state prosecutor to disclose exculpatory physical evidence as violating due process — personal items other than weapons, 55 ALR6th 391.

Paragraph II. Protection to person and property; equal protection.

Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

1976 Constitution. — Art. I, Sec. II, Para. III.

Cross references. — Due process, Ga. Const. 1983, Art. I, Sec. I, Para. I. Taking of private property for public purposes, Ga. Const. 1983, Art. I, Sec. III, Paras. I, II, and Ga. Const. 1983, Art. III, Sec. VI, Para. III. General laws to operate uniformly throughout state, Ga. Const. 1983, Art. III, Sec. VI, Para. IV. Prohibition against discrimination in the extending of credit or the making of loans, T. 7, Ch. 6. Fair housing, § 8-3-200 et seq. Penalty for hiring applicant with criminal record, § 31-7-353. Age discrimination in employment, § 34-1-2. Sex discrimination in employment, T. 34, Ch. 5. Duty of common carriers to receive all passengers whom such carriers are able and accustomed to carry, § 46-9-130.

Law reviews. — For article suggesting county unit system discriminates against classes of voters in violation of equal protection clause, see 14 Ga. B.J. 28 (1951). For article, "Personal Rights, Property Rights and Due Process: A Comparison of Constitutional Protection in the Georgia Supreme Court and the United States Supreme Court," see 9 Mercer L. Rev. 253 (1958). For article suggesting potential problems of discrimination in municipal annexation statutes, see 2 Ga. L. Rev. 35 (1967). For article on the effect on receiving government-issued licenses after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979). For

survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982). For survey article on local government law, see 34 Mercer L. Rev. 225 (1982). For survey article on torts, see 34 Mercer L. Rev. 271 (1982). For annual survey on constitutional law, see 36 Mercer L. Rev. 137 (1984). For article, "The Georgia Bill of Rights: Dead or Alive?," see 34 Emory L.J. 341 (1985). For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986). For article, "Regulating Business Activity by Means of the Substantive Due Process and Equal Protection Doctrines Under the Georgia Constitution: An Analysis and a Proposal," see 3 Ga. St. U.L. Rev. 1 (1987). For article, "Wheel of Fortune: A Critique of the 'Manifest Imbalance' Requirement for Race-Conscious Affirmative Action under Title VII," see 43 Ga. L. Rev. 993 (2009).

For comment on *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969) as to the constitutionality of §§ 15-19-30 through 15-19-34, see 21 Mercer L. Rev. 355 (1969). For comment on *City of Atlanta v. Mapel*, 121 Ga. App. 567, 174 S.E.2d 599 (1970), as to municipal corporation's negligence liability for injuries sustained at municipal golf courses, see 22 Mercer L. Rev. 608 (1971). For comment on *Deal v. Seaboard C.L.R.R.*, 236 Ga. 629, 224 S.E.2d 922 (1976), see 25 Emory L. J. 983 (1976). For comment on *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979), see 31 Mercer L. Rev. 341 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROTECTION OF PROPERTY
EQUAL PROTECTION
CLASSIFICATION
JUDICIAL RELIEF
POLICE POWER
ZONING
TAXATION

General Consideration

This paragraph is a safeguard against the dangers of arbitrary power. *Cutsinger v. City of Atlanta*, 142 Ga. 555, 83 S.E. 263, 1915B L.R.A. 1097, 1916C Ann. Cas. 280 (1914).

Pro se litigant sued government and court officials alleging Georgia’s alimony provisions, O.C.G.A. § 19-6-1 et seq., violated (1) the right to privacy, protections of the equal protection clause, and prohibitions against involuntary servitude, as contained in the U.S. Constitution; and (2) the right to privacy, due process provisions, equal protection provisions, privileges and immunities clause, prohibitions on involuntary servitude, and prohibitions against legislation based on social status, as guaranteed by the Georgia Constitution. However, the federal court determined that plaintiff must raise these constitutional challenges as part of the litigant’s state divorce proceedings, and, furthermore, that Georgia had an important state interest in enforcing these provisions. *Cormier v. Green*, 2005 U.S. App. LEXIS 14034 (11th Cir. July 12, 2005) (Unpublished).

Behavior prescribed by O.C.G.A. § 17-10-30(b) did not involve fundamental right. — Defendants equal protection challenge under U.S. Const., amend. XIV and Ga. Const. 1983, Art. I, Sec. I, Para. II failed since the defendants were similarly situated to the defendants against whom the state sought the death penalty under one or more of the statutory aggravating circumstances as provided in O.C.G.A. § 17-10-30(b). The trial court did not err in refusing to apply strict scrutiny analysis in considering the defendants’ equal protection challenge on the

basis that the punishment prescribed by the criminal statute involves an interference with a fundamental right. The proper inquiry was whether the behavior involved a fundamental right, and the obvious answer was that the behavior did not. *Fair v. State*, 288 Ga. 244, 702 S.E.2d 420 (2010).

O.C.G.A. § 44-13-100(a)(9) is constitutional. — O.C.G.A. § 44-13-100(a)(9) did not violate Ga. Const. 1983, Art. I, Sec. I, Para. II, when the legislature rationally balanced the needs of creditors and bankruptcy debtors in requiring the debtors to sacrifice more of the debtor’s penumbral property in order to obtain greater relief on property more central to a fresh start. *McFarland v. Wallace (In re McFarland)*, 790 F.3d 1182 (11th Cir. 2015).

Cited in *Gordon v. State*, 102 Ga. 673, 29 S.E. 444 (1897); *Davis & Co. v. Morgan*, 117 Ga. 504, 43 S.E. 732, 97 Am. St. R. 171, 61 L.R.A. 148 (1903); *Georgia R.R. & Banking Co. v. Wright*, 125 Ga. 589, 54 S.E. 52 (1906); *Harp v. Fireman’s Fund Ins. Co.*, 130 Ga. 726, 61 S.E. 704, 14 Ann. Cas. 299 (1908); *Henry v. Campbell*, 133 Ga. 882, 67 S.E. 390, 27 L.R.A. (n.s.) 283, 18 Ann. Cas. 178 (1910); *Gray v. McLendon*, 134 Ga. 224, 67 S.E. 859 (1910); *Holton v. City of Camilla*, 134 Ga. 560, 68 S.E. 472, 31 L.R.A. (n.s.) 116, 20 Ann. Cas. 199 (1910); *Cureton v. State*, 135 Ga. 660, 70 S.E. 332, 49 L.R.A. (n.s.) 182 (1911); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781, 35 L.R.A. (n.s.) 583, 1972B Ann. Cas. 1259 (1911); *Smith v. State*, 141 Ga. 482, 81 S.E. 220, 1915C Ann. Cas. 999 (1914); *Cutsinger v. City of Atlanta*, 142 Ga. 555, 83 S.E. 263, 1915B L.R.A. 1097, 1916C Ann. Cas. 280 (1914); *Lehon v. City of Atlanta*, 16 Ga. App. 64, 84 S.E. 608 (1915); *Almand v. Pate*, 143

General Consideration (Cont'd)

Ga. 711, 85 S.E. 909 (1915); *Bunger v. State*, 146 Ga. 672, 92 S.E. 72 (1917); *Davis v. Mayor of Savannah*, 147 Ga. 605, 95 S.E. 6 (1918); *Ty Ty Consol. Sch. Dist. v. Colquitt Lumber Co.*, 153 Ga. 426, 112 S.E. 561 (1922); *Badger v. State*, 154 Ga. 443, 114 S.E. 635 (1922); *Lynch v. State*, 159 Ga. 76, 125 S.E. 70 (1924); *Morgan v. Lowry*, 168 Ga. 723, 149 S.E. 37 (1929); *Greer v. State*, 169 Ga. 552, 150 S.E. 839 (1929); *Butler v. Mobley*, 170 Ga. 265, 152 S.E. 229 (1930); *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930); *Camp v. State*, 171 Ga. 25, 154 S.E. 436 (1930); *Mobley v. Brundage*, 170 Ga. 829, 154 S.E. 452 (1930); *Southern Transf. Co. v. Harrison*, 171 Ga. 358, 155 S.E. 338 (1930); *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930); *Georgia Fertilizer Co. v. Walker*, 171 Ga. 734, 156 S.E. 820 (1931); *F.W. Woolworth Co. v. Harrison*, 172 Ga. 179, 156 S.E. 904 (1931); *Gregory v. Quarles*, 172 Ga. 45, 157 S.E. 306 (1931); *Georgia Hwy. Express v. Harrison*, 172 Ga. 431, 157 S.E. 464 (1931); *Saunders v. State*, 172 Ga. 770, 158 S.E. 791 (1931); *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931); *City of Newnan v. Atlanta Laundries, Inc.*, 174 Ga. 99, 162 S.E. 497 (1932); *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932); *Slater v. Davis*, 174 Ga. 633, 163 S.E. 704 (1932); *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S.E. 708 (1932); *Montgomery & Atlanta Freight Lines v. Georgia Pub. Serv. Comm'n*, 175 Ga. 826, 166 S.E. 200 (1932); *Milliron v. Harrison*, 175 Ga. 764, 166 S.E. 231 (1932); *State Bd. of Barber Exmrs. v. Blocker*, 176 Ga. 125, 167 S.E. 298 (1932); *City of Albany v. Ader*, 176 Ga. 391, 168 S.E. 1 (1933); *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933); *Interstate Co. v. Richardson*, 177 Ga. 9, 169 S.E. 373 (1933); *National Linen Serv. Corp. v. City of Albany*, 177 Ga. 81, 169 S.E. 894 (1933); *Mayor of Savannah v. V.C. Ellington Co.*, 177 Ga. 149, 170 S.E. 38 (1933); *Felton v. Huiet*, 178 Ga. 311, 173 S.E. 660 (1933); *Guerry v. Harrison*, 178 Ga. 669, 173 S.E. 831 (1934); *Simmons v. Newton*, 178 Ga. 806, 174 S.E. 703 (1934); *Standard Oil Co. v. State Revenue Comm'n*, 179 Ga. 371,

176 S.E. 1 (1934); *City of Macon v. Ries*, 179 Ga. 320, 176 S.E. 21 (1934); *Southeastern Elec. Co. v. City of Atlanta*, 179 Ga. 514, 176 S.E. 400 (1934); *Georgia Power Co. v. City of Decatur*, 179 Ga. 471, 176 S.E. 494 (1934); *City of Douglas v. South Ga. Grocery Co.*, 180 Ga. 519, 179 S.E. 768 (1935); *Jones v. City of Atlanta*, 51 Ga. App. 218, 179 S.E. 922 (1935); *Payne v. State*, 180 Ga. 609, 180 S.E. 130 (1935); *DeWell v. Quarles*, 180 Ga. 864, 181 S.E. 159 (1935); *National Linen Serv. Corp. v. City of Gainesville*, 181 Ga. 397, 182 S.E. 610 (1935); *Sosebee v. City of Demorest*, 182 Ga. 338, 185 S.E. 330 (1936); *Snow's Laundry v. City of Dublin*, 182 Ga. 316, 185 S.E. 343 (1936); *Keeney v. State*, 182 Ga. 523, 186 S.E. 561 (1936); *Wright v. Richmond County Dep't of Health*, 182 Ga. 651, 186 S.E. 815 (1936); *Commissioners of Glynn County v. Cate*, 183 Ga. 111, 187 S.E. 636 (1936); *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936); *Gray v. City of Atlanta*, 183 Ga. 730, 189 S.E. 591 (1937); *National Fin. Co. v. Citizens Loan & Sav. Co.*, 184 Ga. 619, 192 S.E. 717 (1937); *Jollie v. Hughes*, 184 Ga. 860, 193 S.E. 769 (1937); *Carmichael v. Atlanta Gaslight Co.*, 185 Ga. 34, 193 S.E. 896 (1937); *Hornsby v. Bristow*, 185 Ga. 577, 196 S.E. 25 (1938); *Gibbs v. Milk Control Bd.*, 185 Ga. 844, 196 S.E. 791 (1938); *Moyers v. State*, 186 Ga. 446, 197 S.E. 846 (1938); *Miller v. Head*, 186 Ga. 694, 198 S.E. 680 (1938); *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938); *Lloyds Am. v. Brown*, 187 Ga. 240, 200 S.E. 292 (1938); *Ard v. City of Macon*, 187 Ga. 127, 200 S.E. 678 (1938); *City of Waycross v. Harrell*, 59 Ga. App. 615, 1 S.E.2d 681 (1939); *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S.E.2d 705 (1939); *Garner v. Wood*, 188 Ga. 463, 4 S.E.2d 137 (1939); *Great Atl. & Pac. Tea Co. v. City of Columbus*, 189 Ga. 458, 6 S.E.2d 320 (1939); *Hardin v. Reynolds*, 189 Ga. 534, 6 S.E.2d 328 (1939); *Independent Gasoline Co. v. Bureau of Unemployment Comp.*, 190 Ga. 613, 10 S.E.2d 58 (1940); *Woodward v. City of Lithonia*, 191 Ga. 234, 11 S.E.2d 476 (1940); *Town of McIntyre v. Scott*, 191 Ga. 473, 12 S.E.2d 883 (1940); *Suttles v. Montgomery*, 193 Ga. 128, 17 S.E.2d 734 (1941); *Speed Oil of Atlanta, Inc. v. City of*

Rome, 193 Ga. 327, 18 S.E.2d 628 (1942); Ingram v. State, 193 Ga. 565, 19 S.E.2d 493 (1942); Huiet v. Dayan, 194 Ga. 250, 21 S.E.2d 423 (1942); DeJarnette v. Hospital Auth., 195 Ga. 189, 23 S.E.2d 716 (1942); Jeffreys-McElrath Mfg. Co. v. Huiet, 196 Ga. 710, 27 S.E.2d 385 (1943); Baskin v. Meadors, 196 Ga. 802, 27 S.E.2d 696 (1943); Steward v. Peerless Furn. Co., 70 Ga. App. 236, 28 S.E.2d 396 (1943); Lee v. City of Atlanta, 197 Ga. 518, 29 S.E.2d 774 (1944); Fowler v. Grimes, 198 Ga. 84, 31 S.E.2d 174 (1944); Ayers v. Franklin County, 199 Ga. 835, 35 S.E.2d 455 (1945); Holman v. Holman, 73 Ga. App. 205, 35 S.E.2d 923 (1945); Parke, Davis & Co. v. City of Atlanta, 200 Ga. 296, 36 S.E.2d 773 (1946); Deaton v. Mayor of Tallapoosa, 200 Ga. 632, 38 S.E.2d 284 (1946); Northwestern Mut. Life Ins. Co. v. Suttles, 201 Ga. 84, 38 S.E.2d 786 (1946); Auld v. Schmelz, 201 Ga. 42, 39 S.E.2d 39 (1946); Reed v. City of Smyrna, 201 Ga. 228, 39 S.E.2d 668 (1946); McWhorter v. Settle, 202 Ga. 334, 43 S.E.2d 247 (1947); Cartersville Candlewick, Inc. v. Huiet, 204 Ga. 609, 50 S.E.2d 647 (1948); Burke v. State, 205 Ga. App. 520, 51 S.E.2d 693 (1949); Murphy v. West, 205 Ga. 116, 52 S.E.2d 600 (1949); Burke v. State, 205 Ga. 520, 54 S.E.2d 348 (1949); Burke v. State, 205 Ga. 656, 54 S.E.2d 350 (1949); Franklin v. Harper, 205 Ga. 779, 55 S.E.2d 221 (1949); Lamons v. Yarbrough, 206 Ga. 50, 55 S.E.2d 551 (1949); Walton v. City of Atlanta, 89 F. Supp. 309 (N.D. Ga. 1949); Redwine v. Southern Co., 206 Ga. 377, 57 S.E.2d 194 (1950); Capitol Distrib. Co. v. Redwine, 206 Ga. 477, 57 S.E.2d 578 (1950); Williams v. State, 206 Ga. 837, 59 S.E.2d 384 (1950); Cole v. Foster, 207 Ga. 416, 61 S.E.2d 814 (1950); McBurnett v. Balkcom, 207 Ga. 452, 62 S.E.2d 180 (1950); Stembridge v. Georgia, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952); Barge v. Camp, 209 Ga. 38, 70 S.E.2d 360 (1952); City of Atlanta v. Wilson, 209 Ga. 527, 74 S.E.2d 455 (1953); Porch v. Foster, 209 Ga. 697, 75 S.E.2d 420 (1953); Gullledge v. Augusta Coach Co., 210 Ga. 377, 80 S.E.2d 274 (1954); City of Atlanta v. Sims, 210 Ga. 605, 82 S.E.2d 130 (1954); Gary v. Johnson, 210 Ga. 686, 82 S.E.2d 651 (1954); Archer v. Johnson, 90 Ga. App. 418, 83 S.E.2d 314 (1954); City of

McCaysville v. Tri-State Elec. Coop., 211 Ga. 5, 83 S.E.2d 598 (1954); Georgia Power Co. v. Georgia Pub. Serv. Comm'n, 211 Ga. 223, 85 S.E.2d 14 (1954); Hutchins v. Howard, 211 Ga. 830, 89 S.E.2d 183 (1955); City of Moultrie v. Colquitt County Rural Elec. Co., 211 Ga. 842, 89 S.E.2d 657 (1955); City of Moultrie v. Burgess, 212 Ga. 22, 90 S.E.2d 1 (1955); Taylor v. Shetzen, 212 Ga. 101, 90 S.E.2d 572 (1955); Cruise v. City of Rome, 94 Ga. App. 373, 94 S.E.2d 617 (1956); Arlington Cem. v. Bindig, 212 Ga. 698, 95 S.E.2d 378 (1956); Hill v. Balkcom, 213 Ga. 58, 96 S.E.2d 589 (1957); Yancey v. State, 98 Ga. App. 797, 107 S.E.2d 265 (1959); Garland v. Tanksley, 99 Ga. App. 201, 107 S.E.2d 866 (1959); Ammons v. Central of Ga. Ry., 215 Ga. 758, 113 S.E.2d 438 (1960); Pasley v. State, 215 Ga. 768, 113 S.E.2d 454 (1960); Buchanan v. State, 215 Ga. 791, 113 S.E.2d 609 (1960); Josey v. State, 102 Ga. App. 707, 117 S.E.2d 641 (1960); Porter v. Watkins, 217 Ga. 73, 121 S.E.2d 120 (1961); Williams v. State, 217 Ga. 312, 122 S.E.2d 229 (1961); Cason v. State, 217 Ga. 339, 122 S.E.2d 232 (1961); Jones v. Mayor of Athens, 105 Ga. App. 86, 123 S.E.2d 420 (1961); Hill v. Busbia, 217 Ga. 781, 125 S.E.2d 34 (1962); Bennett v. George, 105 Ga. App. 527, 125 S.E.2d 122 (1962); Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962); Civils v. Fulton County, 218 Ga. 705, 130 S.E.2d 220 (1963); Harper Motor Lines v. Roling, 218 Ga. 812, 130 S.E.2d 817 (1963); Ferguson v. State, 219 Ga. 33, 131 S.E.2d 538 (1963); Pistor v. State, 219 Ga. 161, 132 S.E.2d 183 (1963); First Nat'l Bank v. State Hwy. Dep't, 219 Ga. 144, 132 S.E.2d 263 (1963); Pugh v. State, 219 Ga. 166, 132 S.E.2d 203 (1963); Coffee v. State, 219 Ga. 328, 133 S.E.2d 590 (1963); Metcalfe v. City of Decatur, 220 Ga. 160, 137 S.E.2d 659 (1964); Henson v. Georgia Indus. Realty Co., 220 Ga. 857, 142 S.E.2d 219 (1965); Shirley v. City of Commerce, 220 Ga. 896, 142 S.E.2d 784 (1965); Hornstein v. Lovett, 221 Ga. 279, 144 S.E.2d 378 (1965); Champion Papers, Inc. v. Williams, 221 Ga. 345, 144 S.E.2d 514 (1965); Stinson v. Manning, 221 Ga. 487, 145 S.E.2d 541 (1965); Kingsberry Homes Corp. v. Gwinnett County, 248 F. Supp. 765 (N.D. Ga. 1965); Massey v. State, 222

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Ga. 143, 149 S.E.2d 118 (1966); McLennan v. Undercofler, 222 Ga. 302, 149 S.E.2d 705 (1966); Ingram v. Payton, 222 Ga. 503, 150 S.E.2d 825 (1966); Givens v. Dutton, 222 Ga. 756, 152 S.E.2d 358 (1966); Undercofler v. Seaboard Air Line R.R., 222 Ga. 822, 152 S.E.2d 878 (1966); Berta v. State, 223 Ga. 267, 154 S.E.2d 594 (1967); Hughes v. Reynolds, 223 Ga. 727, 157 S.E.2d 746 (1967); Southern Ry. v. Overnite Transp. Co., 223 Ga. 825, 158 S.E.2d 387 (1967); O'Quinn v. Ellis, 224 Ga. 328, 161 S.E.2d 832 (1968); Pharr Rd. Inv. Co. v. City of Atlanta, 224 Ga. 403, 162 S.E.2d 333 (1968); National Factor & Inv. Corp. v. State Bank, 224 Ga. 535, 163 S.E.2d 817 (1968); Bugden v. Bugden, 225 Ga. 413, 169 S.E.2d 337 (1969); Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969); Pye v. State Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970); Bradfield v. Hospital Auth., 226 Ga. 575, 176 S.E.2d 92 (1970); Lane v. Morrison, 227 Ga. 468, 181 S.E.2d 339 (1971); Alexander v. State, 228 Ga. 179, 184 S.E.2d 450 (1971); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971); Hart v. Columbus, 125 Ga. App. 625, 188 S.E.2d 422 (1972); Camp v. Metropolitan Atlanta Rapid Transit Auth., 229 Ga. 35, 189 S.E.2d 56 (1972); Blackmon v. Cobb County-Marietta Water Auth., 126 Ga. App. 459, 191 S.E.2d 128 (1972); White v. State, 230 Ga. 327, 196 S.E.2d 849, appeal dismissed, 414 U.S. 886, 94 S. Ct. 222, 38 L. Ed. 2d 134 (1973); Breaux v. State, 230 Ga. 506, 197 S.E.2d 695 (1973); Nathan v. Smith, 230 Ga. 612, 198 S.E.2d 509 (1973); Cunningham v. State, 232 Ga. 416, 207 S.E.2d 48 (1974); Spalding County v. East Enters., Inc., 232 Ga. 887, 209 S.E.2d 215 (1974); Coleman v. GMC, 386 F. Supp. 87 (N.D. Ga. 1974); Brownlee v. Williams, 233 Ga. 548, 212 S.E.2d 359 (1975); Rutledge v. Gaylord's, Inc., 233 Ga. 694, 213 S.E.2d 626 (1975); Doran v. Home Mart Bldg. Ctrs., Inc., 233 Ga. 705, 213 S.E.2d 825 (1975); Pace v. City of Atlanta, 135 Ga. App. 399, 218 S.E.2d 128 (1975); Tucker Door & Trim Corp. v. Fifteenth St. Co., 235 Ga. 727, 221 S.E.2d 433 (1975); Busbee v. Georgia Conference, Am. Ass'n of Univ. Professors, 235 Ga. 752, 221 S.E.2d 437 (1975); Thompson

v. Municipal Elec. Auth., 238 Ga. 19, 231 S.E.2d 720 (1976); Boynton v. Carswell, 238 Ga. 417, 233 S.E.2d 185 (1977); Bickford v. Nolen, 142 Ga. App. 256, 235 S.E.2d 743 (1977); Meeks v. State, 142 Ga. App. 452, 236 S.E.2d 119 (1977); Dunn v. State, 239 Ga. 537, 238 S.E.2d 77 (1977); Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc., 240 Ga. 743, 242 S.E.2d 69 (1978); Bradley v. Tenneco Oil Co., 146 Ga. App. 161, 245 S.E.2d 862 (1978); Williams v. Byrd, 242 Ga. 80, 247 S.E.2d 874 (1978); Moore v. Georgia Pub. Serv. Comm'n, 242 Ga. 182, 249 S.E.2d 549 (1978); Lott Inv. Corp. v. Gerbing, 242 Ga. 90, 249 S.E.2d 561 (1978); Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404 (1979); Delk v. Sellers, 149 Ga. App. 439, 254 S.E.2d 446 (1979); City of Covington v. Newton County, 243 Ga. 476, 254 S.E.2d 855 (1979); Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc., 244 Ga. 800, 262 S.E.2d 106 (1979); Board of Comm'rs v. Cooper, 245 Ga. 251, 264 S.E.2d 193 (1980); Huskins v. State, 245 Ga. 541, 266 S.E.2d 163 (1980); Mingo v. State, 155 Ga. App. 284, 270 S.E.2d 700 (1980); Austin v. McNeese, 156 Ga. App. 533, 275 S.E.2d 79 (1980); State v. Hudson, 247 Ga. 36, 273 S.E.2d 616 (1981); Fluker v. State, 248 Ga. 290, 282 S.E.2d 112 (1981); Barrett v. Carter, 248 Ga. 389, 283 S.E.2d 609 (1981); Carpenter v. State, 250 Ga. 177, 297 S.E.2d 16 (1982); Risdon Enters., Inc. v. Colemill Enters., Inc., 172 Ga. App. 902, 324 S.E.2d 738 (1984); Bowen v. City of Columbus, 256 Ga. 462, 349 S.E.2d 740 (1986); Stegall v. Leader Nat'l Ins. Co., 256 Ga. 765, 353 S.E.2d 484 (1987); Rowe v. Rowe, 195 Ga. App. 493, 393 S.E.2d 750 (1990); Bowman v. Knight, 263 Ga. 222, 430 S.E.2d 582 (1993); Braden v. Bell, 222 Ga. App. 144, 473 S.E.2d 523 (1996); Fulton County Tax Comm'r v. GMC, 234 Ga. App. 459, 507 S.E.2d 772 (1998); Ga. Dep't of Human Res. v. Sweat, 276 Ga. 627, 580 S.E.2d 206 (2003); Golden v. State, 299 Ga. App. 407, 683 S.E.2d 618 (2009); WMW, Inc. v. Am. Honda Motor Co., 291 Ga. 683, 733 S.E.2d 269 (2012).

Protection of Property

Protection of private property. — The Constitution of this state, by repeated

declarations, leaves no room for doubt but that it intends to place around private property the same safeguards with which it shields life and liberty. *Cox v. GE Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955).

The right of the humblest individual in the enjoyment of property must be protected. The power to take private property from the owner for public use often works extreme hardship and savors of oppression. *Williams v. City of La Grange*, 213 Ga. 241, 98 S.E.2d 617 (1957).

If one is granted the liberty to invade another's private property over the objection of the owner, the result is destruction of property without due process. *Clark v. State*, 219 Ga. 680, 135 S.E.2d 270 (1964).

Any invasion of the owner's dominion over the use or sale of the owner's private property, regardless of its degree, is interdicted by this paragraph. *Clark v. State*, 219 Ga. 680, 135 S.E.2d 270 (1964); *Durham v. State*, 219 Ga. 830, 136 S.E.2d 322 (1964).

Deprivation of property is denial of constitutional protection. — Protection of the citizen and the citizen's property is not afforded when courts deprive the citizen of the possession of the citizen's property when the citizen's right thereto has not been forfeited under some rule of law. *Frankel v. Frankel*, 212 Ga. 643, 94 S.E.2d 728 (1956).

Right to transact business in a manner not contrary to public health, safety, morals, or public policy is a protected constitutional right and must be preserved to the citizens without discrimination. *Hughes v. Reynolds*, 223 Ga. 727, 157 S.E.2d 746 (1967).

Right to use property for business purpose. — In the absence of valid zoning regulations or restrictive covenants to the contrary, the right to use one's property for a lawful business purpose is a right inherent in the ownership of the property, and is protected by the law. *Sikes v. Pierce*, 212 Ga. 567, 94 S.E.2d 427 (1956).

Right to sell property. — The unshackled right to sell one's own property for a lawful use is within itself property protected by the Constitution and is beyond the reach of legislative impairment. *Gray v. Georgia Real Estate Comm'n*, 209

Ga. 301, 71 S.E.2d 645 (1952).

Billboard restrictions. — Denial of permission to a landowner to raise a billboard following reconstruction of a highway which reduced visibility of the billboard to traffic was not a denial of equal protection since the landowner failed to show that the landowner received treatment dissimilar to others similarly situated. *Moreton Rolleston, Jr. Living Trust v. DOT*, 242 Ga. App. 835, 531 S.E.2d 719 (2000).

Protection applies to children. — See *In re G.L.H.*, 209 Ga. App. 146, 433 S.E.2d 357 (1993).

This constitutional right of protection extends equally to children as well as adults. *In re S.H.*, 204 Ga. App. 135, 418 S.E.2d 454 (1992).

Public office is not property within the sense of constitutional guaranties. *Walton v. Davis*, 188 Ga. 56, 2 S.E.2d 603 (1939).

A licensee facing the possibility of the loss of a license/livelihood must be allowed access to information held by the board that is exculpatory in order for the application of O.C.G.A. §§ 43-1-19(h)(2) and 43-34-37(d) to reach a constitutional result. *Wills v. Composite State Bd. of Medical Exmrs.*, 259 Ga. 549, 384 S.E.2d 636 (1989).

Legislative control of statutory remedies. — Whatever legal remedies holders of security deeds have are given by virtue of statutes, and these remedies are subject to legislative control. Once given, they are subject to subsequent change when they do not violate vested rights. *Hill v. Perkins*, 218 Ga. 354, 127 S.E.2d 909 (1962).

Equal Protection

State and federal provisions are substantially equivalent. — This paragraph guarantees equal protection of the laws. *Georgia R.R. & Banking Co. v. Wright*, 125 Ga. 589, 54 S.E. 52 (1906), rev'd on other grounds, 207 U.S. 127, 28 S. Ct. 47, 52 L. Ed. 134 (1907); *Atlantic Coast Line R.R. v. State*, 135 Ga. 545, 69 S.E. 725, 32 L.R.A. (n.s.) 20 (1910), aff'd, 234 U.S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914), aff'd, 234 U.S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914).

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This paragraph is the equivalent of a declaration that no person shall be denied the equal protection of the laws. *Hobbs v. New England Ins. Co.*, 93 Ga. App. 687, 92 S.E.2d 636 (1956); *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964); *Dansby v. Dansby*, 222 Ga. 118, 149 S.E.2d 252 (1966).

"Equal protection" provisions of Georgia Constitution, though employing different phraseology than U.S. Const., amend. 14, are substantially equivalent of equal protection of the laws under the United States Constitution.

The equal protection clause of the Georgia Constitution is "substantially equivalent" to the equal protection clause of the Fourteenth Amendment of the federal constitution. Thus, a female plaintiff must show that she was intentionally discriminated against on the basis of sex in order to recover on her equal protection claim. *Suber v. Bulloch County Bd. of Educ.*, 722 F. Supp. 736 (S.D. Ga. 1989).

The protection of Ga. Const. 1983, Art. I, Sec. I, Para. II and the equal protection clause of the federal constitution are coextensive. *Rucks v. State*, 201 Ga. App. 142, 410 S.E.2d 206 (1991).

The protection of the equal protection clause in the 1983 Georgia Constitution and the United States Constitution is coextensive; yet this court may interpret the equal protection clause in the Georgia Constitution to offer greater rights than the federal equal protection clause as interpreted by the U.S. Supreme Court. *Grissom v. Gleason*, 262 Ga. 374, 418 S.E.2d 27 (1992).

Intent of equal protection. — The equal protection provisions of the state and federal Constitutions are intended to prevent extraordinary benefits or burdens from flowing to any one group. *Bickford v. Nolen*, 240 Ga. 255, 240 S.E.2d 24 (1977).

Trial court erred in finding that a county board of commissioners violated a property owner's equal protection rights by refusing to re-zone the owner's property even though the board re-zoned the property of a landowner just five miles away on the same day it refused to re-zone the property owner's property; the land-

owner and the property owner were not similarly situated property owners, as required for equal protection purposes, because the landowner's property involved the existence of a pre-existing, non-conforming use of property and the property owner's property did not have that same designation. *Rockdale County v. Burdette*, 278 Ga. 755, 604 S.E.2d 820 (2004).

Protection for rights alone. — The equal protection clauses of the federal and state Constitutions protect rights alone, and have no reference to mere concessions or mere privileges which may be bestowed or withheld by the state or municipality at will. *Bunn v. City of Atlanta*, 67 Ga. App. 147, 19 S.E.2d 553, cert. denied, 317 U.S. 666, 63 S. Ct. 73, 87 L. Ed. 535 (1942).

Protection not for privileges. — Discrimination in the grant of favors by the state or municipality is not a denial of the equal protection of the law to those not favored when the privileges may be bestowed or withheld at will. *Bunn v. City of Atlanta*, 67 Ga. App. 147, 19 S.E.2d 553, cert. denied, 317 U.S. 666, 63 S. Ct. 73, 87 L. Ed. 535 (1942).

Equal protection applies to all. — An employer is entitled to the equal and impartial protection of the law just as much as the employer's employee. *Ellis v. Parks*, 212 Ga. 540, 93 S.E.2d 708 (1956).

Like treatment with no arbitrary governmental power. — This constitutional guaranty requires that all persons shall be treated alike under like circumstances and conditions. Our system of government does not allow the exercise of arbitrary power. *Dorsey v. City of Atlanta*, 216 Ga. 778, 119 S.E.2d 553 (1961); *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

So long as the law operates alike on all members of the class, which includes all persons and property similarly situated, it is not subject to any objection that it is special or class legislation. *Blackmon v. Monroe*, 233 Ga. 656, 212 S.E.2d 827 (1975).

Equal protection requires uniformity upon all those coming within a class. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

This paragraph interdicts discrimination in laws. — It demands unifor-

mity and impartiality and hence, forbids discrimination. *Simpson v. State*, 218 Ga. 337, 127 S.E.2d 907 (1962).

Party claiming equal protection violation must be similarly situated. — Landowners were not similarly situated to their neighbors, who had sought and received a permit and license to build a dock in a coastal marshland area, and the landowners failed to show that they would not have been able to build a dock had they so chosen. Therefore, the landowners' equal protection claim arising out of the issuance of the license to their neighbors failed. *Hitch v. Vasarhelyi*, 302 Ga. App. 381, 691 S.E.2d 286 (2010).

Discrimination not shown in composing grand jury array. — Plea in abatement of a defendant's indictment for aggravated assault and other charges arising out of a road rage incident on the ground that the grand jury was not a fair and representative cross-section of the community was properly denied because an alleged disparity between the gender distribution in the county and the gender distribution on the grand jury was not indicative of prima facie discrimination; there was no constitutional guarantee that the grand or petit juries impaneled in a particular case would constitute a representative cross-section of the entire community, and the defendant offered no evidence that gender discrimination occurred with regard to the composition of the grand jury array. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Number of peremptory challenges afforded codefendants not violative of equal protection. — O.C.G.A. § 17-8-4(b), which allows defendants tried jointly 14 peremptory challenges (while O.C.G.A. § 15-12-165 allows a defendant tried alone nine such challenges) does not violate equal protection as there are valid reasons for discriminating between the peremptory challenges of single defendants and codefendants: the avoidance of undue delay and a needless burden on the public. *Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

Differing treatment in similar circumstances is denial of equal protec-

tion. — It is only when laws are applied differently to different persons under the same or similar circumstances that the equal protection of the law is denied. *Franklin v. Mayor of Savannah*, 199 Ga. 426, 34 S.E.2d 506 (1945); *Hughes v. Reynolds*, 223 Ga. 727, 157 S.E.2d 746 (1967); *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Exclusion of one witness pursuant to rule of sequestration did not violate equal protection. — Application of the rule of sequestration to exclude a single witness, the defendant's father, from trial, while allowing the victim's mother to attend the proceedings, notwithstanding that the mother was a witness at trial, did not violate the guarantee of equal protection. *Nicely v. State*, 291 Ga. 788, 733 S.E.2d 715 (2012).

Contract bidding process. — Bidding insurer's summary judgment motion was properly granted as to its equal protection claim against a county as the county did not exercise arbitrary power but acted rationally and reasonably in rejecting all bids across the board after it was discovered that a consultant lacked a counselor's license under O.C.G.A. §§ 33-23-1.1 and 33-23-4; because of the taint to the process, all bids were rejected, no classification was created at all, and all similarly situated persons were treated alike. *Benefit Support, Inc. v. Hall County*, 281 Ga. App. 825, 637 S.E.2d 763 (2006), cert. denied, No. S07C0306, 2007 Ga. LEXIS 214 (Ga. 2007).

Traffic consideration was rational basis for denying conditional use permit. — City's rationale for granting a conditional use permit to a school, but disallowing it to built a 1500-seat football stadium, did not violate the school's equal protection rights, as evidence that the school's proposed stadium would exacerbate an already existing traffic problem in the area was a rational basis for the denial of that part of the permit; moreover, even if the school had shown it was similarly situated with other property owners whose applications were granted, it failed to show that the city's decision was not rationally related to a legitimate government interest. *City of Roswell v.*

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Fellowship Christian Sch., Inc., 281 Ga. 767, 642 S.E.2d 824 (2007).

Although statute providing special benefits may not deny equal protection. — A statute does not deny equal protection merely because certain persons may derive special benefits when all persons within its purview are subject to like conditions. *Hancock v. Board of Tax Assessors*, 226 Ga. 570, 176 S.E.2d 102 (1970).

Seduction statute (O.C.G.A. § 51-1-16), giving parents a cause of action for the seduction of their unmarried daughter, violates the equal protection clause because only men may be civilly liable under the statute. *Franklin v. Hill*, 264 Ga. 302, 444 S.E.2d 778 (1994).

O.C.G.A. § 46-3-204 is constitutional. — One-year statute of limitations under O.C.G.A. § 46-3-204 is constitutional because the statute does not violate the Equal Protection Clause of the Georgia Constitution and is not unconstitutionally vague. *Daniel v. Amicalola Elec. Mbrshp. Corp.*, 289 Ga. 437, 711 S.E.2d 709 (2011).

Use of direct recording electronic equipment does not deny equal protection. — Trial court did not err in granting the Secretary of State, the Governor, and the Georgia State Election Board summary judgment in voters' action challenging the use of direct recording electronic equipment on the ground that it denied the voters equal protection under the equal protection clause of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. II because all Georgia voters had the option of casting an absentee ballot or using the touch screen electronic voting machines on election day, and in deciding to forego the privilege of voting early on a paper ballot, voters assumed the risk of necessarily different procedures if a recount was required; since every Georgia citizen could vote by absentee ballot or by utilizing the touch screen voting system, the voters' contention that there was some state based classification between voters was false. *Favorito v. Handel*, 285 Ga. 795, 684 S.E.2d 257 (2009).

Election districts unconstitutional. — Citizen was successful in the citizen's

42 U.S.C. § 1983 equal protection challenge to the sizes of board of education districts in a county in Georgia; using the one person, one vote principle, the court declared the districts unconstitutional given their unacceptable deviations from the ideal district population size, enjoined further elections using the old districts, and implemented an interim new district map based on the 2000 census results taking care to ensure that the new map also satisfied the requirements of §§ 2 and 5 of the Voting Rights Act, 42 U.S.C. § 1973 et seq. *Markham v. Fulton County Bd. of Registrations & Elections*, 2002 U.S. Dist. LEXIS 27505 (N.D. Ga. May 29, 2002).

Redistricting attempts for school board members. — While voting rights and the right to run for public office are core constitutional rights, an attempted deprivation of constitutional or statutory rights is not the same as an actual deprivation. Furthermore, incurring legal fees to vindicate rights does not itself establish that those rights were violated. Thus, plaintiff, a school board member, pursuing attempted violations of plaintiff's right to run and hold a designated seat in a pre-defined district, could not succeed as an injunction in another lawsuit and failure of preclearance interfered with the implementation of the efforts of defendants, the local voting registrars; since the attempt to deprive plaintiff of plaintiff's constitutional rights did not succeed, neither can plaintiff's lawsuit succeed. *Cook v. Randolph County*, 573 F.3d 1143 (11th Cir. 2009).

Photo identification requirement. — In an action by a political party challenging the 2006 Photo ID Act, amending O.C.G.A. § 21-2-417, the photo ID requirement was not an impermissible qualification on voting in violation of Ga. Const. 1983, Art. I, Sec. I, Para. II because the Act did not deprive any Georgia voter from casting a ballot in any election. *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 707 S.E.2d 67 (2011).

Differing terms of court. — O.C.G.A. §§ 15-6-3(15.1) and 17-7-171 did not combine to deprive a criminal defendant of equal protection of the law by permitting the county of the defendant's adjudication

to operate with only two terms of court, while other similar-sized counties operate with more terms of court. Although defendant may have had to wait months longer for the defendant's trial than similarly situated defendants in other counties, the presumptive validity of the statutes stood. *Henry v. State*, 263 Ga. 417, 434 S.E.2d 469 (1993).

Conflicting rules. — Fact that one rule precludes defendant from commenting on state's failure to produce certain witnesses and another rule permits state to comment on defendant's failure to produce certain witnesses does not violate equal protection, as there is a rational reason for the disparity. *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442, cert. denied, 459 U.S. 1092, 103 S. Ct. 580, 74 L. Ed. 2d 940 (1982), but see, *Morgan v. State*, 267 Ga. 203, 476 S.E.2d 747 (1996).

Nonresident aliens. — O.C.G.A. § 34-9-265, regarding the award of workers' compensation death benefits, clearly discriminates between U.S. and Canadian citizens and residents on the one hand and all other nonresident aliens on the other. However, the discrimination is not an unlawful one. *Barge-Wagener Constr. Co. v. Morales*, 263 Ga. 190, 429 S.E.2d 671 (1993), cert. denied, 510 U.S. 1003, 114 S. Ct. 579, 126 L. Ed. 2d 477 (1993).

Hearing impaired suspects. — Defendant failed to meet the defendant's burden to show that the procedure whereby criminal suspects who are hearing impaired are not interrogated for up to one hour except in the presence of a translator was arbitrary or otherwise not rationally related to a legitimate state interest. *Sisson v. State*, 232 Ga. App. 61, 499 S.E.2d 422 (1998).

Jury pool. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIII for failing to properly pursue an equal protection objection under Ga. Const. 1983, Art. I, Sec. I, Para. II based on the exclusion of African-Americans from the jury and from the pool of available jurors; the only evidence showed that the population of available African-American jurors in the trial court's county was very small, and the defendant did not show that the jury list failed to contain a fair cross section of the

community or that there was purposeful discrimination in the selection of the panel. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

A defendant's Batson challenge was properly denied. The prosecutor stated that one juror had an incarcerated relative, and although the defendant showed that the juror stated that the relationship was not close, the trial court had to decide the credibility of the race-neutral explanation. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

When the prosecutor struck a juror because the prosecutor thought that the juror as an immigrant might apply an improper standard of proof, the trial court properly denied the defendant's Batson challenge. Batson did not extend to national origin; moreover, the prosecutor's other reason for striking the juror, that the juror's child had been charged with a crime, was race-neutral. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

Trial counsel was not ineffective for not using the word "pretextual" in making Batson challenges. Although counsel did not use the word "pretextual," counsel sought to rebut the prosecutor's explanations by arguing either that the strike was not race-neutral or that, considering the totality of the jury's responses to questions on voir dire examination, there was no factual basis for the strike. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

Peremptory striking of all black prospective jurors in a case is not per se a denial of equal protection, but presumption protecting prosecutor may well be overcome by proof of systematic exclusion of black jurors by use of peremptory challenges by district attorney resulting in no Negroes ever serving on petit juries in that circuit. *Blackwell v. State*, 248 Ga. 138, 281 S.E.2d 599 (1981).

Use of peremptory strikes to exclude white males. — Despite defendant's ostensibly race-neutral reason for a single contested peremptory strike, after failing to express any reason why the juror's friendship with a district attorney was case-related, and the record failed to indicate that defendant did not challenge at least one other juror with a friend who

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worked as a prosecutor in the same judicial circuit, upon a showing by the state of a prima facie case of racial discrimination by virtue of defendant's use of all of defendant's peremptory strikes to remove whites from the jury, the trial court's finding that defendant's reliance on non-racial explanations to defend the strike was implausible and a mere pretext to disguise discrimination against white males was not clearly erroneous. *Allen v. State*, 280 Ga. 678, 631 S.E.2d 699 (2006).

While the trial court found that the state established a prima facie case of defendant's use of racial discrimination in using peremptory challenges, asked defense counsel to explain the basis for each of the strikes, and listened to rebuttal by the prosecuting attorney, based on the assumption that defense counsel had used the peremptory strikes to remove all white males from the venire, the court erred by not applying the three-step Batson/McCollum process in disallowing defendant's exercise of peremptory strikes against jurors 5, 7, and 10 and by ordering those panel members reseated. *Moon v. State*, 280 Ga. App. 84, 633 S.E.2d 418 (2006).

Use of peremptory strikes to exclude minorities. — Trial court did not err in denying the Batson claim raised by defendant in a rape case after the state used two peremptory strikes to strike two African-American jurors; defendant did not carry the burden of proving that the state engaged in purposeful discrimination and, thus, did not show that the jury selection in defendant's case violated defendant's equal protection rights. *Walker v. State*, 270 Ga. App. 733, 607 S.E.2d 912 (2004).

Trial court erred in ruling that defendants had not shown discriminatory intent and in overruling their Batson challenge because the prosecutor's own explanation established that a discriminatory purpose was involved in the decision; the prosecutor stated that the juror was struck because the juror was black and had a black son in an interracial marriage. *McCastle v. State*, 276 Ga. App. 218, 622 S.E.2d 896 (2005).

Reasons given by a prosecutor for striking three jurors were sufficiently race neutral to withstand the defendant's Batson challenge, and the trial court did not clearly err in denying the Batson challenge, since the prosecutor explained that the prosecutor struck the first juror because that juror was quite young, had no world experience, the prosecutor had no rapport with the juror, and the juror worked as a police cadet, that the prosecutor struck the second juror because the juror was an extremely young, recent high school graduate, with no job, that the prosecutor could not establish a rapport with this juror, and that the juror had no life experience to give the juror a framework in which to fit the alleged crime, and that the prosecutor struck the third juror because, based on the juror's statements, the prosecutor was concerned that this juror would rely on "karmic justice," instead of making a decision based on the evidence. *Mayes v. State*, 279 Ga. App. 499, 631 S.E.2d 724 (2006).

Upon appellate review of an order denying defendant's Batson challenge, the appeals court found that after considering that the ratio of African-American jurors to white jurors exceeded the ratio of potential African-American jurors to potential white jurors, defendant failed to make out a prima facie showing of racial discrimination in jury selection. *Goldberg v. State*, 280 Ga. App. 600, 634 S.E.2d 419 (2006), *aff'd*, 282 Ga. 542, 651 S.E.2d 667 (2007).

While the defendant made out a prima facie case of racial discrimination regarding the state's use of three peremptory strikes, because sufficient race-neutral reasons existed for those strikes, the defendant's rights were not violated. *LeMon v. State*, 290 Ga. App. 527, 660 S.E.2d 11 (2008).

State provided sufficient race-neutral reasons for using nine of the state's 10 peremptory strikes against non-white prospective jurors, including that one stricken prospective juror worked for a group home with boys about the defendant's age, one had multiple conflicts with the criminal justice system, and one had been falsely accused of a crime but acted in self-defense, the same legal theory ad-

vanced by the defendant. *Stacey v. State*, 292 Ga. 838, 741 S.E.2d 881 (2013).

Use of peremptory strikes to exclude unmarried jurors. — Defendant made a prima facie showing of race and gender discrimination in use of peremptory challenges; the prosecutor presented a race and gender neutral explanation, in accordance with Ga. Const. 1983, Art. I, Sec. I, Para. II, by stating that defendant struck every unmarried juror in the jury pool because the prosecutor thought that family-oriented jurors might have been more likely to convict defendant of domestic violence related offenses. *Floyd v. State*, 281 Ga. App. 72, 635 S.E.2d 366 (2006), cert. denied, 2007 Ga. LEXIS 86 (Ga. 2007), 552 U.S. 840, 128 S. Ct. 80, 169 L.Ed.2d 62 (2007).

Use of peremptory strikes to exclude minorities and females. — Claim by a defendant, an African-American woman, that the prosecutor violated *Batson* by striking potential jurors based on race and gender, failed. The prosecutor's explanations for the strikes were race and gender neutral because the strikes were not based on a characteristic that was peculiar to any race or on a stereotypical belief, the reasons proffered were specific and related to the case, and three African-Americans and seven women were chosen to serve on the jury. *McKenzie v. State*, 294 Ga. App. 376, 670 S.E.2d 158 (2008).

Death penalty statutes not racially discriminatory. — Petitioner, a death row inmate, challenged the imposition of the death penalty in a federal habeas petition, arguing that the death penalty was being administered in a racially discriminatory manner; however, the argument failed because the statistical evidence was not so strong as to permit no inference other than that the results were the product of a racially discriminatory intent or purpose in that the death penalty was sought in 58 percent of the possible death penalty cases when the defendant was black but in only 40 percent of the cases when the defendant was white, and sought in only 25 percent of the cases when the victim was black and 54 percent of the cases when the victim was white. *Jefferson v. Terry*, 490 F. Supp. 2d 1261

(N.D. Ga. 2007), aff'd in part and rev'd in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

O.C.G.A. § 17-10-30(b)(8) bears a rational relationship to the legitimate state purposes of providing deterrence of possible harm to peace officers and, thus, of protecting officers. Accordingly, the statutory aggravating circumstance does not violate equal protection under U.S. Const., amend. XIV or Ga. Const. 1983, Art. I, Sec. I, Para. II. *Fair v. State*, 288 Ga. 244, 702 S.E.2d 420 (2010).

Court not required to appoint state-paid psychiatrist for defendant filing special plea of insanity. — Trial court is under no constitutional or statutory duty to appoint a state-paid psychiatrist to evaluate a defendant even though a special plea of insanity has been filed. *Blankenship v. State*, 247 Ga. 590, 277 S.E.2d 505 (1981), overruled on other grounds, *Thompson v. State*, 263 Ga. 23, 426 S.E.2d 895 (1993) and, overruled on other grounds, *McClellan v. State*, 274 Ga. 819, 561 S.E.2d 82 (2002).

Private corporation may attack state statute on due process and equal protection grounds. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982).

A hospital authority has standing by statute to attack state law on grounds that it violates due process and equal protection clauses of Georgia Constitution. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982).

Separate classification and treatment of architects, engineers, and contractors by O.C.G.A. § 9-3-51 from owners, tenants, and manufacturers is reasonable and not arbitrary. *Mullis v. Southern Co. Servs.*, 250 Ga. 90, 296 S.E.2d 579 (1982).

Specialty training for physicians. — Public hospital bylaw requiring specific postgraduate specialty training or residency in order for physicians to be eligible for admission to the medical staff did not transgress the equal protection or due process rights of osteopathic physicians. *Silverstein v. Gwinnett Hosp. Auth.*, 861 F.2d 1560 (11th Cir. 1988).

Public hospital bylaws excluding osteopathic physicians, who have not com-

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pleted allopathic postgraduate training, from the medical staff do not violate the equal protection clause if the bylaws are rationally related to differences in osteopathic and allopathic training and promote a legitimate state interest in promoting quality health care. *Silverstein v. Gwinnett Hosp. Auth.*, 672 F. Supp. 1444 (N.D. Ga. 1987), *aff'd*, 861 F.2d 1560 (11th Cir. 1988).

Grant of official immunity to state employee providing medical services.

— Grant of official immunity from a malpractice suit to a state-employed doctor based on the patient's status as a Medicaid patient did not violate the constitutional rights of the patient's parents, as the due process and equal protection clauses of the U.S. and Georgia Constitutions protected only rights, and a waiver of sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., was merely a privilege. *Porter v. Guill*, 298 Ga. App. 782, 681 S.E.2d 230 (2009).

Plumbers. — O.C.G.A. § 43-14-8 is unconstitutional insofar as it denies to formerly locally licensed plumbers the rights extended to formerly state-licensed plumbers by § 43-14-8. *Waller v. State Constr. Indus. Licensing Bd.*, 250 Ga. 529, 299 S.E.2d 554 (1983) (decided prior to 1983 amendment of O.C.G.A. § 43-14-8).

Arbitration of attorney fee disputes. — Neither State Bar Rule 6-303(a) nor Rule 6-502 violate the state and federal constitutional rights to equal protection as the interest of a state in regulating the legal profession and attorney-client relationship is a "compelling" one. *Nodvin v. State Bar*, 273 Ga. 559, 544 S.E.2d 142 (2001).

Punitive damages law. — Paragraph (e)(2) of O.C.G.A. § 51-12-5.1, requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury, does not violate the equal protection clauses of the United States and Georgia Constitutions. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993); *State v. Moseley*, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128

L. Ed. 2d 663 (1994).

Allocation of a portion of the fines and forfeitures collected in this state to the Peace Officers' Annuity and Benefit Fund is not a violation of this paragraph because of the possibility that peace officers will institute prosecutions for the sole purpose of building the fund, as public officers are presumed to do their duty. *Cole v. Foster*, 207 Ga. 416, 61 S.E.2d 814 (1950).

Employees' equal protection challenge to the reduction in their retirement benefits was belied by evidence that an age reduction factor was applied to employees retiring both before and after July 1, 1998. *Alverson v. Employees' Ret. Sys.*, 272 Ga. App. 389, 613 S.E.2d 119 (2005).

Unconstitutionality of wrongful death provisions. — Because the rights of children whose mothers had been wrongfully killed were protected by former O.C.G.A. § 51-4-3 in ways in which the rights of children whose fathers had been wrongfully killed were not protected, O.C.G.A. § 51-4-2 deprived children of deceased fathers who left widows equal protection of the law in violation of Ga. Const. 1983, Art. I, Sec. I, Para. II. Henceforth, children of deceased fathers who left widows were to be afforded rights afforded children under former O.C.G.A. § 51-4-3. *Tolbert v. Murrell*, 253 Ga. 566, 322 S.E.2d 487 (1984).

Classification of minors in statute of limitations. — The 1987 amendment to O.C.G.A. § 9-3-73 which altered tolling provisions otherwise applicable to tort claims by injured minors in cases in which tort claims arose from health care professionals' malpractice, did not violate a brain-damaged child's right to equal protection or right of access to the courts. *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 423 S.E.2d 235 (1992).

Disparate treatment of individual and corporate insureds under paragraphs (b)(2) and (e) of O.C.G.A. § 33-24-45 is not a violation of equal protection in that it bears a real relation to the object of the legislation, which is to protect unsophisticated and, more likely, unwary insureds by assuring that insurance remains in effect pending written notice of intention not to renew. *Home*

Materials, Inc. v. Auto Owners Ins. Co., 250 Ga. 599, 300 S.E.2d 139 (1983).

Denial of insurance coverage to resident operating vehicle registered out of state constitutional. — This provision is not violated by the denial of the \$45,000 optional no-fault coverage, otherwise available under *Flewellen v. Atlantic Cas. Co.*, 250 Ga. 709, 300 S.E.2d 673 (1983), to a Georgia resident who was injured in the course of employment in Georgia while operating a vehicle licensed outside of the state and insured under a policy issued outside of the state to an out-of-state resident, but that the parties understood would be used and garaged in Georgia. *Doran v. Travelers Indem. Co.*, 254 Ga. 63, 326 S.E.2d 221 (1985).

Statutory scheme providing different procedures for handling service upon foreign and domestic corporations does not deny domestic corporations equal protection under the state and federal Constitutions. *Ticor Constr. Co. v. Brown*, 255 Ga. 547, 340 S.E.2d 923 (1986).

O.C.G.A. § 34-9-285, in authorizing disparate treatment of occupational diseases and other injuries compensable under the Workers' Compensation Act, does not violate constitutional guarantees of equal protection. *Price v. Lithonia Lighting Co.*, 256 Ga. 49, 343 S.E.2d 688 (1986).

Ability to pay court costs. — When the defendant did not claim that the defendant was being treated differently from other individuals similarly situated in regard to O.C.G.A. § 9-15-2, which provides that findings of the court concerning the ability of a party to pay costs shall be final, there was no merit to the defendant's claim that the defendant was suffering discrimination because the defendant was indigent. *Penland v. State*, 256 Ga. 641, 352 S.E.2d 385 (1987).

Charitable immunity doctrine does not constitute a violation of the equal protection or due process clauses of the federal or state constitutions. *Ponder v. Fulton-DeKalb Hosp. Auth.*, 256 Ga. 833, 353 S.E.2d 515, cert. denied, 484 U.S. 863, 108 S. Ct. 181, 98 L. Ed. 2d 134 (1987); *Patterson v. Fulton-DeKalb Hosp. Auth.*, 192 Ga. App. 167, 384 S.E.2d 205 (1989).

Child testimony statute not void. — O.C.G.A. § 24-3-16 is not unconstitutional by allowing the state to bolster the testimony of the victim while denying the same opportunity to the defendant. *Weathersby v. State*, 262 Ga. 126, 414 S.E.2d 200 (1992).

The 1995 amendment of O.C.G.A. § 24-3-16, allowing the admission into evidence of hearsay statements made by a child under the age of 14 years who witnessed an act of physical or sexual abuse inflicted upon another, violates constitutional principles of equal protection. *Woodard v. State*, 269 Ga. 317, 496 S.E.2d 896 (1998).

Juvenile court jurisdiction statute does not violate the separation of powers doctrine of the state constitution, nor does it violate the due process and equal protection provisions of the federal and state constitutions. *Bishop v. State*, 265 Ga. 821, 462 S.E.2d 716 (1995); *Murphy v. State*, 267 Ga. 100, 475 S.E.2d 590 (1996).

Sentencing juvenile as adult. — Juvenile defendant was tried in superior court for murder and conspiracy to commit armed robbery, but was convicted only of the latter charge. The superior court's decision to sentence the defendant as an adult under O.C.G.A. § 15-11-28(b)(2)(A)(i) did not violate the defendant's due process or equal protection rights as the defendant had no constitutional right to be treated as a juvenile. *Pascarella v. State*, 294 Ga. App. 414, 669 S.E.2d 216 (2008), cert. denied, No. S09C0426, 2009 Ga. LEXIS 188 (Ga. 2009).

Reckless conduct statute vague regarding child care. — Because the reckless conduct statute failed to provide defendant with fair notice that the defendant could be held criminally responsible for leaving children in the care of the defendant's older son, it failed to clearly define its prohibitions, rendering it unconstitutionally vague as applied. *Hall v. State*, 268 Ga. 89, 485 S.E.2d 755 (1997).

Immunity granted employers in the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not violate the due process and equal protection provisions of the state and federal Constitutions. *Geor-*

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gia Dep't of Human Resources v. Joseph Campbell Co., 261 Ga. 822, 411 S.E.2d 871 (1992).

Provisions of the Tort Reform Act (O.C.G.A. § 51-12-5.1), relating to punitive damages, violated the due process and equal protection clauses of the federal and state constitutions, violated the excessive fines provisions of both constitutions, and violated the double jeopardy provision of the Fifth Amendment to the federal constitution. McBride v. GMC, 737 F. Supp. 1563 (M.D. Ga. 1990).

Georgia witness competency statutes present a reasonable requirement regarding the minimal level of understanding for people participating in one of the most important functions of government and do not violate the equal protection clause. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989).

State had standing to challenge Georgia witness competency statutes. Ambles v. State, 259 Ga. 406, 383 S.E.2d 555 (1989).

Public officers' malpractice statute not unconstitutional. — O.C.G.A. § 45-11-4, by affording only certain enumerated officials the privilege of appearing before the grand jury prior to indictment for malpractice, does not violate the equal protection clauses of the state and federal Constitutions. State v. Deason, 259 Ga. 183, 378 S.E.2d 120 (1989).

Implied consent statute does not violate the dictates of equal protection set forth in the Georgia and federal Constitutions. Lutz v. State, 274 Ga. 71, 548 S.E.2d 323 (2001).

Municipal affirmative action program providing favored treatment for minority and female-owned business enterprises in the award of city contracts violated the equal protection clause since the city failed to identify the need for a race-conscious program in the awarding of the city's public contracts and the program was not "narrowly tailored" to remedy prior discrimination. American Subcontractors Ass'n v. City of Atlanta, 259 Ga. 14, 376 S.E.2d 662 (1989).

Affirmative action programs. — Because genuine issues of fact existed as to whether the defendants violated the equal

protection clause in connection with the operation of a county's minority and female business enterprise program, they were not entitled to summary judgment as a matter of law as to plaintiff's state equal protection claim. Webster v. Fulton County, 44 F. Supp. 2d 1359 (N.D. Ga. 1999).

Standing to challenge administration of municipal programs. — City employees did not have standing to make equal protection challenges against the administration of retirement incentive programs when the employees retired prior to adoption of the programs or at a time when the administration of a particular program did not affect their rights. Smith v. City of LaGrange, 218 Ga. App. 394, 461 S.E.2d 550 (1995).

Standing to challenge Medicaid reimbursement for medically necessary abortion. — The trial court erroneously dismissed a complaint filed by certain medical providers, alleging violations of the Georgia Constitution on privacy and equal protection grounds, and holding that the medical providers lacked third-party standing to assert a claim on behalf of their Medicaid-eligible patients as: (1) the medical providers properly asserted an injury in fact insofar as they had a direct financial interest in obtaining state funding to reimburse them for the cost of abortion services provided to Medicaid-eligible women, and have alleged that they performed, and will continue to perform, medically necessary abortions for which they will not be reimbursed under Georgia's Medicaid program; and (2) the relationship between the medical providers and their patients made them uniquely qualified to litigate the constitutionality of the state's action interfering with a woman's decision to terminate a pregnancy. Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 651 S.E.2d 36 (2007).

Tractor-trailer length limits. — Enforcement of total length limits, i.e., combination of vehicle and load, for general freight transport that are different from those total length limits enforced as to live poultry transport violates the equal protection clause. State v. Moore, 259 Ga. 139, 376 S.E.2d 877 (1989).

Pay for public officials. — The payment plan for police officers in Columbus, Georgia did not deny the officers equal protection under either U.S. Const., amend. 14 or Ga. Const. 1983, Art. I, Sec. I, Para. II, as there were legitimate government purposes, which satisfied rational basis review, and the pay plan at issue enjoyed a strong presumption of constitutionality; improving the educational quality of the police force was a legitimate government purpose, as was increasing pay for new officers, which was rationally related to the legitimate purpose of recruiting and retaining the best qualified new officers. *Ackerman v. Columbus, Ga.*, 269 F. Supp. 2d 1354 (M.D. Ga. 2003).

Pension funds for county employees. — Court fines and forfeitures were county funds and, thus, the payment of those monies into a court clerk's state retirement plan were contributions made with county funds; the county's determination to exclude the clerk from the county's pension plan, based on the county's decision that it should contribute to each constitutional officer's retirement plan only once, did not violate equal protection, since it was based on a rational distinction between the various constitutional officers, and furthered the legitimate governmental purpose of equalizing the county's pension contributions and fostering financial responsibility in the funding of its retirement plans. *Morgan County Bd. of Comm'rs v. Meador*, 280 Ga. 241, 626 S.E.2d 79 (2006).

Prior service credit for retirement. — Employee Retirement System classification system, providing differing methods of credit for military service based upon the dates and conditions of service, does not violate equal protection rights. *Horton v. State Employee Retirement Sys.*, 262 Ga. 458, 421 S.E.2d 703 (1992).

Review of Department of Natural Resources decisions. — The Georgia Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq., and O.C.G.A. § 12-2-1 govern the procedure for judicial review of final decisions of the Department of Natural Resources; since the party seeking review failed to make a timely request therefor, affirmance of the final decision of the Department violated neither equal

protection nor due process. *Nix v. Long Mtn. Resources, Inc.*, 262 Ga. 506, 422 S.E.2d 195 (1992).

Statute of repose for medical malpractice claims is rationally related to a legitimate legislative attempt to reduce the uncertainties and costs related to malpractice litigation long after the medical services have been rendered and does not violate equal protection guarantees. *Hanflik v. Ratchford*, 848 F. Supp. 1539 (N.D. Ga. 1994), aff'd, 56 F.3d 1391 (11th Cir. 1995).

Statute of repose for medical malpractice suits under O.C.G.A. § 9-3-71(b) did not violate the equal protection clauses of the federal or Georgia Constitutions. There was a rational basis for treating medical malpractice differently from other forms of professional malpractice and for the five-year repose period itself, based on the considerations that uncertainty over the causes of illness and injury made it difficult for insurers to adequately assess premiums and that the passage of time made it more difficult to determine the cause of injury. *Nichols v. Gross*, 282 Ga. 811, 653 S.E.2d 747 (2007).

1994 Sign Ordinance. — The 1994 Sign Ordinance, a comprehensive regulatory framework for the posting of all signs within the City of Atlanta, does not violate equal protection or free speech. *Outdoor Sys. v. City of Atlanta*, 885 F. Supp. 1572 (N.D. Ga. 1995).

Classification of property as part of Airport Noise Abatement Program. — Classifications drawn by a city between single-family and multi-family residences as part of its Airport Noise Abatement Program did not violate constitutional guarantees of equal protection. *City of Atlanta v. Watson*, 267 Ga. 185, 475 S.E.2d 896 (1996).

Mandatory minimum sentences. — O.C.G.A. § 17-10-6.1, imposing mandatory minimum sentences in certain cases, does not violate equal protection because the legislation bears a reasonable relationship to the legitimate legislative concern of deterring crime and ensuring that a court imposed sentence will be served in its entirety. *Campbell v. State*, 268 Ga. 44, 485 S.E.2d 185 (1997).

Equal Protection (Cont'd)**Exclusion from drug court program did not violate equal protection.** —

Defendant was not admitted into a drug court program under O.C.G.A. § 16-13-2(a) not because of the defendant's HIV status, but because the defendant had a mental illness, was under a doctor's supervision, and was taking four prescription medications. As the state's interest in preserving the defendant's health was rationally related to the state's decision to exclude the defendant from the program, there was no equal protection violation. *Evans v. State*, 293 Ga. App. 371, 667 S.E.2d 183 (2008).

AIDS testing of convicts. — O.C.G.A. § 17-10-15(b) does not violate the Fourth Amendment because the government's interest outweighs the individual's and the results are kept confidential and cannot be used against the individual in a criminal prosecution; nor does O.C.G.A. § 17-10-15(b) violate the right to privacy under the due process clause of the Fourteenth Amendment or the state or federal equal protection clauses. *Adams v. State*, 269 Ga. 405, 498 S.E.2d 268 (1998).

Driving under the influence by minor. — O.C.G.A. § 40-6-391(k) (minor driving under the influence) does not violate the right to equal protection under the federal or state constitutions. *Barnett v. State*, 270 Ga. 472, 510 S.E.2d 527 (1999).

Purity requirement of drugs. — O.C.G.A. § 16-13-31(e) did not violate principles of equal protection of the law because the statute contained no purity requirement, as was required for cocaine. Because the legislature was under no duty to treat all drugs and drug offenders the same, the mere fact that cocaine and methamphetamine were both listed as Schedule II controlled substances did not mean that the legislature had to enact identical statutes pertaining to those substances, and the statute treated all those charged with methamphetamine trafficking equally. *Hardin v. State*, 277 Ga. 242, 587 S.E.2d 634 (2003).

Inheritance through out of wedlock children. — O.C.G.A. § 53-2-4(b)(2) creates a gender-based classification in viola-

tion of the equal protection clauses of both the United States and Georgia Constitutions; it provides that a father of a child born out of wedlock cannot inherit from his child if he failed or refused to openly treat the child as his own, but that a mother who acts in the same manner can inherit from the child, and there is no legitimate state interest achieved by not subjecting mothers of illegitimate children to the same standards of conduct. *Rainey v. Chever*, 270 Ga. 519, 510 S.E.2d 823 (1999), cert. denied, 527 U.S. 1044, 119 S. Ct. 2411, 144 L. Ed. 2d 808 (1999).

Deprived children. — Treating deprived children who were placed in the legal custody of the Department of Families and Children Services because there was no relative committed to the child who was available for immediate placement differently from deprived children who did have a committed parent or guardian available for immediate placement did not violate the equal protection clause or Ga. Const. 1983, Art. I, Sec. I, Para. II, as the classes were not similarly situated and the laws were rationally related to the goal of minimizing government intervention while ensuring that children were reared in a familial environment. *In the Interest of A.N.*, 281 Ga. 58, 636 S.E.2d 496 (2006).

Action for termination of parental rights. — By not raising the issue below, a mother in a termination of parental rights case waived her arguments that the trial court violated equal protection and due process by not determining whether her mental health concerns affected her ability to complete the specific goals in her case plan; moreover, there was uncontradicted evidence that despite her mental health problems, the mother understood the case plan, appreciated its requirements, and could have completed it, but did not do so, and the mother testified that she was able both physically and mentally to care for the child. *In the Interest of H.M.*, 287 Ga. App. 418, 651 S.E.2d 527 (2007).

Parents required to pay part of costs of case plan in deprivation. — In a deprivation proceeding, the department of family and child services did not violate equal protection by requiring the parents to pay part of the costs for services mandated under their caseplan. The depart-

ment was not drawing a distinction between similarly situated parties in that a parent who could afford to contribute financially was not similarly situated to one who could not afford to do so; moreover, even if the parents were similarly situated to others who were not required to pay for a portion of services, the goals served by the contribution requirement of calling for parents to take responsibility for conduct that harmed their children and of increasing the likelihood of success for family reunification represented legitimate governmental purposes. *In the Interest of P.N.*, 291 Ga. App. 512, 662 S.E.2d 287 (2008).

Rational basis for disparate treatment of utility companies. — Trial court properly granted summary judgment to the county, particularly because the telecommunications company did not show its equal protection rights had been violated. Although the telecommunications company argued that the county, through its ordinance, imposed a permit fee on telecommunication companies that it did not charge other utilities, the county was able to show that the telecommunication companies filed for a disproportionately high number of the permits to use the county's rights of way and also that their installations had caused a disproportionately high amount of damages and disruption in the county, which meant there existed a rational basis for imposing permit fees on telecommunication companies, but not on other utilities. *BellSouth Telecomms., Inc. v. Cobb County*, 277 Ga. 314, 588 S.E.2d 704 (2003).

Driving under the influence jury charges. — Equal protection clause was not violated in charging the jury to convict if defendant was under the influence of alcohol to the extent that it was "less safe" for defendant to drive, rather than if defendant was "rendered incapable of driving safely"; the standards were legally equivalent. *Johnson v. State*, 268 Ga. App. 426, 602 S.E.2d 177 (2004).

State conduct is required. — Former employee's claims that the employee was dismissed because of expressive activity, failed under both Georgia's equal protection provisions and freedom of speech guarantees because the former employer

and the two managers, were not state actors or private parties acting under the color of state law. *Johnson v. Shoney's, Inc.*, No. 7:04-CV-68 (HL), 2005 U.S. Dist. LEXIS 18101 (M.D. Ga. Aug. 18, 2005).

Education. — Claim that the equal protection clause imposed an obligation on the state to equalize education opportunities, and that education was a "fundamental right" subject to strict scrutiny has been rejected and a trial court properly dismissed a complaint alleging violations of constitutional rights arising from the closing of an elementary school. *Williams v. State of Ga.*, 277 Ga. App. 850, 627 S.E.2d 891 (2006).

The mere fact that a defendant who pled guilty was treated differently than one who was convicted after trial did not violate the equal protection clause because the defendants were not similarly situated; thus, the defendant's equal protection claim, based on the rule requiring that a motion to withdraw a guilty plea be filed in the same term as that in which the defendant was sentenced, failed. *Smith v. State*, 283 Ga. 376, 659 S.E.2d 380 (2008).

Elementary school orchestra and band teachers' equal protection claims failed because: (1) the school district had a rational basis for treating those teachers and Grades 1 through 3 paraprofessionals differently with regard to which employees would be retained since, inter alia, "teachers" and "paraprofessionals" were treated differently under Georgia law; and (2) the district was not collaterally estopped from defending against the equal protection claims since the district was not subject to offensive, non-mutual collateral estoppel. *Demaree v. Fulton County Sch. Dist.*, No. 12-15900, 2013 U.S. App. LEXIS 6994 (11th Cir. Apr. 8, 2013) (Unpublished).

O.C.G.A. § 20-2-690.1 did not violate equal protection because the defendant failed to show any potential variation in application of the statute without a rational basis and the statute was reasonably related to the legitimate governmental interest of ensuring that children residing in Georgia are afforded the opportunity of an education. *Pitts v. State*, 293 Ga. 511, 748 S.E.2d 426 (2013).

O.C.G.A. § 42-1-12, pertaining to registration of convicted sex offend-

Equal Protection (Cont'd)

ers, does not violate the concept of equal protection under the law. —

Trial court did not err in revoking a convicted sexual offender's probation for failing to register an address change after the offender moved into a motel because the offender failed to establish that the offender was treated differently from a similarly situated nonresident sexual offender entering the state; if O.C.G.A. § 42-1-12(e)(7) applies to a hypothetical nonresident sexual offender, that person must update his or her information within 72 hours of a change of address as required in § 42-1-12(f)(5), and any nonresident sexual offender who is required to register by virtue of the specification of § 42-1-12(e)(7) is equally subject to the requirement that he or she register a new address within 72 hours of changing that address and equally subject to being charged with a violation. *Dunn v. State*, 286 Ga. 238, 686 S.E.2d 772 (2009).

Age classification in criminal statute of limitation tolling provision. —

Supreme Court of Georgia holds that the age classification chosen in the tolling statute of O.C.G.A. § 17-3-2.2 does not violate the Equal Protection clauses of Ga. Const. 1983, Art. I, Sec. I, Para. II, and U.S. Const., amend. XIV. *Harper v. State*, 292 Ga. 557, 738 S.E.2d 584 (2013).

Classification

Three generally accepted standards for determining constitutionality under equal protection provisions

of both United States and state Constitutions: (1) rational relationship test; (2) intermediate level of scrutiny; and (3) strict judicial scrutiny standard. Under the rational relationship test a statutory classification is presumed valid and will comport with constitutional standards as long as it bears a reasonable relationship to a legitimate governmental purpose. Intermediate level of judicial scrutiny requires that the classification be substantially related to an important governmental objective. Under the strict judicial scrutiny standard, which is employed when the classification involves socially stigmatic inequalities, such as

those based on race, the governmental classification will fall unless it demonstrates that the classification is necessarily related to a compelling governmental objective. *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981).

Strict scrutiny test means that classification is not entitled to usual presumption of validity and that the state bears the burden of proving that classification system "has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected less 'drastic means' for effectuating its objectives." *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981).

State has right to classify. — A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933).

The State of Georgia has an inherent, sovereign right to properly classify all businesses carried on within the state's borders. *Harrison v. Hartford Steam Boiler Inspection & Ins. Co.*, 183 Ga. 1, 187 S.E. 648 (1936), rev'd on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

The right of the legislature to make reasonable classifications of persons and things for the purpose of legislation is clearly recognized by all authorities. The mere fact that legislation is based on a classification, and is made to apply to certain persons and not to others, does not affect its validity, if it be so made that all persons subject to its terms are treated alike under like circumstances and conditions. *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939).

Reasonable classification permitted. — The lawmaking power may classify and provide penalties applicable to different classes, so long as the classification is fair and reasonable, and all coming within the same class are treated alike. *Leonard v. American Life & Annuity Co.*, 139 Ga. 274, 77 S.E. 41 (1913); *Commercial Sec. Co. v. Lee*, 148 Ga. 597, 97 S.E. 516 (1918); *Assets Realization Co. v. Lewis*, 150 Ga. 301, 103 S.E. 463 (1920).

The constitutional guaranty of equal protection requires that all persons shall be treated alike under like circumstances and conditions. However, it does not prevent a reasonable classification relating to the purpose of the legislation. *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

Trial court did not err in denying defendant's motion in arrest of judgment, as the indictment filed against defendant arising out of the offense of first-degree homicide by vehicle, which contained a predicate offense making it easier to convict defendant because defendant was under 21-years-old and had a blood alcohol concentration of .02 or more at the time of the accident that killed defendant's passenger, did not violate defendant's equal protection rights under the state and federal constitutions because the predicate offense did not operate to disadvantage a suspect class or interfere with a fundamental right; rather, it was rationally related to the state's legitimate purpose in deterring younger, more inexperienced drivers from drinking and driving. *David v. State*, 261 Ga. App. 468, 583 S.E.2d 135 (2003).

Because the legislative purpose of O.C.G.A. § 51-1-29.5(c) is legitimate, and the classification drawn has some reasonable relation to furthering that purpose, the classification passes constitutional muster, and, although § 51-1-29.5(c) raises the burden of proof in certain cases, it does not deprive one of the right to a jury trial or any other fundamental right. Promoting affordable liability insurance for health care providers and hospitals, and thereby promoting the availability of quality health care services, are legitimate legislative purposes, and it is entirely logical to assume that emergency medical care provided in hospital emergency rooms is different from medical care provided in other settings and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will help achieve those legitimate legislative goals. *Gliemmo v. Cousineau*, 287 Ga. 7, 694 S.E.2d 75 (2010).

When classification is based on rational distinctions. — Under the equal

protection guarantee of the Georgia Constitution, classification in legislation is permitted when the classification is based on rational distinctions, and the basis of the classification bears a direct and real relation to the object or purpose of the legislation. *Cannon v. Georgia Farm Bureau Mut. Ins. Co.*, 240 Ga. 479, 241 S.E.2d 238 (1978); *State Farm Mut. Auto. Ins. Co. v. Five Transp. Co.*, 246 Ga. 447, 271 S.E.2d 844 (1980); *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983).

Classification must have reasonable basis. — The fact that a revenue or tax-raising statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction. *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933).

Municipal ordinances which are intended to regulate lawful occupations and businesses must be reasonable, otherwise they are void. *Bunn v. City of Atlanta*, 67 Ga. App. 147, 19 S.E.2d 553, cert. denied, 317 U.S. 666, 63 S. Ct. 73, 87 L. Ed. 535 (1942).

Classification is permitted, provided it is made upon reasonable basis. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

Classification must relate to object of legislation. — In order to constitutionally classify for legislation, the basis for classification must relate to the object or purpose of the legislation. *City of Atlanta v. Wilson*, 209 Ga. 527, 74 S.E.2d 455 (1953); *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

This paragraph allows classification by legislation only when the basis of such classification bears a direct and real relation to the object or purpose of the legislation, and when thus classified, uniformity upon all those coming within the class satisfies the Constitution. *Simpson v. State*, 218 Ga. 337, 127 S.E.2d 907 (1962).

If the legislative purpose is legitimate and the classification drawn has some reasonable relation to furthering that purpose, the classification passes muster. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974).

Limitation on income benefits in former

Classification (Cont'd)

Code 1933, § 56-3404, as construed by the Supreme Court and the Court of Appeals, established a constitutionally permissible classification reasonably related to the purposes of the no-fault Act. *Leonard v. Preferred Risk Mut. Ins. Co.*, 247 Ga. 574, 277 S.E.2d 675 (1981).

That employee is entitled to benefits based on employment by hospital bears substantial relationship to purpose of Employment Security Law. *Caldwell v. Hospital Auth.*, 248 Ga. 887, 287 S.E.2d 15 (1982).

Any reasonable state of facts will sustain classification. — A classification, even though discriminatory, is not a violation of the equal protection clause of the Fourteenth Amendment if any state of facts reasonably may be conceived that would sustain it. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974); *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975); *State Farm Mut. Auto. Ins. Co. v. Five Transp. Co.*, 246 Ga. 447, 271 S.E.2d 844 (1980).

Arbitrary classification not allowed. — The law recognizes the right and power of a municipal government to make reasonable classifications of subjects for taxation and to make subclassifications of such classes. But it does not permit an arbitrary classification, the basis for which has no reasonable relationship to the purpose for which classification is made. *Elder v. Smith*, 188 Ga. 65, 2 S.E.2d 670 (1939).

An arbitrary classification, when there exists no real difference as concerns the purpose of the legislation, is not allowed and constitutes a violation of the Constitution notwithstanding an arbitrary attempt to classify and then discriminate as between those in the different classifications. *Simpson v. State*, 218 Ga. 337, 127 S.E.2d 907 (1962).

Standard for valid classification. — If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933).

If the legislature has the power to enact

discriminatory legislation, the discrimination is not invalid under the equal protection provision of the Constitution, if not so arbitrary as to be unreasonable and beyond the wide discretion that a legislature may exercise. *Harrison v. Hartford Steam Boiler Inspection & Ins. Co.*, 183 Ga. 1, 187 S.E. 648 (1936), rev'd on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

Classification for taxation. — All that the law requires is that classification of persons who are to be exempt from taxation shall not be arbitrary and unreasonable. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

Uniformity within classes satisfies Constitution. — When a proper basis for classification exists, the law may classify; and uniformity within the classes thus created satisfies the Constitution. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

Imperfect classifications not necessarily violative. — The validity of the state's classifications does not depend upon their absolute correctness nor upon the absence of any under- or over-inclusiveness in the categories drawn. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974).

In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. *State Farm Mut. Auto. Ins. Co. v. Five Transp. Co.*, 246 Ga. 447, 271 S.E.2d 844 (1980).

Mathematical precision not required. — In its regulation of business and industry, the state is not bound to make classifications which are perfectly symmetrical or mathematically precise, so long as the classifications are not arbitrary or unreasonable. *State Farm Mut. Auto. Ins. Co. v. Five Transp. Co.*, 246 Ga. 447, 271 S.E.2d 844 (1980).

If a classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. *State Farm Mut. Auto. Ins. Co. v. Five Transp. Co.*, 246 Ga. 447, 271 S.E.2d 844 (1980).

Court need not agree with soundness of categories. — The court must necessarily agree with the soundness of the distinction maintained by the statutory scheme. If the legislative purpose is legitimate and the classification drawn has some reasonable relation to furthering that purpose, the classification passes muster. *Wilder v. State*, 232 Ga. 404, 207 S.E.2d 38 (1974).

Basis for separate classification of businesses. — A mere difference in the nature or character of two businesses which it is sought to regulate by legislative enactment will not be sufficient to justify separate classification of each business into different classes. But if a business is affected with a great public interest in which all of the citizens of the state are concerned, and injury will result to the general public unless regulatory control is applied, a right of classification arises on behalf of the general public. *Harrison v. Hartford Steam Boiler Inspection & Ins. Co.*, 183 Ga. 1, 187 S.E. 648 (1936), rev'd on other grounds, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937).

Distinction between residents and nonresidents is permissible classification. — An ordinance, which provides that rates for water service shall be higher in territory outside the corporate limits, is not unconstitutional and void as denying equal protection under the federal and state Constitutions. *Barr v. City Council*, 206 Ga. 753, 58 S.E.2d 823 (1950).

When the city has the right under the city's charter to furnish water to resident and nonresident users, and to classify the rates for such service, an ordinance, increasing the rates and fixing rates for nonresident users higher than for resident users, is not violative of the equal protection clauses of the federal and state Constitutions. *Messenheimer v. Windt*, 211 Ga. 575, 87 S.E.2d 402 (1955).

The incest statute's classification on the basis of step-parent and step-child bears a rational relationship to the governmental interest in protecting children and family unity and does not violate equal protection guarantees. *Benton v. State*, 265 Ga. 648, 461 S.E.2d 202 (1995).

Classification of procedural rules by amount in controversy permitted. — Classification by the General Assembly

of procedural rules based upon the amount in controversy does not deny poor persons equal protection of the laws under the Georgia and federal Constitutions. *Sellers v. Home Furnishing Co.*, 235 Ga. 831, 222 S.E.2d 34 (1976).

Population is discriminatory basis for classification. — Population as the sole basis for the attempted classification of counties to be excluded from the privilege of fishing noncommercially on Sunday is discriminatory and repugnant to this paragraph. *McAllister v. State*, 220 Ga. 570, 140 S.E.2d 828 (1965).

Present customers and future customers of a utility do not form discrete classes for purposes of equal protection analysis because customers are a constantly fluctuating group. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

O.C.G.A. § 46-2-26.3 does not create an unconstitutional classification although its application is in fact limited to only one power plant, because it is possible to conclude that the section does not confer a special benefit upon the utility. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

Improper classification found. — Directives which the University System of Georgia's Board of Regents gave the institutions for calculating pay raises resulted in some faculty members being treated unfairly and not receiving the full pay to which they were entitled under their contracts, and violated the equal protection rights of the affected faculty members, as there was no standard delineating what sets of circumstances would authorize the use of each method, and instead conferred upon the institutions uncontrolled discretion in deciding which of the two methods to use in calculating pay; the classification was also defective in that it drew a line between otherwise identical groups without an objective basis for doing so. *Bd. of Regents of the Univ. Sys. v. Rux*, 260 Ga. App. 760, 580 S.E.2d 559 (2003).

DUI cases ineligible for first offender treatment. — O.C.G.A. § 40-6-391(f) did not violate equal protection under the Fourteenth Amendment or Ga. Const. 1983, Art. I, Sec. I, Para. II by

Classification (Cont'd)

excluding driving-under-the-influence offenses from First Offender Act, O.C.G.A. § 42-8-60 et seq., coverage. The defendant did not show the absence of a rational relationship between the state's compelling interest in protecting the public's safety and the classification; the defendant's equal protection argument boiled down to no more than the claim that the legislature made a bad policy judgment about which offenders should be eligible for First Offender Act treatment. *Rhodes v. State*, 283 Ga. 361, 659 S.E.2d 370 (2008).

Judicial Relief

Courts of equity to provide relief. — If by mistake the constitutional protection provided for in this paragraph is denied the citizen, and it is not voluntarily rectified, courts of equity will command its rectification. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

A citizen who has been wronged by an arbitrary or capricious exercise of the power to grant licenses may not be prevented from seeking aid from the courts to protect the citizen. *Jenkins v. Manry*, 216 Ga. 538, 118 S.E.2d 91 (1961).

Consumer has standing to challenge a rate schedule on the ground that the schedule discriminates against the consumer or a class of consumers in violation of the equal protection guarantees of the state and federal Constitutions. *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

Individuals outside affected class lack standing. — When none of the petitioners come within the class of individuals who are alleged to have been discriminated against, those petitioners are not in a position to raise the question of violation of this paragraph. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948).

Municipal corporation may not protest denial of equal protection. — A municipal corporation created by the state for the better ordering of government cannot make the point that a provision of the state law is invalid because it denies to the municipality the equal pro-

tection of the laws. *V.C. Ellington Co. v. City of Macon*, 177 Ga. 541, 170 S.E. 813 (1933).

A county or municipal corporation, created by the legislature, does not have standing to invoke the equal protection clause of the state or federal Constitution in opposition to the legislature. *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978).

Collateral source damages provision unconstitutional. — O.C.G.A. § 51-12-1(b), which authorizes the admission of evidence of collateral sources of recovery available to a plaintiff seeking special damages for tortious injury, violates the provision of Ga. Const. 1983, Art. I, Sec. I, Para. II, which proclaims that the paramount duty of government is the protection of person and property and that the protection shall be impartial and complete. *Denton v. Con-Way S. Express, Inc.*, 261 Ga. 41, 402 S.E.2d 269 (1991).

Police Power

Laws for protection of public permitted. — To be able to prevent the construction or maintenance of fire hazards is as much within the scope of the general powers of a municipality as the building of a school house. *Irwin v. Torbert*, 204 Ga. 111, 49 S.E.2d 70 (1948).

The state in the exercise of its police powers may make, repeal, alter, or modify laws for the protection of the public. *Bailey v. State*, 210 Ga. 52, 77 S.E.2d 511 (1953).

A municipality can, in the exercise of its police power, make reasonable regulations to protect its citizens, including measures designed to preclude the use of water unfit for human consumption or other use. *City of Midway v. Midway Nursing & Convalescent Ctr., Inc.*, 230 Ga. 77, 195 S.E.2d 452 (1973).

Act must bear reasonable relation to public health. — An Act which, considered as a whole, does not bear any reasonable or substantial relation to the public health, safety, or morality, or other phase of the general welfare, is unconstitutional and void as an exercise of the police power. *Bramley v. State*, 187 Ga. 826, 2 S.E.2d 647 (1939).

No power to arbitrarily discriminate. — A municipal government is without power under the “police power” to arbitrarily and without cause discriminate between licensees by revoking one license and not those of others who occupy exactly the same position, since the licensee has something more than a “mere privilege” and is entitled to the equal protection guaranteed by the Constitution. *Mayor of Savannah v. Savannah Distrib. Co.*, 202 Ga. 559, 43 S.E.2d 704 (1947).

State not victim has interest in prosecutions. — Trial court abused the court’s discretion by dismissing charges alleging that the defendant violated state statutes prohibiting affrays, disrupting a public school, and criminal trespass by fighting on school grounds, over the state’s objection, after defense counsel told the court that school officials wanted the charges dismissed. *State v. Perry*, 261 Ga. App. 886, 583 S.E.2d 909 (2003).

Zoning

Power to zone established. — The police power of the state to zone property to prevent its use for certain purposes in the future, as distinguished from the taking or damaging in respect to a use already in existence, is not open to question, and does not require the payment of any compensation. *National Adv. Co. v. State Hwy. Dep’t*, 230 Ga. 119, 195 S.E.2d 895 (1973).

Power to zone limited. — When substantial expenditures are made in the acquisition of property or in preparations for the construction of a building in reliance upon the granting of a permit, vested rights are acquired which cannot be displaced by the passage of a new ordinance. *Clairmont Dev. Co. v. Morgan*, 222 Ga. 255, 149 S.E.2d 489 (1966).

Criteria for valid zoning ordinances. — A zoning ordinance does not offend equal protection if it has some fair and substantial relation to the object of the legislation and furnishes a legitimate ground of differentiation. *Parking Ass’n v. City of Atlanta*, 264 Ga. 764, 450 S.E.2d 200 (1994), cert. denied, 515 U.S. 1116, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995).

Notice and hearing required. — It is a prerequisite to the validity of a municipal ordinance that notice be given and an opportunity for a hearing be accorded to anyone who has an interest or property right in the property which may be affected by the zoning regulation. *Sikes v. Pierce*, 212 Ga. 567, 94 S.E.2d 427 (1956).

A zoning ordinance, in which no language appears providing for hearing and notice of hearing to the property affected thereby, is clearly in contravention of the constitutional requirements of due process, and is therefore unconstitutional and void. *Bell v. Studdard*, 220 Ga. 756, 141 S.E.2d 536 (1965).

Notice by publication of a rezoning hearing is proper and adequate insofar as the requirements of equal protection are concerned. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Exercise of zoning power to be reasonably and fairly done. — Municipalities and counties which have had conferred upon them the power to zone property cannot always at one and the same time enact such a comprehensive scheme of zoning and planning as will particularly describe and embrace every piece of property in the entire area of the county or municipality. When reasonably and fairly done, however, such power may be exercised by the enactment of different ordinances affecting different areas at different times. *Taylor v. Shetzen*, 212 Ga. 101, 90 S.E.2d 572 (1955).

Zoning ordinance which changed rear-yard setback for properties zoned for multi-family use after the date the ordinance was passed but which retained a prior and more restrictive setback requirement for properties zoned prior to that date was arbitrary and unreasonable and, thus, violated the equal protection clauses of the United States and Georgia Constitutions. *Bailey Inv. Co. v. Augusta-Richmond County Bd. of Zoning Appeals*, 256 Ga. 186, 345 S.E.2d 596 (1986).

Detriment to owner by zoning. — In a suit by a property buyer against the county alleging that the zoning was unconstitutional, the trial court erred in

Zoning (Cont'd)

granting summary judgment to the county on the ground that the owner did not prove a significant detriment, because the evidence authorized inferences that the buyer could not feasibly develop the property for residential use under the current agricultural zoning, and that the property only had economic value for residential uses. *Legacy Inv. Group, LLC v. Kenn*, 279 Ga. 778, 621 S.E.2d 453 (2005).

Ordinance banning permit applications if two or more ordinance violations existed. — In a declaratory judgment action brought by a developer against a county seeking to invalidate an ordinance which required denial of the developer's land disturbance permit based on two soil-related ordinance violations existing, the judgment in favor of the developer was upheld on appeal with regard to the developer's claim for damages under 42 U.S.C. § 1983, for alleged violations of the developer's equal protection rights in the county's enforcement of the ordinance. The trial court properly determined that the developer was not required to prove a valid property right with regard to the developer's equal protection challenge; the trial court properly awarded attorney fees to the developer under O.C.G.A. § 13-6-11 as the jury was authorized to award the attorney fees as an element of the damages it awarded on the developer's federal equal protection claim, regardless of whether the developer could prevail on any state law claim for damages; but the trial court erred by failing to address the merits of the developer's petition for a declaratory judgment since the overall enforceability of the ordinance, which was still the law, was not rendered moot by the withdrawal notice. *Fulton County v. Legacy Inv. Group, LLC*, 296 Ga. App. 822, 676 S.E.2d 388 (2009).

Taxation

This paragraph does not affect the right of the legislature to tax occupations and to classify the occupations for taxation. *Williams v. Fears*, 110 Ga. 585, 35 S.E. 699, 50 L.R.A. 685 (1900), *aff'd*, 179 U.S. 270, 21 S. Ct. 128, 45 L. Ed. 186 (1900).

Unequal taxation forbidden. — The discrimination in taxation which the equal protection clause forbids is the failure of the taxing authorities to tax all like property which is subject to taxation equally or to tax the property of one owner and exempt like property belonging to another owner. *Delta Air Lines v. Coleman*, 219 Ga. 12, 131 S.E.2d 768, cert. denied, 375 U.S. 904, 84 S. Ct. 195, 11 L. Ed. 2d 145 (1963).

Unequal benefit did not violate equal protection. — County's approval of a tax assessment of each property in the county in order to pay for medical care for indigent patients did not violate due process and equal protection under U.S. Const., amends. 5 and 14 and under Ga. Const. 1983, Art. I, Sec. I, Paras. I and II even though not all taxpayers benefitted; the question of the benefit to each taxpayer was for the legislature except in extraordinary cases, and the instant case was not extraordinary. *Greene County Bd. of Comm'rs v. Higdon*, 277 Ga. App. 350, 626 S.E.2d 541 (2006).

Meaning of uniform taxation. — The requirement in the Constitution that the rule of taxation shall be uniform means that all kinds of property of the same class not absolutely exempt must be taxed alike, by the same standard of valuation, equally with other taxable property of the same class, and coextensively with the territory to which it applies. *Colvard v. Ridley*, 218 Ga. 490, 128 S.E.2d 732 (1962).

Property valuation by method other than standard method. — The uniformity clause of the state constitution and the equal protection clauses of the state and federal Constitutions were not offended by a county's valuation of a motel by a method other than the standard method for motels, since the motel property was not actually being operated as a motel and there was no income stream from which to calculate room revenue for use with the standard gross income multiplier method. *Coastal Equities, Inc. v. Chatham County Bd. of Tax Assessors*, 201 Ga. App. 571, 411 S.E.2d 540, cert. denied, 201 Ga. App. 903, 411 S.E.2d 540 (1991).

Statute creating special districts for the purpose of implementing a

hotel/motel tax did not violate state and federal constitutional due process and equal protection guarantees. *Youngblood v. State*, 259 Ga. 864, 388 S.E.2d 671 (1990).

County homestead tax exemptions did not violate equal protection. — County homestead exemptions from ad valorem and education taxes did not violate due process or equal protection because they were rationally related to the legitimate government interests of the encouragement of neighborhood preservation, continuity, and stability, and the protection of reliance interest of existing homeowners, and the limits placed on the exemptions were not arbitrary. *Blevins v. Dade County Bd. of Tax Assessors*, 288

Ga. 113, 702 S.E.2d 145 (2010).

Ordinance imposing an occupational tax on attorneys. — City ordinance imposing an occupational tax on attorneys who maintain an office and practice law in the city did not violate constitutional equal protection because the tax paid for a variety of city services that benefited all citizens within the city, including attorneys. It was reasonable for the city to require attorneys with offices inside city limits to help pay for city services from which the attorneys benefit, and all attorneys subject to the ordinance were taxed uniformly. *Moss v. City of Dunwoody*, 293 Ga. 858, 750 S.E.2d 326 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Inconsistent state action is denial of equal protection. — Allowing students who move into fraternity housing to void their university housing contracts while not extending the same privilege to other students is state action which denies equal protection of the laws. 1971 Op. Att’y Gen. No. 71-93.

Unreasonable restriction on police power. — Requiring state personnel to sign waivers of liability for injuries sustained while carrying out their duties of inspection constitutes an unreasonable

restriction on the state’s police power. 1976 Op. Att’y Gen. No. 76-121.

Fulton County’s obligation to accord equal treatment to all superior court judges of the Atlanta Judicial Circuit is applicable to all county funded support services, including staffing (e.g., law clerks, secretaries, court reporters, case managers and the like) and the operating budget required for a superior court judge to properly perform the judge’s constitutional and statutory duties. 2002 Op. Att’y Gen. No. U2002-6.

RESEARCH REFERENCES

Am. Jur. Trials. — Age Discrimination in Employment under ADEA, 75 Am. Jur. Trials 363.

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Constitutionality of regulations as to milk, 18 ALR 235; 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243; 155 ALR 1383.

Constitutionality of statutes restricting right of aliens to bear arms, 34 ALR 63.

Constitutionality of statutes imposing absolute liability on private persons or corporations, irrespective of negligence or breach of a specific statutory duty, for injury to person or property, 53 ALR 875.

Statute regulating banks and trust companies as special or class legislation, or as denying the equal protection of the laws, 111 ALR 140.

Validity, construction, and application of statutes or ordinances relating to inspection of food sold at retail, 127 ALR 322.

Exception of existing buildings or businesses from statute or ordinance enacted in exercise of police or license taxing power, as unconstitutional discrimination, 136 ALR 207.

Racial segregation, 38 ALR2d 1188.

What businesses or establishments fall within state civil rights statute provisions prohibiting discrimination, 87 ALR2d 120.

Preconviction procedure for raising con-

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granting summary judgment to the county on the ground that the owner did not prove a significant detriment, because the evidence authorized inferences that the buyer could not feasibly develop the property for residential use under the current agricultural zoning, and that the property only had economic value for residential uses. *Legacy Inv. Group, LLC v. Kenn*, 279 Ga. 778, 621 S.E.2d 453 (2005).

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Preconviction procedure for raising con-

tention that enforcement of penal statute or law is unconstitutionally discriminatory, 4 ALR3d 404.

Validity of statutes restricting political activities of public officers or employees, 28 ALR3d 717.

Indigency of offender as affecting validity of imprisonment as alternative to payment of fine, 31 ALR3d 926.

Racial discrimination in punishment for crime, 40 ALR3d 227.

Validity and construction of statute or ordinance respecting employment of women in places where intoxicating liquors are sold, 46 ALR3d 369.

Zoning provisions protecting land owners who applied for or received building permit prior to change in zoning, 49 ALR3d 1150.

Discrimination in provision of municipal services or facilities as civil rights violation, 51 ALR3d 950.

Application of state law to sex discrimination in sports, 66 ALR3d 1262.

Mandatory retirement of public officer or employee based on age, 81 ALR3d 811.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions, 85 ALR3d 351.

Statute expressly allowing alimony to wife, but not expressly allowing alimony to husband, as unconstitutional sex discrimination, 85 ALR3d 940.

State laws prohibiting sex discrimination as violated by dress or grooming requirements for customers of establishments serving food or beverages, 89 ALR3d 7.

Validity, construction, and effect of state statutes affording preferential property tax treatment to land used for agricultural purposes, 98 ALR3d 916.

Validity of statutory classifications based on population — tax statutes, 98 ALR3d 1083.

Constitutionality of rape laws limited to protection of females only, 99 ALR3d 129.

Identification of jobseeker by race, religion, national origin, sex, or age, in "Situation Wanted" employment advertising as violation of state civil rights laws, 99 ALR3d 154.

Validity of state statutes restricting right of aliens to bear arms, 28 ALR4th 1096.

Judicial power to order discontinuance of life-sustaining treatment, 48 ALR4th 67.

Validity, construction, and effect of state statutes restricting political activities of public officers or employees, 51 ALR4th 702.

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 ALR4th 1063.

AIDS infection as affecting right to attend public school, 60 ALR4th 15.

"Guilty but mentally ill" statutes: validity and construction, 71 ALR4th 702.

Nonconsensual treatment of involuntarily committed mentally ill persons with neuroleptic or antipsychotic drugs as violative of state constitutional guaranty, 74 ALR4th 1099.

Power of court or other public agency to order medical treatment over parental religious objections for child whose life is not immediately endangered, 21 ALR5th 248.

Voir dire exclusions of men from state trial jury or jury panel — *Post-J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), cases, 88 ALR5th 67.

Federal and state constitutional provisions as prohibiting discrimination in employment on basis of gay, lesbian, or bisexual sexual orientation or conduct, 96 ALR5th 391.

Application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to state death penalty proceedings, 110 ALR5th 1.

Federal and state constitutional provisions and state statutes as prohibiting employment discrimination based on heterosexual conduct or relationship, 123 ALR5th 411.

Class-of-one equal protection claims based upon real estate development, zoning, and planning, 68 ALR6th 229.

When intervention as matter of right is appropriate under Rule 24(a)(2) of Federal Rules of Civil Procedure in civil rights action, 132 ALR Fed. 147.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes — private employment cases, 150 ALR Fed. 1.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes — nonemployment cases, 152 ALR Fed. 1.

What constitutes reverse or majority gender discrimination against males violative of federal constitution or statutes — public employment cases, 153 ALR Fed. 609.

What constitutes reverse sex or gender discrimination against males violative of federal constitution or statutes — nonemployment cases, 166 ALR Fed. 1.

What constitutes reverse or majority race or national origin discrimination violative of federal constitution or statutes — public employment cases, 168 ALR Fed. 1.

Equal protection and due process clause challenges based on racial discrimination — Supreme Court cases, 172 ALR Fed. 1.

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Forcible administration of antipsychotic medication to pretrial detainees — Federal cases, 188 ALR Fed. 285.

Construction and application of constitutional rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) — United States Supreme Court cases, 8 ALR Fed. 2d 547.

Paragraph III. Freedom of conscience.

Each person has the natural and inalienable right to worship God, each according to the dictates of that person's own conscience; and no human authority should, in any case, control or interfere with such right of conscience.

1976 Constitution. — Art. I, Sec. I, Para. II.

Cross references. — Freedom of speech and religion, U.S. Const., amend. 1. Declaration of Sunday as a religious holiday, § 1-4-2. Common day of rest, § 10-1-570 et seq. Interference by courts with management of church, § 14-5-45. Prohibition against exclusion of persons from University of Georgia on account of religious beliefs, § 20-3-65. Freedom from religious discrimination in employment, § 45-19-29. Right of employee of county board of health, county department of family and children services, and other governmental agencies to refuse to accept duty of offering family-planning services on religious grounds, § 49-7-6.

Law reviews. — For article, "Freedoms of the First Amendment in Georgia," see 15 Ga. B.J. 405 (1953). For article, "Religious Liberty Law and the States," see 3 Ga. St. U.L. Rev. 19 (1987).

For note discussing compulsory medical attention in light of constitutional protection of freedom of religion, see 22 Ga. B.J. 558 (1960). For note, "Christmas Carols in School Assemblies May Be Constitutional," see 31 Mercer L. Rev. 627 (1980).

For comment, "I Object: The RLUIPA as a Model for Protecting the Conscience Rights of Religious Objectors to Same-Sex Relationships," see 59 Emory L.J. 259 (2009).

JUDICIAL DECISIONS

Right to adopt, profess, entertain, or advocate any religious views, or to fail or refuse to do so, is unlimited, and cannot be controlled by any law. There is no authority under the system of jurisprudence to alter, modify, or infringe upon this right. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Acts inimical to societal order not allowed. — While there is no power to control what a person may believe about religion or the type of religion the person may adopt or profess, there is a power under the law to limit the person's acts, even though to do such acts may be part of the person's religious belief. The constitu-

tional guarantee of the exercise of religious freedom does not extend to acts which are inimical to the peace, good order, and morals of society. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943); *Ferguson v. City of Moultrie*, 71 Ga. App. 15, 29 S.E.2d 786 (1944).

Right to exercise religious freedom ceases when others' rights transgressed. — A person's right to exercise religious freedom, which may be manifested by acts, ceases when it overlaps and transgresses the rights of others. Everyone's rights must be exercised with due regard to the rights of others. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943); *Ferguson v. City of Moultrie*, 71 Ga. App. 15, 29 S.E.2d 786 (1944); *Anderson v. State*, 84 Ga. App. 259, 65 S.E.2d 848 (1951).

When professed creed not subversive of societal order not concern of government. — So long as professed creed is not subversive of the peace and good order of society, it is not within the province of any department of the government to settle differences in creeds or to determine what ought or ought not to be a fundamental religious belief. *Crosby v. Lee*, 88 Ga. App. 589, 76 S.E.2d 856 (1953).

Questions of faith and practice not concern of court when civil rights not involved. — All questions relating to the faith and practice of the church and of its members belong to the church judicatories, to which the members have voluntarily subjected themselves. When a person becomes a member of a church, the person does so upon the condition of submission to its ecclesiastical jurisdiction, and the person has no right to invoke the supervisory power of a civil court so long as none of the person's civil rights are involved. *Crosby v. Lee*, 88 Ga. App. 589, 76 S.E.2d 856 (1953).

Communications in proceeding for expulsion from church membership privileged. — Communications allegedly defaming plaintiff were privileged when made in the course of proceedings expelling a member from a church. *Crosby v. Lee*, 88 Ga. App. 589, 76 S.E.2d 856 (1953).

Determination of church property rights. — In a dispute over control of

church property, after the trial court found that a genuine issue of material fact existed as to which of the two competing factions represented a majority of the congregation and established a procedure for holding an election to resolve the issue, judgment for the deacons was affirmed since: (1) it appeared that the church meeting may have been manipulated to exclude the deacons and their supporters and that non-members may have been allowed to cast votes, the trial court properly ordered and supervised an election process to determine which faction had majority support of the congregation on the issue of church property; and (2) the trial court did not exceed its authority in violation of Ga. Const. 1983, Art. I, Sec. I, Para. III, as it limited the election procedures to resolving the issue of which faction represented the majority of church members. *Howard v. Johnson*, 264 Ga. App. 660, 592 S.E.2d 93 (2003).

In a dispute over ownership of a church's property and assets, a trial court erred by granting summary judgment to the plaintiffs, who claimed to be the majority of the church's membership, because the record was insufficient to allow the trial court to determine whether the plaintiffs represented a majority of the church. *God's Hope Builders, Inc. v. Mount Zion Baptist Church of Oxford, Georgia, Inc.*, 321 Ga. App. 435, 741 S.E.2d 185 (2013).

Ordinance forbidding use of public address system from vehicle on public streets upheld. — An ordinance forbidding any person, firm, or corporation to operate a loud speaker or public address system from any vehicle on public streets, alleys, or thoroughfares is not an infringement upon the rights of the defendant granted to the defendant by the provisions of the Constitution of the State of Georgia or of the United States. The thoroughfares of cities are maintained by the public and to say that anyone has a constitutional right to use a loud speaker or public address system from any vehicle on these streets seems to overlap and interfere with the constitutional rights of other people. It makes no difference whether the violation is using the loud speaker to broadcast what one terms recorded ser-

mons or using the loud speaker for vending goods or promoting some political candidate or for some other purpose. *Brinkman v. City of Gainesville*, 83 Ga. App. 508, 64 S.E.2d 344 (1951).

Ordinance forbidding sales on certain sidewalks during certain hours reasonable regulation. — A municipal ordinance making it illegal for any person, firm, or corporation to sell or offer for sale any goods, wares, merchandise, pamphlets, magazines, maps, or other articles of value, on any Saturday between the hours of 12 Noon and 9 P.M. on certain congested sidewalks and setting a penalty is a valid and reasonable regulation for public safety and convenience, under the police power of the city. When the plaintiffs seek to enjoin enforcement of the ordinance against them, on the grounds that the magazines sold and offered for sale are devoted to religious subjects, and advocate the adoption of a particular form of religion, the distribution of which is a part of their religious belief, and urge that to prohibit the sale of the magazines would be in violation of their rights of religious freedom under the state and federal Constitutions, it is not error to deny an injunction. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

County commission's invocational practice. — County commission's sectarian invocational practice did not violate the Freedom of Conscience Clause, Ga. Const. 1983, Art. I, Sec. I, Para. III, because county taxpayers and residents failed to persuasively explain how being exposed to prayers with sectarian references interfered with their right of conscience within the meaning of the Georgia Constitution and did not show any government-imposed obstacle to their ability to worship, or not, in a manner that they saw fit. *Bats v. Cobb County*, 410 F. Supp. 2d 1324 (N.D. Ga. 2006), *aff'd*, 547 F.3d 1263 (11th Cir. 2008).

Cited in *Phillips v. Rozar*, 172 Ga. 862, 159 S.E. 245 (1931); *Leoles v. Landers*, 184 Ga. 580, 192 S.E. 218 (1937); *Rose Theater, Inc. v. Lilly*, 185 Ga. 53, 193 S.E. 866 (1937); *Rogers v. Mayor of Atlanta*, 219 Ga. 799, 136 S.E.2d 342 (1964); *City of Smyrna v. Parks*, 240 Ga. 699, 242 S.E.2d 73 (1978); *Brown v. Rooks*, 240 Ga. 674, 242 S.E.2d 128 (1978); *Time Ins. Co. v. Lamar*, 195 Ga. App. 452, 393 S.E.2d 734 (1990); *DOT v. Whitfield*, 233 Ga. App. 747, 505 S.E.2d 247 (1998); *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

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C.J.S. — 16A C.J.S., Constitutional Law, § 855 et seq.

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Constitutional guaranty of freedom of religion as applied to license taxes or regulations, 141 ALR 538; 146 ALR 109; 152 ALR 322.

Power of legislature or school authorities to prescribe and enforce oath of allegiance, salute to flag, or other ritual of a patriotic character, 141 ALR 1030; 147 ALR 698.

Sectarianism in schools, 141 ALR 1144.

Right of school authorities to release pupils during school hours for purpose of

attending religious education classes, 2 ALR2d 1371.

Religious beliefs of parents as defense to prosecution for failure to comply with compulsory education law, 3 ALR2d 1401.

Suspension or expulsion from church or religious society and the remedies therefor, 20 ALR2d 421.

Bible distribution or reading in public schools, 45 ALR2d 742.

Wearing of religious garb by public schoolteachers, 60 ALR2d 300.

Zoning regulations as affecting churches, 74 ALR2d 377; 62 ALR3d 197.

Prayers in public schools, 86 ALR2d 1304.

Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adult, 9 ALR3d 1391.

freedom under the state and federal Constitutions, it is not error to deny an injunction. *Jones v. City of Moultrie*, 196 Ga. 526, 27 S.E.2d 39 (1943).

Civil courts forbidden from determining ecclesiastical issues. — Courts of Georgia are prohibited from determining issues of expulsion of members, pastors, and the internal procedures of a religious entity. *United Baptist Church, Inc. v. Holmes*, 232 Ga. App. 253, 500 S.E.2d 653 (1998).

Trial court did not involve itself in ecclesiastical matters in church property dispute case. — A trial court did not violate the principle of separation of church and state by exercising jurisdiction in a civil case brought by a church and its board of deacons against the pastor and others to have the pastor removed and to have the pastor relinquish control of the church's property because the trial court did not involve itself in ecclesiastical matters when it ordered that persons eligible to vote on whether to retain or discharge the pastor were limited to those in membership with the church under the church's existing bylaws. Further, because the petition in the case involved a dispute over the control of church property, it presented a civil matter over which the trial court had jurisdiction. *Smith v. Mount Salem Missionary Baptist Church*, 289 Ga. App. 578, 657 S.E.2d 642 (2008).

Depiction of ten commandments on seal not violation. — Court's seal used to authenticate legal documents did not violate the establishment clause when it depicted the ten commandments with a sword on a relatively small and discreet seal and the text of the ten commandments did not appear. *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003).

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OPINIONS OF THE ATTORNEY GENERAL

Statutory provisions deemed constitutional. — The "respect for the creator" portion of the character education program authorized by O.C.G.A. § 20-2-145 and the provision of O.C.G.A.

§ 50-3-4.1 allowing display of the motto "In God We Trust" in public do not violate the separation of church and state provisions of either the state or federal Constitution. 2000 Op. Att'y Gen. No. 00-9.

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Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, § 432 et seq.

ALR. — Right of association to expel or discipline member for exercising a right, or performing duty, as a citizen, 14 ALR 1446.

Power of legislature or school authorities to prescribe and enforce oath of allegiance, "salute to flag," or other ritual of a

patriotic character, 120 ALR 655; 127 ALR 1502; 141 ALR 1030; 147 ALR 698.

Validity of statutory or municipal regulation of soliciting of alms or contributions for charitable, religious, or individual purposes, 128 ALR 1361; 130 ALR 1504.

Use of streets or parks for religious purposes, 133 ALR 1402.

Constitutional guaranty of freedom of

religion as applied to license taxes or regulations, 141 ALR 538; 146 ALR 109; 152 ALR 322.

Sectarianism in schools, 141 ALR 1144.

Race or religious belief as permissible consideration in choosing tenants or purchasers of real estate, 14 ALR2d 153.

Wearing of religious garb by public schoolteachers, 60 ALR2d 300.

Defamatory nature of statements reflecting on plaintiff's religious beliefs, standing, or activities, 87 ALR2d 453.

Validity and effect of gift for charitable purposes which excludes otherwise qualified beneficiaries because of their race or religion, 25 ALR3d 736.

Validity of vagrancy statutes and ordinances, 25 ALR3d 792.

Validity of loitering statutes and ordinances, 25 ALR3d 836.

Erection, maintenance, or display of religious structures or symbols on public property as violation of religious freedom, 36 ALR3d 1256.

Validity of blasphemy statutes or ordinances, 41 ALR3d 519.

Censorship of convicted prisoners' "non-legal" mail, 47 ALR3d 1192.

Religion as factor in adoption proceedings, 48 ALR3d 383.

Topless or bottomless dancing or similar conduct as offense, 49 ALR3d 1084.

Determination of property rights between local church and parent church body: modern view, 52 ALR3d 324.

Power of court to impose standard of personal appearance or attire, 73 ALR3d 353.

Criminal offenses under statutes and ordinances regulating charitable solicitations, 76 ALR3d 924.

Right of clergyman appearing in court as professional attorney to be in clerical garb, 84 ALR3d 1143.

Wills: condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 89 ALR3d 984.

Regulation of astrology, clairvoyancy, fortunetelling, and the like, 91 ALR3d 766.

Religious belief, affiliation, or prejudice of prospective jurors as proper subject of inquiry or grounds for challenge on voir dire, 95 ALR3d 172.

Validity, under federal and state estab-

lishment of religion provisions, of prohibition of sale of intoxicating liquors on specific religious holidays, 27 ALR4th 1155.

Validity, under state constitutions, of private shopping center's prohibition or regulation of political, social, or religious expression or activity, 38 ALR4th 1219.

Validity of local or state denial of public school courses or activities to private or parochial school students, 43 ALR4th 776.

Judicial power to order discontinuance of life-sustaining treatment, 48 ALR4th 67.

Relief available for violation of right to counsel at sentencing in state criminal trial, 65 ALR4th 183.

Power of court or other public agency to order medical treatment over parental religious objections for child whose life is not immediately endangered, 21 ALR5th 248.

Judicial construction and application of state legislation prohibiting religious discrimination in employment, 37 ALR5th 349.

Free exercise of religion as applied to individual's objection to obtaining or disclosing social security number, 93 ALR5th 1.

First amendment challenges to display of religious symbols on public property, 107 ALR5th 1.

Landlord's refusal to rent to unmarried couple as protected by landlord's religious beliefs, 10 ALR6th 513.

Wearing of religious symbols in courtroom as protected by first amendment, 18 ALR6th 775.

State constitutional challenges to the display of religious symbols on public property, 26 ALR6th 145.

Constitutionality of legislative prayer practices, 30 ALR6th 459.

Application of First Amendment's "ministerial exception" or "ecclesiastical exception" to state civil rights claims, 53 ALR6th 569.

When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 ALR6th 93.

Constitutionality of teaching or suppressing teaching of Biblical creationism or Darwinian evolution theory in public schools, 102 ALR Fed. 537.

Constitutionality of teaching or other-

wise promoting secular humanism in public schools, 103 ALR Fed. 538.

Constitutionality of regulation or policy governing prayer, meditation, or “moment of silence” in public schools, 110 ALR Fed. 211.

Bible distribution or use in public schools — modern cases, 111 ALR Fed. 121.

Validity, construction, and application of Religious Freedom Restoration Act (42 USCS § 2000bb et seq.), 135 ALR Fed. 121.

What constitutes “hybrid rights” claim under Employment Div., Dep’t of Human Resources v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), 163 ALR Fed. 493.

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Ineffective assistance of counsel in removal proceedings — Particular acts, 59 ALR Fed. 2d 151.

Paragraph V. Freedom of speech and of the press guaranteed.

No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty.

1976 Constitution. — Art. I, Sec. I, Para. IV.

Cross references. — Liberty of speech or of the press generally, U.S. Const., amend. 1. Invasion of privacy through electronic mediums, T. 16, C. 11, Pt. 3. Limits to free speech: abusive or obscene language, §§ 16-5-25, 16-11-39, 16-11-39.1, and 38-2-549. Publication of name or identity of female raped or assaulted with intent to commit rape, § 16-6-23. False alarms, § 16-10-27 et seq. Inciting insurrection, § 16-11-3 et seq. Exercise of rights of freedom of speech and right to petition government for redress of grievances; legislative findings; verification of claims; definitions; procedure on motions; exception; attorney’s fees and expenses, § 9-11-11.1. Illegal advertising, § 16-11-26 et seq. Terroristic threats or acts, § 16-11-37. Defamation, § 16-11-40. Disclosure of information obtained in business of preparing federal or state income tax returns or assisting in preparation, § 16-11-81. Obscene publications, §§ 16-12-80 et seq. and 36-60-3. Open and public meetings, § 50-14-1 et seq. Newspaper libel, § 51-5-2. Slander, § 51-5-4.

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cer L. Rev. 284 (1960). For comment on *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E.2d 421 (1960), see 23 Ga. B.J. 406 (1961). For comment on *City of Atlanta v. Twentieth Century-Fox Film Corp.*, 219 Ga. 271, 133 S.E.2d 12 (1963), and movie censorship with regard to freedom of speech and press, see 15 Mercer L. Rev. 514 (1964). For comment on *Atlanta v. Twentieth Century-Fox Film Corp.*, 219 Ga. 271, 133 S.E.2d 12 (1963), see 26 Ga. B.J. 475 (1964). For comment, “The Re-

porter’s Privilege in Georgia: ‘Qualified’ to do the Job?,” see 9 Ga. St. U.L. Rev. 495 (1993). For comment, “You’ve Got Libel: How the Can-Spam Act Delivers Defamation Liability to Spam-Fighters and Why the First Amendment Should Delete the Problem,” see 58 Emory L.J. 1013 (2009). For comment, “Room for Error Online: Revising Georgia’s Retraction Statute to Accommodate the Rise of Internet Media,” see 28 Ga. St. U.L. Rev. 923 (2012).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
FREEDOM OF THE PRESS
APPLICATION

- 1. IN GENERAL
- 2. CRIMINAL MATTERS
- 3. SIGN ORDINANCES
- 4. SEXUAL EXPRESSION

General Consideration

No absolute right to speak or publish. — It is a fundamental principle, long established that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932).

Exercise of freedom must be compatible with preservation of other essential, guaranteed freedoms. — Freedom of speech and of the press, as guaranteed by the Constitution, is essential to the preservation of a free society; but its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by the Constitution. The independence of the judiciary and the fair and impartial administration of justice are also necessary to a free society. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

Free speech does not necessarily exempt one from regulation, license, or payment of tax, which, under some

other theory of law, is a protected public or private right. That which may be a permissible regulation even though it restricts the right of free speech to some extent must bear some genuine and reasonable relation to the general welfare, and to the public health, safety, or morals. *Wolfe v. City of Albany*, 104 Ga. App. 264, 121 S.E.2d 331 (1961).

Free speech does not give one right to malign another or do act injurious to another’s person or property. *Wolfe v. City of Albany*, 104 Ga. App. 264, 121 S.E.2d 331 (1961).

Restraints on freedom of speech must be reasonably related to community welfare. — When there is no reasonable relationship between the restraints imposed on freedom of speech and the general welfare of the community, the ordinance is unconstitutional. *Wolfe v. City of Albany*, 104 Ga. App. 264, 121 S.E.2d 331 (1961).

All speech and press that lie outside of an “abuse of that liberty” are protected by this paragraph. The protection is absolute and cannot be abridged, curtailed, or restrained in any degree for any period of time no matter how short. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962).

General Consideration (Cont'd)

Abuses of liberty may be suppressed, restrained, enjoined, or punished. — “Abuses of that liberty” are outside the protection of the Constitution and may be suppressed, restrained, enjoined, or punished without violating the Constitution, provided constitutional means for so doing are employed. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962).

No prior restraints upon publications but no freedom from censure when criminal matter published. — The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free person has an undoubted right to lay what sentiments the person pleases before the public; to forbid this, is to destroy the freedom of the press; but if the person publishes what is improper, mischievous, or illegal, the person must take the consequence of the person's own temerity. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Liberty of the press was intended to prevent all previous restraints upon publications as had been practiced by other governments, and in early times, to stifle the efforts of patriots to enlighten their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but one who used it was to be responsible in case of its abuse. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), *aff'd*, 482 F.2d 280 (5th Cir. 1973), *cert. denied*, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

When injunction not invalid as illegal prior restraint. — If prior to the issuance of an injunction an adequate determination is made that certain communication is unprotected by constitutional provisions safeguarding freedom of speech; that the order is based on a continuing course of repetitive conduct; and that the order is clear and sweeps no more

broadly than necessary, then the injunction is not invalid as an illegal prior restraint. *Retail Credit Co. v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975).

Regulatory statute not intended to control content of speech upheld when justified by valid governmental interest. — The freedom of expression guaranteed under the Constitution has been consistently recognized as being narrower than an unlimited license to talk; and regulatory statutes not intended to control the content of speech but incidentally limiting its unfettered exercise are not regarded as violating the constitutional guarantee when justified by a valid governmental interest. *Hodnett v. City of Atlanta*, 145 Ga. App. 285, 243 S.E.2d 605 (1978).

State conduct is required. — Former employee's claim that the employee was dismissed because of expressive activity, failed under both Georgia's equal protection provisions and freedom of speech guarantees because the former employer and the two managers, were not state actors or private parties acting under the color of state law. *Johnson v. Shoney's, Inc.*, No. 7:04-CV-68 (HL), 2005 U.S. Dist. LEXIS 18101 (M.D. Ga. Aug. 18, 2005).

Cited in 10950 *Retail, LLC v. City of Johns Creek*, 299 Ga. App. 458, 682 S.E.2d 637 (2009); *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011).

Freedom of the Press

Newspaper libel as limitation on publication privilege. — Certain newspaper publications are privileged; but the privilege is conditional, not absolute; and the “liberty of the press” will not authorize a violation of O.C.G.A. § 51-5-2. *Horton v. Georgian Co.*, 175 Ga. 261, 165 S.E. 443 (1932).

Libel is abuse of liberty of press for which laws of state hold press answerable in damages. *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78 (1953).

Liberty of press is subordinate to independence of judiciary and proper administration of justice. *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78 (1953); *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E.2d 421 (1960); *Atlanta Newspapers, Inc. v. State*,

216 Ga. 399, 116 S.E.2d 580 (1960).

Obstructing administration of justice by state courts is abuse of liberty of speech and of press. — Constitution of Georgia guarantees the liberty of speech and of the press, but does not protect an abuse of that liberty. Obstructing the administration of justice by the courts of this state is an abuse of that liberty and will subject the abuser to punishment for contempt of court. *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78 (1953); *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

Liberty of the press is not synonymous with license, and it does not give the press any right or license to publish libelous matter without responsibility to those who are innocent victims of such libelous publication. Freedom of the press gives the right to print the truth and to comment fairly about the truth; freedom of the press does not give a license to print untruths or half-truths, which are equivalent to untruths and which, in their effect on a person's character and reputation are often more damaging and devastating than would be an outright falsehood. *Davis v. Macon Tel. Publishing Co.*, 93 Ga. App. 633, 92 S.E.2d 619 (1956).

Courts may stop press when interfering with conducting court proceedings. — Courts may stop conduct of representatives of the press in any field of activity interfering with orderly conduct of court procedure or creating distractions interfering therewith. *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E.2d 421 (1960), commented on in 23 Ga. B.J. 406 (1961).

When restraint upon newspaper's liberty of speech and of press unwarranted. — A restraining order which prohibited a newspaper from publishing any information on an alleged suspect in a murder case obtained through discovery without the newspaper's first following a procedure of notifying the court of its intent to disclose any information and obtaining the permission of the court to disclose the information in the event an objection was filed constituted an unwarranted restraint upon the newspaper's liberty of speech and of the press. *Georgia Gazette Publishing Co. v. Ramsey*, 248 Ga.

528, 284 S.E.2d 386 (1981).

No right to keep news source confidential. — The guaranty of freedom of the press does not afford a reporter a right not to disclose a confidential news source. *Vaughn v. State*, 259 Ga. 325, 381 S.E.2d 30 (1989).

Liberty of the press balanced against right to privacy. — Newspaper articles naming a high school student as the victim of a vicious attack by fellow students, and containing a graphic description of the attack, were not an actionable invasion of privacy, in light of the public's legitimate interest in the arrest and prosecution of the perpetrators. *Tucker v. News Publishing Co.*, 197 Ga. App. 85, 397 S.E.2d 499 (1990).

Publishing 20-year-old nude photos of an aspiring model who later became a professional wrestler and whose murder was highly publicized did not fall within Georgia's right of publicity newsworthiness exception; the photos were unrelated to the incident of public concern, the model's death, and thus, a right of publicity case filed by the plaintiff, the mother and personal representative for the model's estate, against the defendant publisher, could be pursued; under the First Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. V, every private fact disclosed in an otherwise truthful, newsworthy publication had to have some substantial relevance to a matter of legitimate public interest in order to fall within the newsworthiness exception. *Toffoloni v. LFB Publ'g Group*, 572 F.3d 1201 (11th Cir. 2009), cert. denied, mot. granted, 130 S. Ct. 1689, 176 L. Ed. 2d 206 (2010).

Newspaper acted with actual malice. — Given that defendants, a newspaper, its editor, and a columnist, so doubted the truthfulness of their articles (alleging that a deputy sheriff beat an arrestee to death with a flashlight) that they refused to print contradictory versions of the events, actual malice could be inferred; as a result, the trial court properly denied their motions for a directed verdict and awarded compensatory and punitive damages to a deputy sheriff in the deputy's libel action. *Lake Park Post, Inc. v. Farmer*, 264 Ga. App. 299, 590 S.E.2d 254 (2003), cert. denied, 543 U.S. 875, 125 S.

Freedom of the Press (Cont'd)

Ct. 104, 160 L. Ed. 2d 125 (2004).

Plaintiff failed to prove newspaper acted with actual malice. — Former police officer sued a newspaper for libel based on a letter to the editor the newspaper printed. As a public figure, the officer had to establish actual malice on the part of the newspaper under O.C.G.A. § 51-5-7(9) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but failed to do so because the statements at issue were opinions that were not susceptible of being proved true or false. *Evans v. Sandersville Georgian, Inc.*, 296 Ga. App. 666, 675 S.E.2d 574 (2009).

Application**1. In General**

State may penalize utterances openly advocating overthrow of government. — A state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Freedom of speech and press does not protect disturbances to public peace or attempt to subvert government. — Freedom of speech and press does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. *Carr v. State*, 176 Ga. 55, 166 S.E. 827 (1932), later appeal, 176 Ga. 747, 169 S.E. 201 (1933).

Constitutionality of false statement statute. — False statement statute, O.C.G.A. § 16-10-20, when properly construed to require that the defendant make the false statement with knowledge and intent that the statement may come within the jurisdiction of a state or local government agency, is constitutional because correctly interpreted, the statute raises no substantial constitutional concern on the statute's face; the statute requires a defendant to know and intend,

that is, to contemplate or expect, that his or her false statement will come to the attention of a state or local department or agency with the authority to act on the statement, and as properly construed, O.C.G.A. § 16-10-20 may only be applied to conduct that persons of common intelligence would know was wrongful because the statement could result in harm to the government. *Haley v. State*, 289 Ga. 515, 712 S.E.2d 838 (2011), cert. denied, U.S. , 133 S. Ct. 60, 183 L. Ed. 2d 711 (2012).

Ordinance forbidding use of public address system from vehicle on public streets upheld. — An ordinance forbidding any person, firm, or corporation to operate a loud speaker or public address system from any vehicle on public streets, alleys, or thoroughfares is not an infringement upon the rights of the defendant granted to the defendant by the provisions of the Constitution of Georgia or of the United States. The thoroughfares of cities are maintained by the public and to say that anyone has a constitutional right to use a loud speaker or public address system from any vehicle on these streets seems to overlap and interfere with the constitutional rights of other people. It makes no difference whether the violator is using the loud speaker to broadcast what the violator terms recorded sermons, or using the loud speaker for vending goods, or promoting some political candidate, or for some other purpose. *Brinkman v. City of Gainesville*, 83 Ga. App. 508, 64 S.E.2d 344 (1951).

Ordinance regulating the volume of noise upheld. — Local ordinance regulating the volume of noise from mechanical sound-making devices, Athens-Clarke County, Ga. Ordinance § 3-5-24(c)(2)(a), did not violate Ga. Const. 1983, Art. I, Sec. I, Para. V since the ordinance served a significant government interest in protecting both the community in general and individual citizens from noises which could have affected their comfort, repose, health, or safety, the provision left open ample alternatives for expression, and the ordinance was the least restrictive means of promoting the county's significant interest in protecting the comfort and repose of the county's citizens. *Grady v. Unified*

Gov't of Athens-Clarke County, 289 Ga. 726, 715 S.E.2d 148 (2011).

Vagueness finding reversed since party lacked standing to challenge constitutionality of county zoning provision. — Because a lessor and a lessee did not preserve an “as applied” challenge to two county zoning code provisions, did not seek a special use permit, and lacked standing to make a constitutional challenge, the trial court erred in finding the provisions unconstitutionally vague, regardless of whether they had an otherwise viable facial challenge. *Catoosa County v. R.N. Talley Props., LLC*, 282 Ga. 373, 651 S.E.2d 7 (2007).

Malevolent picketing to injure employer and aid unlawful strike not constitutionally protected. — The judicial theory that peaceful picketing is a form of free speech, which is protected by the Constitutions, both federal and state, cannot be stretched to shield malevolent picketing for the purpose of injuring the employer and aiding an unlawful strike. *Ellis v. Parks*, 212 Ga. 540, 93 S.E.2d 708 (1956); *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965), cert. dismissed, 384 U.S. 118, 86 S. Ct. 1306, 16 L. Ed. 2d 409 (1966).

Prohibition against showing motion pictures until permit obtained held unconstitutional. — A charter and ordinance provision, requiring inspection of protected as well as unprotected pictures, and requiring a permit from the city authorities before any picture can be exhibited in the theater, violate this paragraph and are void. *K. Gordon Murray Prods., Inc. v. Floyd*, 217 Ga. 784, 125 S.E.2d 207 (1962).

A section of a city's charter amending act and an ordinance of the city adopted pursuant thereto which prohibit the display of all motion pictures, the good as well as the bad, until a permit to display any of them has been obtained from the city's Board of Censorship offend this section of Georgia's Constitution since the section of the charter amending act authorizes, and the ordinance imposes, a prior restraint of speech on good as well as bad or objectionable pictures. *City of Atlanta v. Twentieth Century-Fox Film Corp.*, 219 Ga. 271, 133 S.E.2d 12 (1963), commented

on in 26 Ga. B.J. 475 (1964).

Government-instituted proceeding must place defendant exhibitor or seller on notice as to what film or publication the defendant has exhibited, sold, or held for sale that the government seeks to seize or suppress. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Freedom of teachers to comment upon matters of public importance and concern. — The question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the school board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question, free and open debate is vital to informed decision-making by the electorate; teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent; accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. *Lindsey v. Board of Regents*, 607 F.2d 672 (5th Cir. 1979).

When a questionnaire solicits the views of faculty on a broad range of issues, such as the degree of mutual confidence existing between administration and faculty, the extent to which good teaching and good research are rewarded, the extent to which faculty opinions are listened to and respected, the effectiveness of the administration in dealing with grievances, the accuracy and completeness of information used to evaluate teachers, and other matters that are of public importance and concern, comment upon them is protected speech. *Lindsey v. Board of Regents*, 607 F.2d 672 (5th Cir. 1979).

Former school district employee's claim that the right to free speech under Ga. Const. 1983, Art. I, Sec. I, Para. V was violated when the employee was terminated after complaining of discriminatory acts by a Superintendent was dismissed upon summary judgment because the employee's speech did not involve a matter of public concern but was related to the employee's own private interest in receiving benefits and a certain pay level. *Palmer v. Stewart County Sch. Dist., No.*

Application (Cont'd)**1. In General** (Cont'd)

4:04-CV-21 (CDL), 2005 U.S. Dist. LEXIS 35511 (M.D. Ga. June 17, 2005).

When restraint upon newspaper's liberty of speech and of press unwarranted. — A restraining order which prohibited a newspaper from publishing any information on an alleged suspect in a murder case obtained through discovery without the newspaper's first following a procedure of notifying the court of its intent to disclose any information and obtaining the permission of the court to disclose the information in the event an objection was filed constituted an unwarranted restraint upon the newspaper's liberty of speech and of the press. *Georgia Gazette Publishing Co. v. Ramsey*, 248 Ga. 528, 284 S.E.2d 386 (1981).

Material printed by law publisher rating attorneys is protected by U.S. Const., amend. 1 and this paragraph. *Bergen v. Martindale-Hubbell, Inc.*, 248 Ga. 599, 285 S.E.2d 6 (1981).

Business license tax. — When the purpose of a business license tax was for the purpose of revenue raising and not for the control of solicitation it was not in violation of Ga. Const. 1983, Art. I, Sec. I, Para. V. *Miles v. City Council*, 551 F. Supp. 349 (S.D. Ga. 1982), *aff'd*, 710 F.2d 1542 (11th Cir. 1983).

Statement is contemptuous and therefore not constitutionally protected when the statement poses a present danger to the orderly administration of justice but neither an inherent nor a reasonable tendency to do so is enough to justify a restriction of free expression. *Garland v. State*, 253 Ga. 789, 325 S.E.2d 131 (1985).

Equity will not enjoin libel and slander. *Brannon v. American Micro Distribs., Inc.*, 255 Ga. 691, 342 S.E.2d 301 (1986); *High Country Fashions, Inc. v. Marlenna Fashions, Inc.*, 257 Ga. 267, 357 S.E.2d 576 (1987).

Injunction restricting activities of abortion protesters. — Injunction issued pursuant to a city ordinance declaring the actions of abortion protesters to be a public nuisance was not unconstitutional since the protesters were permitted

to exercise their right of free speech by engaging in social protest, limited only by reasonable time, place, and manner restrictions. *Hirsh v. City of Atlanta*, 261 Ga. 22, 401 S.E.2d 530, cert. denied, 501 U.S. 1221, 111 S. Ct. 2836, 115 L. Ed. 2d 1004 (1991).

Statute regulating profane words on bumper stickers unconstitutionally restricts freedom of expression as guaranteed by the First and Fourteenth Amendments of the United States Constitution and by the Georgia Constitution. *Cunningham v. State*, 260 Ga. 827, 400 S.E.2d 916 (1991).

Ordinance prohibiting the distribution of printed materials to homes violated the freedom of speech and press clauses under the United States and Georgia Constitutions because it was not narrowly tailored to meet the city's interest in preventing litter and failed to provide for meaningful alternatives of communication. *Statesboro Publ. Co. v. City of Sylvania*, 271 Ga. 92, 516 S.E.2d 926 (1999).

Soliciting in privately owned shopping mall. — Policy of a privately owned shopping mall that prohibited all mall visitors from engaging in solicitation or leafleting in the mall's common areas did not violate Ga. Const. 1983, Art. I, Sec. I, Para. V. *Cahill v. Cobb Place Assocs., L.P.*, 271 Ga. 322, 519 S.E.2d 449 (1999).

Intent of the Anti-Strategic Lawsuits Against Public Participation statute, O.C.G.A. § 9-11-11.1, is to encourage the exercise of free speech and afford a procedural protection to acts of communication on public issues; in connection with this procedural protection, the appellate court held that the mere procedural filing of a verification does not end the matter as to whether a claim could go forward under O.C.G.A. § 9-11-11.1(b) and (d). *Harkins v. Atlanta Humane Soc'y*, 264 Ga. App. 356, 590 S.E.2d 737 (2003).

Unauthorized practice of law could be limited. — O.C.G.A. § 15-19-51(a)(7) did not limit defendant's right to free speech under U.S. Const., amend. 1, or Ga. Const. 1983, Art. I, Sec. I, Para. V, as defendant had no right to engage in speech which was calculated to deceive or

mislead people into thinking that defendant was qualified to practice law. *Marks v. State*, 280 Ga. 70, 623 S.E.2d 504 (2005).

Festival permits. — City’s moratorium on the issuance of festival permits was not an unconstitutional prior restraint under either U.S. Const., amend. 1, or Ga. Const. 1983, Art. I, Sec. I, Para. V because the moratorium did not abridge the right of free speech, the moratorium was content-neutral, and in the absence of a festivals ordinance, the city was not obligated to provide municipal services pertaining to outdoor festivals. *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006).

Ninety-day advance application requirement of the Atlanta Outdoor Festivals Ordinance of 2003, Atlanta, Ga., Code of Ordinances §§ 138-186 to 138-209, was not an unconstitutional prior restraint under either U.S. Const., amend. 1, or Ga. Const. 1983, Art. I, Sec. I, Para. V because the requirement was content-neutral, the requirement was the least restrictive means of regulation, and the requirement left open alternative channels of communication. *Camp Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257 (11th Cir. 2006).

Content-neutral regulation that incidentally affected protected expression should not have been analyzed using rational basis test. — When a night club asserted violations of the club’s free speech rights under Ga. Const. 1983, Art. I, Sec. I, Para. V, the trial court erred in applying the rational basis test in denying the night club’s petition for an interlocutory injunction. The challenged content-neutral amendments to county ordinances, which provided that one hour after the end of the legal period for selling alcoholic beverages, a business must be cleared of customers, close, and not reopen until 9:00 A.M., should have been analyzed using the appropriate legal standard: whether the regulation furthered an important government interest, whether the government interest was unrelated to the suppression of speech, and whether the incidental restriction of speech was no greater than was essential to the furtherance of that interest. *Great Am. Dream,*

Inc. v. DeKalb County, 290 Ga. 749, 727 S.E.2d 667 (2012).

2. Criminal Matters

This paragraph does not guarantee freedom of speech or right of assembly in perpetration of crime. *Lowry v. Herndon*, 182 Ga. 582, 186 S.E. 429 (1936), rev’d on other grounds, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).

Anti-Mask Act held constitutional. — Georgia “Anti-Mask Act”, O.C.G.A. § 16-11-38, which proscribes intimidating or threatening mask-wearing behavior, does not violate the constitutional rights of freedom of speech, freedom of association, and equal protection of the law. *State v. Miller*, 260 Ga. 669, 398 S.E.2d 547 (1990).

“Fighting words” not protected speech. — “Fighting words” constitute one of those narrow speech areas not constitutionally protected. *State v. Klinakis*, 206 Ga. App. 318, 425 S.E.2d 665 (1992).

Rape Victim Confidentiality Statute. — The victim of a sexual assault could not recover damages from a newspaper for invasion of privacy, since, when the victim shot and killed the perpetrator of the assault, the victim became the object of legitimate public interest and the newspaper had the right under the United States and Georgia Constitutions to accurately report facts regarding the incident, including the victim’s name. *Macon Tel. Publishing Co. v. Tatum*, 263 Ga. 677, 436 S.E.2d 655 (1993).

Prior restraint of freedom of speech. — A city’s refusal to issue a building permit because the business intended to violate O.C.G.A. § 16-12-80(c) did not constitute an unconstitutional prior restraint of free speech. *Chamblee Visuals v. City of Chamblee*, 270 Ga. 33, 506 S.E.2d 113 (1998).

Obscene material not protected. — Devices “designed or marketed as useful primarily for the stimulation of human genital organs,” prohibited from distribution under O.C.G.A. § 16-12-80, are not protected expressions under either the First Amendment of the federal constitution or Ga. Const. 1983, Art. I, Sec. I.

Application (Cont'd)**2. Criminal Matters (Cont'd)**

Morrison v. State, 272 Ga. 129, 526 S.E.2d 336 (2000).

“Fighting words” construed narrowly. — To ensure no abridgment of constitutional rights, the application of O.C.G.A. § 16-11-39(a)(3)’s proscription on “fighting words” must necessarily be narrow and limited; since the only statements shown in the evidence to have been uttered by defendant to an officer during an incident at a store were, “Arrest me” and “Damn, I’m calling corporate office” did not rise to the level of required “fighting words,” defendant’s conviction of disorderly conduct, O.C.G.A. § 16-11-39(a)(3), was not supported by sufficient evidence. *Sandidge v. State*, 279 Ga. App. 86, 630 S.E.2d 585 (2006).

Constitutionality of O.C.G.A. § 16-11-34. — O.C.G.A. § 16-11-34(a) was overbroad and was unconstitutional; the literal language of the statute was so overbroad in its scope that it led to an absurdity manifestly not intended by the legislature, and its constitutionality could not have been preserved by judicial construction. *State v. Fielden*, 280 Ga. 444, 629 S.E.2d 252 (2006).

Constitutionality of O.C.G.A. § 16-8-60(b). — Trial court did not err in finding that O.C.G.A. § 16-8-60(b) was not unconstitutionally vague nor overbroad and was not preempted by federal law, as: (1) the statute aimed to protect the public and entertainment industry from piracy and bootlegging, a legitimate governmental interest unrelated to free speech concerns; (2) it did not impinge upon pure speech, but, at most, regulated a combination of commercial conduct and speech; (3) its deterrent effect on legitimate expression was minimal; and (4) it plainly prohibited the sale, or possession for the purposes of sale, of an article that did not prominently display the name and address of the individual (or entity) who transferred the sounds to the article. *Briggs v. State*, 281 Ga. 329, 638 S.E.2d 292 (2006).

Constitutionality of Georgia Street Gang Terrorism and Prevention Act. — Trial court properly denied the appel-

lants’ motion to dismiss various counts charging the appellants with gang-related crimes under the Georgia Street Gang Terrorism and Prevention Act, O.C.G.A. § 16-15-1 et seq., since properly construed O.C.G.A. § 16-15-4(a) did not directly or indirectly infringe upon the First Amendment right to freedom of association as, to support a conviction, gang conduct or participation was required. Further, reading of § 16-15-4(a) according to the natural and obvious import of the statute’s language and in conjunction with the specific definitions in O.C.G.A. § 16-15-3, the statute provided a sufficiently definite warning to persons of ordinary intelligence of the prohibited conduct and was not susceptible to arbitrary and discriminatory enforcement and did not reach a substantial amount of constitutionally protected conduct, thus, the statute was not unconstitutionally vague or overbroad. *Rodriguez v. State*, 284 Ga. 803, 671 S.E.2d 497 (2009).

O.C.G.A. § 16-5-5(b) is unconstitutional under the free speech provisions of the United States and Georgia Constitutions, U.S. Const., amend. 1 and Ga. Const. 1983, Art. I, Sec. I, Para. V, because it is not all assisted suicides that are criminalized but only those that include a public advertisement or offer to assist; because the state failed to provide any explanation or evidence as to why a public advertisement or offer to assist in an otherwise legal activity was sufficiently problematic to justify an intrusion on protected speech rights, it could not, consistent with the United States and Georgia Constitutions, make the public advertisement or offer to assist in a suicide a criminal offense. *Final Exit Network, Inc. v. State*, 290 Ga. 508, 722 S.E.2d 722 (2012).

Freedom to choose own counsel. — Trial court did not abuse the court’s discretion by denying the defendant’s motion for a continuance and ruling that the defendant had three options: proceed to trial with old counsel, proceed with new counsel instantaneously, or self-represent when the trial court engaged in a proper balancing test by weighing the fact that the defendant and trial counsel, who was prepared for trial, disagreed regarding trial

strategy against what the court determined was an undue delay in trying the case. *Alwi v. State*, 331 Ga. App. 903, 773 S.E.2d 387 (2015), cert. denied, 2015 Ga. LEXIS 559 (Ga. 2015).

3. Sign Ordinances

Sign ordinance's content-based restrictions were invalid. — In grandfathering a condominium development sign pursuant to Avondale Estates, Ga., Sign Ordinance § 5-370, while prohibiting all other commercial signs in residential areas, the city imposed differential burdens upon speech based on its content. *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

Selective enforcement of sign ordinance prohibited. — Grandfather provision of Avondale Estates, Ga., Sign Ordinance § 5-370, was unconstitutional to the extent that city sign ordinance enforcement officials chose not to enforce the sign ordinance against any non-compliant sign in place before their jobs began; having decided to enact a rigorous sign ordinance, the city was prohibited from selectively applying its provisions for the sake of convenience; moreover, if aesthetics were a concern, as the city stated, that concern was not promoted by allowing non-compliant signs, no matter when they were erected. *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

1994 Sign Ordinance. — The 1994 Sign Ordinance, a comprehensive regulatory framework for the posting of all signs within the City of Atlanta, does not violate equal protection or free speech. *Outdoor Sys. v. City of Atlanta*, 885 F. Supp. 1572 (N.D. Ga. 1995).

City sign ordinance that prohibited the display of noncommercial messages at locations where commercial messages were permitted was unconstitutional. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 467 S.E.2d 875 (1996).

Ordinance that restricted signs in residential zoning districts to on-premise signs and certain temporary or special signs, allowing temporary political signs, but not providing for permanent signs expressing the political, religious, or other

noncommercial views of residents, was unconstitutional. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 266 Ga. 393, 467 S.E.2d 875 (1996).

Trial court properly granted summary judgment to a city in a suit brought by an outdoor sign company challenging the constitutionality of the city's sign ordinance as the company's sign applications failed to meet the city's height and size restrictions and the restrictions were constitutional. Since the company lacked standing to challenge any other provision of the ordinance, the trial court should not have addressed the company's constitutional arguments concerning other provisions of the ordinance, though that appellate court determination did not change the grant of summary judgment to the city. *Granite State Outdoor Adver., Inc. v. City of Roswell*, 283 Ga. 417, 658 S.E.2d 587 (2008), cert. denied, 129 S. Ct. 222, 172 L.Ed.2d 143 (2008).

Standing to object to city ordinance. — In a corporation's suit alleging that a city's denial of the corporation's variance applications under the September 20, 1983, Cumming, Georgia zoning ordinance, as amended on June 20, 2006, violated Ga. Const. 1983, Art. I, Sec. 1, Para. V, the corporation lacked standing to assert the corporation's claims regarding the actual denial of the variances; those claims were not redressible because the corporation did not challenge the height or spacing requirements upon which the denials were predicated. However, the corporation had standing to assert the corporation's claims regarding the city's long delay in processing the applications because such injury was redressible. *Roma Outdoor Creations, Inc. v. City of Cumming*, 599 F. Supp. 2d 1332 (N.D. Ga. 2009).

County sign ordinance. — A county ordinance which prohibited off-premise signs in commercially-zoned areas, including all commercial signs, and then permitted the county to decide on a case-by-case basis which signs were allowed, violated the First Amendment. By initially declaring all signs as illegal and allowing the county to exempt from the ban only on a case-by-case basis, the ordinance was more extensive than was necessary to

Application (Cont'd)**3. Sign Ordinances** (Cont'd)

protect against misleading commercial speech and provided insufficient protection for protected speech, both commercial and otherwise. *Fulton County v. Galberaith*, 282 Ga. 314, 647 S.E.2d 24 (2007).

Standard for determining constitutionality of sign ordinance. — Trial court erred by holding that there was a rational relationship between a county's sign restrictions and its interests in aesthetics and traffic safety in denying a request filed by two residents to temporarily enjoin the enforcement of certain provisions of the county ordinance; the court should have applied a time, place, and manner standard as required by the U.S. Constitution, or a least restrictive means analysis as required by the Georgia Constitution, drawing regulations to suppress no more speech than was necessary to achieve the county's goals. *Coffey v. Fayette County*, 279 Ga. 111, 610 S.E.2d 41 (2005).

In considering the constitutionality of ordinances restricting free speech, the courts were required to review the ordinance closely to ensure that it was narrowly drawn to serve the governmental interest and were not permitted to merely defer to the discretion of the governmental entity; a trial court erred in upholding a county's sign ordinance without taking evidence and in deferring without question to the decisions made at the discretion of the county. *Coffey v. Fayette County*, 280 Ga. 656, 631 S.E.2d 703 (2006).

Ban on signs in public right of way not unconstitutional. — City clearly had the right to prohibit the erection of signs on the public right of way; therefore, the provision of the city sign ordinance, banning signs on the public right of way, *Avondale Estates, Ga., Sign Ordinance § 5-372(e)*, was not unconstitutional. *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

Holiday decoration exemption unconstitutional. — Although the general setback provision of the city sign ordinance, *Avondale Estates, Ga., Sign Ordinance* § 5-374(a), requiring signs to be set

back 10 feet from the edge of the sidewalk or 15 feet from the edge of the road where there was no sidewalk, was constitutional since it was narrowly drawn to ensure that yard signs did not block the view of traffic or otherwise obstruct intersections, but otherwise allowed those passing by to be able to read the signs, the exemption for seasonal displays and decorations found in *Avondale Estates, Ga., Sign Ordinance § 5-363(f)* was not constitutional; if the city did not wish a sign near its right of way because of traffic and visibility concerns, allowing a large holiday decoration near the sidewalk would have posed the same problems. *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

Content-based ban on flags unconstitutional. — City's arbitrary enforcement of *Avondale Estates, Ga., Sign Ordinance § 5-376(e)*, which banned all commercial flags on residential property, was unconstitutional, based on the city's own definition of a "commercial message," found in *Avondale Estates, Ga., Sign Ordinance § 5-362*; the city's failure to enforce the ban on the posting of commercial messages in residential areas against the flags of professional sports teams constituted content-based discrimination since non-sports team commercial messages were at a disadvantage; accordingly, such content-based restrictions were presumptively invalid. *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

Content-neutral sign ordinance constitutionally valid. — *Cherokee County, Ga., sign ordinance* did not violate the state or federal constitution because the number, height, and area requirements under which the permit applications were denied were constitutionally valid; the sign ordinance allowed a maximum area of 120 square feet, a maximum height of 35 feet and restricted businesses to only one freestanding sign. Furthermore, the ordinance was content-neutral and did not grant unfettered discretion to government officials, as the ordinance itself contained adequate standards to guide the official's decision and render it subject to judicial review. *Douglas Out-*

door Adver. of Ga., Inc. v. Cherokee County, No. 1:03-CV-1677-JOF, 2004 U.S. Dist. LEXIS 14113 (N.D. Ga. July 13, 2004).

Because there was a reasonable fit between the city's stated goals of public and traffic safety and aesthetic harmony and the city sign ordinance's restrictions on the size and height of real estate signs and the number and location of yard sale signs, Avondale Estates, Ga., Sign Ordinance §§ 5-361(a) and 5-380(a)(4), the court found that the restrictions, limiting real estate signs to four square feet in area and three square feet in height, as well as the number and location of yard sale signs, were constitutional limitations on commercial speech. *Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184 (N.D. Ga. 2005).

Sign ordinance's content based restrictions were invalid. — Corporation was successful in the corporation's suit alleging that a city's denial of the corporation's variance applications under the September 20, 1983, Cumming, Georgia zoning ordinance, as amended on June 20, 2006, violated Ga. Const. 1983, Art. I, Sec. I, Para. V since the ordinance, which limited billboard content to travel services and attractions, was unconstitutional on the ordinance's face because the ordinance was a prior restraint that was content-based and lacked time limits, and the city's delay of more than 150 days in processing the corporation's billboard variance applications violated the corporation's rights. *Roma Outdoor Creations, Inc. v. City of Cumming*, 599 F. Supp. 2d 1332 (N.D. Ga. 2009).

4. Sexual Expression

When allegedly obscene materials or films are suppressed or seized, a judicial proceeding must provide for a prompt and final judicial determination of the obscenity of the film or material. Temporary restraints to preserve the status quo in this regard are authorized after an adversary hearing and when followed by a prompt final determination of obscenity. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Injunctive procedures are available to stop obscene expressions. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Government must bear burden of proof of obscenity. — In each case, the government must institute judicial proceedings whereby the material or film is seized or suppressed and the government bears the burden of proof of the obscenity of the material or film. *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974).

Sexually-oriented communication. — Statute prohibiting certain nude and sexual conduct on premises where alcoholic beverages are sold or dispensed for consumption on the premises infringes upon protected speech and must fall as an improper exercise of the state's police power. *Harris v. Entertainment Sys.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

Although a state may have a certain amount of its police power restored to it under the Twenty-first Amendment that would otherwise be limited under the First Amendment, the expression involved in an establishment offering sexually-oriented communication where alcohol is served is still within the purview of the First Amendment, and is still protected by Georgia's free expression guarantees. Because Georgia has no constitutional equivalent to the Twenty-first Amendment, the state's police power, though possibly not limited under the U.S. Constitution, is limited by Georgia's Constitution. *Harris v. Entertainment Sys.*, 259 Ga. 701, 386 S.E.2d 140 (1989).

O.C.G.A. § 16-12-103(b)(2) prohibiting the admission of persons between 18 and 21 years of age to premises where sexually explicit performances are exhibited is unconstitutional as an infringement on free speech rights without proof of a compelling state interest justifying the application of such a restriction. *State v. Cafe Erotica, Inc.*, 269 Ga. 486, 500 S.E.2d 574 (1998).

"Total nude dancing" municipal ordinance unconstitutional. — Municipal ordinance prohibiting total nude dancing and placing restrictions on partial nude dancing was an unconstitutional infringement on protected expression as overly broad, and void for vagueness for lack of sufficient warning as to proscribed conduct. *Pel Assoc., Inc. v. Joseph*, 262 Ga.

Application (Cont'd)**4. Sexual Expression** (Cont'd)

904, 427 S.E.2d 264 (1993).

Ordinance prohibiting sale of alcohol in adult entertainment establishments. — City ordinance prohibiting the sale of alcohol at an erotic dance establishment was constitutional. The adult entertainment establishment ordinance was narrowly drawn to promote the city's interest in combating the secondary effects of adult entertainment establishments. *Gravely v. Bacon*, 263 Ga. 203, 429 S.E.2d 663 (1993).

County ordinance restricting adult entertainment establishments offering nude dancing and alcohol was sufficiently narrow in its descriptions of prohibited attire and conduct to pass constitutional challenges for "overbreadth". *S.J.T., Inc. v. Richmond County*, 263 Ga. 267, 430 S.E.2d 726 (1993).

A legislative restriction on adult entertainment must satisfy a tripartite test in order to comport with the free speech guarantees of the federal and state constitutions. The constitutionality of a law regulating adult entertainment will be upheld only: (1) if it furthers an important government interest; (2) if that government interest is unrelated to the suppression of speech; and (3) if the incidental restriction of speech is no greater than is essential to the furtherance of that government interest. *Discotheque, Inc. v. City Council*, 264 Ga. 623, 449 S.E.2d 608 (1994).

When the stated purpose of a municipal ordinance regulating adult entertainment on premises licensed to sell alcoholic beverages was to reduce criminal activity and deterioration of neighborhoods as pernicious secondary effects of adult entertainment establishments, the city failed to show there was no genuine issue of material fact as to these issues. *Discotheque, Inc. v. City Council*, 264 Ga. 623, 449 S.E.2d 608 (1994).

A city ordinance adopted pursuant to the authority of Ga. Const. 1983, Art. III, Sec. VI, Para. VII, and providing that a liquor license would not be issued for a location where adult entertainment licenses were required did not violate con-

stitutional free speech guarantees. *Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997), cert. denied, 522 U.S. 818, 118 S. Ct. 70, 139 L. Ed. 2d 31 (1997).

Restricting off-site advertising of nude dance establishments. — A statute proscribing any form of off-site advertising for commercial establishments featuring nude dancing impedes the free flow of information and far exceeds the state's legitimate interest in preventing hazards to the traveling public, and, thus, impermissibly infringes the right of free speech. *State v. Cafe Erotica, Inc.*, 270 Ga. 97, 507 S.E.2d 732 (1998).

Indecent or obscene speech. — Defendant's conviction for violating O.C.G.A. § 46-5-21(a)(1) was reversed as the statute was an overbroad infringement on defendant's First Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. V rights to free speech; the statute does not contain the necessary language setting out the least restrictive means to further a compelling state interest as it applies to indecent or obscene speech, whether heard by children or adults, and whether not welcomed by listeners or spoken with intent to please. *McKenzie v. State*, 279 Ga. 265, 626 S.E.2d 77 (2005).

Cited in *Phillips v. Rozar*, 172 Ga. 862, 159 S.E. 245 (1931); *Dalton v. State*, 176 Ga. 645, 169 S.E. 198 (1933); *Melton v. Beard*, 15 F. Supp. 980 (M.D. Ga. 1936); *Ferguson v. City of Moultrie*, 71 Ga. App. 15, 29 S.E.2d 786 (1944); *Williams v. Jenkins*, 211 Ga. 10, 83 S.E.2d 614 (1954); *Atlanta Newspapers, Inc. v. State*, 101 Ga. App. 105, 113 S.E.2d 148 (1960); *Williams v. State*, 217 Ga. 312, 122 S.E.2d 229 (1961); *City of Atlanta v. Lopert Pictures Corp.*, 217 Ga. 432, 122 S.E.2d 916 (1961); *International Longshoremen's Ass'n v. Georgia Ports Auth.*, 217 Ga. 712, 124 S.E.2d 733 (1962); *City of Atlanta v. Columbia Pictures Corp.*, 218 Ga. 714, 130 S.E.2d 490 (1963); *Mack v. Connor*, 220 Ga. 450, 139 S.E.2d 286 (1964); *Henson v. Georgia Indus. Realty Co.*, 220 Ga. 857, 142 S.E.2d 219 (1965); *Harper v. Burgess*, 225 Ga. 420, 169 S.E.2d 297 (1969); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969); *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250

(1982); *Speedway Grading Corp. v. Gardner*, 206 Ga. App. 439, 425 S.E.2d 676 (1992); *Anderson v. State*, 231 Ga.

App. 807, 499 S.E.2d 717 (1998); *Airtran Airlines v. Plain Dealer Publishing Co.*, 66 F. Supp. 2d 1355 (N.D. Ga. 1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, §§ 424 et seq., 465 et seq.

Am. Jur. Trials. — Homeowners' Association Defense: Free Speech, 93 Am. Jur. Trials 293.

C.J.S. — 16B C.J.S., Constitutional Law, §§ 740 et seq., 841 et seq., 918 et seq.

ALR. — Validity of legislation directed against social or industrial propaganda deemed to be of a dangerous tendency, 1 ALR 336; 20 ALR 1535; 73 ALR 1494.

Right of association to expel or discipline member for exercising a right, or performing duty, as a citizen, 14 ALR 1446.

What amounts to vagrancy, 14 ALR 1482.

Constitutionality of statute regulating newspapers or magazines, 35 ALR 7; 110 ALR 327.

Validity of statute or ordinance against picketing, 35 ALR 1200; 108 ALR 1119; 122 ALR 1043; 125 ALR 963; 130 ALR 1303.

Constitutionality of statute or ordinance prohibiting or regulating advertising by physician, surgeon, or other person professing healing arts, 54 ALR 400.

Constitutionality, construction, and effect of censorship laws, 64 ALR 505.

Constitutionality of statute regulating or imposing tax or license fee upon newspapers or magazines, 110 ALR 327.

Power of legislature or school authorities to prescribe and enforce oath of allegiance, "salute to flag," or other ritual of a patriotic character, 110 ALR 383; 120 ALR 655; 127 ALR 1502; 141 ALR 1030; 147 ALR 698.

Injunction against picketing per se, where past picketing has been accompanied by violence or other improper conduct, 132 ALR 1218.

Right of privacy, 138 ALR 22; 57 ALR2d 634; 57 ALR3d 16.

Validity, construction, and application of statute or ordinance prohibiting solicitation of passers-by in street in front of place of business, 139 ALR 1197.

Unfair labor practice, within National Labor Relations Act or similar state statute, predicated upon expressions of opinion or statements by employer concerning labor unions, 146 ALR 1024.

Freedom of speech and press as limitation on power to punish for contempt, 159 ALR 1379.

Governmental control of actions or speech of public officers or employees in respect of matters outside the actual performance of their duties, 163 ALR 1358.

Constitutionality of statute respecting employer's control of or interference with political affiliations or activities of employees, 166 ALR 707.

Validity, construction, and application of statute or ordinance regarding solicitation of persons to join an organization or society or to pay membership fees or dues, 167 ALR 697.

Picketing of place of business by persons not employed therein, 1 ALR2d 1274.

Public regulation and prohibition of sound amplifiers or loud-speaker broadcasts in streets and other public places, 10 ALR2d 627.

Defamatory nature of statements reflecting on plaintiff's religious beliefs, standing, or activities, 87 ALR2d 453.

Validity and construction of statute or ordinance requiring or prohibiting posting or other publication of price of commodity or services, 89 ALR2d 901; 80 ALR3d 740.

Nonlabor picketing or boycott, 93 ALR2d 1284.

Modern concept of obscenity, 5 ALR3d 1158.

Validity of procedures designed to protect the public against obscenity, 5 ALR3d 1214; 93 ALR3d 297.

Legality of peaceful labor picketing on private property, 10 ALR3d 846.

Invasion of privacy by publication dealing with one other than plaintiff, 18 ALR3d 873.

Right of publisher of newspaper or magazine, in absence of contractual obligation, to refuse publication of advertisement, 18 ALR3d 1286.

Validity and construction of statutes or ordinances regulating telephone answering services, 35 ALR3d 1430.

Student organization registration statement, filed with public school or state university or college, as open to inspection by public, 37 ALR3d 1311.

Attacks on judiciary as a whole as indirect contempt, 40 ALR3d 1204.

Validity of statute or ordinance forbidding pharmacist to advertise prices of drugs or medicines, 44 ALR3d 1301.

Censorship of convicted prisoners' "legal" mail, 47 ALR3d 1150.

Censorship of convicted prisoners' "non-legal" mail, 47 ALR3d 1192.

Right of accused to have press or other media representatives excluded from criminal trial, 49 ALR3d 1007.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340.

Exhibition of obscene motion pictures as nuisance, 50 ALR3d 969.

Invasion of privacy by radio or television, 56 ALR3d 386.

Waiver or loss of right of privacy, 57 ALR3d 16.

Consumer picketing to protest products, prices, or services, 62 ALR3d 227.

Application of state law to sex discrimination in employment advertising, 66 ALR3d 1237.

Criminal offenses under statutes and ordinances regulating charitable solicitations, 76 ALR3d 924.

Power of corporation to make political contribution or expenditure under state law, 79 ALR3d 491.

Validity and construction of state or local regulation prohibiting off-premises advertising structures, 81 ALR3d 486.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR3d 564.

Restricting public access to judicial records of state courts, 84 ALR3d 598.

Right of clergyman appearing in court as professional attorney to be in clerical garb, 84 ALR3d 1143.

Publication of address as well as name of person as invasion of privacy, 84 ALR3d 1159.

Unemployment compensation: eligibility as affected by claimant's refusal to comply with requirements as to dress, grooming, or hygiene, 88 ALR3d 150.

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, 93 ALR3d 297.

State regulation of the giving or making of political contributions or expenditures by private individuals, 94 ALR3d 944.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass, 95 ALR3d 411.

Privilege of newsgatherer against disclosure of confidential sources of information, 99 ALR3d 37.

Identification of jobseeker by race, religion, national origin, sex, or age, in "Situation Wanted" employment advertising as violation of state civil rights laws, 99 ALR3d 154.

Defamation: publication of "Letter to Editor" in newspaper as actionable, 99 ALR3d 573; 54 ALR5th 443.

Validity of "war zone" ordinances restricting location of sex-oriented businesses, 1 ALR4th 1297.

Validity and construction of state statute or ordinance prohibiting picketing, parading, demonstrating, or appearing in public while masked or disguised, 2 ALR4th 1241.

Validity and construction of statute or ordinance prohibiting use of "obscene" language in public, 2 ALR4th 1331.

Validity of ordinances restricting location of "adult entertainment" or sex-oriented business, 10 ALR4th 524; 10 ALR5th 538.

Discharge from employment on ground of political views or conduct as affecting right to unemployment compensation, 29 ALR4th 287; 38 ALR5th 39.

Validity, under state constitutions, of private shopping center's prohibition or regulation of political, social, or religious expression or activity, 38 ALR4th 1219.

Validity and construction of "terroristic threat" statutes, 45 ALR4th 949.

Validity, construction, and effect of state statutes restricting political activities of public officers or employees, 51 ALR4th 702.

False light invasion of privacy — cognizability and elements, 57 ALR4th 22.

False light invasion of privacy — defenses and remedies, 57 ALR4th 244.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation—post-New York Times cases, 57 ALR4th 404.

Libel or slander: defamation by statement made in jest, 57 ALR4th 520.

Intrusion by news-gathering entity as invasion of right of privacy, 69 ALR4th 1059.

Liability for discharge of employee from private employment on ground of political views or conduct, 38 ALR5th 39.

Propriety of exclusion of press or other media representatives from civil trial, 39 ALR5th 103.

Propriety of publishing identity of sexual assault victim, 40 ALR5th 787.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 ALR5th 291.

Validity of regulation by public-school authorities as to clothes or personal appearance of pupils, 58 ALR5th 1.

Constitutionality of state statutes banning distribution of sexual devices, 94 ALR5th 497.

First Amendment protection afforded to commercial and home video games, 106 ALR5th 337.

First Amendment protection afforded to comic books, comic strips, and cartoons, 118 ALR5th 213.

Construction and application of federal and state constitutional and statutory speech or debate provisions, 24 ALR6th 255.

Amendment protection afforded to web site operators, 30 ALR6th 299.

First Amendment protection afforded to blogs and bloggers, 35 ALR6th 407.

Validity of restrictions imposed during national political conventions impinging upon rights to freedom of speech and assembly under First Amendment, 46 ALR6th 465.

Restrictive covenants or homeowners'

association regulations restricting or prohibiting flags, signage, or the like on homeowner's property as restraint on free speech, 51 ALR6th 533.

When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 ALR6th 93.

Construction and application of Supreme Court's holding in *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 175 L. Ed. 2d 753, 187 L.R.R.M. (BNA) 2961, 159 Lab. Cas. (CCH) P 10166 (2010), that government may not prohibit independent and indirect corporate expenditures on political speech, 65 ALR6th 503.

Constitutionality of restricting public speech in street, sidewalk, park, or other public forum — Characteristics of forum, 70 ALR6th 513.

Constitutionality of restricting public speech in street, sidewalk, park, or other public forum — Manner of restriction, 71 ALR6th 471.

Constitutional challenges to compelled speech — General principles, 72 ALR6th 513.

Constitutional challenges to compelled speech — Particular situations or circumstances, 73 ALR6th 281.

Constitutionality of teaching or otherwise promoting secular humanism in public schools, 103 ALR Fed. 538.

Protection of commercial speech under first amendment — Supreme Court Cases, 164 ALR Fed. 1.

Construction and application of establishment clause of First Amendment — U.S. Supreme Court cases, 15 ALR Fed. 2d 573.

First Amendment protection for members of military subjected to discharge, transfer, or discipline because of speech, 40 ALR Fed. 2d 229.

Application of First Amendment's "ministerial exception" or "ecclesiastical exception" to federal civil rights claims, 41 ALR Fed. 2d 445.

Application of First Amendment in school context — Supreme Court cases, 57 ALR Fed. 2d 1.

Paragraph VI. Libel.

In all civil or criminal actions for libel, the truth may be given in evidence; and, if it shall appear to the trier of fact that the matter charged as libelous is true, the party shall be discharged.

1976 Constitution. — Art. I, Sec. I, Para. VIII.

Cross references. — Truth evidence in libel cases, § 51-5-6.

Law reviews. — For comment, “You’ve

Got Libel: How the Can-Spam Act Delivers Defamation Liability to Spam-Fighters and Why the First Amendment Should Delete the Problem,” see 58 Emory L.J. 1013 (2009).

RESEARCH REFERENCES

ALR. — State constitutional protection of allegedly defamatory statements regarding private individual, 33 ALR4th 212.

Defamation: designation as scab, 65 ALR4th 1000.

Paragraph VII. Citizens, protection of.

All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship.

1976 Constitution. — Art. I, Sec. II, Para. IX.

Cross references. — United States citizen residents of Georgia being citizens

of this state, U.S. Const., amend. 14. Rights of Georgia citizens generally, § 1-2-6. Rights of persons not citizens of Georgia generally, § 1-2-9 et seq.

JUDICIAL DECISIONS

Equality of the civil rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the employment of this principle, if within its power. *Missouri State Life Ins. Co. v. Lovelace*, 1 Ga. App. 446, 58 S.E. 93 (1907).

Safeguarding the right of the people to exercise their civil rights and to be free from violence and intimidation is not only a compelling interest, it is the General Assembly’s affirmative constitutional duty. *State v. Miller*, 260 Ga. 669, 398 S.E.2d 547 (1990).

Access to courts. — The 1987 amendment to O.C.G.A. § 9-3-73, which altered tolling provisions otherwise applicable to tort claims by injured minors in cases in

which tort claims arose from health care professionals’ malpractice, did not violate a brain-damaged child’s right to equal protection or right of access to the courts. *Smith v. Cobb County-Kennestone Hosp. Auth.*, 262 Ga. 566, 423 S.E.2d 235 (1992).

Punishment for violent or repeat offenders constitutional. — O.C.G.A. § 17-10-6.1, which dictates the punishment for serious violent offenders, in conjunction with O.C.G.A. § 17-10-7, the sentencing statute applicable to recidivist armed robbers, does not violate either the federal or the state constitutions. *Byrd v. State*, 236 Ga. App. 485, 512 S.E.2d 372 (1999).

Failure to conduct Faretta hearing. — Trial court deprived the defendant of the defendant’s constitutional right to

self-representation by summarily ruling that the defendant could not represent oneself at trial without conducting a Faretta hearing and apprising the defendant of the dangers and disadvantages of self-representation. *Smith v. State*, 332 Ga. App. 849, 775 S.E.2d 211 (2015).

Cited in *Smith v. DuBose*, 78 Ga. 413, 3 S.E. 309, 6 Am. St. R. 260 (1887); *Melton v. State*, 180 Ga. 104, 178 S.E. 447 (1935); *National Fin. Co. v. Citizens Loan & Sav. Co.*, 184 Ga. 619, 192 S.E. 717 (1937); *Rossman v. City of Moultrie*, 189 Ga. 681, 7 S.E.2d 270 (1940); *Williams v. State*, 199 Ga. 504, 34 S.E.2d 854 (1945); *Williams v. State*, 206 Ga. 837, 59 S.E.2d 384 (1950); *Cox v. Peters*, 208 Ga. 498, 67 S.E.2d 579

(1951); *Chronister v. City of Atlanta*, 99 Ga. App. 447, 108 S.E.2d 731 (1959); *Mack v. Connor*, 220 Ga. 450, 139 S.E.2d 286 (1964); *Williams v. Shaffer*, 222 Ga. 334, 149 S.E.2d 668 (1966); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969); *J. Bain, Inc. v. Poulos*, 121 Ga. App. 647, 175 S.E.2d 86 (1970); *Houser v. State*, 234 Ga. 209, 214 S.E.2d 893 (1975); *Gibson v. State*, 236 Ga. 874, 226 S.E.2d 63 (1976); *King v. State*, 244 Ga. 536, 261 S.E.2d 333 (1979); *Great N. Nekoosa Corp. v. Board of Tax Assessors*, 244 Ga. 624, 261 S.E.2d 346 (1979); *Stoker v. Wood*, 161 Ga. App. 110, 289 S.E.2d 265 (1982); *In the Interest of J.H.*, 244 Ga. App. 788, 536 S.E.2d 805 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Legal resident is synonymous with domiciliary, a domiciliary being one whose permanent home is in a particular place, known as the domicile. 1958-59 Op. Att'y Gen. p. 91.

Requirements for state citizenship. — A person must be a citizen, either natural born or naturalized, of the United States and must reside within this state in order to be a citizen of the State of Georgia. 1984 Op. Att'y Gen. No. 84-55.

Resident need not retain legal residence in Georgia. — It is not necessary to retain a legal residence in Georgia in order to be a resident of the state. 1958-59 Op. Att'y Gen. p. 91.

Legal resident is not actual resident. — The fact that one is a legal resident of Georgia does not, of itself, render one an actual resident of the state. One can only be an actual resident by living in the state. 1958-59 Op. Att'y Gen. p. 91.

Effect of temporary change of residence. — Loss of citizenship does not result from a change of residence not intended to be permanent. 1958-59 Op. Att'y Gen. p. 92.

County citizenship. — Since a county is only a subdivision of the state and is not a sovereign, citizenship of a county means only domicile or residence within the county. 1984 Op. Att'y Gen. No. 84-55.

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, §§ 332 et seq., 408.

ALR. — Constitutionality of discrimination as regards degree of penalty or punishment for violation of Sunday law, 8 ALR 566.

Constitutionality of provisions of Workmen's Compensation Acts which are limited to residents of the state, 12 ALR 1207; 147 ALR 925.

Constitutionality of "civil rights" legislation by state, 49 ALR 505.

Diversity of citizenship, for purposes of federal jurisdiction, in stockholders' deriv-

ative action, 68 ALR2d 824.

What businesses or establishments fall within state civil rights statute provisions prohibiting discrimination, 87 ALR2d 120.

Power of municipal corporation to enact civil rights ordinance, 93 ALR2d 1028.

Civil rights: racial or religious discrimination in furnishing of public utilities services or facilities, 53 ALR3d 1027.

Construction and application of state equal rights amendments forbidding determination of rights based on sex, 90 ALR3d 158.

Prohibition, under state civil rights laws, of racial discrimination in rental of

privately owned residential property, 96 ALR3d 497.

Sex discrimination in treatment of jail or prison inmates, 12 ALR4th 1219.

Paragraph VIII. Arms, right to keep and bear.

The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.

1976 Constitution. — Art. I, Sec. I, Para. V.

Cross references. — Right to bear

arms, U.S. Const., amend. 2, and § 1-2-6. Restrictions on the right to bear arms, § 16-11-100 et seq.

JUDICIAL DECISIONS

Right to bear arms is common-law right, and is for the purpose of securing a well qualified militia. *Nunn v. State*, 1 Ga. 243 (1846); *Strickland v. State*, 137 Ga. 1, 72 S.E. 260, 36 L.R.A. (n.s.) 115, 1913B Ann. Cas. 323 (1911).

Legislature may inhibit wearing of concealed weapons. *Stockdale v. State*, 32 Ga. 225 (1861).

Provision requiring one carrying revolver to obtain license does not violate this paragraph. *Strickland v. State*, 137 Ga. 1, 72 S.E. 260, 36 L.R.A. (n.s.) 115, 1913B Ann. Cas. 323 (1911); *Glenn v. State*, 10 Ga. App. 128, 72 S.E. 927 (1911); *McCoy v. State*, 157 Ga. 767, 122 S.E. 200 (1924).

Prohibition of keeping and carrying certain kinds of weapons is justified for purpose of preventing crime under the general police power of regulation of the state, the question in each case being whether the particular regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary, and, under the name of regulation, amounts to a deprivation of the constitutional right to keep and bear arms. *Carson v. State*, 241 Ga. 622, 247 S.E.2d 68 (1978).

Prohibition of possessing weapons in context of visitation order. — Trial court's order that the parties not have any weapons in their possession when exchanging their children did not infringe on a parent's right under Ga. Const. 1983, Art. I, Sec. I, Para. VIII to keep and bear arms as the parent's possession of a firearm was not restricted except in the con-

text of a narrowly tailored condition of visitation justified by the evidence. *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Marketing of handguns not unreasonably dangerous or socially unacceptable. — The enactment of comprehensive licensing provisions for suppliers and purchasers of handguns indicates that the General Assembly is not inclined to ban the use of such weapons and that legislators do not consider the marketing of handguns to be an unreasonably dangerous or socially unacceptable activity. *Rhodes v. R.G. Indus., Inc.*, 173 Ga. App. 51, 325 S.E.2d 465 (1984).

O.C.G.A. § 16-11-131 is a reasonable regulation authorized by the police power and thus is not violative of Ga. Const. 1976, Art. I, Sec. I, Para. V (see now O.C.G.A. Art. I, Sec. I, Para. VIII). *Landers v. State*, 250 Ga. 501, 299 S.E.2d 707 (1983).

O.C.G.A. § 16-11-129 not unconstitutional. — O.C.G.A. § 16-11-129, which regulated the ability of citizens to carry a weapon in public, was justified by the goal to protect the safety of individuals who are in public places, which was a legitimate and compelling government interest. The statute was not unconstitutional as applied to an applicant who pled nolo contendere to violent felonies in Florida more than 20 years earlier, under either U.S. Const., amend. II or Ga. Const. 1983, Art. I, Sec. I, Para. VIII. *Hertz v. Bennett*, 294 Ga. 62, 751 S.E.2d 90 (2013).

Cited in *Melton v. Beard*, 15 F. Supp. 980 (M.D. Ga. 1936); *Coleman v. State*,

215 Ga. 865, 114 S.E.2d 2 (1960); Shouse v. State, 231 Ga. 716, 203 S.E.2d 537 (1974); Wells v. State, 134 Ga. App. 328, 214 S.E.2d 414 (1975); Mahar v. State, 137 Ga. App. 116, 223 S.E.2d 204 (1975); John-

ston v. State, 236 Ga. 370, 223 S.E.2d 808 (1976); Anderson v. State, 141 Ga. App. 249, 233 S.E.2d 240 (1977); McClure v. Kemp, 285 Ga. 801, 684 S.E.2d 255 (2009).

OPINIONS OF THE ATTORNEY GENERAL

Applicant seeking Georgia pistol totter's permit need not be United

States citizen. 1976 Op. Att'y Gen. No. U76-69.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Weapons and Firearms, § 8 et seq.

Am. Jur. Pleading and Practice Forms. — 25 Am. Jur. Pleading and Practice Forms, Weapons and Firearms, § 2.

C.J.S. — 94 C.J.S., Weapons, § 7 et seq.

ALR. — Validity and construction of gun control laws, 28 ALR3d 845.

Application of statute or regulation dealing with registration or carrying of weapons to transient nonresident, 68 ALR3d 1253.

Validity of state statutes restricting the right of aliens to bear arms, 28 ALR4th 1096.

Validity of state statute proscribing pos-

session or carrying of knife, 47 ALR4th 651.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 ALR4th 931.

Federal constitutional right to bear arms, 37 ALR Fed. 696.

Substitution, under Rule 24c of Federal Rules of Criminal Procedure, of alternate juror for regular juror before jury retires to consider verdict in federal criminal case, 115 ALR Fed. 381.

Construction and application of 18 USCS § 922(e), prohibiting delivery of firearms to common carrier, 125 ALR Fed. 613.

Paragraph IX. Right to assemble and petition.

The people have the right to assemble peaceably for their common good and to apply by petition or remonstrance to those vested with the powers of government for redress of grievances.

1976 Constitution. — Art. I, Sec. I, Para. VI.

Cross references. — Freedom of assembly, U.S. Const., amend. 1. A citizen's obligation to disperse in certain situations, §§ 16-10-30 and 38-2-304. Unlawful assembly, § 16-11-33. Mass gatherings by permit only, T. 31, C. 27. Unlawful picketing, §§ 34-6-3 and 34-6-5.

Law reviews. — For article discussing the weaknesses in Georgia statutes pro-

hibiting lobbying, and the effect of such law on lawyers, see 5 Mercer L. Rev. 311 (1954).

For note analyzing sovereign immunity in this state and proposing implementation of a waiver scheme and creation of a court of claims pursuant to Ga. Const. 1976, Art. VI, Sec. V, Para. I, see 27 Emory L.J. 717 (1978). For note on the Georgia right against self-incrimination, see 15 Ga. L. Rev. 1104 (1981).

JUDICIAL DECISIONS

No duty on officials to effectuate presentation and consideration of pe-

tition. — While every citizen of this state is given a constitutional right to petition

to those vested with the powers of government for redress of grievances, it does not follow that there was a duty upon the defendants, Speaker and Clerk of the House of Representatives, to effectuate its presentation and consideration, and their failure, therefore, to present a petition seeking the impeachment of certain officers to the House did not constitute a violation of a legal duty to petitioner which would form the basis for a right of action for even nominal damages. *Richter v. Harris*, 62 Ga. App. 64, 7 S.E.2d 432 (1940).

Invalidity of statute restricting right of application. — A law authorizing a court to restrain any person from applying to either department of the government for a right to which that person claims to be entitled is invalid. *Northeastern R.R. v. Morris*, 59 Ga. 364 (1877).

Unified city/county government was not a municipality for purposes of the waiver of sovereign immunity by operation of O.C.G.A. § 36-33-1, because the charter creating the unified government expressly provided that its tort and nuisance liability would follow the law and

rules of tort liability applicable to counties in Georgia. *Athens-Clarke County v. Torres*, 246 Ga. App. 215, 540 S.E.2d 225 (2000).

Requirement that one judge of a court of limited jurisdiction be available on a 24-hour basis to issue warrants does not infringe on the right to assemble as guaranteed in the state and federal constitutions. *McCray v. Cobb County*, 251 Ga. 24, 302 S.E.2d 563 (1983).

No right to solicit in privately-owned shopping malls. — Nothing in the Georgia Constitution or the Recall Act of 1989, either separately or together, establishes a right of private citizens to enter onto privately-owned shopping malls to solicit signatures for a recall petition. *Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assoc.*, 260 Ga. 245, 392 S.E.2d 8 (1990).

Cited in *Mayor of Savannah v. Fawcett*, 186 Ga. 132, 197 S.E. 253 (1938); *Ander-son v. City of Albany*, 321 F.2d 649 (5th Cir. 1963); *Verdi v. Wilkinson County*, 288 Ga. App. 856, 655 S.E.2d 642 (2007); *Meacham v. Franklin-Heard County Water Auth.*, 302 Ga. App. 69, 690 S.E.2d 186 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, §§ 397, 554, 559, 567.

C.J.S. — 16A C.J.S., Constitutional Law, §§ 740 et seq., 1134 et seq. 16B C.J.S., Constitutional Law, §§ 1134, 1135.

ALR. — Validity of statute or ordinance against picketing, 35 ALR 1200; 108 ALR 1119; 122 ALR 1043; 125 ALR 963; 130 ALR 1303.

Right of signer of petition or remonstrance to withdraw therefrom or revoke withdrawal, and time therefor, 126 ALR 1031; 27 ALR2d 604.

Nonlabor picketing or boycott, 93 ALR2d 1284.

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 ALR3d 551.

Validity, construction, and application of statute prohibiting loitering for the purpose of using or possessing dangerous drugs, 48 ALR3d 1271.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340.

Validity of regulation of college or university denying or restricting right of student to receive visitors in dormitory, 78 ALR3d 1109.

Validity of restrictions imposed during national political conventions impinging upon rights to freedom of speech and assembly under First Amendment, 46 ALR6th 465.

When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 ALR6th 93.

Paragraph X. Bill of attainder; ex post facto laws; and retroactive laws.

No bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.

1976 Constitution. — Art. I, Sec. I, Para. VII.

Cross references. — Bill of attainder, U.S. Const., art. I, sec. X, Cl. 1 and § 1-3-5. Statute of limitation defense to contracts, §§ 9-3-24 et seq. and 11-2-725. Statute of frauds defense, §§ 11-1-206, 11-2-201, and 11-8-319. Unconscionable contracts, § 11-2-302. Capacity of parties, § 13-3-20 et seq. Grounds to deny the obligations of contracts, §§ 13-4-22, 13-4-60 et seq., 13-4-81 et seq., 13-5-1 et seq. Fraud, § 13-5-5. Duress, § 13-5-6. Illegal and void contracts generally, § 13-8-1 et seq.

Law reviews. — For article, “Constitutionality of Economic Regulations,” see 2 J. of Pub. L. 98 (1953). For article discussing Georgia alimony provisions allowing modification of judgments with respect to federal and state constitutional limitations, see 18 Ga. B.J. 153 (1955). For article, “Personal Rights, Property Rights and Due Process: A Comparison of Constitutional Protection in the Georgia Supreme Court and the United States Su-

preme Court,” see 9 Mercer L. Rev. 253 (1958). For article discussing the effect of *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) on marketable title laws, see 34 Mercer L. Rev. 1005 (1983). For article, “Federal Preemption, Federal Conscription Under the New Superfund Act,” see 38 Mercer L. Rev. 643 (1987). For annual survey on local government law, see 64 Mercer L. Rev. 213 (2012).

For note, “Annexation by Municipalities in Georgia,” see 2 Mercer L. Rev. 423 (1951). For note, “Restrictive Covenants: A Need For Reappraisal of the Limitations Period,” see 17 Ga. St. B.J. 137 (1981).

For comment on *Winston v. State*, 186 Ga. 573, 198 S.E. 667 (1938), see 1 Ga. B.J. 46 (1939). For comment on *General Motors Acceptance Corp. v. Saliba*, 260 F.2d 262 (5th Cir. 1958), see 11 Mercer L. Rev. 235 (1959). For comment on *Sanders v. Harper*, 220 Ga. 649, 141 S.E.2d 156 (1965), see 17 Mercer L. Rev. 311 (1965). For comment on revival prosecutions and the ex post facto clauses, see 50 Emory L.J. 397 (2001).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- BILL OF ATTAINDER
- EX POST FACTO LAWS
- RETROACTIVE LAWS
- LAWS IMPAIRING OBLIGATION OF CONTRACTS
- VESTED RIGHTS

General Consideration

Status analogous to contractual relation could not be impaired by subsequent provisions. — The approval of school bonds by the electors and their validation according to statute created a status analogous to a contractual relation between such electors and the state, which could not be destroyed or impaired

by a subsequent statute or constitutional provision. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Contract between state and individual is protected by this constitutional prohibition. *Morris v. Interstate Bond Co.*, 180 Ga. 689, 180 S.E. 819 (1935).

No bar to tax legislation effective upon business or occupation in year

General Consideration (Cont'd)

in which enacted. — It is competent for the legislature to enact that a person entering upon the business or occupation upon which the tax provided in an ordinance has been imposed, by the terms thereof, should pay the amount of the tax named for the year, or for any period of time within the year, during which the person should choose to apply for a license. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

Statute made no irrevocable grant of right of taxation. — Former Code 1933, § 56-1310, (see now O.C.G.A. § 33-8-8) was not unconstitutional because it neither made any irrevocable grant of special privileges and immunities nor did it irrevocably give, grant, limit, or restrain the state's sovereign right of taxation as proscribed by this paragraph and Ga. Const. 1945, Art. VII, Sec. I, Para. I (see now Ga. Const. 1983, Art. VII, Sec. I, Para. I). *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966).

Statute regulating coin operated amusement machines. — In a suit for tortious interference with contractual relations, the trial court erred by granting partial summary judgment against the owners of coin-operated amusement machines because O.C.G.A. § 50-27-70 et seq. did not void preexisting contracts and it was error to interpret the statute otherwise. *All Star, Inc. v. Ga. Atlanta Amusements, LLC*, 332 Ga. App. 1, 770 S.E.2d 22 (2015).

Constitutional issue on zoning ordinance. — Trial court erred by failing to address whether a 1993 county zoning ordinance was constitutional because the record established that the landfill permit applicant raised a constitutional challenge to the zoning ordinance before the trial court in its response to the challengers' motion for partial summary judgment and, in fact, in its transfer order to the appellate court, the trial court specifically stated that the court did not rule on the applicant's constitutional argument. *Southern States-Bartow County, Inc. v. Riverwood Farm Prop. Owners Ass'n, Inc.*, 331 Ga. App. 878, 769 S.E.2d 823 (2015).

Application of amendments to criminal history record information statute. — Recent amendments to Georgia's criminal history record information statute, O.C.G.A. § 35-3-37, are to be applied to information regarding arrests occurring prior to the amendments' effective date as the statute itself made clear that the statute does apply to information regarding arrests pre-dating the amendments, and such application presents no constitutional problem. *Mosley v. Lowe*, 298 Ga. 363, 782 S.E.2d 43 (2016).

Cited in *Cochran v. City of Thomasville*, 167 Ga. 579, 146 S.E.2d 462 (1928); *State Hwy. Bd. v. Willcox*, 168 Ga. 883, 149 S.E. 182 (1929); *Camp v. State*, 171 Ga. 25, 154 S.E. 436 (1930); *Georgia Pub. Serv. Comm'n v. Saye & Davis Transf. Co.*, 170 Ga. 873, 154 S.E. 439 (1930); *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930); *Manley v. Mobley*, 174 Ga. 228, 162 S.E. 536 (1932); *Slater v. Davis*, 174 Ga. 633, 163 S.E. 704 (1932); *Perkins v. Mayor of Madison*, 175 Ga. 714, 165 S.E. 811 (1932); *State Bd. of Barber Exmrs. v. Blocker*, 176 Ga. 125, 167 S.E. 298 (1932); *Hutchinson v. Brown*, 47 Ga. App. 82, 169 S.E. 848 (1933); *Gormley v. Searcy*, 179 Ga. 389, 175 S.E. 913 (1934); *West v. Frick Co.*, 55 Ga. App. 854, 192 S.E. 55 (1937); *Walker County Fertilizer Co. v. Napier*, 184 Ga. 861, 193 S.E. 770 (1937); *Wright v. Cannon*, 185 Ga. 363, 195 S.E. 168 (1938); *Bowers v. Keller*, 185 Ga. 435, 195 S.E. 447 (1938); *West v. Trotzier*, 185 Ga. 794, 196 S.E. 902 (1938); *Benton v. State*, 187 Ga. 149, 199 S.E. 749 (1938); *Morris v. Stanford*, 58 Ga. App. 726, 199 S.E. 773 (1938); *West v. Anderson*, 187 Ga. 587, 1 S.E.2d 671 (1939); *Green & Milam v. State Revenue Comm'n*, 188 Ga. 442, 4 S.E.2d 144 (1939); *Salter v. Bank of Commerce*, 189 Ga. 328, 6 S.E.2d 290 (1939); *Barnett v. D.O. Martin Co.*, 191 Ga. 11, 11 S.E.2d 210 (1940); *Town of McIntyre v. Scott*, 191 Ga. 473, 12 S.E.2d 883 (1940); *National Sur. Corp. v. Gatlin*, 192 Ga. 293, 15 S.E.2d 180 (1941); *Renfroe v. Butts*, 192 Ga. 720, 16 S.E.2d 551 (1941); *McCook v. Long*, 193 Ga. 299, 18 S.E.2d 488 (1942); *FDIC v. Beasley*, 193 Ga. 727, 20 S.E.2d 23 (1942); *Thacker v. Morris*, 196 Ga. 167, 26 S.E.2d 329 (1943); *Steward v. Peerless Furn. Co.*, 70 Ga. App.

236, 28 S.E.2d 396 (1943); *Kelley v. Newton County*, 198 Ga. 483, 32 S.E.2d 99 (1944); *Williams v. Ragsdale*, 205 Ga. 274, 53 S.E.2d 339 (1949); *South W.R.R. v. Benton*, 206 Ga. 770, 58 S.E.2d 905 (1950); *Ivy v. Ferguson*, 82 Ga. App. 600, 62 S.E.2d 191 (1950); *City of Atlanta v. Anglin*, 209 Ga. 170, 71 S.E.2d 419 (1952); *McGill v. State*, 209 Ga. 282, 71 S.E.2d 548 (1952); *Biddle v. Moore*, 87 Ga. App. 524, 74 S.E.2d 552 (1953); *MacNeill v. Fulton County*, 210 Ga. 119, 78 S.E.2d 40 (1953); *Williams Bros. Lumber Co. v. Anderson*, 210 Ga. 198, 78 S.E.2d 612 (1953); *Stewart v. Davis*, 210 Ga. 278, 79 S.E.2d 535 (1954); *Crawford v. Irwin*, 211 Ga. 241, 85 S.E.2d 8 (1954); *Harper v. City Council*, 212 Ga. 605, 94 S.E.2d 690 (1956); *Murphey v. Murphey*, 215 Ga. 19, 108 S.E.2d 872 (1959); *Schaffer v. Oxford*, 102 Ga. App. 710, 117 S.E.2d 637 (1960); *Dependable Ins. Co. v. Gibbs*, 218 Ga. 305, 127 S.E.2d 454 (1962); *Hill v. Perkins*, 218 Ga. 354, 127 S.E.2d 909 (1962); *Stephenson v. State*, 219 Ga. 652, 135 S.E.2d 380 (1964); *Bolton v. State*, 220 Ga. 632, 140 S.E.2d 866 (1965); *Sanders v. Harper*, 220 Ga. 649, 141 S.E.2d 156 (1965); *Brown v. City of Marietta*, 220 Ga. 826, 142 S.E.2d 235 (1965); *Webb v. Whitley*, 221 Ga. 618, 146 S.E.2d 722 (1966); *Veal v. Smith*, 221 Ga. 712, 146 S.E.2d 751 (1966); *National Factor & Inv. Corp. v. State Bank*, 224 Ga. 535, 163 S.E.2d 817 (1968); *Bugden v. Bugden*, 225 Ga. 413, 169 S.E.2d 337 (1969); *Stith v. Hudson*, 226 Ga. 364, 174 S.E.2d 892 (1970); *Hawes v. National Serv. Indus., Inc.*, 121 Ga. App. 775, 175 S.E.2d 34 (1970); *Whitley v. Whitley Constr. Co.*, 121 Ga. App. 696, 175 S.E.2d 128 (1970); *Smith v. Merchants & Farmers Bank*, 226 Ga. 715, 177 S.E.2d 249 (1970); *Southern Land, Timber & Pulp Corp. v. United States*, 322 F. Supp. 788 (N.D. Ga. 1970); *Carter v. Haynes*, 228 Ga. 462, 186 S.E.2d 115 (1971); *Chatham County Hosp. Auth. v. John Hancock Mut. Life Ins. Co.*, 325 F. Supp. 614 (S.D. Ga. 1971); *Montaquila v. Cranford*, 230 Ga. 442, 197 S.E.2d 357 (1973); *Stith v. Hudson*, 231 Ga. 520, 202 S.E.2d 392 (1973); *House v. James*, 232 Ga. 443, 207 S.E.2d 201 (1974); *Spalding County v. East Enters., Inc.*, 232 Ga. 887, 209 S.E.2d 215 (1974); *Stoner v. Fortson*, 379 F. Supp. 704

(N.D. Ga. 1974); *Johnson v. State*, 134 Ga. App. 67, 213 S.E.2d 170 (1975); *Town of Lyerly v. Short*, 234 Ga. 877, 218 S.E.2d 588 (1975); *Thompson v. Hornsby*, 235 Ga. 561, 221 S.E.2d 192 (1975); *Busbee v. Georgia Conference, Am. Ass'n of Univ. Professors*, 235 Ga. 752, 221 S.E.2d 437 (1975); *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975); *Bell v. Bell*, 237 Ga. 464, 228 S.E.2d 850 (1976); *Nelson v. Bloodworth*, 238 Ga. 264, 232 S.E.2d 547 (1977); *Stith v. Morris*, 241 Ga. 247, 244 S.E.2d 817 (1978); *Savage v. City of Atlanta*, 242 Ga. 671, 251 S.E.2d 268 (1978); *Bryan v. Bryan*, 242 Ga. 826, 251 S.E.2d 566 (1979); *Insurance Co. of N. Am. v. Henson*, 150 Ga. App. 788, 258 S.E.2d 706 (1979); *Hollowell v. Jove*, 628 F.2d 513 (5th Cir. 1980); *Holley v. State*, 157 Ga. App. 863, 278 S.E.2d 738 (1981); *State v. Hasty*, 158 Ga. App. 464, 280 S.E.2d 873 (1981); *Stone v. First Nat'l Bank*, 159 Ga. App. 812, 285 S.E.2d 207 (1981); *Hart v. Owens-Illinois, Inc.*, 161 Ga. App. 831, 289 S.E.2d 544 (1982); *DOT v. Delta Mach. Prods. Co.*, 162 Ga. App. 252, 291 S.E.2d 104 (1982); *State Farm Mut. Auto. Ins. Co. v. Bates*, 542 F. Supp. 807 (N.D. Ga. 1982); *Clark & Stephenson v. State Personnel Bd.*, 252 Ga. 548, 314 S.E.2d 658 (1984); *Eig v. Savage*, 177 Ga. App. 514, 339 S.E.2d 752 (1986); *Stinchcomb v. Clayton County Water Auth.*, 177 Ga. App. 558, 340 S.E.2d 217 (1986); *Stegall v. Leader Nat'l Ins. Co.*, 256 Ga. 765, 353 S.E.2d 484 (1987); *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987); *Horton v. State Employee Retirement Sys.*, 262 Ga. 458, 421 S.E.2d 703 (1992); *Bieling v. Battle*, 209 Ga. App. 874, 434 S.E.2d 719 (1993); *Chandler v. State*, 281 Ga. 712, 642 S.E.2d 646 (2007).

Bill of Attainder

Removal of county commissioner from office. — Local act, which had the effect of removing a county commissioner from office before the end of the two-year term to which the commissioner had been appointed to fill a vacancy left by a deceased commissioner, was a bill of attainder prohibited by both the Georgia and United States Constitutions. *Fulton v. Baker*, 261 Ga. 710, 410 S.E.2d 735 (1991).

Bill of Attainder (Cont'd)

Discovery. — The amended discovery procedure of O.C.G.A. § 17-16-1 et seq. is not a bill of attainder, which refers to legislative imposition of punishment on specific persons or on a class of persons without any judicial proceeding. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

Local deannexation statute that included the area of the city in which the mayor resided, making the mayor ineligible to hold office, was not an unconstitutional bill of attainder because it neither singled out the mayor nor punished the mayor as an officeholder. *Lee v. City of Villa Rica*, 264 Ga. 606, 449 S.E.2d 295 (1994).

Local act providing for selection of chair of board of education was unconstitutional bill of attainder. — H.B. 563 was an unconstitutional bill of attainder under Ga. Const. 1983, Art. I, Sec. I, Para. X, as applied to the chairperson of the Randolph County Board of Education because prior to the passage of the bill, the chairperson's term was not set to expire until December 31, 2010, but the bill operated to cut short the chairperson's four-year term that had previously been established by O.C.G.A. § 20-2-57(a) and local board policy. *Cook v. Smith*, 288 Ga. 409, 705 S.E.2d 847 (2010).

Ex Post Facto Laws

Ex post facto laws are prohibited. *Akins v. State*, 231 Ga. 411, 202 S.E.2d 62 (1973).

The amended discovery procedure of O.C.G.A. § 17-16-1 et seq. is not an ex post facto law because it affects purely procedural rights and duties. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

General aspects of ex post facto laws. — A statute cannot be an ex post facto law if it is apparent that the legislature in enacting the statute involved did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the

accused of any substantial right or immunity possessed by the defendant at the time of the commission of the offense. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

As a general rule, any law is ex post facto which is enacted after the offense was committed, and which, in relation to it or its consequences, alters the situation of the accused to the accused's disadvantage. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

Construction of ex post facto prohibitions. — The ex post facto laws prohibited by the state and federal Constitutions refer only to laws which aggravate the crime, increase the punishment, or allow conviction on a less or different weight of evidence, and not to those which reduce or mollify the penalty. *Barton v. State*, 81 Ga. App. 810, 60 S.E.2d 173 (1950).

Term ex post facto refers to criminal statutes. *Williams v. State*, 213 Ga. 221, 98 S.E.2d 373 (1957); *Goolsby v. Regents of Univ. Sys.*, 141 Ga. App. 605, 234 S.E.2d 165 (1977).

The taking of a urine sample from a fireman by a city was not a legislative enactment and therefore did not violate the ex post facto clause. *Smith v. City of E. Point*, 189 Ga. App. 454, 376 S.E.2d 215 (1988), cert. denied, 189 Ga. App. 913, 376 S.E.2d 215 (1989).

Ex post facto law relates to criminal cases only and is a law that alters the situation of the accused to the accused's disadvantage. *Bailey v. State*, 210 Ga. 52, 77 S.E.2d 511 (1953).

Prohibition of ex post facto laws applies only to substantive, not procedural, rights. *Cannon v. State*, 246 Ga. 754, 272 S.E.2d 709 (1980).

Act which is procedural in nature does not violate ex post facto rule when applied to previously committed offense unless it results in the infliction of greater punishment for the crime or alters the situation of the accused to the accused's disadvantage. *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974).

Statute that only regulates procedure is outside constitutional prohibitions. — While it is the rule that no one

has a vested right in a mere mode of procedure, so that a statute merely regulating procedure, and leaving untouched “all the substantial protections with which existing law surrounds the person accused of crime,” is not within the constitutional inhibition against ex post facto laws, yet a statute is void and ineffective as related to previous offenses, if it takes from the accused a substantial right given to the accused by the law in force at the time to which the accused’s guilt relates, and such a statute “cannot be sustained simply because, in a general sense, it may be said to regulate procedure.” *Winston v. State*, 186 Ga. 573, 198 S.E. 667 (1938), commented on in 1 Ga. B.J. 46 (1939); *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

In order for statute to violate prohibition against ex post facto laws it must affect substantive right of accused and an accused does not have a vested right in a mere mode of procedure. *Eades v. State*, 232 Ga. 735, 208 S.E.2d 791 (1974).

Upon the defendant’s constitutional challenge to the retrospective application of three provisions of the Criminal Justice Act, Ga. L. 2005, p. 20, no reversible error resulted from challenges to the closing arguments and admission of character evidence, as: (1) the former was not distinctly ruled upon by the lower court; and (2) the lower court sustained objections to the admissibility of character evidence, and thus, the state could not introduce character evidence regarding the defendant’s prior criminal convictions; moreover, a change in the number of the defendant’s peremptory challenges by the Act did not affect any protected right by the application of the amended version of O.C.G.A. § 15-12-165, as strikes were procedural and not substantive in nature. *Madison v. State*, 281 Ga. 640, 641 S.E.2d 789 (2007).

Jury determination of sentence is not a substantive right so as to come within the proscriptions of “ex post facto laws”. *Adkins v. State*, 134 Ga. App. 507, 215 S.E.2d 270 (1975); *Mealor v. State*, 134 Ga. App. 564, 215 S.E.2d 272 (1975).

Changes deemed necessary for orderly and just conduct of criminal

trials is outside ex post facto prohibitions. — When the changes effected by the enactment of a law constitute merely an alteration in the conditions deemed necessary for the orderly and just conduct of criminal trials, they do not deprive the defendant of any substantial personal right within the meaning of the constitutional prohibitions of ex post facto laws. *Todd v. State*, 228 Ga. 746, 187 S.E.2d 831, answer conformed to, 125 Ga. App. 841, 189 S.E.2d 696 (1972).

Statute may use conviction as element of future offense. — Even though a statute, passed after a conviction, uses the conviction as an element of a future offense, this is not an ex post facto law, because the defendant’s punishment for an earlier conviction is not increased, because the statute punishes only for a future offense, and because punishment is rationally enhanced by the prior conviction. *State v. Dean*, 235 Ga. App. 847, 510 S.E.2d 605 (1998).

Prior conviction as an element of a future offense. — Even though O.C.G.A. § 42-1-13 was passed after a sex offender’s statutory rape conviction, and used the prior conviction as an element of a future offense, it was not an ex post facto law since it only punished a future offense, which punishment was enhanced by the prior conviction, and the sex offender could only have been punished under § 42-1-13 if the offender prospectively chose to violate it by continuing to live at the offender’s current home; the fact that the prior conviction subjected the sex offender to possible punishment under § 42-1-13 did not make the statute into an unconstitutional ex post facto law. *Denson v. State of Ga.*, 267 Ga. App. 528, 600 S.E.2d 645 (2004).

Habitual violator statute is not ex post facto. — A habitual violator statute allowing consideration of offenses which occurred before enactment of the statute is not ex post facto. The repetition of the criminal conduct aggravates the offender’s guilt and justifies heavier penalties when the offender is again convicted, and the penalty is imposed for a new crime only but is heavier if the offender is a habitual violator. *Cofer v. Crowell*, 146 Ga. App. 639, 247 S.E.2d 152 (1978).

Ex Post Facto Laws (Cont'd)

Statute allowing the use of victim impact evidence at the sentencing phase of a trial is not an unconstitutional ex post facto law since it does not affect the manner and degree of punishment nor alter any substantive rights of the defendant. *Livingston v. State*, 264 Ga. 402, 444 S.E.2d 748 (1994).

Sex offender registration. — A defendant who entered an Alford plea in 2000 to sex offenses as a first offender was properly required to register as a sex offender pursuant to the 2005 amendment to O.C.G.A. § 42-1-12; that section applies to first offenders convicted before July 1, 2004, and it is not an ex post facto law because if a defendant fails to register, the defendant will be guilty of a felony distinct from those crimes of which the defendant has been previously convicted. *Watson v. State*, 283 Ga. App. 635, 642 S.E.2d 328 (2007).

Amendment of forcible rape statute meant indictment within statute of limitations. — With regard to a defendant's conviction for forcible rape of the defendant's child during the time the child was 13 through 15 years of age, the trial court correctly concluded that the state had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12, 2010, to prosecute the case noting the extension of the statute of limitation to 15 years as to forcible rape by the 1996 amendment to O.C.G.A. § 17-3-1; therefore, no ex post facto violation occurred since the indictment was filed on January 8, 2008. *Duke v. State*, 298 Ga. App. 719, 681 S.E.2d 174 (2009), cert. denied, No. S09C1866, 2010 Ga. LEXIS 31 (Ga. 2010).

Amendment changing retroactive effect of prior amendment. — An amendment which changed the retroactive effect of an earlier amendment to O.C.G.A. § 40-5-67.1, the implied consent warning law, so that it applied only to stops made after the effective date of the earlier amendment, rather than to cases pending on such date, did not violate federal or state ex post facto constitutional provisions. *State v. Martin*, 266 Ga. 244, 466 S.E.2d 216 (1996).

Imposition of special conditions of parole that were not part of the state's

parole regimen at the time of defendant's convictions did not violate the ex post facto clause of the state constitution. *Hamm v. Ray*, 272 Ga. 659, 531 S.E.2d 91 (2000).

Use of the amended version of O.C.G.A. § 42-8-34.1 when an appellant's probation was revoked due, in part, to the appellant's failure to abide by a special condition of the probation, did not implicate ex post facto concerns inasmuch as the imposition of a probated sentence is within the discretion of the sentencing court, and the appellant did not have a substantial right to receive probation, much less to receive probation that could not be revoked in its entirety upon violation of a special condition of probation. *Walker v. Brown*, 281 Ga. 468, 639 S.E.2d 470 (2007).

Amendment to firearms possession statute. — Amendment adding the phrase "or within arm's reach" after the phrase "on his person" to a criminal firearms possession statute was a substantive change and therefore subject to the prohibition against ex post facto laws. *McIntosh v. State*, 185 Ga. App. 612, 365 S.E.2d 454, cert. denied, 185 Ga. App. 910, 365 S.E.2d 454 (1988).

Amendment to drug trafficking statute. — When, at the time of the offense, O.C.G.A. § 16-13-31(a) defined two methods of committing the crime of trafficking in cocaine, one dealing with pure cocaine and the other with mixtures containing cocaine, by amending the trafficking statute in 1985 to define the crime as "actual possession of 28 grams or more of cocaine," the legislature demonstrated an intent to repeal that portion of the trafficking statute which defined the crime as "actual possession of 28 grams or more ... of any mixture containing cocaine ...," and a defendant convicted thereafter of trafficking in a mixture is being held under an illegal sentence and must be discharged in a habeas corpus proceeding. *Bassett v. Lemacks*, 258 Ga. 367, 370 S.E.2d 146 (1988).

Manufacturing methamphetamine charge in a complaint did not violate ex post facto protections under U.S. Const., art. I, sec. X and Ga. Const. 1983, Art. I, Sec. I, Para. X since the defendant was not

charged under O.C.G.A. § 16-13-31(f)(1), which was not effective at the time of the defendant's conduct; at the time of the offense, the defendant's alleged conduct was prohibited by former O.C.G.A. § 16-13-31(e). *Gentry v. State*, 281 Ga. App. 315, 635 S.E.2d 782 (2006), cert. denied, 2007 Ga. LEXIS 78 (Ga. 2007).

Probation revocation ex-post facto inquiry. — To determine if an ex post facto violation resulted from use of the applied law in a probation revocation matter, the law in effect at the time of the probation revocation must be measured against the law in effect at the time of the initial offense, not the law in effect at the time of the act that resulted in probation revocation. *Walker v. Brown*, 281 Ga. 468, 639 S.E.2d 470 (2007).

Retroactive Laws

Retroactive laws are prohibited. *Anthony v. Penn*, 212 Ga. 292, 92 S.E.2d 14 (1956).

Definition of retroactive laws. — An Act of the General Assembly which creates a new obligation and imposes a new duty in respect to transactions or considerations already past is retroactive in character, and in violation of this paragraph. *Ross v. Lettice*, 134 Ga. 866, 68 S.E. 734 (1910); *Wilkins v. Mayor of Savannah*, 152 Ga. 638, 111 S.E. 42 (1922); *Rider v. Taylor*, 166 Ga. App. 474, 304 S.E.2d 557 (1983).

Term "retroactive law" applies exclusively to constitutional challenges to civil statutes. *Evans v. State*, 252 Ga. 312, 314 S.E.2d 421, cert. denied, 469 U.S. 826, 105 S. Ct. 106, 83 L. Ed. 2d 50 (1984).

That no retroactive law shall be passed is unconditional mandate of the people; it is too positive and too certain in meaning to be misunderstood by anyone, lawyer, judge, or layman. *Grimes v. Lindsey*, 219 Ga. 779, 135 S.E.2d 860 (1964).

General aspects of retrospective laws. — Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective. Lon-

don Guarantee & Accident Co. v. Pittman, 69 Ga. App. 146, 25 S.E.2d 60 (1943); *Todd v. Morgan*, 215 Ga. 220, 109 S.E.2d 803 (1959); *Davis v. Hunt*, 218 Ga. 630, 129 S.E.2d 778 (1963).

A statute is retroactive in its legal sense, which creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. A statute does not operate retrospectively because it relates to antecedent facts, but if it is intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribe to them essentially different effects, in view of the law at the time of their occurrence, it is retroactive in character. *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943); *Todd v. Morgan*, 215 Ga. 220, 109 S.E.2d 803 (1959); *Adams v. Adams*, 219 Ga. 633, 135 S.E.2d 428 (1964); *Woodruff v. Trust Co.*, 233 Ga. 135, 210 S.E.2d 321 (1974).

Retrospective statutes are forbidden by first principles of justice, and an Act of the General Assembly which affects detrimentally some substantial right of a party, or imposes a new duty in respect to transactions or considerations already past, or places an additional burden on a pending action, is retroactive and violates the Constitution. *Bank of Norman Park v. Colquitt County*, 169 Ga. 534, 150 S.E. 841 (1929); *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943).

General rule regarding operation of laws. — This paragraph expressly prohibited the passage of retroactive laws, and the general rule laid down by former Code 1933, § 102-104 (see now O.C.G.A. § 1-3-5) was that laws prescribe only for the future; it was also a general rule applicable to amending statutes that they are to be construed as intended to have operation on future transactions only, and as having no retroactive purpose not plainly expressed. *Layton v. Liberty Loans*, 152 Ga. App. 504, 263 S.E.2d 167 (1979), overruled on other grounds, *Finance Am. Corp. v. Drake*, 154 Ga. App. 811, 270 S.E.2d 449 (1980).

Because a retroactive application of O.C.G.A. § 9-11-68 would have impaired

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the offeror's rights to recover attorney's fees and costs, the trial court did not err in applying the statute in effect at the time the offeror's offer was made. *Kromer v. Bechtel*, 289 Ga. App. 306, 656 S.E.2d 910 (2008).

Laws prescribe only for the future, and generally have no retroactive operation, and the settled rule for the construction of statutes is not to give them a retrospective operation, unless the language imperatively requires such construction. *Bank of Norman Park v. Colquitt County*, 169 Ga. 534, 150 S.E. 841 (1929); *London Guarantee & Accident Co. v. Pittman*, 69 Ga. App. 146, 25 S.E.2d 60 (1943).

Retroactive application of statute only when expressed or by necessary implication. — Unless a statute, either expressly or by necessary implication, shows that the General Assembly intended it to operate retroactively, it will be given only prospective application. *Anthony v. Penn*, 212 Ga. 292, 92 S.E.2d 14 (1956); *Robert & Co. Assocs. v. Pinkerton & Laws Co.*, 124 Ga. App. 309, 183 S.E.2d 628 (1971); *Southern Ry. v. Insurance Co. of N. Am.*, 228 Ga. 23, 183 S.E.2d 912 (1971).

Not all retrospective statutes prohibited by Constitution. — A statute which may be retrospective in its operation is not necessarily prohibited by the Constitution or by any principle of justice. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937).

Retroactive laws which do not injuriously affect any right of citizen may be passed. *State Hwy. Dep't v. Bass*, 197 Ga. 356, 29 S.E.2d 161 (1944).

Passage of only those retroactive, or rather retrospective, laws which injuriously affect vested rights of citizens is forbidden. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937); *Darby v. Cook*, 201 Ga. 309, 39 S.E.2d 665 (1946).

The general rule throughout the United States is that a state legislature may constitutionally repeal, alter, or modify state laws enacted under the police power for the protection of the public, without violating any express or implied constitu-

tional prohibition against retroactive statutes. *Fortson v. Weeks*, 232 Ga. 472, 208 S.E.2d 68 (1974).

The constitutional prohibition against retroactive laws applies only to those laws which affect or impair vested rights. *Bituminous Cas. Corp. v. United Servs. Auto. Ass'n*, 158 Ga. App. 739, 282 S.E.2d 198 (1981); *Cole v. Roberts*, 648 F. Supp. 415 (M.D. Ga. 1986).

This paragraph strikes at such retrospective legislation as injuriously affects some substantial right of citizen. *Bacon v. Mayor of Savannah*, 105 Ga. 62, 31 S.E. 127 (1898); *Mills v. Geer*, 111 Ga. 275, 36 S.E. 673, 52 L.R.A. 504 (1900).

Some laws have valid retrospective application. — While new laws passed by the legislature are normally only prospective in application, a statute determining who may be proper parties to actions, especially when the actions are of a remedial nature, will be applied to actions accrued or pending at the time of its passage. *Motor Fin. Co. v. Harris*, 150 Ga. App. 762, 258 S.E.2d 628 (1979).

Retroactive remedial laws are valid. — To apply the constitutional provision against "retroactive laws," as meaning any retroactive law, rather than those which "injuriously affect the right of citizens," would be contrary to the many decisions of this court holding that remedial laws, even though retroactive, are valid, as the reason for holding these laws to be constitutional is based on the fact that there is no vested right of the citizen involved. *State Hwy. Dep't v. Bass*, 197 Ga. 356, 29 S.E.2d 161 (1944).

Even though a statute may not be effective in a certain situation for retroactively affecting vested rights, the statute is not otherwise invalid per se. *Mead Corp. v. Collins*, 258 Ga. 239, 367 S.E.2d 790 (1988).

Ga. Const. 1983, Art. I, Sec. I, Para. X does not apply to remedial or procedural statutes. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441 (11th Cir. 1991).

Retroactive application of statute of limitations held constitutional. — The legislature may revive a workers' compensation claim which would have been barred by a previous limitation period by enacting a new statute of limita-

tion without violating Ga. Const. 1983, Art. I, Sec. I, Para. X. *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 317 S.E.2d 189, cert. denied, 469 U.S. 918, 105 S. Ct. 296, 83 L. Ed. 2d 231 (1984).

Administrator's fraudulent conveyance claims against group one were time-barred under O.C.G.A. §§ 18-2-74(a)(1) and 18-2-79(1), even though the claim was not time-barred under the limitations period in effect when the claim accrued, as application of O.C.G.A. § 18-2-79, a procedural law in effect at the time the suit was filed, did not violate the constitutional prohibition against retroactive laws under Ga. Const. 1983, Art. I, Sec. I, Para. X; the administrator also failed to avail the administrator of the one-year statute of limitation effective upon discovery of the alleged fraud. *Huggins v. Powell*, 315 Ga. App. 599, 726 S.E.2d 730 (2012).

There is no violation of the state's constitutional prohibition against the retroactive application of a procedural statute because one has no vested rights in any course of procedure, and the presumption against a retrospective statutory construction does not apply to statutory enactments which affect only court procedure and practice, even when the alteration from the statutory change results in a disadvantage to a party. *Murphy v. Murphy*, 295 Ga. 376, 761 S.E.2d 53 (2014).

Legislature cannot revive a right of action which is barred by the statute of limitations in existence prior to the passage of the reviving Act. Such an Act is unconstitutional and void for the reason that it violates this paragraph which provides that no retroactive law shall be passed. *Bussey v. Bishop*, 169 Ga. 251, 150 S.E. 78 (1929).

State has sovereign right to legislate for general welfare despite effect on existing contracts. — Constitutional restraints upon the impairment of the obligation of contracts do not prevent the state from exercising such powers as are necessary in the exercise of its sovereign right to protect the lives, health, morals, comfort, and general welfare of the public, though contracts previously entered into between individuals may thereby be af-

fected. *Moore v. Georgia Pub. Serv. Comm'n*, 242 Ga. 182, 249 S.E.2d 549 (1978).

Arbitration Code. — The application of the Georgia Arbitration Code, O.C.G.A. § 9-9-1 et seq., to a dispute arising after its effective date regarding contracts entered into at an earlier date was contemplated in its enactment; the law does not provide a new remedy or repair any obligation under the contract and its application to such a dispute does not violate the constitutional prohibition against retroactive laws. *Weyant v. MacIntyre*, 211 Ga. App. 281, 438 S.E.2d 640 (1993).

Legislative enactments modifying state laws under police power not prohibited. — A state legislature may constitutionally repeal, alter, or modify state laws enacted under the police power for the protection of the public, without violating any express or implied constitutional provision against retroactive statutes. *Keenan v. Hardison*, 245 Ga. 599, 266 S.E.2d 205 (1980).

Legislature was not precluded from subsequently modifying express and implied powers given to city authorities to prohibit livestock from running loose by the prohibition against retroactive laws. *Pierce v. Powell*, 188 Ga. 481, 4 S.E.2d 192 (1939).

Right of state may be impaired by retrospective laws. — There is authority to the effect that the right of the state, as distinguished from the right of a citizen, may be impaired by retrospective laws. *State Hwy. Dep't v. Bass*, 197 Ga. 356, 29 S.E.2d 161 (1944).

Repealing act will not be given retroactive operation, so as to divest previously acquired rights, or to impair the obligation of a contract lawfully made by virtue of and pending the existence of the law repealed. *Bank of Norman Park v. Colquitt County*, 169 Ga. 534, 150 S.E. 841 (1929).

Subsequent adoption of pending zoning ordinance was not ex post facto or retroactive law. — When the plaintiff, while proceeding to zone property was pending, filed application to authorize building of a filling station, and an ordinance was later adopted zoning plaintiff's property for residential purposes,

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such ordinance was not in violation of the federal and state Constitutions as an ex post facto or retroactive law. *Gay v. Mayor of Lyons*, 212 Ga. 438, 93 S.E.2d 352 (1956).

Statute on covenants restricting land use not intended to operate retrospectively. — Former Code 1933, § 29-301 (see now O.C.G.A. § 44-5-60), declaring that “covenants restricting lands to certain uses shall not run for more than 20 years in municipalities which have adopted zoning laws”, properly construed, was not intended to operate retrospectively, and would not have the effect of terminating a covenant that was already in existence as a valid and binding contract between the parties. *Dooley v. Savannah Bank & Trust Co.*, 199 Ga. 353, 34 S.E.2d 522 (1945).

Asbestos claim statute. — Superior and state courts did not err in entering nearly identical orders which held that because O.C.G.A. § 51-14-1 et seq. required asbestos plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected an employee’s substantive rights by establishing a new element which did not exist when the original cause of action accrued, and hence, could not be applied retrospectively; moreover, because these requirements and limitations were the heart of the statute, their severance would result in a statute that failed to correspond to the main legislative purpose, or give effect to that purpose. *DaimlerChrysler v. Ferrante*, 281 Ga. 273, 637 S.E.2d 659 (2006).

Board zoning action changing use classification of property not prohibited. — In the passage of a comprehensive zoning plan and amending it, the board of county commissioners did so under the police power, and the action of the board in changing the use classification of the defendants’ property from an agricultural use to that of apartment use does not deny the plaintiffs the equal protection of law, nor operate retroactively in violation of the federal and state constitutional provisions prohibiting the passage of ex post

facto laws. *Morgan v. Thomas*, 207 Ga. 660, 63 S.E.2d 659 (1951).

Attempt by legislature to make amendment retroactive fails. — A party in an alimony action in which a final judgment was entered prior to the 1977 amendment to Ga. L. 1964, p. 713, § 1 (see now O.C.G.A. § 19-6-19) had a vested right in the judgment not being subject to modification because of a change in the income of the wife, since the law in effect at the time of the judgment did not permit a modification on such change. Accordingly, the attempt by the legislature in Ga. L. 1978, p. 2204, § 1 and Ga. L. 1957, p. 94, § 1 (see now O.C.G.A. §§ 19-6-23 and 19-6-24), to make the 1977 amendment to Ga. L. 1964, p. 713, § 1 retroactive is unconstitutional under this paragraph. *McClain v. McClain*, 241 Ga. 422, 246 S.E.2d 187 (1978).

Retroactive application of provisions regarding insanity verdict not unconstitutional. — The provisions of former Code 1933, § 27-1503 (see now O.C.G.A. § 17-7-131), that, in the event of an acquittal of a person accused of crime by reason of insanity, the jury shall so state in their verdict, and the accused shall thereafter be confined in the state hospital for the insane, would not be unconstitutional, as being retroactive or ex post facto, when applied to the trial of a person charged with a crime committed prior to the date of the passage of the act. *Bailey v. State*, 210 Ga. 52, 77 S.E.2d 511 (1953).

Applying guilty but mentally ill provision retrospectively. — When crimes were committed before July 1, 1982, and a verdict of guilt is authorized by the evidence, the application of the “guilty but mentally ill” provision, O.C.G.A. § 17-7-131, is procedural, not substantive; it leaves untouched the substantive right to the insanity plea as an absolute defense, and the accused is given an additional advantage when the “guilty but mentally ill” statute is applied. Such a verdict is not an unconstitutional application of an ex post facto law. *Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

Statute inapplicable to commercial paper executed prior to its enact-

ment. — Ga. L. 1935, p. 381, § 1 (see now O.C.G.A. § 44-14-161) relating to confirmation of sales under foreclosure proceedings on real estate, to limit and abate deficiency judgments in suit and foreclosure proceedings on debts secured by mortgages, security deeds, and other lien contracts on real estate, is not applicable to a note and security deed executed prior to its enactment. *Guardian Life Ins. Co. of Am. v. Laird*, 181 Ga. 416, 182 S.E. 617 (1935).

Adverse possession of mineral rights constitutional. — The protection against retroactive (or retrospective) laws prohibits the impairment of vested rights. Although owners of mineral interests may be said to have “vested rights,” that property is held subject to the proper exercise of the police power by legislative bodies. O.C.G.A. § 44-5-168 (adverse possession of mineral rights) does not divest the mineral owner of the owner’s rights; it conditions the retention of those rights upon the requirements of either using them or paying taxes upon them for the public benefit. *Hayes v. Howell*, 251 Ga. 580, 308 S.E.2d 170 (1983).

No retroactive application of change in “guest passenger” rule. — A trial court does not err in refusing to apply O.C.G.A. § 51-1-36, changing the “guest passenger” rule as to the duty owed by an automobile operator to passengers to ordinary care, to a case involving a 1981 accident, since, although a statute is “remedial” and affects only the procedure and practice of the courts and thus may be retroactive in application, the “guest passenger” rule established the duty owed by an automobile owner or operator to a nonpaying guest passenger, and there is nothing in the enactment of O.C.G.A. § 51-1-36 which discloses a legislative intent to apply the terms thereof retroactively. *Rider v. Taylor*, 166 Ga. App. 474, 304 S.E.2d 557 (1983).

No retroactive application of former bank share tax statute. — Although the former bank share tax statute, Ga. L. 1975, pp. 147-153, was passed in March 1975 and stated that it did “apply to all taxable years beginning on or after January 1, 1975,” this could not retroactively impose a tax on property held by a

bank before the statute was enacted, in violation of Ga. Const. 1983, Art. I, Sec. I, Para. X. *Roberts v. Gunter*, 251 Ga. 276, 304 S.E.2d 369 (1983).

Wrongful death act amendment not applied retroactively. — The 1985 amendment to O.C.G.A. § 51-4-2, conferring exclusive standing upon the surviving spouse to bring a wrongful death action, could not be applied retroactively to bar a son’s suit on a claim which arose prior to the effective date of the amendment. *Cole v. Roberts*, 648 F. Supp. 415 (M.D. Ga. 1986).

Notice and service provisions of the Tort Claims Act, O.C.G.A. § 50-21-20 et seq., were procedural laws that could be applied retroactively to authorize dismissal of a claim against the Department of Transportation when the plaintiff did not serve the Director of the Risk Management Division of the Department of Administrative Services or mail a copy of the complaint to the Attorney General. *Henderson v. DOT*, 267 Ga. 90, 475 S.E.2d 614 (1996).

Retirement benefits. — Ga. Const. 1983, Art. I, Sec. I, Para. X precludes the application of an amendatory statute or ordinance in the calculation of the employee’s retirement benefits if the effect of the amendment is to reduce rather than increase the benefits payable. *City of Athens v. McGahee*, 178 Ga. App. 76, 341 S.E.2d 855 (1986).

Application to interest from child support statute. — The amended version of O.C.G.A. § 7-4-12.1 applies to all civil actions that were filed when the former version of the statute was effective but were still pending on or after January 1, 2007; the amended version of § 7-4-12.1 makes changes related to interest on child support arrearage that are remedial rather than substantive, and therefore retroactive application does not impair vested substantive rights. *Gowins v. Gary*, 284 Ga. App. 370, 643 S.E.2d 836 (2007), rev’d on other grounds, 283 Ga. 433, 658 S.E.2d 575 (2008).

Application to attorney fee statute. — O.C.G.A. § 9-11-68(b)(1) does not merely prescribe the methods of enforcing rights and obligations, but rather affects the rights of parties by imposing an addi-

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tional duty and obligation to pay an opposing party's attorney fees when a final judgment does not meet a certain amount or is one of no liability; by creating this new obligation, the statute operates as a substantive law, which is unconstitutional under Ga. Const. 1983, Art. I, Sec. I, Para. X, given its retroactive effect to pending cases. *Fowler Props. v. Dowland*, 282 Ga. 76, 646 S.E.2d 197 (2007).

Authorization for direct action against insurer of common carrier. — Prohibition in Ga. Const. 1983, Art. I, Sec. I, Para. X against retroactive laws applied only to those laws which affected substantive rights under prior law that had vested at the time the subsequent law took effect; the amendments to former O.C.G.A. § 46-7-12(c), effective July 1, 2000, providing for a direct action against the insurer of a common carrier, did not affect substantive rights and were given retroactive effect. *Devore v. Liberty Mut. Ins. Co.*, 257 Ga. App. 7, 570 S.E.2d 87 (2002).

No retroactive application of amendment to voluntary dismissal law. — When plaintiff's first complaint was filed before July 1, 2003, the effective date of the amendment to O.C.G.A. § 9-11-41(a)(3), and the second and third complaints were filed after July 1, 2003, the 2003 amendment did not apply retroactively to make the voluntary dismissal of the second complaint act an adjudication on the merits. *Davis v. Lugenbeel*, 283 Ga. App. 642, 642 S.E.2d 337 (2007), cert. denied, 2007 Ga. LEXIS 518 (Ga. 2007).

Provision permitting contracts in partial restraint of trade. — Retroactive application of O.C.G.A. § 13-8-2.1, permitting contracts in partial restraint of trade, did not violate Ga. Const. 1983, Art. I, Sec. I, Para. X. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441 (11th Cir. 1991).

Retroactive extinguishment of right to trial by jury unconstitutional. — Retroactive application of the 1977 amendment to O.C.G.A. § 19-7-40, which extinguished the right to a jury trial in a paternity suit, was unconstitutional. *Hargis v. Department of Human*

Resources, 272 Ga. 617, 533 S.E.2d 712 (2000).

No retroactive application of tolling statute by injured passenger. — As a vehicle passenger's claim was only two months old when the tolling provisions of O.C.G.A. § 9-3-99 became effective, and the passenger had not yet filed suit, § 9-3-99 was applicable to the action and there was no merit to a claim that it was retroactively applied in violation of Ga. Const. 1983, Art. I, Sec. I, Para. X. *Beneke v. Parker*, 293 Ga. App. 186, 667 S.E.2d 97 (2008), aff'd in part, rev'd in part, 285 Ga. 733, 684 S.E.2d 243 (2009).

Laws Impairing Obligation of Contracts

This paragraph forbids passage of laws which impair vested rights. — The test is whether there was a vested right. If so, no subsequent legislative act could impair it; but if not, there is no bar to a change or abolition of it at any time before it becomes fixed by a judgment. *Spengler v. Employers Com. Union Ins. Co.*, 131 Ga. App. 443, 206 S.E.2d 693 (1974); *Aetna Ins. Co. v. Windsor*, 133 Ga. App. 159, 210 S.E.2d 373 (1974); *Goolsby v. Regents of Univ. Sys.*, 141 Ga. App. 605, 234 S.E.2d 165 (1977).

Decision to award a limited liability company fee simple title in real property did not violate the contract impairment clauses in U.S. Const., art. I, sec. X and Ga. Const. 1983, Art. I, Sec. I, Para. X as a corporation's rights to the property pursuant to a 1984 tax deed had not vested prior to the effective date of a 1989 amendment of O.C.G.A. § 48-4-48, which operated retrospectively. *BX Corp. v. Hickory Hill 1185, LLC*, 285 Ga. 5, 673 S.E.2d 205 (2009).

Statutes which impair contracts are void. — The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Even remedial statute may impair obligation of contract, and in such event the act is unconstitutional. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Specific remedies constitute part of contract. — A specific remedy, provided by the contract itself, cannot be changed by legislation, because it constitutes a part of the contract. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Permissible to modify remedies existing by law but not remedies expressly part of contract. — The remedies existing by law at the time of the execution of a contract may be modified by the legislature without impairing the obligation, provided an efficient remedy is left for its enforcement; however, the rule is different as to a remedy which the parties have expressly made a part of the contract, because in such case the remedy is integrated as a part of the obligation, and a subsequent statute which affects the remedy impairs the obligation and is unconstitutional. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E.2d 15 (1935).

This paragraph does not prohibit passage of laws curing defects in remedy, or confirming rights already existing, or adding to the means of securing and enforcing those rights. *Pritchard v. Savannah St. & Rural Resort R.R.*, 87 Ga. 294, 13 S.E. 493, 14 L.R.A. 721 (1891); *Mills v. Geer*, 111 Ga. 275, 36 S.E. 673, 52 L.R.A. 504 (1900).

Legislation lessening efficacy of contract enforcement impairs obligation. — The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it, and whatever legislation lessens the efficacy of these means impairs the obligation. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Laws are construed in future so as not to impair obligation of contracts. *Jones v. Oemler*, 110 Ga. 202, 35 S.E. 375 (1900); *Dennington v. Mayor of Roberta*, 130 Ga. 494, 61 S.E. 20 (1908); *Chason v. O'Neal*, 158 Ga. 725, 124 S.E. 519 (1924).

Obligation of contract is not impaired by later taxing statute, which taxes the proceeds of the contract, if it

does not prevent receipt of the proceeds under the contract. *Airways Parking Co. v. City of Atlanta*, 229 Ga. 70, 189 S.E.2d 405 (1972).

Constitution precludes application of amendatory statute or ordinance in calculation of employee's retirement benefits if the effect of the amendment is to reduce rather than increase the benefits payable. *Withers v. Register*, 246 Ga. 158, 269 S.E.2d 431 (1980).

This paragraph does not forbid the equitable modification of contract. *Selby v. Gilmer*, 240 Ga. 241, 240 S.E.2d 80 (1977).

Impairment clause does not preclude reformation of contracts. *Withers v. Register*, 246 Ga. 158, 269 S.E.2d 431 (1980).

Reformation of written agreement by court not impairment of contract. — Parties to a contract cannot claim unconstitutional impairment of their contractual rights simply because a court of equity has reformed their written agreement to speak the true intentions of the parties. *Withers v. Register*, 246 Ga. 158, 269 S.E.2d 431 (1980).

Constitutional Act of legislature is equivalent to contract, and when performed, is a contract executed; and whatever rights are thereby created, a subsequent legislature cannot impair. *Davis v. Hunt*, 218 Ga. 630, 129 S.E.2d 778 (1963); *Spengler v. Employers Com. Union Ins. Co.*, 131 Ga. App. 443, 206 S.E.2d 693 (1974).

This constitutional inhibition on any state law impairing obligation of contracts is not limitation on power of eminent domain. — The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power is a taking, and not an impairment of its obligation. *City of Atlanta v. Airways Parking Co.*, 225 Ga. 173, 167 S.E.2d 145 (1969).

The condemnation of a portion of the rights of a condemnee under its contract with a city does not violate the provisions of this paragraph prohibiting the passage of a law impairing the obligation of contracts. *City of Atlanta v. Airways Parking Co.*, 225 Ga. 173, 167 S.E.2d 145 (1969).

Laws Impairing Obligation of Contracts (Cont'd)

No impairment of obligation when changes in salary expressly linked to appropriations. — If a contractual salary obligation itself is expressly conditioned upon changes in state appropriations, then such changes requiring readjustments of salaries do not impair the obligations of contracts. *Austin v. Benefield*, 140 Ga. App. 96, 230 S.E.2d 16 (1976).

Amendment to statute given no retroactive effect. — While the Act of the General Assembly, Ga. L. 1949, p. 455, amending former Code 1933, § 3-108 (see now O.C.G.A. § 9-2-20), was apparently enacted to permit a beneficiary under a contract between other parties to recover, it could be given no retroactive effect, as to do so would violate U.S. Const., art. I, sec. X, cl. 1 and this paragraph, as to impairing the obligations of contracts, by creating a right for one to recover under an existing contract when one previously had no such right and subjecting a party to an existing contract to liability to a third person who previously had no right under the contract. *Guest v. Stone*, 206 Ga. 239, 56 S.E.2d 247 (1949).

Statute subsequent to execution of contract inapplicable thereto. — A contract made and indebtedness incurred by the County Superintendent of Schools in 1918, on behalf of the county board of education, for school supplies and furnishings was prior to the enactment of former Code 1933, § 32-928 (see now O.C.G.A. § 20-2-504), and therefore is not void under such provisions, the statute not being construed as being applicable to contracts made before its passage. *Board of Educ. v. Southern Mich. Nat'l Bank*, 184 Ga. 641, 192 S.E. 382 (1937).

No prohibition against ordinance limiting power to make certain contracts. — Ordinance prohibiting the owning, maintaining, and operating of pinball machines and the like was not violative of the provisions of the federal and state Constitutions inhibiting the passage of laws impairing the obligation of contracts, in that it impaired the contractual powers of petitioner, and imposed a limitation

upon the petitioner's power to make contracts. *Woodward v. City of Lithonia*, 191 Ga. 234, 11 S.E.2d 476 (1940).

Impairment of contracts with authority's bond owners proscribed by statute and Constitution. — Ga. L. 1975, p. 107, § 30 (see now O.C.G.A. § 46-3-146), limiting the power of the state to adversely affect the interests of the owners of the municipal electric authority's bonds and notes, does not constitute an unconstitutional delegation of legislative powers in violation of Ga. Const. 1976, Art. III, Sec. I, Para. I (see now Ga. Const. 1983, Art. III, Sec. I, Para. I), because it does not limit the right of the General Assembly to legislate except to prevent legislation which will impair the contracts with the bond owners, and this is consistent with the Constitution. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Statutory provisions impairing existing contractual obligations are unconstitutional. — Georgia Laws 1979, pp. 1625, 1627 (formerly Code 1933, § 84-6610(a-c)) were declared unconstitutional, null, and void because each and all of those sections improperly and unlawfully impaired existing contractual obligations between manufacturers and dealers in violation of this paragraph. *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800, 262 S.E.2d 106 (1979).

Imposition of conditions not in existence at time of contract execution impaired obligation. — Ga. L. 1953, Nov.-Dec. Sess., p. 313, § 1 (see now O.C.G.A. § 44-14-80), providing that title to real property conveyed to secure debt should revert to the grantor when the debt became 20 years past due, unless the debt was extended or renewed and such renewal recorded, or an affidavit setting out the facts of the renewal was recorded with the conveyance, imposed conditions upon grantee not in existence at the time of the execution of the contract, divested the grantee of a vested right to the property, and impaired the obligation of the grantee's contract and as applied to such deed, which was executed prior to the passage and effective date of the Act, is unconstitutional, because it is in violation of U.S.

Const., art. I, sec. X, cl. 1 and of this paragraph, which prohibit this state from passing any retroactive law or any law impairing the obligations of contracts. *Todd v. Morgan*, 215 Ga. 220, 109 S.E.2d 803 (1959).

No impairment to require performance by one county of obligations of merged county. — The legislature can impose upon the county into which another county is merged the burden of performing the contracts and paying the debts of the merged county; an Act so providing for the performance of the contracts and payment of the debts of the merged county does not in any way impair the obligation of the contracts of the merged county in the sense in which that term is used in the Constitution of this state and the Constitution of the United States. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931).

This paragraph was not violated by merger of City of Atlanta and Town of Kirkwood. *Davidson v. Town of Kirkwood*, 152 Ga. 357, 110 S.E. 154 (1921).

Municipal ordinance requiring deposits by consumers of light and water, was not invalid under this paragraph as impairing the obligation of contract. *Young v. City of Moultrie*, 163 Ga. 829, 137 S.E. 257 (1927).

Statute invalid when it undertook to affect existing contractual obligations. — Former Code 1933, § 30-209 (see now O.C.G.A. § 19-6-5), insofar as it undertook to affect the obligations of a valid contract in existence at the time of its passage so as to provide for the duration of alimony was null and void as violative of this paragraph and U.S. Const., Art. I, Sec. X, Cl. 1. *Candler v. Wilkerson*, 223 Ga. 520, 156 S.E.2d 358 (1967).

Provisions for revisions in alimony and support judgments not unconstitutional. — Ga. L. 1955, p. 630, §§ 1-4 (see now O.C.G.A. §§ 19-6-18 and 19-6-19), which conferred jurisdiction and power on the courts of this state to revise judgments fixing permanent alimony or support for minor children, do not offend those constitutional provisions of this state and of the United States which pro-

vide that no law impairing the obligation of contracts shall be enacted, and this is true even though the amount of alimony or support so awarded by the judgment, as well as the time during which it was to be paid, was agreed to in writing by the parties. *Nelson v. Roberts*, 216 Ga. 741, 119 S.E.2d 545 (1961).

Modification of a judgment incorporating a contract between husband and wife governing property and alimony rights between them pursuant to Ga. L. 1955, p. 630, §§ 1-4 (see now O.C.G.A. §§ 19-6-18 and 19-6-19) is not an unconstitutional impairment of the obligation of contracts in violation of this paragraph. This is so because, technically, what is being modified is a judgment of the court and not a contract. *Kitfield v. Kitfield*, 237 Ga. 184, 227 S.E.2d 9 (1976).

Adverse possession of mineral rights constitutional. — Application of O.C.G.A. § 44-5-168 (adverse possession of mineral rights) does not violate the state constitutional prohibition against impairment of the obligation of contracts. The preservation of the mineral owner's claim under § 44-5-168 depends only upon the owner's use of the minerals or upon returning them for taxes, which is a minimal burden that does not impair contractual obligations. *Hayes v. Howell*, 251 Ga. 580, 308 S.E.2d 170 (1983).

Municipal employee cannot be barred from recovering pay for services performed. — To bar a municipal employee from recovering pay for services the employee performed by allowing the municipality to claim statutory immunity would violate the prohibition against the impairment of a contract which is found in both the state and federal Constitutions. *Smith v. City of Atlanta*, 167 Ga. App. 458, 306 S.E.2d 720 (1983).

Retirement benefits as part of employment contract. — When a statute or ordinance establishes a retirement plan for government employees, and the employee contributes toward the benefits the employee is to receive and performs services while the ordinance or statute is in effect, the ordinance or statute becomes part of the contract of employment and is a part of the compensation for the services rendered so that an attempt to amend the

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statute or ordinance to reduce or eliminate the retirement benefits the employee is to receive violates the impairment clause of the state constitution. *Swann v. Board of Trustees*, 257 Ga. 450, 360 S.E.2d 395 (1987).

Reduction in non-vested future retirement benefits not impairment of obligation of contract. — Since there is no vested right to benefits one was never entitled to receive, the reduction in future benefits to retiree did not violate the retiree's constitutional right to protection against impairment of contract. *Tate v. Teachers' Retirement Sys.*, 257 Ga. 365, 359 S.E.2d 649 (1987).

County's rescission of county's pension plan and termination of a member's right to benefits under the plan violated the constitutional guarantee against impairment of contracts and was void. *Malcom v. Newton County*, 244 Ga. App. 464, 535 S.E.2d 824 (2000).

City ordinance increasing pension plan contribution rate. — Trial court properly granted the city defendants summary judgment on the city employees' claims of breach of contract and unconstitutional impairment of contract regarding an ordinance increasing their pension plan contribution rate because the Georgia General Assembly expressly contemplated that a municipal corporation's provision for employee retirement or pension benefits would be subject to being supplemented by local law. *Borders v. City of Atlanta*, 298 Ga. 188, 779 S.E.2d 279 (2015).

Law regulating insurance. — Provision of O.C.G.A. § 33-34-3 that motor vehicle insurance policies issued by insurers authorized to transact business in the state are deemed to provide the minimum coverage required by Georgia law when the insured is involved in an accident in Georgia does not retroactively impair obligations under the contract in violation of the Georgia Constitution. *Bankers Ins. Co. v. Taylor*, 267 Ga. 134, 475 S.E.2d 619 (1996).

Vested Rights

Constitutional prohibition against retroactive laws applies only to those laws which affect or impair vested rights. *Armistead v. Cherokee County Sch. Dist.*, 144 Ga. App. 178, 241 S.E.2d 19 (1977).

Substantive right, which has vested, cannot be changed or impaired by subsequent statute. *Spengler v. Employers Com. Union Ins. Co.*, 131 Ga. App. 443, 206 S.E.2d 693 (1974).

Vested ground of defense is protected from being destroyed by Act of legislature. *Guest v. Stone*, 206 Ga. 239, 56 S.E.2d 247 (1949).

Prohibition against interference with vested rights and vested defenses. — The same rule which forbids interference with vested rights prevents the disturbance of vested defenses; there is no distinction between a vested right of action and a vested right of defense. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937).

Requiring the Unified Government of Athens-Clarke County retirees to elect the health maintenance organization option if they wished to receive cost-free coverage did not violate Ga. Const. 1983, Art. I, Sec. I, Para. X, since they never had a vested right to maintain in retirement the precise health-care delivery system by which they received their coverage while employed; the precise source of the retirees' cost-free medical coverage was not guaranteed, instead, they were only entitled to cost-free coverage to the same extent that their medical expenses were covered at the time of their retirement, and cost-free coverage was provided by the Unified Government only under the health maintenance organization option. *Unified Gov't of Athens-Clarke County v. McCrary*, 280 Ga. 901, 635 S.E.2d 150 (2006).

Rights of the decedent's surviving spouse were already vested when the Revised Georgia Trust Code of 2010 (Revised Code), O.C.G.A. § 53-12-1 et seq., was enacted because under the terms of the amended trust agreement, the surviving

spouse's rights to the trust assets took effect upon the decedent's death before the Revised Code took effect. Accordingly, any new obligation imposed by the Revised Code that would have impaired the surviving spouse's right to possession could not be applied retroactively. *Rose v. Waldrip*, 316 Ga. App. 812, 730 S.E.2d 529 (2012), cert. denied, No. S12C1888, 2012 Ga. LEXIS 981 (Ga. 2012).

No protection for technical defenses involving no substantial equities. — A vested ground of defense is as fully protected from being cut off or destroyed by an Act of the legislature as is a vested cause of action; the legislature may, however, deprive a party of technical defenses involving no substantial equities. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937).

Party has no vested right in defense based upon mere informality not affecting the party's substantial equities. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937); *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974).

No one has a vested right to a defense based on mere informalities especially when such informalities consist of matters which originally could have been dispensed with by the legislature; but the legislature has no power, by a subsequent curative statute, to remedy a jurisdictional defect, or one which obviously goes to the substance of a vested right. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937).

There is no such thing as a vested right to do wrong. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937); *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974).

Accused has no vested right in procedural matters. *Walker v. State*, 132 Ga. App. 274, 208 S.E.2d 5 (1974).

No one has vested right in statutory privileges and exemptions, and until final judgment on a pending action, the repeal of the statute, which gives the right of action, or upon which the suit is predicated, destroys it. *Winston v. State*, 186 Ga. 573, 198 S.E. 667 (1938), commented on in 1 Ga. B.J. 46 (1939).

Vested rights under contract come under protection of this paragraph. *Bender v. Anglin*, 207 Ga. 108, 60 S.E.2d

756, cert. denied, 340 U.S. 878, 71 S. Ct. 125, 95 L. Ed. 638 (1950).

Statute which changes or affects remedy only and does not destroy or impair vested rights is not unconstitutional as impairing the obligation of a contract, although it may be retroactive and in changing or modifying the remedy, the rights of the parties may be incidentally affected. *Morris v. Interstate Bond Co.*, 180 Ga. 689, 180 S.E. 819 (1935).

No impairment of obligation when contract provides for modification. — County board of education was not precluded from terminating the employer matching portion of a retirement savings plan since the plan itself provided that its terms could be modified or changed in the future and participating employees never acquired a property right in unchanged benefits. *Murray County Sch. Dist. v. Adams*, 218 Ga. App. 220, 461 S.E.2d 228 (1995).

Vesting of rights in companies. — Void county sign ordinance could not be used as the basis for the denial of sign companies' applications for permits to construct billboards, and the invalidity of the ordinance resulted in there being no valid restriction on the construction of billboards in the county. Accordingly, the sign companies obtained vested rights in the issuance of the permits which the companies sought and the subsequent creation of new cities within unincorporated county land and the annexation of property into one city did not divest the sign companies of the companies' vested rights. *Fulton County v. Action Outdoor Adver., JV, LLC*, 289 Ga. 347, 711 S.E.2d 682 (2011).

Lien once acquired under existing law is regarded as vested property right which may not be impaired by subsequent legislation. *Morris v. Interstate Bond Co.*, 180 Ga. 689, 180 S.E. 819 (1935).

Any subrogation rights are vested and therefore cannot be abrogated by later statute. *Blaylock v. Georgia Mut. Ins. Co.*, 239 Ga. 462, 238 S.E.2d 105 (1977).

A city cannot legally divest or restrict vested right by enactment of

Vested Rights (Cont'd)

regulations, even if the enactment is valid and the regulations reasonable and constitutional. *Craig v. City of Lilburn*, 226 Ga. 679, 177 S.E.2d 75 (1970).

Office of incumbent official not vested. — An incumbent in a public office has no vested right as will entitle the incumbent to complain of legislation affecting the office upon the ground that it is retrospective when no other right under the Constitution is violated. *Copland v.*

Wohlwender, 197 Ga. 782, 30 S.E.2d 462 (1944).

An Act of the General Assembly revoking a city charter, thus abolishing municipal offices, is not a law in impairment of contract since the right of an incumbent to an office is not vested, but may be revoked if the law the incumbent holds office under is capable of being repealed. *City of Mt. View v. Clayton County*, 242 Ga. 163, 249 S.E.2d 541 (1978), appeal dismissed, 440 U.S. 902, 99 S. Ct. 1205, 59 L. Ed. 2d 450 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Georgia Detainer Act, Ga. L. 1968, p. 1110, § 1 (see now O.C.G.A. Art. 1, Ch. 6, T. 42), is not an ex post facto or retroactive law. 1969 Op. Att'y Gen. No. 69-95.

Validated bonds created status analogous to contractual relation which cannot be destroyed or impaired by subsequent statute. 1977 Op. Att'y Gen. No. U77-10.

Prohibiting involuntary separation benefits to state employees. — An amendment to the Georgia Constitution prohibiting the grant of involuntary separation retirement benefits to state employees who are by law currently entitled to coverage under the involuntary separation benefits section of the Employees' Retirement System Act would, in all prob-

ability, be unconstitutional under the federal Impairment Clause contained in U.S. Const., art. I, sec. X. 1983 Op. Att'y Gen. No. U83-72.

Forfeiture of public retirement system benefits. — General Assembly has the authority to enact a statute which proposes the forfeiture of earned retirement benefits of future public employees due to the conviction of a crime; however, an amendment to the Georgia Constitution proposing such a forfeiture by employees who are currently by law vested with rights under the public retirement system would, in all probability, be unconstitutional under the federal Impairment Clause contained in U.S. Const., art. I, sec. X. 1985 Op. Att'y Gen. No. U85-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 16B Am. Jur. 2d, Constitutional Law, § 716 et seq.

C.J.S. — 16A C.J.S., Constitutional Law, §§ 645 et seq., 696 et seq.

ALR. — Grant of perpetual franchise to public service corporation, 2 ALR 1105.

Constitutionality of discrimination as regards degree of penalty or punishment for violation of Sunday law, 8 ALR 566.

Constitutionality of statute which extinguishes or impairs lien of special assessments on sale of property for taxes, 53 ALR 1140.

Effect of statutory change of penalty or punishment after conviction, 55 ALR 443.

Constitutionality of retroactive statute curing defect in private instrument pur-

porting to convey title or create interest in property or as to filing or recording thereof, 57 ALR 1197.

Constitutionality of legislation which varies punishment for same offense according to the county or district within state in which the offense is committed, 59 ALR 433.

Construction of statutes of limitation as regards their retrospective application to causes of action already barred, 67 ALR 297.

Validity of stipulation in contract of employment against connection with labor union or employers' association, and power of legislature to prohibit such contract, 68 ALR 1267.

Duration of street franchise without fixed term, beyond the life of the grantee, 71 ALR 121.

Constitutionality, construction, and applicability of statute making refusal to pay for commodities a criminal offense, 76 ALR 1338.

Retroactive effect of statutes regarding provisions with reference to avoidance of fire insurance policies, 78 ALR 617.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 82 ALR 345; 116 ALR 209; 132 ALR 91; 139 ALR 673.

Constitutional provision against impairing obligation of contract as applicable to statutes affecting rights or remedies of holders or owners of improvement bonds or liens, 85 ALR 244; 97 ALR 911.

Blue Sky Laws, 87 ALR 42.

Raising maximum limit of permissible municipal indebtedness as impairing obligation of existing municipal contracts, 90 ALR 859.

Debtor's exemption statutes as impairing obligations of existing contracts, 93 ALR 177.

Retrospective operation of statutes relating to alimony or suit money in divorce, 97 ALR 1188.

Constitutionality of statutes providing for refund of taxes illegally or erroneously exacted, 98 ALR 284.

Constitutional provision against impairing obligation of contracts as applied to rights or remedies of owners of property subject to assessment for local improvements, 100 ALR 164.

Constitutionality, construction, and application of statute permitting release of part of property subject to tax liens or special assessments, 100 ALR 418.

Statute affecting mortgagee's rights and remedies in respect of deficiency as unconstitutional impairment of obligation of contract, 108 ALR 891; 115 ALR 435; 130 ALR 1482; 133 ALR 1473.

Tax exemption as unconstitutionally impairing public obligations antedating the exemption, 109 ALR 817.

Constitutional prohibition of ex post facto laws as applicable to statutes relating to joinder of offenses or defendants, 110 ALR 1308.

Constitutionality of crop insurance statutes, 113 ALR 739.

Character of defenses that may be cut off by retrospective legislation, 113 ALR 768.

Competition by grantor of nonexclusive franchise, or provision therefor, as violation of constitutional rights of franchise holder, 114 ALR 192.

Constitutional provisions against impairment of obligations of contract as applied to sinking funds for retirement of municipal or other public bonds, 115 ALR 220.

Power of legislature to revive a right of action barred by limitation or to revive an action which has abated by lapse of time, 133 ALR 384.

Validity and effect, as to previously recorded instrument, of statute which places or changes time limit on effectiveness of record of mortgages or other instruments, 133 ALR 1325.

Constitutionality of statute changing rights of withdrawing members of building and loan association, 133 ALR 1493.

Constitutionality of statute which in effect limits judgment after crediting thereon fair market value of property purchased by him at execution sale, 144 ALR 858.

Validity and construction of war legislation in nature of moratory statute, 144 ALR 1508.

Constitutionality of retroactive statute imposing excise, license, or privilege tax, 146 ALR 1011.

Constitutionality of retrospective statutes as regards chattel mortgages, 146 ALR 1100.

Constitutionality and construction of repeal or modification by legislative action of teachers' tenure statute, as regards retrospective operation, 147 ALR 293.

Retroactive application, to previous sales, of statutes reducing period of redemption from tax sales, as unconstitutional impairment of contract obligations, 147 ALR 1123.

Price ceiling, adopted as a war measure, as affecting preexisting contracts, 147 ALR 1286; 149 ALR 1451; 151 ALR 1450.

Retrospective statute subjecting interests of trust beneficiaries to claims of creditors, 151 ALR 1417.

Rights of parties to contract the performance of which is interfered with or pre-

vented by war conditions or acts of government in prosecution of war, 151 ALR 1447; 152 ALR 1447; 153 ALR 1417; 154 ALR 1445; 155 ALR 1447; 156 ALR 1446; 157 ALR 1446; 158 ALR 1446.

Constitutionality, construction, and application of statute or contract regarding deduction from, or adjustment of, wages in respect of defective workmanship, 153 ALR 866.

Constitutionality, construction, and application of statutes affecting the rights or remedies of purchasers under antecedent executory contracts for purchase of real property, 153 ALR 1209.

Retroactive application of statutes regarding enforcement of awards under workmen's compensation acts, 155 ALR 558.

Constitutionality of retroactive statute limiting time for duration or enforcement of existing mortgage, or other real estate lien, or ground rent, 158 ALR 1043.

Statute providing for apportionment between lessor and lessee of a tax imposed upon the producer of oil, gas, or other natural production as violation of the constitutional provision against impairment of the obligation of contracts, 160 ALR 980.

Effect, as to prior offenses, of amendment increasing punishment for crime, 167 ALR 845.

Immunity from suit of government liquor control agency, 9 ALR2d 1292.

Retrospective operation of legislation affecting estates by the entirety, 27 ALR2d 868.

Retroactive effect of statute fixing minimum value of corporate stock shares or otherwise affecting power of corporation to change par value of existing shares, 54 ALR2d 1289.

Retroactive effect of statute changing manner and method of distribution of recovery or settlement for wrongful death, 66 ALR2d 1444.

Effect of simultaneous repeal and re-enactment of all, or part, of legislative act, 77 ALR2d 336.

Retroactive effect of statute which imposes, removes, or changes a monetary limitation of recovery for personal injury or death, 98 ALR2d 1105.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence, 37 ALR3d 1438.

Retroactive effect of zoning regulation, in absence of saving clause, on validly issued building permit, 49 ALR3d 13.

Zoning provisions protecting land owners who applied for or received building permit prior to change in zoning, 49 ALR3d 1150.

Validity of statute establishing or authorizing minimum price schedules for barbers, 54 ALR3d 916.

Validity and construction of state or local regulation prohibiting off-premises advertising structures, 81 ALR3d 486.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR3d 564.

Mandatory retirement of public officer or employee based on age, 81 ALR3d 811.

Validity of imposition, by state regulation, of natural gas use priorities, 84 ALR3d 541.

Zoning: building in course of construction as establishing valid nonconforming use or vested right to complete construction for intended use, 89 ALR3d 1051.

"Guilty but mentally ill" statutes: validity and construction, 71 ALR4th 702.

Paragraph XI. Right to trial by jury; number of jurors; selection and compensation of jurors.

(a) The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

(b) A trial jury shall consist of 12 persons; but the General Assembly may prescribe any number, not less than six, to constitute a trial jury in courts of limited jurisdiction and in superior courts in misdemeanor cases.

(c) The General Assembly shall provide by law for the selection and compensation of persons to serve as grand jurors and trial jurors.

1976 Constitution. — Art. I, Sec. I, Paras. VIII, XI; Art. VI, Sec. IV, Para. VII; Art. VI, Sec. XV, Paras. I, II, III.

Cross references. — Rights of the accused, U.S. Const., amend. 6 and § 9-11-38. Jury of less than 12 members, § 9-11-47. Juries in criminal cases, §§ 15-12-160 and 17-9-2. Jury as judges of law and fact in criminal cases, § 17-9-2. Discrimination against employee for attending a judicial proceeding in response to a court order or process, § 34-1-3.

Law reviews. — For article advocating reforms to improve the jury mentally and morally, see 5 Ga. B.J. 38 (1942). For article, “The Divorce Act of 1946” (Ch. 5, T. 19), see 9 Ga. B.J. 287 (1947). For article surveying development of equity and the right to trial by jury in equity suits in Georgia, and advocating use of jury to try issues of fact in equitable actions, see 8 Mercer L. Rev. 225 (1957). For article, “Personal Rights, Property Rights and Due Process: A Comparison of Constitutional Protection in the Georgia Supreme Court and the United States Supreme Court,” see 9 Mercer L. Rev. 253 (1958). For article surveying cases dealing with criminal law and criminal procedure from June 1, 1977 through May, 1978, see 30 Mercer L. Rev. 27 (1978). For annual survey of constitutional law, see 35 Mercer L. Rev. 73 (1983). For article, “The Georgia Bill of Rights: Dead or Alive?,” see 34 Emory L.J. 341 (1985). For article, “Justice and Juror,” see 20 Ga. L. Rev. 257 (1986). For article, “The Endangered Right of Jury Trials in Dispossessories,”

see 24 Ga. St. B.J. 126 (1988). For survey of 1995 Eleventh Circuit cases on constitutional criminal procedure, see 47 Mercer L. Rev. 765 (1996). For article, “Misdemeanor Sentencing in Georgia,” see 7 Ga. St. B.J. 8 (2001). For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005). For annual survey of death penalty law, see 57 Mercer L. Rev. 479 (2006). For annual survey of law on criminal law, see 62 Mercer L. Rev. 87 (2010). For article, “The Case Against Closure: Open Courtrooms After Presley v. Georgia,” see 16 (No. 2) Ga. St. B.J. 10 (2010).

For note, “Another Milepost in Jury Selection Under the Constitution,” see 2 J. of Pub. L. 456 (1953). For note, “Toward an Integrated Rule Prohibiting All Race-Based Peremptory Challenges: Some Considerations on Georgia v. McCollum,” see 26 Ga. L. Rev. 503 (1992).

For comment on Henderson v. State, 207 Ga. 206, 60 S.E.2d 345 (1950), see 13 Ga. B.J. 230 (1950). For comment on Blevins v. State, 220 Ga. 720, 141 S.E.2d 426 (1965), see 2 Ga. St. B.J. 242 (1965). For comment on Deal v. Seaboard C.L.R.R., 236 Ga. 629, 224 S.E.2d 922 (1976), see 25 Emory L.J. 983 (1976). For comment, “Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia,” see 28 Ga. St. U.L. Rev. 1341 (2012). For comment, “The Guiding Hand of Counsel: Effective Representation for Indigent Defendants in the Cordele Judicial Circuit,” see 66 Mercer L. Rev. 781 (2015).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RIGHT TO TRIAL BY JURY

- 1. IN GENERAL
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1. PUBLIC TRIAL

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JURORS

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General Consideration

Editor's notes. — Some of the cases noted under this paragraph were decided under language appearing in the 1976 Constitution (Art. I, Sec. I, Paras. VIII, XI; Art. VI, Sec. IV, Para. VII; Art. VI, Sec. XV, Paras. I, II) and antecedent provisions, all of which dealt with aspects of the right to jury trial now contained in this paragraph.

Altering order in which persons were selected from jury venire was not shown to have failed to produce an array of impartial, properly drawn prospective jurors from which to pick a jury. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Constitutionality. — See *Sanders v. State*, 234 Ga. 586, 216 S.E.2d 838 (1975), cert. denied, 424 U.S. 931, 96 S. Ct. 1145, 47 L. Ed. 2d 340 (1976).

Right to jury trial not violated in plea bargain. — Defendant's right to a jury trial was not violated by illegal plea bargaining through a threatened longer sentence if the defendant proceeded to trial. *Logan v. State*, 309 Ga. App. 95, 709 S.E.2d 302, cert. denied, No. S11C1101, 2011 Ga. LEXIS 579; cert. denied, 132 S. Ct. 823, 181 L. Ed. 2d 533 (2011).

Prelitigation contractual waiver of the right to trial by jury is not enforceable in cases tried under the laws of Georgia. *Bank S. v. Howard*, 264 Ga. 339, 444 S.E.2d 799 (1994).

Jury's importance. — The jury is as important a branch of the judicial department as the judge. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930).

Juror not incompetent on account of having been impaneled in case. — A

juror is not incompetent to testify as a witness solely on account of having been impaneled and sworn in the case, if the juror is otherwise competent. *Tumlin v. State*, 88 Ga. App. 713, 77 S.E.2d 555 (1953).

Cited in *McElroy v. McElroy*, 252 Ga. 553, 314 S.E.2d 893 (1984); *Andrews v. State*, 175 Ga. App. 22, 332 S.E.2d 299 (1985); *Tutton v. State*, 179 Ga. App. 462, 346 S.E.2d 898 (1986); *Hughes v. State*, 257 Ga. 200, 357 S.E.2d 80 (1987); *Freeman v. State*, 194 Ga. App. 905, 392 S.E.2d 330 (1990); *Quiller v. Bowman*, 262 Ga. 769, 425 S.E.2d 641 (1993); *Howard v. Bank S.*, 209 Ga. App. 407, 433 S.E.2d 625 (1993); *Burg v. State*, 297 Ga. App. 118, 676 S.E.2d 465 (2009).

Right to Trial by Jury**1. In General**

Origin of phrase "shall remain inviolate". — The statement in this paragraph that the right of trial by jury shall remain inviolate refers to the right as it existed at common law at the time of the incorporation of this paragraph into the state Constitution, and consequently the expression means that the right of trial, as it existed in England, should be inviolate or unaltered. *Wright v. Davis*, 184 Ga. 846, 193 S.E. 757 (1937).

A jury trial in Georgia must be governed by the same rules as prevailed in England at the time the Constitution was adopted if there is an absence of any provision in organic law affecting the right of jury trial. *Wright v. Davis*, 184 Ga. 846, 193 S.E. 757 (1937).

First part of this paragraph is derived from the declarations in the Magna Carta and is subject to the limi-

tations of the common law. *Tift v. Griffin*, 5 Ga. 185 (1848); *Stewart Dunholter & Co. v. Sholl*, 99 Ga. 534, 26 S.E. 757 (1896); *De Lamar v. Dollar*, 128 Ga. 57, 57 S.E. 85 (1907); *Pollard v. State*, 148 Ga. 447, 96 S.E. 997 (1918).

Right to jury trial cannot be impaired by legislature. — The right to a jury trial as guaranteed by the state Constitution, i.e., the right shall remain inviolate, are those rights heretofore enjoyed at common law in civil and criminal cases, which cannot be impaired by the legislature. *Porter v. Watkins*, 217 Ga. 73, 121 S.E.2d 120 (1961).

In a case at common law, a party has a constitutional right to have all questions of fact passed upon by a jury, and a legislative denial of that right is unconstitutional. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

Preservation of rights to jury trial which existed when Constitution adopted. — Constitutional right to trial by jury shall not be taken away in cases where it existed when Constitution was adopted in 1798. *Cawthon v. Douglas County*, 248 Ga. 760, 286 S.E.2d 30 (1982).

This provision has been uniformly construed as not conferring a right to trial by jury in all classes of cases, but merely as guaranteeing the continuance of the right unchanged as it existed either at common law or by statute at the time of the adoption of the Constitution. *Beasley v. Burt*, 201 Ga. 144, 39 S.E.2d 51 (1946).

The provision in the Constitution that “trial by jury, as heretofore used, shall remain inviolate” means that it shall not be taken away in cases where it existed when that instrument was adopted in 1798; and not that there must be a jury in all cases. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

All cases triable without a jury prior to the Constitution may still be so tried. — It will be conceded that it is competent for the legislature to provide for a trial without a jury in cases similar to those in which such a trial was in use prior to the adoption of the Constitution. *Beasley v. Burt*, 201 Ga. 144, 39 S.E.2d 51 (1946).

Demand. — Parties may be required to enter a demand for a jury trial. *Sutton v.*

Gunn, 86 Ga. 652, 12 S.E. 979 (1891) See also *Sanders v. Alexander*, 23 Ga. App. 563, 99 S.E. 53 (1919).

This paragraph is complied with if a right to jury trial is had before final liability. *Hobbs v. Dougherty County*, 98 Ga. 574, 25 S.E. 579 (1896); *De Lamar v. Dollar*, 128 Ga. 57, 57 S.E. 85 (1907).

This paragraph is complied with if a right to jury trial is obtainable on appeal. *Davis v. Harper*, 54 Ga. 180 (1875); *De Lamar v. Dollar*, 128 Ga. 57, 57 S.E. 85 (1907).

Retroactive extinguishment of right to trial by jury unconstitutional. — Retroactive application of the 1977 amendment to O.C.G.A. § 19-7-40, which extinguished the right to a jury trial in a paternity suit, was unconstitutional. *Hargis v. Department of Human Resources*, 272 Ga. 617, 533 S.E.2d 712 (2000).

This paragraph is not violated by a law requiring payment of costs and giving of bond as a condition precedent to an appeal. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248 (1848).

Determination of damages. — Paragraph (e)(2) of O.C.G.A. § 51-12-5.1, requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury, does not violate Ga. Const. 1983, Art. I, Sec. I, Para. XI. *State v. Moseley*, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994).

Private voir dire on sensitive issues. — Defendant’s right to a public trial was not violated by the trial court’s conduct of certain portions of voir dire in a private jury room rather than in open court because the defendant’s counsel agreed that jurors should have a private opportunity to answer questions of a sensitive nature, including jurors’ attitudes toward homosexuality and jurors’ prior arrests, and the right to a public trial gave way to the right for a fair trial. *State v. Abernathy*, 289 Ga. 603, 715 S.E.2d 48 (2011).

2. Civil Cases

Common-law right continued. — In civil actions, the right of a jury trial exists

Right to Trial by Jury (Cont'd)**2. Civil Cases (Cont'd)**

only when the right existed prior to the first Georgia Constitution, and the Constitution guarantees the continuance of this right unchanged as it existed at common law. *Strange v. Strange*, 222 Ga. 44, 148 S.E.2d 494 (1966).

Party to civil action is entitled to trial by jury when issuable defense is filed. *Whitaker & Rambo Interior Designs, Inc. v. Prudential Property Cas. Ins. Co.*, 510 F. Supp. 97 (N.D. Ga. 1981).

When complaint fails to state claim, dismissal of claim is not error even though complainant has made demand for jury trial, and does not contravene the provisions of Ga. L. 1966, p. 609, §§ 38 and 40 (see now O.C.G.A. §§ 9-11-38 and 9-11-40), and this paragraph. *Bush v. Morris*, 123 Ga. App. 497, 181 S.E.2d 503 (1971).

There is no constitutional right to jury trial in equity cases even when questions of fraud are involved. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973); *Burns v. Ledbetter, Inc. v. Primark Marking Co.*, 244 Ga. 341, 260 S.E.2d 58 (1979); *Cawthon v. Douglas County*, 248 Ga. 760, 286 S.E.2d 30 (1982).

Because in equity cases the right of trial by jury is not constitutional, but statutory, and a legislative restriction thereof would be constitutional. *Mahan v. Cavender*, 77 Ga. 118 (1886); *Bemis v. Armour Packing Co.*, 105 Ga. 293, 31 S.E. 173 (1898); *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

A case begun as an action to enforce an equitable lien on funds held by a defendant and concluded as an interpleader action after the funds were paid into the registry of the court by the stockholder is a case in equity in which there is no right to trial by jury. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

Jury trial in chancery not constitutional right. — The interposition of juries in trial of chancery cases is purely a matter of legislative regulation. It is not a constitutional right or one guaranteed by Magna Charta. *Williams v. Overstreet*, 230 Ga. 112, 195 S.E.2d 906 (1973).

Right to trial by jury in a contempt proceeding was not conferred by this provision of the Constitution. *Hortman v. Georgia Bd. of Dental Exmrs.*, 214 Ga. 560, 105 S.E.2d 732 (1958).

Right to trial by jury in a contempt proceeding for violation of mandamus not conferred. — In a proceeding for contempt against the defendant, growing out of the defendant's alleged violation of a mandamus absolute, the defendant is not entitled to a trial by a jury when an issue of fact is raised. *Gaston v. Shunk Plow Co.*, 161 Ga. 287, 130 S.E. 580 (1925).

Right to jury trial in contempt proceeding for violation of injunction not conferred. — Respondent was not entitled to trial by jury in a contempt proceeding on the issue of whether or not the respondent had violated an injunctive order prohibiting the respondent from practicing dentistry without a license, as such case did not fall within the class of proceedings for contempt provided for in former Code 1933, § 24-105 (see now O.C.G.A. § 15-1-4) wherein a jury trial was required. *Hortman v. Georgia Bd. of Dental Exmrs.*, 214 Ga. 560, 105 S.E.2d 732 (1958).

When the order simply enjoined the defendants from operating the plant "in a manner so as to create foul and offensive odors that can be smelled in petitioners' homes," the jury was not called upon to interpret the meaning of the order, but rather to determine the factual question of whether the plant was still emitting offensive odors. The submission of such question to the jury has long been considered as being within the discretion of the trial court. *Bennett v. Bagwell & Stewart, Inc.*, 216 Ga. 290, 116 S.E.2d 288 (1960).

Right to jury trial not conferred when receiver held in contempt. *Tindall v. Westcott*, 113 Ga. 1114, 39 S.E. 450, 55 L.R.A. 225 (1901).

Defendants in contempt case do not have constitutional right to jury trial even on pure questions of fact. *Bennett v. Bagwell & Stewart, Inc.*, 216 Ga. 290, 116 S.E.2d 288 (1960).

Judge possesses discretion to invoke jury's aid when advisable. — The presiding judge, if the judge deems it

proper, may determine, without aid of a jury, all questions of fact arising upon the auditor's report; but inasmuch as the case upon which the contempt proceedings were founded is one in which the court is exercising chancery powers, there is no reason why the judge may not, if such course seems advisable to the judge, invoke the aid of a jury in arriving at a proper conclusion upon the questions of fact presented. It is a matter of discretion as to what method the judge will adopt to arrive at the actual truth to be ascertained. *Bennett v. Bagwell & Stewart, Inc.*, 216 Ga. 290, 116 S.E.2d 288 (1960).

Jury trial right in most cases. — The Constitution of Georgia, as well as the Civil Practice Act, O.C.G.A. Ch. 11, T. 9, guarantee the right of a jury trial to civil litigants in most cases. *Raintree Farms, Inc. v. Stripping Ctr., Ltd.*, 166 Ga. App. 848, 305 S.E.2d 660 (1983).

There is no constitutional right to a jury trial in eminent domain cases. *DOT v. Gibson*, 251 Ga. 66, 303 S.E.2d 19 (1983).

There is no constitutional right to a jury trial in garnishment proceedings. *Worsham Bros. Co. v. FDIC*, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

Georgia garnishment law is a special statutory proceeding enacted subsequent to the first Georgia Constitution and is in derogation of the common law. Thus, a garnishment action is not a civil action of such a nature in which a trial by jury is guaranteed. *Mull v. Mull*, 167 Ga. App. 687, 307 S.E.2d 675 (1983).

No right to jury trial if case best handled by summary judgment. — Because the Seventh Amendment to the U.S. Constitution did not apply in state courts, and an insured's right to a jury trial thereunder was not infringed when genuine issues of material fact were lacking and disposition of the matter was best handled by way of summary judgment, the insured's Seventh Amendment right to a jury trial was not infringed; as a result, the insured failed to demonstrate any constitutional deprivation warranting a 42 U.S.C. § 1983 action. *Cuyler v. Allstate Ins. Co.*, 284 Ga. App. 409, 643 S.E.2d 783, cert. denied, 2007 Ga. LEXIS 510 (Ga. 2007).

Trial court did not violate a purchaser's right to a jury trial under the Georgia Constitution or O.C.G.A. § 9-11-38 by granting summary judgment to a lender because the right to a jury trial was not infringed as the jury would have no role since there were no issues of material fact in dispute. *Leone v. Green Tree Servicing, LLC*, 311 Ga. App. 702, 716 S.E.2d 720 (2011).

Arbitration. — Local court rule, requiring parties to timely appeal the adverse ruling of an arbitration board if they desired to pursue a jury trial, did not deny them their constitutional right to a jury trial when they were given a reasonable opportunity to demand a jury trial and waived their right to a jury trial by failing to file a timely demand. *Tippins v. Winn-Dixie Atlanta, Inc.*, 192 Ga. App. 172, 384 S.E.2d 199, cert. denied, 192 Ga. App. 172, 384 S.E.2d 199 (1989).

Local court rule provision that a trial de novo be available only upon demand after nonbinding arbitration did not deny the right to a jury trial. *Davis v. Gaona*, 260 Ga. 450, 396 S.E.2d 218 (1990).

Probate court. — Probate court did not err by failing to conduct a jury trial on the construction of a decedent's will as the decedent's will was unambiguous and no issues of fact remained; further, the corporation challenging the construction was not authorized under Georgia law to serve as a corporate trustee. *Chattowah Open Land Trust, Inc. v. Jones*, 281 Ga. 97, 636 S.E.2d 523 (2006).

Waiver of right to jury trial in probate proceeding. — Trial court had subject matter jurisdiction to review the probate court's decision under Ga. Const. 1983, Art. VI, Sec. IV, Para. I and O.C.G.A. § 15-6-8(4)(E) to deny probate of the decedent's 1988 will and the parties' waiver of the statutory right to a jury trial did not deprive the trial court of subject matter jurisdiction to deny probate of the will. *Mosley v. Lancaster*, 296 Ga. 862, 770 S.E.2d 873 (2015).

Husband did not waive right to jury trial. — Trial court erroneously denied a husband's motion for a new trial and to set aside the decree of divorce, as the husband's actions in showing up 45 minutes late in answering a calendar call did not

Right to Trial by Jury (Cont'd)
2. Civil Cases (Cont'd)

amount to either an expressed or implied waiver of an asserted right to a jury trial, and the husband did not expressly consent to a bench trial. *Walker v. Walker*, 280 Ga. 696, 631 S.E.2d 697 (2006).

Dismissed employee had no constitutional right to trial by jury on the employee's claim for back pay under the Georgia Equal Employment for the Handicapped Code, O.C.G.A. § 34-6A-1 et seq. *Smith v. Milliken & Co.*, 189 Ga. App. 897, 377 S.E.2d 916 (1989).

Right to trial by jury in action on subrogation lien. — When pursuing its subrogation rights, a workers' compensation insurer is not entitled to a jury trial on the question of whether the injured employee has been fully and completely compensated under O.C.G.A. § 34-9-11.1(b). *Liberty Mut. Ins. Co. v. Johnson*, 244 Ga. App. 338, 535 S.E.2d 511 (2000).

No right to jury trial in appeal from adverse decision of policemen's pension fund board. — There is no constitutionally protected right to a trial by jury in an appeal from an adverse decision of the policemen's pension fund board, only the election provided by statute (Ga. L. 1953, pp. 2707, 2710) enabling the appellant to obtain a jury trial upon a proper application within a limited 30-day period. *Simmons v. Board of Trustees*, 167 Ga. App. 511, 306 S.E.2d 759 (1983).

Right to trial by jury does not apply to special proceedings of a summary character. *Hartman v. Georgia Bd. of Dental Exmrs.*, 214 Ga. 560, 105 S.E.2d 732 (1958); *Williams v. State*, 138 Ga. App. 662, 226 S.E.2d 816 (1976).

No right to jury trial in proceedings to collect taxes. — As a general rule, there is no right under general constitutional provisions to a jury trial in statutory or summary proceedings for the collection of taxes. *Hicks v. Stewart Oil Co.*, 182 Ga. 654, 186 S.E. 802 (1936).

A bond validation proceeding is not one of the class of cases in which jury trials have ever existed as a matter of right, and it does not fall within this paragraph. *Steadham v. State*, 224 Ga. 78,

159 S.E.2d 397, cert. denied, 393 U.S. 825, 89 S. Ct. 87, 21 L. Ed. 2d 96 (1968).

Right to jury trial not denied by issuing writ of possession. — A request for jury trial and demand for a court reporter is no "answer" to a petition for a writ of possession. The trial court is therefore mandated by law to issue the writ of possession, which does not amount to a denial of the constitutional right to a jury trial. *Banks v. Borg-Warner Acceptance Corp.*, 168 Ga. App. 46, 308 S.E.2d 54 (1983).

A debtor's constitutionally guaranteed right to a jury trial was not infringed when the trial court issued a writ of possession without the benefit of a jury since there were no issues of material fact in dispute. *Bledsoe v. Central Ga. Prod. Credit Ass'n*, 180 Ga. App. 598, 349 S.E.2d 821 (1986).

No right to trial by jury exists in habeas corpus cases, and certainly not in juvenile courts when the state as *parens patriae* created the juvenile court with powers in the nature of habeas corpus for the protection of children. *Porter v. Watkins*, 217 Ga. 73, 121 S.E.2d 120 (1961).

Appeal to superior court from condemnation award. — There is no state constitutional right to a jury trial with respect to proceedings of statutory origin unknown at the time the Georgia Constitution was adopted. An appeal to the superior court from a special master's condemnation award is such a proceeding. *Benton v. Georgia Marble Co.*, 258 Ga. 58, 365 S.E.2d 413 (1988).

Applicability to dispossessory actions. — Georgia Constitution provides for the right of trial by jury in dispossessory actions. *Thomas v. Wells Fargo Credit Corp.*, 200 Ga. App. 592, 409 S.E.2d 71, cert. denied, 200 Ga. App. 897, 409 S.E.2d 71 (1991).

Verdict on unconditional contract without jury valid. — When a suit on an unconditional contract in writing was in default, and a verdict was taken therein, and a judgment was signed by the judge thereon, such judgment was not void because a verdict was taken, but was a valid judgment. *Hayes v. International Harvester Co. of Am.*, 52 Ga. App. 328, 183 S.E. 197 (1935).

When no issuable defense is filed under oath or affirmation, the court does not err in striking a defendant's answer and rendering judgment without verdict of a jury for the plaintiff in a civil case founded on an unconditional contract. *Belt v. Georgia Bank & Trust Co.*, 115 Ga. App. 545, 154 S.E.2d 764 (1967).

This paragraph was not violated when facts were not submitted to jury in case dealing with validation of municipal bonds. *Lippett v. City of Albany*, 131 Ga. 629, 63 S.E. 33 (1908).

This paragraph was not violated by former Penal Code 1910, §§ 295 and 296 (see now O.C.G.A. § 45-11-4), which provided a penalty for malpractice by a justice of the peace. *Kent v. State*, 18 Ga. App. 30, 88 S.E. 913 (1916).

This paragraph was not violated by former Code 1933, § 60-101 (see now O.C.G.A. § 44-2-40 et seq.). *Crowell v. Akin*, 152 Ga. 126, 108 S.E. 791, 19 A.L.R. 51 (1921); *Saunders v. Staten*, 152 Ga. 142, 108 S.E. 797 (1921).

Contest of city elections. — This paragraph was not violated when facts were not submitted to the jury concerning contest of election of city officers. *Hill v. Mayor of Dalton*, 72 Ga. 314 (1884); *Freeman v. State ex rel. McDonald*, 72 Ga. 812 (1884).

This paragraph was not violated when facts were not submitted to jury in case resulting in verdict on a foreign judgment. *Stewart Dunholter & Co. v. Sholl*, 99 Ga. 534, 26 S.E. 757 (1896).

This paragraph was not violated by Ga. L. 1909, § 9, creating a Board of Road and Revenue (now Board of Commissioners) and providing its duties, and for the removal of members of such board. *Smith v. Duggan*, 153 Ga. 463, 112 S.E. 458 (1922).

Former Civil Code 1910, § 1741 (see now O.C.G.A. § 43-34-37) was not unconstitutional as violative of this paragraph. *Lewis v. State Bd. of Medical Exmrs.*, 162 Ga. 263, 133 S.E. 469 (1926).

Ga. L. 1958, p. 34, § 34 (see now O.C.G.A. Art. 2, Ch. 11, T. 19) is not unconstitutional in that it does not provide a jury trial for a divorced father when he is sued by his former wife

for the future support of their minor children who are in her custody. *Strange v. Strange*, 222 Ga. 44, 148 S.E.2d 494 (1966).

Because it was of statutory origin and was unknown to the common or statutory law of England prior to Georgia's first Constitution, a proceeding under Ga. L. 1958, p. 34, § 34 (see now O.C.G.A. Art. 2, Ch. 11, T. 19), did not entitle the father of the minor children to a jury trial as a constitutional right. *Strange v. Strange*, 222 Ga. 44, 148 S.E.2d 494 (1966).

Because an action for recovery of environmental costs was unknown in 1798 when the Georgia Constitution was adopted, defendants suing under O.C.G.A. § 12-8-96.1(a) of the Georgia Hazardous Site Response Act, O.C.G.A. § 12-8-90 et seq., had no right to a jury trial on the issue of whether the actual costs were reasonable, but they were entitled to a jury trial on the issue of punitive damages. *Reheis v. Baxley Creosoting & Osmose Wood Preserving Co.*, 268 Ga. App. 256, 601 S.E.2d 781 (2004).

Crop lien foreclosure statute. — There is no right to a jury trial in an action under the Georgia Crop Lien Foreclosure Statute, O.C.G.A. § 44-14-340. *Bitt Int'l Co. v. Fletcher*, 259 Ga. App. 406, 577 S.E.2d 276 (2003).

Exceptions to an auditor's report must be submitted to the jury. *Cook v. Commissioners of Houston County*, 62 Ga. 223 (1879); *Weed v. Gainesville, Jefferson & S.R.R.*, 119 Ga. 576, 46 S.E. 885 (1904).

Jury verdict on exceptions of fact to auditor's report is a constitutional prerequisite to valid judgment when there is no semblance of a waiver of the jury in the record. *Simonton Constr. Co. v. Pope*, 213 Ga. 360, 99 S.E.2d 216 (1957).

Attorney's fees. — Since attorney fees were not allowable at common law, there is no constitutional right to a jury trial on the issue of attorney fees. *Hudson v. Abercrombie*, 258 Ga. 729, 374 S.E.2d 83 (1988).

Statutory cap on noneconomic damages in medical malpractice cases. — Statutory limitation of awards of noneconomic damages in medical malpractice cases to a predetermined amount

Right to Trial by Jury (Cont'd)**2. Civil Cases (Cont'd)**

was unconstitutional because it violated the right to a jury trial guaranteed by Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), and the statute was wholly void and of no force and effect from the date of the statute's enactment. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731, 691 S.E.2d 218 (2010).

Jury trial not authorized for recovery of appellate costs. — Because O.C.G.A. § 5-6-5 was enacted in 1845, the statutory procedure for the recovery of appellate costs was unknown in 1798, the year the Georgia Constitution was enacted, and there was no right to jury trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). *Mize v. First Citizens Bank & Trust Co.*, 302 Ga. App. 757, 691 S.E.2d 648 (2010).

3. Criminal Cases

Right to jury trial attaches when the maximum penalty for an offense exceeds six months' imprisonment. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

This paragraph requires the right of jury trial in cases of felonies. *Mattox v. State*, 115 Ga. 212, 41 S.E. 709 (1902); *Pollard v. State*, 148 Ga. 447, 96 S.E. 997 (1918).

Right to jury trial attaches in both felony and misdemeanor cases. — Only in cases concerning truly petty crimes, if the deprivation of liberty is minimal, does the defendant have no constitutional right to trial by jury. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Right to jury trial does not apply to police courts of cities and towns and arrests and trial, with fine and imprisonment therein, under ordinances thereof. *Williams v. City Council*, 4 Ga. 509 (1848); *Floyd v. Commissioners of Eatonton*, 14 Ga. 354, 58 Am. Dec. 559 (1853); *Hill v. Mayor of Dalton*, 72 Ga. 314 (1884); *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751, 4 Ann. Cas. 501 (1906).

Right of jury trial is not required in trial of violators of municipal ordinances. *Hill v. Mayor of Dalton*, 72 Ga.

314 (1884); *Tindall v. Westcott*, 113 Ga. 1114, 39 S.E. 450, 155 L.R.A. 225 (1901); *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751, 4 Ann. Cas. 501 (1906).

Exercise of rights should not be impeachment grounds. — Neither the initial right to exercise the right to trial by jury, nor a subsequent decision to waive that right and plead guilty, should be viewed as a "lie" or ammunition for impeachment. *Brown v. State*, 228 Ga. App. 281, 491 S.E.2d 488 (1997).

Indictment need not state statutory aggravators. — Trial court did not err by denying a defendant's motion to quash an indictment, based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), because the face of the indictment did not contain the statutory aggravators for the death penalty; the state was not required to list the statutory aggravators in the indictment. *Thomason v. State*, 281 Ga. 429, 637 S.E.2d 639 (2006).

Defendant was entitled to trial by jury when indicted for zoning violation punishable as misdemeanor. — An indictment charging violation of a county zoning ordinance is a charge of a violation of state law for failure to comply with the local zoning ordinances and when such violation is a misdemeanor under state law the defendant is entitled to trial by jury. *Clark v. State*, 157 Ga. App. 486, 277 S.E.2d 738 (1981).

Right not violated in death penalty case. — O.C.G.A. § 17-10-30, enumerating the statutory aggravating factors in a death penalty case, was not unconstitutional under U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XI as applied in defendant's case; the jury found beyond a reasonable doubt the existence of the statutory aggravating circumstances, there was no requirement that the jury find non-statutory aggravating factors beyond a reasonable doubt, and the non-statutory aggravating evidence presented by the state was reliable and admissible. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

O.C.G.A. § 40-13-60 manifestly infringes on constitutional right. —

O.C.G.A. § 40-13-60 manifestly infringes on Ga. Const. 1983, Art. I, Sec. I, Para. XI insofar as it denies a criminal defendant, who is subject to potential punishment as a misdemeanor, the right to trial by jury; eliminating the language in O.C.G.A. § 40-13-60 that seemingly restricts a traffic violator to a bench trial would not undermine the general intent and overall scheme of O.C.G.A. § 40-13-50 et seq. and would not require that the remainder of the statutory scheme be invalidated. *Geng v. State*, 276 Ga. 428, 578 S.E.2d 115 (2003).

Withdrawing case from jury. — The right to the presumption of innocence is so strong that when the defendant, who had previously plead not guilty, admitted every material element of the crimes charged in the defendant's testimony, it was error to withdraw from the jury the issue of the defendant's guilt or innocence. *Bryant v. State*, 163 Ga. App. 872, 296 S.E.2d 168 (1982).

Waiver of jury trial as delay tactic prohibited. — When the defendant was represented by counsel when the defendant waived the right to a jury trial in writing, the defendant twice requested a continuance to obtain a mental examination that the defendant refused to complete, the defendant subsequently terminated defense counsel and obtained new counsel, and the defendant first asked to revoke the defendant's jury trial waiver on the day of trial when the defendant asked for another new counsel, the trial court properly denied the request and properly found that the request was a mere dilatory tactic and that to grant the request would have substantially delayed the cause of justice. *Bennett v. State*, 262 Ga. App. 800, 586 S.E.2d 704 (2003).

Waiver of constitutional rights in guilty plea. — Habeas court's finding that a petitioner's guilty pleas were validly entered was reversed as the waiver forms signed by the petitioner and reviewed with the petitioner by the petitioner's attorneys addressed only the right to be tried by a jury; the waiver forms did not advise the petitioner that the petitioner was waiving the petitioner's right against self-incrimination and the petitioner's confrontation right. *Beckworth v. State*,

281 Ga. 41, 635 S.E.2d 769 (2006).

Waiver valid. — Evidence supported a trial court's finding that a defendant knowingly and voluntarily waived the defendant's right to a jury trial as the defense counsel testified that: (1) the defense counsel explained to the defendant on several occasions the defendant's right to a jury trial and the ramifications of that right; (2) the counsel explained the difference between a jury trial and a bench trial and recommended that the defendant waive that right in favor of a bench trial and take the defendant's chances with an appeal of the denial of a motion to suppress; and (3) the defendant indicated to the counsel that the defendant understood the defendant's rights and the strategy and affirmatively agreed to go forward with a bench trial. *Fleming v. State*, 282 Ga. App. 373, 638 S.E.2d 769 (2006).

Because the state presented sufficient extrinsic evidence showing that the defendant knowingly and voluntarily waived a jury trial, even though this evidence conflicted with the defendant's later testimony at the hearing on the motion for a new trial, the trial court did not err in denying the defendant a new trial. *Davis v. State*, 287 Ga. App. 783, 653 S.E.2d 107 (2007).

Failure to object to juror. — Because the defense counsel only sought to have a juror removed before the second day of a three-day jury trial based on that juror's acquaintance with three state witnesses, did not ask the jury pool questions related to such information during voir dire, and did not move for a mistrial when the issue arose during trial, the defendant waived any claim that a Sixth Amendment right to a jury trial was violated, and the trial court was not required to grant a mistrial, sua sponte; moreover, because the excused juror was not questioned about any familiarity with the witnesses during voir dire, that juror's selection to sit on the panel was not the result of any concealment or misleading statements. *Artega v. State*, 282 Ga. App. 751, 639 S.E.2d 634 (2006).

Drug forfeiture proceedings. — There is no constitutional right to a jury trial in state drug forfeiture proceedings, as mandated by paragraphs (o)(5) and (p)(6) of O.C.G.A. § 16-13-49. *Swails v.*

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3. Criminal Cases (Cont'd)

State, 263 Ga. 276, 431 S.E.2d 101, cert. denied, 510 U.S. 1011, 114 S. Ct. 602, 126 L. Ed. 2d 567 (1993).

Right to public trial denied when trial held in county jail. — Defendant was denied the right to a public trial under the Sixth Amendment of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) when the defendant's trial was held in a county jail because the produced un rebutted evidence that jail authorities excluded from the jail courtroom the defendant's brother, a member of the public who wanted to attend the trial; the closure of the courtroom to the brother was neither brief nor trivial as the brother was kept out of the courtroom during the entire trial, which involved criminal charges brought against the defendant in regard to a family member, and the trial court, by deciding to hold the defendant's trial in a facility where the public's access was governed exclusively by the jail authorities, failed in the court's obligation to take reasonable measures to accommodate public attendance at the trial. *Purvis v. State*, 288 Ga. 865, 708 S.E.2d 283 (2011).

Abuse of discretion to prohibit questions on subject matter during voir dire. — Trial court abused the court's discretion in prohibiting the defendant from asking voir dire questions of prospective jurors as to whether the jurors would automatically impose the death penalty, as opposed to fairly considering all three sentencing options (death, life without parole, and life with the possibility of parole) in a case involving the murder of young children as such questioning was permitted under O.C.G.A. § 15-12-133. *Ellington v. State*, 292 Ga. 109, 735 S.E.2d 736 (2012).

Public Trial by Impartial Jury

1. Public Trial

Right to public trial subject to administration of justice. — The right to a public trial has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the

courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice. *Lowe v. State*, 141 Ga. App. 433, 233 S.E.2d 807 (1977).

Press not protected in obstructing administration of justice by courts. — Constitution of Georgia guarantees the liberty of speech and of the press, but does not protect an abuse of that liberty, and obstructing the administration of justice by the courts of this state is an abuse of that liberty and will subject the abuser to punishment for contempt of court. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

Judge may for any special reason exclude certain spectators from courtroom. *Tilton v. State*, 5 Ga. App. 59, 62 S.E. 651 (1908).

Judge may for any special reason exclude certain spectators from courtroom. — The trial court did not violate O.C.G.A. § 17-8-57 by expressing to two jurors an opinion that the defendant was guilty, as the court merely sought to determine whether the two jurors should be excused from further service because of their relationship with the defendant's family and resolved the issue in the manner the defendant requested; moreover, the defendant's right to a public trial was not violated when the trial judge ordered the spectators out of the courtroom at this time, as the judge was accommodating a request of one of the jurors for a more private setting. *Berry v. State*, 282 Ga. 376, 651 S.E.2d 1 (2007).

No error excluding spectators for lack of space. — Trial court did not err when the court indicated that spectators would need to be excluded from the courtroom during voir dire because of limited space since the defendant never objected and failed to show that any spectators were barred from or sent out of the courtroom. *Martinez v. State*, 318 Ga. App. 254, 735 S.E.2d 785 (2012).

Permissible to exclude spectators during part of rape trial. — When, on the trial of one accused of rape, the alleged victim is unable to give the victim's testimony before a crowd of spectators, and it appears that the due administration of justice is thereby impeded, the trial judge

may clear the courtroom, during the examination of the victim, without infringing upon the defendant's right to a public trial. *Moore v. State*, 151 Ga. 648, 108 S.E. 47 (1921), appeal dismissed, 260 U.S. 702, 43 S. Ct. 98, 67 L. Ed. 471 (1922).

Failure to object to exclusion of defendant's parents during child victim's testimony. — Because the defendant failed to object to the exclusion of the defendant's parents from the courtroom, and the failure did not amount to plain error, the appeals court rejected the defendant's contentions on appeal that O.C.G.A. § 17-8-54 was violated, as was the defendant's right to public trial; moreover, the appeals court declined to extend the plain error doctrine to the instant facts. *Delgado v. State*, 287 Ga. App. 273, 651 S.E.2d 201 (2007).

Excluding juveniles. — In a prosecution for aggravated sodomy and incest, there was no abuse of discretion on the part of the trial court in excluding juvenile spectators from the courtroom and no violation of the appellant's right to a public trial. *Parker v. State*, 162 Ga. App. 271, 290 S.E.2d 518 (1982).

There was no abuse of discretion of court in exclusion of spectators during testimony of one witness who was in fear of possible harm because of testimony to be given. *Lowe v. State*, 141 Ga. App. 433, 233 S.E.2d 807 (1977).

Defendant failed to show that the trial court violated the defendant's right to a public trial after the court cleared the courtroom of nonessential personnel when the youngest victim testified because the defendant did not identify any specific people or category of people that were wrongly evicted. *Clark v. State*, 309 Ga. App. 749, 711 S.E.2d 339 (2011).

2. Impartial Jury

Defendant entitled to make appearance free from shackles or bonds. — A defendant being tried for a criminal offense on a plea of not guilty was entitled, at common law, to make an appearance free from all shackles or bonds. This is also the present rule, and the right is recognized as an important component of a fair and impartial trial. *McKenzey v.*

State, 138 Ga. App. 88, 225 S.E.2d 512 (1976).

Shackling of defendant, which continued throughout the defendant's trial for aggravated assault and obstruction of an officer, injected partiality into the trial, infringed upon defendant's presumption of innocence and prevented the fundamental fairness which attends a trial by jury. *Mapp v. State*, 197 Ga. App. 7, 397 S.E.2d 476 (1990).

After the defendant wrote threatening letters, it was reasonable for the court to impose additional security measures, but since the court neither considered intermediate security measures or alternate restraints, even though defense counsel offered to suggest such measures for the court's consideration, nor did the court take precautions to shield the restraints from the jury's view, the use of obvious physical restraints (i.e., shackling of the defendant) was an abuse of discretion. *Hicks v. State*, 200 Ga. App. 602, 409 S.E.2d 82 (1991).

While in the absence of exceptional circumstances, the trial court abused the court's discretion by requiring the defendant to remain shackled during trial, the decision was harmless error since the trial court made efforts to avoid bringing the shackles to the jury's attention and two co-defendants, also shackled, were acquitted. *Reid v. State*, 210 Ga. App. 783, 437 S.E.2d 646 (1993).

Although the defendant was obstreperous in unceasingly proclaiming that the defendant was entitled to a different lawyer and that the defendant's rights were being violated, the trial judge failed to properly exercise judicial discretion in the manner in which the judge attempted to control the defendant because there was no evidence that binding and gagging was used as a last resort among reasonable and less prejudicial alternatives, which included removing the defendant from the courtroom until the defendant was willing to be present without disruption. *Weldon v. State*, 247 Ga. App. 17, 543 S.E.2d 56 (2000).

Physical restraints on defendant at trial. — When physical restraints are necessary and are observed by the jury in a criminal case, the trial court must in-

Public Trial by Impartial**Jury (Cont'd)****2. Impartial Jury (Cont'd)**

struct the jury that the use of physical restraints on the defendant has no bearing on the defendant's guilt or innocence and should not be considered by them during their deliberations. *Hicks v. State*, 200 Ga. App. 602, 409 S.E.2d 82 (1991).

When physical restraints are necessary and are observed by the jury in a criminal case, the trial court must instruct the jury that the use of physical restraints on the defendant has no bearing on the defendant's guilt or innocence and should not be considered by them during their deliberations. *Allen v. State*, 248 Ga. App. 79, 545 S.E.2d 629 (2001).

Defendant entitled to panel of qualified jurors not panel of preferred jurors. *Smith v. State*, 245 Ga. 205, 264 S.E.2d 15 (1980).

Jurors may be placed upon their voir dire, and examined as to their impartiality. *Sullivan v. Padrosa*, 122 Ga. 338, 50 S.E. 142 (1905).

Defendant may ask jurors whether family members worked for law enforcement agencies. — The trial court errs in limiting voir dire of the jurors by refusing to allow the defendant to ask the panel whether members of the jurors' immediate families have ever worked for law enforcement agencies. *Henderson v. State*, 251 Ga. 398, 306 S.E.2d 645 (1983).

Determination of competence of juror. — To disqualify a juror in a criminal case, the juror must have formed and expressed an opinion, either from witnessing the crime or having heard sworn testimony concerning it; one who from some other sources had formed and expressed an opinion which is not fixed and determined and who indicates one's competency by answering the statutory questions on voir dire is not an incompetent juror. *Griffeth v. State*, 154 Ga. App. 643, 269 S.E.2d 501 (1980).

Jurors exposed to anti-drunk driving poster during DUI trial. — Defendant, charged with driving under the influence, was not deprived of a fair trial since the six empaneled jurors who were exposed to an anti-drunk driving poster

responded affirmatively when they were asked by defense counsel, "Can you dismiss that poster from your minds and say to me with absolute certainty that it has no bearing on your minds and would have no bearing on this case?". *Bryant v. State*, 201 Ga. App. 305, 410 S.E.2d 778 (1991).

Requirements for establishing denial of impartial jury. — Under the Sixth Amendment, in order for an appellant to establish the denial of the appellant's right to an impartial jury, the appellant must show either actual juror partiality or circumstances inherently prejudicial to that right. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

In order to support a finding that the defendant did not receive a fair trial, defendant must show: (1) that the setting of the trial was inherently prejudicial; or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. *Taft v. State*, 154 Ga. App. 566, 269 S.E.2d 69 (1980).

Factors which indicate right to impartial jury not presumptively violated. — Given the absence of any evidence of actual juror prejudice, the remoteness in time between publicity and trial, and the eventual admission of the prejudicial information into evidence, the right to an impartial jury has not been presumptively violated. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Juror impartial. — Trial court did not abuse its discretion in denying a motion for new trial pursuant to O.C.G.A. § 5-5-25 after defendant was convicted of criminal charges arising from an incident involving an ex-girlfriend; the fact that one juror indicated that the juror's daughter went to school with the victim's daughter and the daughters had a sleepover a year earlier at the victim's house did not create actual juror partiality or circumstances that were inherently prejudicial to defendant's right to an impartial jury under Ga. Const. 1983, Art. I, Sec. I, Para. XI. *Sims v. State*, 276 Ga. App. 246, 622 S.E.2d 909 (2005).

Juror's extrajudicial knowledge regarding appellant's present crime

represents serious potential for prejudice to that appellant's right to an impartial jury, but such potential can be discounted under U.S. Const., amend. 6, if review of the pretrial publicity and total voir dire fails to demonstrate that the "totality of the circumstances" were inherently prejudicial. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Juror who found joint defendant guilty is incompetent. *McKay v. State*, 6 Ga. App. 527, 65 S.E. 306 (1909).

Prejudicial circumstances can impeach juror's declaration of impartiality. — Circumstances inherently prejudicial to the appellant's right to an impartial jury can impeach a juror's declaration of impartiality. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

No deprivation of right when juror called as witness for state. — The defendant in a criminal case is not deprived of the right of trial by a fair and impartial jury merely because one or more of the jurors trying the case are called as witnesses for the state as to a matter other than the commission of the crime itself. *Williams v. State*, 42 Ga. App. 225, 155 S.E. 511 (1930); *Tumlin v. State*, 88 Ga. App. 713, 77 S.E.2d 555 (1953).

Consideration of effect of pretrial publicity on impartiality of prospective jurors. — When in a publicized murder case, in light of the possibility of prejudice, the trial court granted extensive individual voir dire of prospective jurors outside the presence of the others, and granted each of the defendant's motions to strike jurors for cause, leaving a panel of 50 prospective jurors where some prospective jurors admitted to a vague knowledge of the crimes, but none could recall details and each specifically stated an ability to weigh the evidence impartially, there is no prejudicial pretrial publicity which would outweigh the stated impartiality of the prospective jurors. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

In a murder trial, the two and one-half

month period between the publicity and the trial, the low level of community bias as reflected in the total voir dire, and the admission into evidence of the defendant's confessions permit the court to discount the potential for prejudice admittedly present in the extrajudicial knowledge of the selected jurors in the case, and to find that the "totality of circumstances" surrounding the defendant's trial were not inherently prejudicial to the defendant's right to an impartial jury. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

After one prospective juror made a comment that the defendant killed redheads and that the juror was later excused, the trial court did not violate the defendant's right to an impartial jury under Ga. Const. 1983, Art. I, Sec. I, Para. XI and U.S. Const., amend. 6 in refusing to excuse other prospective jurors. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Trial court did not deprive the defendant of a fair and impartial jury pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XI and U.S. Const., amend. 6 in refusing to transfer venue of the murder case due to pretrial publicity; many of the prospective jurors were unaware of the publicity surrounding the crimes due to the 14-year gap between the crimes and trial, and no remaining venire persons expressed a fixed opinion regarding the defendant's guilt based upon exposure to media coverage. *Denny v. State*, 281 Ga. 114, 636 S.E.2d 500 (2006).

Corroboration for the court's belief that pretrial publicity was not inherently prejudicial could be found in the percentage of prospective jurors excused for partiality regarding the accused's guilt. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

When only 4 percent of the prospective jurors were excused for partiality regarding the defendant's guilt, the pretrial publicity surrounding the defendant's case did not create a community bias inherently prejudicial to the appellant's right to an

Public Trial by Impartial**Jury (Cont'd)****2. Impartial Jury (Cont'd)**

impartial jury. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

New trial granted if jury acts from passion or prejudice. — It is a general rule that if the jury acts from passion or prejudice against the accused in rendering their verdict against the accused, a new trial will be granted. *Fitzgerald v. State*, 184 Ga. 19, 190 S.E. 602 (1937).

New trial when incompetent juror renders verdict. — When a juror is incompetent, and renders a verdict, a new trial will be granted. *Doyal v. State*, 73 Ga. 72 (1884).

Press should refrain from activities which interfere with trial by impartial jury. — A responsible press, appreciating as it must the great power of the press in a democratic society, should refrain from publishing and distributing news articles which, in the normal course of events would, or which it could reasonably anticipate would, interfere with the trial of a criminal case by an impartial jury; and to do so may subject it to punishment for contempt of court. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

The press should be given the widest latitude possible in the exercise of its freedom that is consonant with the orderly administration of justice, trial by a fair and impartial jury, and the freedom and independence of the courts in the exercise of their constitutional rights and duties. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

Disqualification of jurors with reservations about capital punishment. — When jurors were disqualified in a murder and rape proceeding because of their reservations about capital punishment, the jurors were properly excused for cause, and the defendant was not deprived of the defendant's right to a jury selected from a representative cross section of the community. *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 855 (1979), cert. denied, 446 U.S. 970, 100 S. Ct. 2952, 64 L. Ed. 2d 831 (1980).

The right of an accused to a trial by an impartial jury, guaranteed by the state and federal Constitutions, means the right to a jury impartial as between the state and the accused on the question of the guilt or innocence of the accused. The crime of rape in this state may be punished by death, and a person accused of such crime has no constitutional right to have jurors trying the case who have conscientious scruples against the infliction of a punishment prescribed by the law. *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118, appeal dismissed, 385 U.S. 36, 87 S. Ct. 241, 17 L. Ed. 2d 36 (1966).

Trial court's disqualification of a juror for cause based upon the juror's opposition to the imposition of the death penalty was not an abuse of discretion as: (1) the juror initially indicated that the juror was open to considering the death penalty as a sentencing option, but almost immediately into voir dire the juror vacillated and repeatedly stated that the juror did not know whether the juror could vote for the death penalty; (2) after extensive questioning by the trial court, the juror stated that the death penalty was against the juror's nature and indicated that the juror did not think the juror could vote for it, regardless of the circumstances; and (3) in finding the juror unqualified, the trial court relied in large part on the juror's demeanor, noting the juror's "body language" and the fact that, although the juror had indicated a couple of times that the juror might consider the death penalty, the juror "seemed to struggle with it." *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

"Death-qualified" jury procedure does not violate constitutional right to jury trial. *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir. 1978).

When the defendant received a sentence of life without parole, not a death sentence, the defendant could not complain of the death-penalty qualification of the jurors; moreover, the death penalty qualification of prospective jurors was clearly authorized. *Stokes v. State*, 281 Ga. 825, 642 S.E.2d 82 (2007).

Circumstances under which examination by court may be cause for new

trial. — The trial judge has the right to propound a question or a series of questions to any witness, for the purpose of developing fully the truth of the case; and the extent to which the examination conducted by the court shall go is a matter within the judge's discretion; and a lengthy examination by the court of a witness called by either party will not be cause for a new trial even though some of the questions propounded by the court were leading in character, unless the court, during the examination of the witness by the court, expresses or intimates an opinion on the facts of the case, or as to what has or has not been proved on the examination takes such course as to become argumentative in character. *Beavers v. State*, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

Restriction of improper voir dire. — The trial court did not violate Uniform Superior Court Rule 10.1, O.C.G.A. § 15-12-133, the Sixth and Fourteenth Amendments, or Ga. Const. 1983, Art. I, Sec. I, Paras. I and XI, by restricting improper voir dire examination of prospective jurors concerning racial bias, pre-trial publicity, and self defense. *Walker v. State*, 258 Ga. 443, 370 S.E.2d 149 (1988).

Out-of-court communication. — Presumption of prejudice to the defendant when an irregularity in the conduct of a juror is shown was overcome since the court conducted a thorough hearing regarding an out-of-court communication at which both the defendant and the state had ample opportunity to question the witness and the offending juror. *Cleveland v. State*, 192 Ga. App. 659, 386 S.E.2d 169 (1989).

Judge's comment on jurors' notes did not violate right to impartial jury. — Trial court did not express an opinion in violation of O.C.G.A. § 17-8-57 or of an inmate's rights to confrontation or a fair and impartial jury when the court explained to those in the courtroom during jury deliberations in the inmate's trial on drug and weapons offenses that it had received two notes from the jury describing a communication received by a juror that offered the juror a bribe in exchange for changing the juror's vote to not guilty; the trial court's comment did not suggest

that the inmate had directed the bribery attempt because it merely reviewed the jurors' notes and did not go beyond them, and it added nothing to that which the jurors already knew. *Greer v. Thompson*, 281 Ga. 419, 637 S.E.2d 698 (2006).

Prejudicial misconduct of counsel may warrant granting mistrial. — The misconduct of counsel may be such that its effect cannot be overcome, and misconduct so prejudicial that the verdict of the jury must have been influenced thereby is not cured by an admonition to the jury, or by sustaining an objection thereto, or by rebuke or admonition of counsel, or by withdrawal by counsel; but the court should grant a mistrial. *Fitzgerald v. State*, 184 Ga. 19, 190 S.E. 602 (1937).

Handling of misconduct of counsel by court. — When the conduct of the attorney warrants a reprimand, a mere placid direction by the court will not suffice. Whenever necessary, the court may and should admonish the jury to disregard improper arguments, whether requested to do so or not, but especially when properly requested so to do; and unless the misconduct is so prejudicial that its injurious effect cannot be eradicated, the error in counsel's misconduct is cured by an admonition to disregard the impropriety by cautioning the jury to decide the case on the evidence and not on counsel's statements, and that statements of counsel are not to be regarded as evidence. *Fitzgerald v. State*, 184 Ga. 19, 190 S.E. 602 (1937).

If the solicitor general (now district attorney) in the address to the jury uses highly improper language not authorized by the evidence or any fair deduction therefrom, and counsel for the accused objects thereto and moves that the court declare a mistrial, which the court refuses, a new trial will be granted in the interest of justice, which requires a fair trial. *Fitzgerald v. State*, 184 Ga. 19, 190 S.E. 602 (1937).

While the language of the court need not be a direct admonishment, a mere perfunctory statement not to consider has been held not sufficient, and a general instruction to try the case free from bias and prejudice and wholly on the evidence is not tantamount to directing the jury to disregard counsel's improper remarks.

**Public Trial by Impartial
Jury (Cont'd)**

2. Impartial Jury (Cont'd)

Fitzgerald v. State, 184 Ga. 19, 190 S.E. 602 (1937).

The court must so admonish the jury as to remove the prejudice resulting from the prosecutor's misconduct, and in some cases in admonishment to the jury to disregard the remarks of counsel will not correct their effect. The misconduct may be such that the sustaining of objections thereto is not sufficient; and when the argument is very prejudicial, in addition to sustaining an objection, the judge should reprimand counsel, require the improper remarks to be withdrawn, and instruct the jury to disregard the remarks, in order to alleviate the harmful effect; and when the court has sustained an objection to remarks, it is the duty of counsel to desist from further argument of the same character. *Fitzgerald v. State*, 184 Ga. 19, 190 S.E. 602 (1937).

Trial court did not err in denying the defendant's motion for mistrial following the state's reference to prison in closing arguments, as the defendant's right to a fair trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI was not violated; even assuming that the prosecutor's statement that the defendant did not want to go to prison was improper, the trial court's prompt curative instruction, requesting the jury to disregard any reference to prison and to not be concerned with punishment, was sufficient to prevent any possible prejudicial effect. *Carswell-Danso v. State*, 281 Ga. App. 576, 636 S.E.2d 735 (2006).

A defendant's conviction for felony murder and other crimes stemming from an incident in which the defendant drove a car into a crowd, hitting and killing the victim, was reversed on appeal since the trial court abused the trial court's discretion by failing to strike a juror for cause since that juror expressed a distinct bias against the defendant, with the juror stating that the juror had pretty much formed an opinion already, that it seemed as if the defendant was guilty of the crime, and that it would be the defense's job to prove that the defendant was not involved. *Max-*

well v. State, 282 Ga. 22, 644 S.E.2d 822 (2007).

Remark did not require entire panel to be excused. — Even if trial counsel was ineffective for failing to challenge the jury array on the basis that the array was tainted by the comments of a juror who was excused after stating that the juror thought the defendant was "guilty in 2003," when the crimes occurred, there was no prejudice because the juror's opinion was based solely on media reports, not on any personal knowledge of the defendant; when a prospective juror's comments did not link a defendant with criminal activity, or characterize the defendant as a criminal, the entire jury panel did not have to be excused. *Edwards v. State*, 282 Ga. 259, 646 S.E.2d 663 (2007).

Refusal to declare mistrial on account of argument of assistant solicitor general (now assistant district attorney) was not denial of constitutional rights of the accused. The argument of the assistant solicitor general (now assistant district attorney), when considered in connection with the statement of the judge, was not such as to affect the impartiality of the jury; and that construction necessarily negatives any violation of this constitutional right. *Hicks v. State*, 196 Ga. 671, 27 S.E.2d 307 (1943).

When in the trial of an accused for rape, the assistant solicitor general (now assistant district attorney) in a concluding argument made the statement, "anything less than the death penalty would be a mockery," and when counsel for accused promptly stated, "We object to that, and ask for a mistrial in this case," and when the court denied the motion by stating, "I will strike the word 'mockery' and tell the jury to put it out of their minds," the court did not err in refusing to declare a mistrial, and there was no violation of the rights of the accused under the due process clause of the Constitution of this state, or under the provisions that the accused be given a trial "by an impartial jury." *Hicks v. State*, 196 Ga. 671, 27 S.E.2d 307 (1943).

State witness serving as bailiff during defendant's trial. — Defendant's

trial counsel was ineffective for failing to object to a county sheriff serving as a bailiff during the defendant's trial on charges of, inter alia, arson because the sheriff was a key witness for the state. Even if the sheriff never directly discussed the case with the jurors, the defendant was prejudiced as the sheriff continually associated with the jurors during half the trial and, thus, denied the defendant the right to a fair trial by an impartial jury. *Bass v. State*, 285 Ga. 89, 674 S.E.2d 255 (2009).

3. Speedy Trial

Speedy trial is fundamental constitutional right, not a privilege. *Blevins v. State*, 113 Ga. App. 702, 149 S.E.2d 423 (1966); *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Speedy resolution is a constitutional requirement under Ga. Const. 1983, Art. VI, Sec. IX, Para. I, just as speedy trial is a defendant's right under Ga. Const. 1983, Art. I, Sec. I, Para. XI. *Williams v. State*, 187 Ga. App. 355, 370 S.E.2d 210 (1988).

Statute regarded as aid and implementation of constitutional right. — Since the right of a speedy trial has become a guaranty under the state Constitution, O.C.G.A. § 17-7-170 is to be regarded as in aid and implementation of the state constitutional right and to secure to a defendant in a criminal case the defendant's right thereunder. *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Purpose of demand statute is to secure rights. — Since the purpose of the demand statute, former Code 1933, § 27-1901 (see now O.C.G.A. § 17-7-170) is to secure to defendants in criminal cases their rights guaranteed by this paragraph to a speedy and public trial, the courts should seek to uphold rather than whittle away by judicial construction this and other provisions of the Bill of Rights, which secure the guarantees of freedom upon which this country is founded. *Rider v. State*, 103 Ga. App. 184, 118 S.E.2d 749 (1961).

Dead docketing a case. — Placing a case upon the dead docket constitutes neither a dismissal nor a termination of

the prosecution in the accused's favor. Consequently, the fact that a case is placed on the dead docket does not affect the constitutional right to a speedy trial. *Hayes v. State*, 298 Ga. App. 338, 680 S.E.2d 182 (2009).

Differing terms of court. — O.C.G.A. §§ 15-6-3(15.1) and 17-7-171 did not combine to deprive a criminal defendant of equal protection of the law by permitting the county of the defendant's adjudication to operate with only two terms of court, while other similar-sized counties operate with more terms of court. Although defendant may have had to wait months longer for the defendant's trial than similarly situated defendants in other counties, the presumptive validity of the statutes stood. *Henry v. State*, 263 Ga. 417, 434 S.E.2d 469 (1993).

Right becomes operative when one becomes accused and prosecution commences either by formal accusation or arrest. *Simpson v. State*, 150 Ga. App. 814, 258 S.E.2d 634 (1979).

Rights effective when charged. — The constitutional provisions requiring and guaranteeing "speedy trial" generally become operative when the accused is charged, i.e., when the prosecution commences. *Hall v. Hopper*, 234 Ga. 625, 216 S.E.2d 839 (1975).

Obligation of courts and prosecution to proceed with reasonable dispatch serves threefold purpose. — The right to a speedy trial is intended to avoid oppression and prevent delay by imposing on the courts and on the prosecution an obligation to proceed with reasonable dispatch. The guaranty has been held to serve a threefold purpose: it protects the accused, if held in jail to await trial, against prolonged imprisonment; it relieves the accused of the anxiety and public suspicion attendant upon an untried accusation of crime; and, like statutes of limitation, it prevents the accused from being exposed to the hazard of a trial after the lapse of so great a time that the means of proving the accused's innocence may have been lost. It also applies to a person who is at large on bail, since, in addition to protecting an accused against prolonged incarceration, the right also serves other purposes which are applica-

Public Trial by Impartial**Jury (Cont'd)****3. Speedy Trial (Cont'd)**

ble whether the defendant is on bail or not. *Blevins v. State*, 113 Ga. App. 702, 149 S.E.2d 423 (1966).

The interests of an accused to be protected by the right to a speedy trial include to: (1) prevent oppressive pretrial incarceration; (2) minimize anxiety and concern of the accused; and (3) limit the possibility that the defense will be impaired. *Simpson v. State*, 150 Ga. App. 814, 258 S.E.2d 634 (1979).

Four factors are relevant to consideration of whether denial of speedy trial assumes due process proportions: the length of delay, the reason for the delay, the prejudice to the defendant, and waiver by the defendant of the defendant's right to a speedy trial. *Sullivan v. State*, 225 Ga. 301, 168 S.E.2d 133 (1969), vacated on other grounds, 408 U.S. 935, 92 S. Ct. 2854, 33 L. Ed. 2d 749 (1972); *Johnson v. Smith*, 227 Ga. 611, 182 S.E.2d 101 (1971); *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972); *Mays v. State*, 229 Ga. 609, 193 S.E.2d 825 (1972); *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976); *Powell v. State*, 143 Ga. App. 684, 239 S.E.2d 560 (1977); *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979); *Simpson v. State*, 150 Ga. App. 814, 258 S.E.2d 634 (1979); *Garrett v. Arrington*, 245 Ga. 47, 262 S.E.2d 808 (1980); *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Violation of constitutional speedy trial right was not denied when the trial court properly analyzed the defendant's claim under a four part test: (1) the length of delay was six months; (2) the initial delay was caused by the defendant's change in counsel and motions for continuance, so the delay was not attributable to the state; (3) the defendant withdrew the defendant's initial statutory demand for a speedy trial and did not assert one again until two months before the defendant was tried; and (4) there was no prejudice when the defendant did not testify or otherwise produce any specific evidence of oppressive pre-trial incarceration and

there was no evidence that the defense was impaired by the delay in bringing the defendant to trial. *Hudson v. State*, 277 Ga. 581, 591 S.E.2d 807, cert. denied, 543 U.S. 934, 125 S. Ct. 317, 160 L. Ed. 2d 238 (2004).

Four factors exist to be considered by a court in determining whether an accused's constitutional right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant. Defendant was not prejudiced by the delay in holding defendant's trial since: (1) the delay was caused by defendant's own failure to appear at defendant's first trial that then required a bench warrant for defendant's arrest to be issued; and (2) the delay did not prejudice defendant's ability to find witnesses to support defendant's alibi defense because a witness who was unavailable would not have been able to testify in support of that defense and defendant had ample time to tell defendant's family members to keep notes of defendant's whereabouts before defendant decided to not appear for defendant's first trial. *Mayfield v. State*, 264 Ga. App. 551, 593 S.E.2d 851 (2003).

After defendant, who was initially indicted for the burglary of victims who died when their house burned down admitted involvement in their deaths, resulting in a new indictment for murder, arson, and other offenses, as well as the original burglary, while a 62-month delay after the new indictment was presumptively prejudicial, as was the delay of another year after the original indictment, the lack of the state's deliberate act causing the delay, defendant's withdrawal of defendant's speedy trial demand, and the lack of a showing that defendant's defense was impaired by the delay indicated that it was not error to deny defendant's motion to dismiss the indictments. *Williams v. State*, 279 Ga. 106, 610 S.E.2d 32 (2005).

While a majority of the delay in bringing the defendant to trial was attributable to the state, and the defendant did not assert any right to a speedy trial until approximately 45 months after the date of arrest, after balancing all four factors set out in *Barker v. Wingo*, any delay in

bringing the defendant to trial did not violate the right to a speedy trial, no actual anxiety or concern on the defendant's part was shown, and the testimony that two alleged material defense witnesses would have presented would have either been cumulative or not material. *Ingram v. State*, 280 Ga. App. 467, 634 S.E.2d 430 (2006), cert. denied, 2007 Ga. LEXIS 868 (Ga. 2007).

Given the fact that the defendant waited until only a few weeks before trial to assert a constitutional speedy trial violation, and in light of the failure to show any prejudice by the delay, the trial court acted within the court's discretion in denying the defendant's speedy trial claim; moreover, such was particularly true when there was no evidence that the delay was the result of a deliberate attempt by the state to hamper the defense. *Parker v. State*, 283 Ga. App. 714, 642 S.E.2d 111, cert. denied, 552 U.S. 995, 128 S. Ct. 496, 169 L.Ed.2d 347 (2007).

Upon the appellate court's analysis of the four *Barker v. Wingo* factors, given the negative weight of one of two factors against the state, specifically, the reason for the delay, and the defendant's failure to show prejudice and timely assertion of a speedy trial right, no abuse of discretion resulted from the trial court's denial of a motion to dismiss the indictments filed against the defendant on speedy trial grounds. *Simmons v. State*, 290 Ga. App. 315, 659 S.E.2d 721 (2008).

Applying four-part *Barker* speedy trial test: (1) the length of the delay; (2) the reason for the delay; (3) the assertion of the right to a speedy trial; and (4) prejudice to the defendant, the appeals court decided that defendant's U.S. Const., amend. 6, Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), and O.C.G.A. § 17-7-171, speedy trial rights were not violated in the defendant's trial for driving under the influence—inter alia deciding that the three-year delay from arrest to trial was presumptively prejudicial, that the loss of DUI blood test result evidence was an equal loss to the defendant and the state, and that the defendant's delay in asserting the right was an indication that the defendant was not anxious or stressed. *Allen v. State*, 268 Ga. App. 161, 601 S.E.2d 485 (2004).

Defendant was not denied the right to a speedy trial as, assuming the 26-month delay between a first indictment and the trial was presumptively prejudicial: (1) the delay was caused by the defendant's motions for new counsel and to recuse the judge, and by declining an offer of an earlier trial; (2) the defendant did not assert the defendant's right to a speedy trial until 14 months after the indictment; and (3) the only alleged prejudice was the defendant's inability to obtain certain local phone records, and the delay in scheduling the trial did not encumber the defendant's ability to obtain those records. *Smith v. State*, 282 Ga. App. 339, 638 S.E.2d 791 (2006).

While the trial court was authorized to conclude that the "lead officer" in the prosecution against the defendant was a material and necessary witness who was unavailable for 14 months while the defendant's case was pending, and thus a continuance during that period was proper under O.C.G.A. § 17-8-31, despite the fact that no explanation was given for the remainder of the delay, given that the defendant failed to prove any of the other *Barker v. Wingo* factors in determining whether a speedy trial violation occurred, the defendant's motion to dismiss the indictment on speedy trial grounds was properly denied. *Bell v. State*, 287 Ga. App. 300, 651 S.E.2d 218 (2007), cert. denied, No. S08C0031, 2007 Ga. LEXIS 811 (Ga. 2007).

The trial court properly rejected a defendant's constitutional speedy trial claim; although the 18-month delay between a remittitur and the filing of the defendant's second motion for discharge and acquittal was presumptively prejudicial and was apparently caused by failure to schedule the case or by an overcrowded docket, the defendant had not asserted the constitutional speedy trial right until 18 months after remittitur and had not shown that witnesses were unavailable. *Oni v. State*, 285 Ga. App. 342, 646 S.E.2d 312 (2007).

The trial court did not abuse the court's discretion in granting the defendants' motions to dismiss the charges filed against them because the court was authorized to find that, as the result of the state's neg-

Public Trial by Impartial**Jury (Cont'd)****3. Speedy Trial (Cont'd)**

ligence, both the defendants were subjected to an extraordinarily long delay in being brought to trial, that they were not dilatory in asserting their right to a speedy trial, and that, as a result of the delay, their ability to defend against the belated murder charge was prejudiced. *State v. White*, 282 Ga. 859, 655 S.E.2d 575 (2008).

Trial court erred by denying the defendant's motion to dismiss the indictment for pre-indictment delay and granting the defendant's motion to dismiss for delay in prosecution because it failed to properly weigh the case law factors and improperly analyzed the defendant's claim for pre-indictment delay as a due process violation. *State v. Curry*, 317 Ga. App. 611, 732 S.E.2d 459 (2012).

Error in applying Barker test. — Trial court erred in granting the defendant's motion to dismiss the indictment on speedy trial grounds as the trial court miscalculated the length of the delay; improperly considered the state's pre-indictment, pre-arrest inaction for purposes of evaluating the reasons for the delay; failed to weigh the defendant's assertions of the right to speedy trial; and erred in finding that the defense was substantially impaired by the death of the defendant's sister. *State v. Gay*, 321 Ga. App. 92, 741 S.E.2d 217 (2013).

Same standards for deciding claims of denial of speedy trial are used whether the claim is based on U.S. Const., amend. 6 or this paragraph. *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979); *Redd v. State*, 261 Ga. 300, 404 S.E.2d 264 (1991), cert. denied, 505 U.S. 1218, 112 S. Ct. 3025, 120 L. Ed. 2d 897 (1992).

Constitutional speedy trial questions involve issues of fact that should be resolved by the court having jurisdiction of the criminal prosecution. *Garrett v. Arrington*, 245 Ga. 47, 262 S.E.2d 808 (1980).

Delay factors weighed against government. — While a deliberate attempt

by the prosecution to delay the trial in order to hamper the defense is weighed heavily against the government, an overcrowded docket is considered to be a more neutral reason although it cannot be overlooked. *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Trial judge's delay in ruling on new trial motion after conviction of accused was not denial of constitutional right to a speedy trial when the delay did not deprive the accused of the opportunity to serve the sentence concurrently with another sentence imposed in a separate trial. *Herring v. Ault*, 230 Ga. 398, 197 S.E.2d 354 (1973).

Delay in transmitting the record of appeal after defendant's conviction was not a violation of the defendant's federal and state constitutional rights to a speedy trial. *Crosby v. State*, 188 Ga. App. 191, 372 S.E.2d 471 (1988).

Finding of speedy trial not supported by evidence. — In determining a constitutional speedy trial claim, the trial court failed to account for two years of the four-year delay, and its finding that the rest of the delay was justified by an investigator's military service was not supported by sufficient evidence as it was not clear when the investigator returned; thus, remand was required. *Fischer v. State*, 286 Ga. App. 180, 651 S.E.2d 432 (2007).

Denial of speedy trial may work to defendant's advantage, and therefore there is no per se prejudice to a defendant from delay, nor is there any specific number of days or months within which a defendant must be tried. *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976).

Delay alone is not enough to entitle one to discharge for denial of speedy trial. *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977), cert. denied, 444 U.S. 885, 100 S. Ct. 177, 62 L. Ed. 2d 115 (1979).

Court did not err in denying motion to dismiss on speedy trial grounds because, although the initial delay was attributable to the state, after the indictment was filed the state moved with reasonable promptness, defendant filed the motion only weeks before the trial date, and defendant's anxiety about the charges

was insufficient to show prejudice. *Chappell v. State*, 272 Ga. App. 1, 611 S.E.2d 157 (2005).

As defendant's blood-alcohol content registered over .3, well over the legal limit, the trial court could have concluded that a witness's live testimony would not have greatly assisted the defense, and that the witness's absence due to delay was not prejudicial; the trial court did not abuse its discretion in denying defendant's motion to dismiss on speedy trial grounds. *Mesaros v. State*, 283 Ga. App. 337, 641 S.E.2d 559 (2007).

A trial court did not err by denying a defendant's motion to dismiss based on an alleged violation of the defendant's constitutional right to a speedy trial because the various appeals by the defendant and the state constituted valid reasons for significant periods of the delay in the trial, part of the delay was inherent since the case involved a death penalty prosecution, there was no evidence of a deliberate attempt by the state to delay the trial in order to hamper the defense, and the trial court was authorized to conclude that there had not been any impairment to the defense. *Griffin v. State*, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, *Garza v. State*, 284 Ga. 696, 670 S.E.2d 73 (2008).

Trial court properly denied the defendant's motion to dismiss the indictment against the defendant because the defendant never filed an effective statutory demand for a speedy trial and, as to the defendant's constitutional right to a speedy trial, the 68-month delay was presumed prejudicial, but the defendant prolonged the proceedings due to the defendant's own issues with retaining counsel, including the defendant's original counsel obtaining various leaves of absences due to illness and the defendant's unsuccessful efforts to retain other private counsel. *Henderson v. State*, 290 Ga. App. 427, 662 S.E.2d 652 (2008).

With regard to a defendant being indicted for malice murder and other crimes, the trial court did not abuse the court's discretion by denying the defendant's motion to dismiss the indictment on speedy trial grounds as, although the delay of two years, two months, and 23 days

in bringing the defendant to trial was presumptively prejudicial, the record supported the trial court's factual conclusion that the defendant failed to establish oppressive pretrial incarceration or anxiety and concern beyond that which necessarily attended confinement in a penal institution, and the defendant failed to present any specific evidence that the defendant's ability to defend had been impaired. *Ruffin v. State*, 284 Ga. 52, 663 S.E.2d 189 (2008), cert. denied, 555 U.S. 1181, 129 S. Ct. 1330, 173 L.Ed.2d 603 (2009).

That a defendant never asserted a statutory right to a speedy trial, agreed to some continuances, never objected to others, and never acted on the trial court's invitation to file an out-of-time speedy trial demand, established that the defendant did not timely and vigilantly assert the defendant's constitutional right to a speedy trial. Therefore, the defendant's motion to dismiss on speedy trial grounds was properly denied. *Bowling v. State*, 285 Ga. 43, 673 S.E.2d 194 (2009).

Trial court did not abuse the court's discretion in denying a defendant's motion to dismiss on the basis that the state violated the defendant's right to a speedy trial pursuant to the Sixth Amendment to the Constitution of the United States and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) because although the 54-month delay between the defendant's arrest and the filing of the defendant's motion was presumptively prejudicial, and the state offered no explanation for the delay, the defendant did not file a request for speedy trial pursuant to O.C.G.A. § 17-7-171, the defendant did not assert the defendant's constitutional right to a speedy trial for the 54 months between the defendant's arrest and the filing of the defendant's motion to dismiss, and the trial court specifically found that the defendant failed to establish prejudice. *Falagian v. State*, 300 Ga. App. 187, 684 S.E.2d 340 (2009), overruled on other grounds, 293 Ga. 282 (2013).

Trial court did not abuse the court's discretion in denying the defendant's motion to dismiss an indictment charging the defendant with armed robbery, O.C.G.A. § 16-8-41, for a violation of the defendant's right to due process because the

Public Trial by Impartial**Jury (Cont'd)****3. Speedy Trial (Cont'd)**

defendant failed to show that the defense was prejudiced by the six-year delay between the commission of the crime and the defendant's arrest or that the state deliberately delayed the arrest to obtain a tactical advantage; the defendant was arrested and indicted for armed robbery, a noncapital felony, within the applicable seven-year statute of limitation, O.C.G.A. §§ 16-8-41(a) and 17-3-1(c), and the mere existence of the possibility that the latent prints could have established "the real perpetrator" if the prints had matched the prints of another offender in the government's database did not establish actual prejudice. *Billingslea v. State*, 311 Ga. App. 490, 716 S.E.2d 555 (2011).

Defendant must show delay was purposeful, oppressive, or prejudicial. — To sustain a prisoner's contention that there was a violation of the prisoner's constitutional right to a speedy trial, not only must delay be shown, but that such delay was purposeful, oppressive, or prejudicial. *Johnson v. Smith*, 227 Ga. 611, 182 S.E.2d 101 (1971); *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972).

Trial court erroneously placed upon defendants burden of proving actual prejudice. — Judgment denying the defendants' pleas in bar, which were urged on the basis that the defendants were denied the right to a speedy trial under the Sixth Amendment of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), was vacated because the trial court erroneously placed upon the defendants the burden of proving actual prejudice to their legal defense; the extraordinary six-year delay between the defendants' arrest and the pleas in bar raised the presumption of actual prejudice, and the defendants' failure to make a particularized showing of their decreased ability to present a defense at trial could not be weighed heavily against the defendants. *Smereczynsky v. State*, 314 Ga. App. 73, 722 S.E.2d 892 (2012).

Speedy trial rights violated. — Trial court erred in denying defendant's motion to dismiss which alleged a speedy trial

violation, as the delay in bringing defendant to trial was prejudicial, especially when, after an assertion of the right, a trial did not immediately ensue, but an additional seven months passed before a ruling on the claim, and in the interim, an alleged material defense witness died. *Hardeman v. State*, 280 Ga. App. 168, 633 S.E.2d 595 (2006).

Renewed motion for discharge and acquittal by the defendant was properly granted upon a determination that the defendant's constitutional speedy trial rights were violated under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI, as the delay of almost four years in bringing the defendant to trial was presumptively prejudicial, and the remaining Barker-Doggett factors weighed in the defendant's favor; only a small portion of the delay was attributable to the defendant and the defendant timely asserted the right to a speedy trial. *State v. Reid*, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Defendant was denied the constitutional right to a speedy trial and to due process based on the state's intentional act of trading discovery responses for a speedy trial right, and the resulting prejudice from the disappearance of a material witness. The trial court therefore abused the court's discretion in denying the defendant's motion for discharge and acquittal. *Ditman v. State*, 301 Ga. App. 187, 687 S.E.2d 155 (2009), cert. denied, No. S10C0539, 2010 Ga. LEXIS 243 (Ga. 2010).

Indictment was dismissed because the defendant's constitutional right to a speedy trial under the Sixth Amendment was violated as 32 months elapsed from the time of the defendant's arrest until the trial court's order denying the defendant's motion to dismiss the indictment. Furthermore, the balancing test for a speedy trial violation showed that the length of the delay, the blame for the delay, and the prejudice to the defendant weighed against the State of Georgia, even though the defendant's failure to assert the defendant's right to a speedy trial weighed against the defendant. *Butler v. State*, 309 Ga. App. 86, 709 S.E.2d 293 (2011).

Denial of the defendant's motion to dis-

miss the defendant's indictment for violation of the defendant's constitutional right to a speedy trial was improper under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) because the trial court clearly erred in reaching several material factual findings of three of the four Barker factors: the cause of the delay, the assertion of the right to speedy trial, and prejudice. *Davis v. State*, 308 Ga. App. 843, 709 S.E.2d 343 (2011).

Dismissal of the indictment on speedy trial grounds was supported by the fact that, while a small portion of the delay was, in fact, attributable to the defendant, at least seven and a half years of the nine year delay was attributable to the state, and the defendant timely asserted the right after finally obtaining counsel and receiving discovery from the state. *State v. Brown*, 315 Ga. App. 544, 726 S.E.2d 500 (2012).

Speedy trial rights were violated when the defendant was brought to trial more than 53 months after being indicted, an uncommonly long delay that weighed against the state. The delay occasioned by the prosecuting attorney's announcement that the state intended to seek the death penalty, made on the day the case was set for trial for the tenth time, weighed more heavily against the state; while the defendant did not assert the right to a speedy trial until almost four years after the indictment, the defendant's late assertion was somewhat mitigated by the defendant's repeated insistence that the state comply with the state's discovery obligations; and the defendant suffered actual prejudice as a result of the defendant's inability to show the extent to which evidence tampering occurred, due to an officer's inability to recall important details of the investigation. *State v. Buckner*, 292 Ga. 390, 738 S.E.2d 65 (2013).

Defendant's right to a speedy trial was violated as the defendant was not brought to trial for three years after being arrested, the delay was due to the state's deliberate choice not to request a production order but to allow the defendant to serve a sentence in another matter and then prosecute the defendant thereafter for the driving under the influence charge, and the defendant was prejudiced by the

delay. *State v. Johnson*, 325 Ga. App. 128, 749 S.E.2d 828 (2013).

Trial court did not err in determining that the defendant's right to a speedy trial was violated as the eight-year passage of time before the case was restored to the trial calendar raised a presumption of prejudice, most of the delay was attributable to the state, the defendant's delay in asserting the right was mitigated by the fact that the defendant had no counsel and a limited education, and the delay impaired the ability to put on a defense. *State v. Alexander*, 295 Ga. 154, 758 S.E.2d 289 (2014).

Speedy trial rights not violated. — Three defendants failed to carry the burden of establishing that a 14-month delay in bringing defendants to trial was presumptively prejudicial and, therefore, violated defendants' right to a speedy trial, because the peculiar circumstances of the case authorized a finding that the case was being prosecuted with the promptness customary for a complex drug trafficking case involving multiple defendants. Defendants failed to show that such a delay was presumptively prejudicial under the circumstances of the case: (1) the case was more akin to a complex conspiracy charge, as opposed to an ordinary street crime, since the indictment charged 11 people with the serious offense of trafficking in cocaine; (2) defendants acknowledged in the trial court and in appellate briefs that there was a massive amount of evidence for discovery, including thousands of documents, thousands of telephone records, and hundreds of hours of taped conversations; and (3) there was also a federal investigation of the drug operation going on at the same time as the state investigation. *Lawrence v. State*, 289 Ga. App. 698, 658 S.E.2d 144 (2008), cert. denied, No. S08C1086, No. S08C1084, 2008 Ga. LEXIS 467, 486, 512 (Ga. 2008).

There was no violation of the defendant's constitutional speedy trial rights under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), as a delay in bringing defendant to trial due to a backlog in the court system was not shown to have caused any prejudice to the defendant, and the defendant failed to timely assert the right to a speedy trial.

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Thomas v. State, 296 Ga. App. 231, 674 S.E.2d 96 (2009).

Defendant's constitutional speedy trial right was not violated by delays ranging from two to five years. The primary reason for the delay was the defendant's cooperation in another inmate's case, to which the defendant agreed; the defendant waited several years to assert the speedy trial right; and there was no prejudice to the defendant, who was already serving a lengthy federal prison sentence. Marshall v. State, 286 Ga. 446, 689 S.E.2d 283 (2010).

Although the defendant contended the trial court should have dismissed the charges against the defendant because the defendant was denied the defendant's constitutional right to a speedy trial under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI the record revealed no basis for granting such a motion because the record showed that any delay in bringing the case to trial was primarily attributable to the defendant and that any resulting prejudice worked to the defendant's benefit, factors which weighed against the defendant and defeated any contention that the defendant was deprived of the defendant's constitutional right to a speedy trial. Zeger v. State, 306 Ga. App. 474, 702 S.E.2d 474 (2010).

As two defendants' speedy trial time from the date of the defendants' mistrial through to the date the defendants' second dismissal motion was denied was only a little over three months, there was no presumption of prejudice and the defendants' speedy trial rights were not violated under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). Brewington v. State, 288 Ga. 520, 705 S.E.2d 660 (2011).

Trial court did not abuse the court's discretion in finding that the defendant's constitutional right to a speedy trial was not violated and in denying the defendant's plea in bar and motion to dismiss the indictment because the defendant failed to show that the delay in bringing

the case to trial was purposeful on the part of the state or that the defendant was harmed by the loss of evidence, and since there was no evidence that the state deliberately tried to hamper the defense with delaying the trial, the state's negligence in not bringing the case to trial sooner was considered "relatively benign"; the defendant, who had the benefit of counsel since shortly after the arrest, did not file a statutory demand for speedy trial pursuant to O.C.G.A. § 17-7-170 and did not assert the constitutional right to a speedy trial until 38 months after the arrest, and the defendant failed to present evidence of any significant anxiety or concern beyond that normally felt by someone facing criminal charges. Weems v. State, 310 Ga. App. 590, 714 S.E.2d 119 (2011).

Trial court did not abuse the court's discretion when the court denied the defendant's claim that the defendant's constitutional right to a speedy trial was violated because neither the defendant nor the defendant's initial attorney made themselves aware of the actual status of the case between 1998 and 2005, and the defendant failed to keep the defendant's address up to date with the trial court such that the court was unable to send the notice for the arraignment to the defendant's home address; the defendant never made a speedy trial demand during the nine years that passed between the arrest and trial, the defendant was not subjected to oppressive pre-trial incarceration and did not suffer any unusual anxiety or concern because the defendant was not actually incarcerated for most of the nine years in question, and the defendant also was not prejudiced by lost evidence. Rafi v. State, 289 Ga. 716, 715 S.E.2d 113 (2011).

While the superior court erred in failing to analyze separately whether the pretrial delay was uncommonly long, and it should have weighed that factor against the state, the superior court acted within the court's discretion in finding that the reasons for the delay weighed in favor of the state, that the defendant's long delay in asserting the defendant's speedy trial right weighed heavily against the defendant, and that the defendant failed to show any prejudice resulting from the delay and in weighing this factor against

the defendant. *Sechler v. State*, 316 Ga. App. 675, 730 S.E.2d 142 (2012).

Prejudice from delay must be shown. — Extraordinary delay without reason shown by the record is overcome when no prejudice is shown and the petitioner did not want a speedy trial (petitioner hoped petitioner would never be tried). *Hall v. Hopper*, 234 Ga. 625, 216 S.E.2d 839 (1975).

Defendant's plea in bar, wherein the defendant claimed denial of the defendant's constitutional right to a speedy trial, pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XI and U.S. Const., amend. 6, was properly denied as the trial court found that the delay of 11 months from the time that the accusation was filed until the parties were ready for trial was not excessive, some of the delay was attributable to the defendant, and the state had provided adequate explanations for its delay, and further, there was no prejudice shown. The court noted that although the state nol prossed the charges by accusation just hours before the defendant filed a demand for a speedy trial, such put the state on notice and, therefore, it was not significant that the defendant did not file another demand for a speedy trial after charges were filed by the grand jury indictment against the defendant. *Shuler v. State*, 263 Ga. App. 124, 587 S.E.2d 269 (2003).

Because the short delay attributable to the state did not have any demonstrable harmful effect on the defense against two murder charges and because defendant was dilatory in formally asserting the right to a speedy trial under the Sixth Amendment and the Georgia Constitution, the trial court correctly denied defendant's motion to dismiss the indictments. *Scandrett v. State*, 279 Ga. 632, 619 S.E.2d 603 (2005).

Convictions for armed robbery, aggravated assault with the intent to rob, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon were proper because the defendant's right to a speedy trial was not violated by the 20-month delay between the date the indictment was issued to the date of the defendant's actual trial as the delay was due to a

higher priority of statutory speedy trial demands, so it was not a deliberate delay on the part of the state, and the defendant failed to show any prejudice from the delay. *Herndon v. State*, 277 Ga. App. 374, 626 S.E.2d 579 (2006).

After weighing the factors considered in determining whether the defendant's right to a speedy trial was violated, the appeals court agreed that denial of the defendant's plea in bar and demand for an acquittal alleging the violation was proper as the defendant failed to show that any prejudice resulted from the delay in bringing the case to trial. *Lackey v. State*, 283 Ga. App. 139, 640 S.E.2d 717 (2006).

Although the state was negligent in failing to bring the defendant to trial in a timely fashion, that consideration was outweighed by the facts that the defendant suffered little actual prejudice from the delay and no unduly oppressive pre-trial incarceration, and the defendant waited a significant amount of time before asserting a speedy trial right; hence, the defendant's constitutional rights to a speedy trial were not violated. *Christian v. State*, 281 Ga. 474, 640 S.E.2d 21 (2007).

The trial court did not err in refusing to find a constitutional speedy trial right violation; although the 18-month delay between a remittitur and the defendant's motion for discharge and acquittal was presumptively prejudicial, and the delay was apparently caused by failure to schedule or by docket overcrowding, the delay in raising the claim weighed against the defendant, and the defendant had not shown that witnesses were unavailable or that the delay had prejudiced the defense. *Oni v. State*, 285 Ga. App. 342, 646 S.E.2d 312 (2007).

Prejudice not shown by lack of professional employment. — Court of appeals erred in affirming the trial court's order granting the defendant's motion to dismiss an indictment on the ground that the state violated the defendant's constitutional right to a speedy trial because the trial court erred in finding that the defendant suffered undue anxiety since the charges made it impossible for the defendant to get a professional job; that finding implied that the defendant had held a professional job at some point, had the

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ability to obtain one, or lost one as a result of the defendant's arrest, but there was no evidence concerning that point. *State v. Pickett*, 288 Ga. 674, 706 S.E.2d 561 (2011).

Passage of nine months between the date a speeding charge was made and the date of trial was not alone sufficient to establish a violation of the right to a speedy trial since there was no evidence that the state delayed the trial to gain a tactical advantage, five months passed between the charge and the defendant's assertion of the defendant's right to a speedy trial and, since the defendant was not incarcerated, there was no prejudice to the defendant. *Nairon v. State*, 215 Ga. App. 76, 449 S.E.2d 634 (1994).

Two-year delay between the commission of the crime and the beginning of trial is not unconstitutional since some of the delay was due to the separate trials of the codefendants, the defendant did not assert the defendant's speedy-trial right until just before trial, and the only prejudice due to the delay was to the state. *Harrison v. State*, 257 Ga. 528, 361 S.E.2d 149 (1987), cert. denied, 485 U.S. 982, 108 S. Ct. 1281, 99 L. Ed. 2d 492 (1988).

A 21-month delay between the commission of the crime and the trial date was not unconstitutional when there was no evidence of an intent to delay the proceedings on behalf of the state, no recording of the defendant's wishes for trial date, and no assertion of prejudice by the delay. *State v. Smith*, 209 Ga. App. 404, 433 S.E.2d 599 (1993).

A 25-month delay. — Presumption of prejudice raised by the state's 25-month delay in bringing defendant's case to trial was sufficiently rebutted as the loss of a witness did not prevent defendant from asserting an alibi defense and defendant was partially responsible for the loss of the witness as defendant waited 15 months after the indictment to assert defendant's speedy trial rights. *Salahuddin v. State*, 277 Ga. 561, 592 S.E.2d 410 (2004).

A 13-month delay. — Defendant did not carry defendant's burden of establish-

ing that a 13-month delay between defendant's arrest and trial was "presumptively prejudicial," and accordingly the trial court did not err when it denied defendant's contention that defendant had been denied the constitutional right to a speedy trial; defense counsel was removed by the trial court three days before trial was scheduled to commence, and several murder convictions appealed to the court had featured pre-trial delays of 12 to 16 months. *Williams v. State*, 282 Ga. 561, 651 S.E.2d 674 (2007).

Trial court properly denied a murder defendant's motion to dismiss an indictment on speedy trial grounds. Although the court found that the 13-month delay was caused by the state's negligence, the court also found that the defendant had not timely asserted the defendant's speedy trial right and that the defendant had not shown that the delay impaired the defense. *Hassel v. State*, 284 Ga. 861, 672 S.E.2d 627 (2009).

A 17-month delay in defendant's trial did not violate the defendant's constitutional rights since the defendant failed to assert either the defendant's statutory or constitutional right to a speedy trial and there was no evidence of a lengthy pretrial incarceration. *Jernigan v. State*, 239 Ga. App. 65, 517 S.E.2d 370 (1999).

Trial court did not err in refusing to dismiss defendant's case for a speedy trial violation as: (1) five to six months of the 17-month delay was due to defendant's motion for a continuance; (2) the state gave reasons for the remaining 11 or 12 months of the delay and reasons for the decision to reindict defendant; (3) there was no proof that the state intentionally delayed prosecution to impair the defense; (4) defendant did not file a speedy trial demand until 14 months after defendant's arrest; and (5) defendant did not present any evidence that defendant's defense was impaired due to the delay, nor did defendant show that defendant had to endure some burden beyond those that necessarily attended imprisonment. *Lopez v. State*, 267 Ga. App. 178, 598 S.E.2d 898 (2004).

A 22-month delay. — Trial court did not abuse the court's discretion by denying the defendant's motion to dismiss the

charges for lack of a speedy trial because while the lengthy delay was attributable to the state, the defendant did not assert the right to a speedy trial in the 22 months after the defendant's current counsel was hired, and the defendant was not significantly prejudiced by the delay; the state's failure to produce the codefendant did not prejudice the defendant since the defendant could have subpoenaed the codefendant personally instead of relying on the state to produce the codefendant simply because the codefendant was included in the state's witness list. *Ward v. State*, 311 Ga. App. 425, 715 S.E.2d 818 (2011).

Three year delay. — There was no speedy trial violation under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a). Although the delay of over three years was presumptively prejudicial, the delay was primarily attributable to the defendant; the defendant delayed in asserting the constitutional right to a speedy trial; and the defendant's generalized statements, along with the fact that the record did not show that trial counsel attempted to locate the physician who examined the victim, did not suffice to show prejudice. *Robinson v. State*, 298 Ga. App. 164, 679 S.E.2d 383 (2009).

A 32-month delay. — With regard to charges of aggravated child molestation, child molestation, and rape, a trial court did not err in denying a defendant's motion for discharge and acquittal since although the 32 month passage of time between the defendant's arrest and the filing of the motion for discharge was presumed prejudicial and more than half of the delay was attributable to the state, the defendant waited 32 months to file the motion and failed to show any prejudice arising from the delay. The defendant failed to explain what physical evidence was affected by the passage of time and merely made a generalized statement that memories fade over time. *Wofford v. State*, 299 Ga. App. 129, 682 S.E.2d 125 (2009).

A 40-month delay was not prejudicial. — In a defendant's motion for acquittal based upon a speedy trial violation under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), although the delay of 40 months raised a

presumption of prejudice, no evidence supported defendant's claim of anxiety and concern over the charges nor the defendant's claims that the defendant was unable to produce two witnesses who would have provided information material to the defendant's defense. In the absence of prejudice, the defendant's motion for acquittal was properly denied. *Lynch v. State*, 300 Ga. App. 723, 686 S.E.2d 268 (2009).

A 41-month delay. — Denial of the defendant's motion to dismiss the indictment against the defendant was not an abuse of discretion since the defendant suffered no impairment to the defendant's defense and the defendant waited 41 months before asserting the defendant's federal and state constitutional rights to a speedy trial. *Coney v. State*, 259 Ga. App. 525, 578 S.E.2d 193 (2003).

Four-year delay. — Although there was a presumption of prejudice due to the four-year delay with respect to a defendant's speedy trial rights under U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), there was no violation thereof upon analysis of the four factors; the reason for the delay was due to the defendant's counsel, the defendant did not file a timely demand for a speedy trial, and the defendant did not show prejudice. *Brewington v. State*, 288 Ga. 520, 705 S.E.2d 660 (2011).

A 54-month delay. — Trial court erred by denying a defendant's motion to dismiss the indictment on speedy trial grounds, which charged the defendant with the crimes of aggravated assault, aggravated battery, and cruelty to children, as the 54-month delay at issue was substantial and longer than delays that the Georgia Supreme Court has described as egregious and deplorable; the evidence showed that the delay resulted from a deliberate, strategic decision by the state since it chose to dead-docket the case; and the defendant asserted the right to a speedy trial in due course. The trial court erred in several respects in the court's legal analysis of the defendant's constitutional speedy trial claim, namely: by failing to weigh the length of the delay as part of the court's balancing analysis and by failing to adequately address the reasons

Public Trial by Impartial**Jury (Cont'd)****3. Speedy Trial (Cont'd)**

for that delay; by abusing the court's discretion in finding that the defendant's three-to-four month delay in asserting the right to a speedy trial should be weighed against the defendant; and by finding that the defendant was required to present additional evidence of actual prejudice caused by the state's conduct. *Hayes v. State*, 298 Ga. App. 338, 680 S.E.2d 182 (2009).

A 45-month delay presumptively prejudicial. — For purposes of U.S. Const., amend. VI and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), a delay of three years and nine months from the date of the defendant's arrest and the date of the defendant's scheduled trial was presumptively prejudicial. *State v. Reid*, 298 Ga. App. 235, 679 S.E.2d 802 (2009).

Five year delay did not prejudice defendant. — A trial court did not abuse the court's discretion in finding that a defendant failed to show a constitutional violation of the defendant's right to a speedy trial and by denying the defendant's motion for discharge and acquittal with regard to the defendant's convictions for sexual assault as the defendant never filed a speedy trial demand; there was no evidence nor finding by the trial court that the state intentionally delayed the trial to impair the defendant's defense; the defendant's failure to assert either a statutory or constitutional right to a speedy trial was entitled to strong evidentiary weight against the defendant; and the fact that the defendant never filed a speedy trial demand suggested that the defendant was not suffering anxiety or stress from the delay. The reviewing court noted that the five year delay in bringing the defendant to trial was solely based on requests from defense counsel due to illness, death in the family, or death of an expert witness. *Disharoon v. State*, 288 Ga. App. 1, 652 S.E.2d 902 (2007).

Despite the state's five-year delay in bringing defendant's child molestation case to trial, defendant's motion to dismiss based on defendant's speedy trial right was denied because the defendant waited

more than five years to assert defendant's statutory right under O.C.G.A. § 17-7-171 and the defendant failed to show any prejudice resulting from the delay. *Arbegast v. State*, 301 Ga. App. 462, 688 S.E.2d 1 (2009), cert. denied, No. S10C0630, 2010 Ga. LEXIS 348 (Ga. 2010).

Defendant was not entitled to the dismissal of an indictment based on a violation of the defendant's speedy trial rights because, while the delay of 63 months from the date of arrest to the dismissal was presumptively prejudicial, the delay was based on the state's neglect rather than any bad faith; the defendant also failed to assert the right to a speedy trial in a timely manner as the motion was filed more than 15 months after the defendant's indictment. *State v. Hartsfield*, 308 Ga. App. 753, 711 S.E.2d 1 (2011).

13-year delay. — Trial court's failure to conduct a hearing on defendant's motion for a new trial for roughly 13 years was excessive and improper but did not deny defendant due process since defendant suffered no prejudice as a result of the delay; the fact that the victim resided outside of Georgia at the time of the hearing, standing alone, neither prevented defendant from presenting an adequate appeal nor impaired a defense which would otherwise have been available to the defendant. *Spradlin v. State*, 262 Ga. App. 897, 587 S.E.2d 155 (2003).

15-year delay. — While the length of the delay in bringing the appeal, 15 years, was excessive, the delay did not violate the defendant's due process rights since the delay was largely attributable to the defendant, the defendant failed to show that the defendant asserted the defendant's appellate rights for much of the 15-year period at issue, and the defendant failed to show actual prejudice to the defendant's ability to assert arguments on appeal. *Payne v. State*, 289 Ga. 691, 715 S.E.2d 104 (2011).

19-year delay. — Because the trial court neglected to consider all of the Barker factors, including, the entire relevant pretrial delay of nearly 19 years that elapsed between defendant's arrest and the denial of defendant's plea in bar, a remand was required to determine if de-

fendant's constitutional speedy trial rights were violated. *Goddard v. State*, 315 Ga. App. 868, 729 S.E.2d 397 (2012).

Two month delay. — Delay in scheduling the defendant's trial was measured not from the defendant's arrest nor from the defendant's second indictment, but from the remittitur to the trial court on an earlier case involving the same charges; the delay of two and a half months between the remittitur and the scheduling of trial was not presumptively prejudicial and the defendant's right to a speedy trial was not violated. *Roberts v. State*, 279 Ga. App. 434, 631 S.E.2d 480 (2006), overruled on other grounds, *DeSouza v. State*, 285 Ga. App. 201, 645 S.E.2d 684 (2007).

Trial court miscalculated. — On remand, a trial court erred by denying defendant's motion for discharge and acquittal based on a speedy trial violation because it made a significant factual error in its calculation of the length of the delay by not including the time that had elapsed between the trial court's original and new orders addressing the speedy trial claim. *Richardson v. State*, 318 Ga. App. 155, 733 S.E.2d 444 (2012).

Reason for delay. — Because of extreme delay (seven years) in bringing the case to trial, the state's lack of any apparent, articulable reason for delay, and consequent impairment of the appellant's case, the appellant's Sixth Amendment due process right was violated by deprivation of a speedy trial. *Lett v. State*, 164 Ga. App. 584, 298 S.E.2d 541 (1982).

No violation of right when delay attributable to conduct of defendant. — There is no violation of due process in respect to a speedy trial, when substantially all of the delay in bringing the defendant to trial appears to be directly or indirectly attributable to the conduct of the defendant. *Mays v. State*, 229 Ga. 609, 193 S.E.2d 825 (1972).

Defendant's right to a speedy trial was not violated although the delay was approximately 22 months, much of that was attributable to the defendant's hiring and discharging four different counsels prior to the final appointment, the defendant did not assert the defendant's demand for trial until almost a year after indictment, and the trial commenced ten months

thereafter. *Lynott v. State*, 198 Ga. App. 688, 402 S.E.2d 747, cert. denied, 198 Ga. App. 898, 402 S.E.2d 747 (1991).

Because the delay in the appeal was caused by the defendant, the defendant's speedy trial rights were not violated. *Smith v. State*, 274 Ga. App. 568, 618 S.E.2d 182 (2005).

The trial court properly found that a defendant's right to a speedy trial was not violated since the defendant was responsible for at least seven months of the 18 months of delay and the defendant did not argue that the delay impaired the defendant's trial or affected the availability of witnesses or evidence; although the defendant claimed that there was damage to the defendant's private life, the defendant also testified that it was the arrest that affected the defendant's medical practice and family life and there was no evidence of any deliberate delay by the state intended to prejudice the defendant. *Vyas v. State*, 285 Ga. App. 467, 646 S.E.2d 692 (2007).

No violation when delay attributable to defendant and state. — Defendant's speedy trial rights were not violated since the total delay was equally attributable to the defendant and the state, the trial court did not abuse the court's discretion as a matter of law in granting a continuance in the absence of a subpoena, there was no evidence the state deliberately attempted to delay the trial in order to hamper the defense, the defendant's assertion of the right to a speedy trial was untimely, the defendant failed to show prejudice, and any stress or anxiety that the defendant might have been experiencing was not undue. *Carraway v. State*, 263 Ga. App. 151, 587 S.E.2d 152 (2003).

Whether delay between indictment and trial violates constitutional right to speedy trial depends on circumstances. — The mere passage of time is not enough, without more, to constitute a denial of due process. *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972); *Dansby v. State*, 140 Ga. App. 104, 230 S.E.2d 64 (1976); *Simpson v. State*, 150 Ga. App. 814, 258 S.E.2d 634 (1979); *Collins v. State*, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Public Trial by Impartial**Jury** (Cont'd)**3. Speedy Trial** (Cont'd)

When defendant was one of the people indicted in a multiple-murder case in which the state sought capital punishment, defendant did not show that a 38-month delay between defendant's indictment and trial was "presumptively prejudicial," because it was necessary for each co-indictee to be tried separately, and this triggered the state's statutory right, under O.C.G.A. § 17-8-4, to elect which defendant to try first; therefore, when the state elected to try defendant's co-indictee first, defendant's case was prosecuted with the promptness customary for death penalty cases involving multiple defendants, and the trial court did not have to balance the factors considered in deciding whether defendant's right to a speedy trial was violated, given the lack of presumptive prejudice. *Wimberly v. State*, 279 Ga. 65, 608 S.E.2d 625 (2005).

Dismissal of an indictment on speedy trial grounds was in error and remand was appropriate because the trial court erred in the court's key factual findings regarding the defendant's anxiety and concern and actual impairment to the defense and, additionally, the trial court attributed only eight months of delay to the State of Georgia, without addressing the reasons for the nearly eight additional years of delay, including a year of delay caused, apparently deliberately, when the defendant became a fugitive. Moreover, the trial court did not properly balance the factors so that the intermediate appellate court could not properly affirm the judgment. *State v. Porter*, 288 Ga. 524, 705 S.E.2d 636 (2011).

No violation of right when delay caused by hospitalization due to insanity. — The fact that, at the petitioner's trial, the petitioner is adjudged insane upon a special plea of insanity and committed to the state hospital does not constitute a violation of the petitioner's right to a speedy trial. While the petitioner is insane, the petitioner cannot be legally tried. *Connelly v. Balkcom*, 213 Ga. 491, 99 S.E.2d 817 (1957), cert. denied, 355 U.S. 934, 78 S. Ct. 415, 2 L. Ed. 2d 416 (1958).

In extradition hearing. — A trial court has no power to consider a claim of denial of speedy trial as to warrants issued in other judicial circuits. *Garrett v. Arrington*, 245 Ga. 47, 262 S.E.2d 808 (1980).

A defendant who is being held by one jurisdiction cannot force the officials of another judicial circuit in which the defendant is wanted to travel to the jurisdiction in which the defendant is incarcerated to test the continuing validity of their charges against the defendant by raising the claim that the defendant is being denied a speedy trial. *Garrett v. Arrington*, 245 Ga. 47, 262 S.E.2d 808 (1980).

Effect of assertion of or failure to assert right. — While an accused has no responsibility to assert the accused's right to a speedy trial, the assertion of or failure to assert that right is a factor to be considered in an inquiry into the deprivation of the right. The accused's assertion of that right would be entitled to strong evidentiary weight in determining whether the accused has been deprived of the right. The accused's failure to assert the right to a speedy trial would make it difficult to prove that the accused was denied that right. *Powell v. State*, 143 Ga. App. 684, 239 S.E.2d 560 (1977).

Defendant's direct appeal from the denial of a speedy trial motion to dismiss lay given the state of Georgia law; however, the motion was properly denied because defendant, who had been incarcerated in the interim period, was equally responsible for the pretrial delay, never asserted the right to trial, never requested disposition of the subject offenses, suffered no prejudice, and did not suffer oppressive pretrial incarceration. *Lamar v. State*, 262 Ga. App. 735, 586 S.E.2d 416 (2003).

Although the defendant was arrested 33 years after the victim's body was found, because the defendant's trial was scheduled within five months after the defendant's arrest and two months after defendant's indictment, there was no speedy trial violation; since the defendant did not assert the claims in the trial court, the claims were not addressed on appeal. *Moore v. State*, 278 Ga. 473, 604 S.E.2d 139 (2004).

Court of appeals erred in determining, apparently from the court's own review of the record, that the speedy trial factor of whether, in due course, the defendant asserted the defendant's right to a speedy trial would be weighed against the defendant based on the more than five year delay from the defendant's arrest to the defendant's assertion of the right; a delay of over five years typically would warrant the speedy trial factor of whether, in due course, the defendant asserted the defendant's right to a speedy trial being weighed heavily against the defendant, and if the factor is to be weighed differently based on the particular circumstances of the case, that exercise of discretion is committed to the trial court, not the appellate courts. *State v. Pickett*, 288 Ga. 674, 706 S.E.2d 561 (2011).

Trial court erred by dismissing the murder indictment against the defendant based on a speedy trial violation because although the over five year delay was presumptively prejudicial, the defendant failed to assert the defendant's constitutional right to a speedy trial until after five years had passed and on the eve of the rescheduled trial, thus, the trial court should have determined whether that factor weighed against the defendant. *State v. Johnson*, 291 Ga. 863, 734 S.E.2d 12 (2012).

No merit to claim of denial of speedy trial when no demand for trial was made. — Even if a demand for trial is made at the term an indictment is found, an accused is not entitled to a discharge for the failure to try the accused until the next succeeding regular term of court has passed without the accused being tried since no demand for trial was made and the accused was tried at the next succeeding regular term of court after the term at which the accused was indicted, the contention that the accused was denied a speedy trial is clearly without merit. *Connelly v. Balkcom*, 213 Ga. 491, 99 S.E.2d 817 (1957), cert. denied, 355 U.S. 934, 78 S. Ct. 415, 2 L. Ed. 2d 416 (1958).

Independent review of trial court record to insure compliance with constitutional dictates. — Sixth Amendment to the United States Consti-

tution combines with this paragraph to assure that every person charged with offending the laws of this state shall have a public and speedy trial by an impartial jury, and appellate courts must independently review the relevant trial court record in each case to insure compliance with these constitutional dictates. *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated on other grounds, 446 U.S. 961, 100 S. Ct. 2934, 64 L. Ed. 2d 819 (1980).

Indictments generally. — There is no right to a speedy indictment. *Griffin v. State*, 282 Ga. 215, 647 S.E.2d 36 (2007), overruled on other grounds, *Garza v. State*, 284 Ga. 696, 670 S.E.2d 73 (2008).

Failure to make written findings in speedy trial demand. — Because the trial court's order denying the defendant's motion to dismiss the criminal charges against the defendant on the ground that the defendant's constitutional right to a speedy trial was violated contained no findings of fact or conclusions of law, the matter had to be remanded for a written order applying the speedy trial factors. *Cawley v. State*, 324 Ga. App. 358, 750 S.E.2d 428 (2013).

Right to appeal. — A defendant may directly appeal from the pre-trial denial of either a constitutional or statutory speedy trial claim. *Mayfield v. State*, 264 Ga. App. 551, 593 S.E.2d 851 (2003).

Refusal by judge to grant written motion is appealable judgment. — The refusal by a judge of a superior court to grant to a defendant in a criminal case not affecting a defendant's life, the defendant's written motion for a speedy trial pursuant to the defendant's constitutional right thereto is a judgment appealable to the Court of Appeals under former Code 1933, § 6-701 (see now O.C.G.A. § 5-6-34). *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967).

Number of Jurors

Trial by 12 jurors essential. — As at common law, one accused of a crime was entitled to a trial by 12 upright men, so likewise it is essential that one accused of a crime shall in Georgia be accorded a trial before 12 men, upright and intelligent, if the right is to be preserved invio-

Number of Jurors (Cont'd)

late. *Wright v. Davis*, 184 Ga. 846, 193 S.E. 757 (1937) (decided under Ga. Const. 1877, Art. VI, Sec. XVIII, Para. I).

When the trial court does authorize a jury trial in an equity case, the composition of the jury is governed by the law which controls those cases in which there is a right to a jury trial, and when such a right is neither waived nor stipulated against, the trial court may not proceed with less than a twelve-person jury. *Hague v. Pitts*, 262 Ga. 777, 425 S.E.2d 636 (1993).

If juror excused with assent of defendant, no error when verdict by 11 jurors. — If the evidence in a criminal trial, though partly circumstantial, was sufficient to authorize a finding that at the time one of the original 12 jurors was excused by the court, and in the presence of the court, the accused was consulted by counsel, and expressly assented, as the accused had the right to do, no error was committed even though the verdict was rendered by 11 jurors. *Coates v. Lawrence*, 193 Ga. 379, 18 S.E.2d 685 (1942).

Waiver. — Defendant was properly tried by 11 jurors when defense counsel waived trial by 12 jurors in the defendant's presence, and the defendant stated no objection. *Doomes v. State*, 261 Ga. App. 442, 583 S.E.2d 151 (2003).

Superior Courts. — Under this state's Constitution and statutes, a jury in the superior courts must be composed of 12 members. *First Fid. Ins. Corp. v. Busbia*, 128 Ga. App. 485, 197 S.E.2d 396 (1973) (decided under Ga. Const. 1976, Art. VI, Sec. XV, Para. I).

General Assembly may now provide for trial by a jury of any number, not less than five, in any court other than the superior courts. *Smith v. Clayton*, 80 Ga. App. 21, 55 S.E.2d 171 (1949) (decided under Ga. Const. 1945, Art. VI, Sec. XV, Para. I).

Provision authorizing General Assembly to prescribe not less than five jurors not unconstitutional. — That portion of this paragraph which provides that "the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior (and city) court(s)," was not re-

pugnant to the equal protection clause of U.S. Const., amend. 14 in that the state Constitution thus permitted the legislature to prescribe different and varying numbers of jurors in different courts in the same county for the same offense; and under former Code 1933, § 59-707 (see now O.C.G.A. § 15-12-125), misdemeanor defendants tried in a superior court have the right to a panel of 24 jurors and to challenge seven peremptorily, whereas under the Act controlling the trial of misdemeanors in the Criminal Court of Fulton County, defendant was deprived of any right to choose the court of the defendant's trial, and thus deprived of a chance to have 12 instead of five jurors decide unanimously on a verdict of guilty. *McIntyre v. State*, 190 Ga. 872, 11 S.E.2d 5 (1940), cert. denied, 312 U.S. 695, 61 S. Ct. 732, 85 L. Ed. 1130 (1941) (decided under Ga. Const. 1877, Art. VI, Sec. XVIII, Para. I).

A five-member jury does not satisfy jury trial guarantee of U.S. Const., amend. 6, as applied to the states through U.S. Const., amend. 14. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Unanimous vote needed to convict in criminal trial. — Irrespective of its size, the Georgia jury in a criminal trial, in order to convict, must do so by unanimous vote. *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Jurors**1. Selection**

Constitutional demand is for a jury list composed of upright and intelligent men, not that every upright and intelligent man be included in the list, and from this list grand jurors must be selected. *Avery v. State*, 209 Ga. 116, 70 S.E.2d 716 (1952), rev'd on other grounds, 345 U.S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953) (decided under Ga. Const. 1945, Art. VI, Sec. XV, Para. II).

Requirement that jury commissioners select most experienced from jury list to make up grand jury box does not necessarily result in rejection of young adults, contrary to the Constitution.

White v. State, 230 Ga. 327, 196 S.E.2d 849, appeal dismissed, 414 U.S. 886, 94 S. Ct. 222, 38 L. Ed. 2d 134 (1973) (decided under Ga. Const. 1945, Art. VI, Sec. XV, Para. II).

No guarantee of representative cross section of community. — There is no constitutional guarantee that grand or petit juries, impaneled in a particular case, will constitute a representative cross section of the entire community. *Smith v. State*, 151 Ga. App. 697, 261 S.E.2d 439 (1979).

Defendant's complaint that the panel of traverse jurors was not composed of a fair cross-section of the county's residents was without merit because the defendant was not constitutionally entitled, in a particular case, to a petit jury that was a representative cross-section of the entire community. *Harris v. State*, 272 Ga. App. 650, 613 S.E.2d 170 (2005).

Highly disproportional representation violates this paragraph. — When the evidence showed that in three major identifiable groups (sex, race, and age), women are 91.2 percent underrepresented in the grand jury pool and 69.7 percent in the traverse or petit jury pool; Negroes are 49.5 percent underrepresented in the grand jury pool and 61.7 percent in the traverse or petit jury pools, coupled with the uncontroverted evidence from the jury commissioners that proportionally there are as many upright and intelligent women as men, Negroes as whites, and young adults as those over 30 years of age, the inescapable conclusion is that as a matter of law the jury commissioners were remiss in the execution of their statutory duties in compiling a jury list composed of "a fairly representative cross section of the intelligent and upright citizens of the county." *Gould v. State*, 131 Ga. App. 811, 207 S.E.2d 519, aff'd in part and rev'd in part, 232 Ga. 844, 209 S.E.2d 312 (1974).

Constitutionality of method of selecting grand jurors upheld against charges that it results in exclusion of young adults ranging in age from 18 to 30 years old. *Estes v. State*, 232 Ga. 703, 208 S.E.2d 806 (1974).

Georgia's constitutional and statutory scheme for selecting its grand

juries is not inherently unfair, or necessarily incapable of administration without regard to race; the federal courts are not powerless to remedy unconstitutional departures from Georgia law by declaratory and injunctive relief. *Turner v. Fouche*, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970).

Opposition to death penalty. — Trial court's disqualification of a juror for cause based upon the juror's opposition to the imposition of the death penalty was not an abuse of discretion as: (1) the juror initially indicated, although somewhat hesitantly, that under some circumstances the juror could perhaps seriously consider voting for a death sentence; (2) the juror went on to state that the juror believed the juror's reservations about the death penalty would interfere with the juror's ability to realistically consider it as a punishment option; and (3) the juror later indicated that, no matter what the circumstances, the juror would always choose either life without parole or life with the possibility of parole, but never death. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Defendant has burden of proving existence of systematic racial exclusion in selection of jurors. *Sullivan v. State*, 225 Ga. 301, 168 S.E.2d 133 (1969), vacated on other grounds, 408 U.S. 935, 92 S. Ct. 2854, 33 L. Ed. 2d 749 (1972).

Burden shifts once prima-facie case of racial exclusion made. — Once a prima-facie case of racial exclusion in the selection of jurors is made, the burden shifts to the prosecution to disprove the existence of racial exclusion. *Sullivan v. State*, 225 Ga. 301, 168 S.E.2d 133 (1969), vacated on other grounds, 408 U.S. 935, 92 S. Ct. 2854, 33 L. Ed. 2d 749 (1972).

Procedural statutes regarding juries not part of system to procure impartial jury. — The statutes for selecting jurors, drawing and summoning them, form no part of a system to procure an impartial jury to parties. *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980).

Use of peremptory strikes to exclude minorities. — Trial court clearly erred in accepting the state's explanations for striking four of the five

Jurors (Cont'd)**1. Selection** (Cont'd)

African-American male jurors as race-neutral since: (1) the first juror was stricken for having an unstable job history, which was not supported by the record; (2) the second juror was stricken for wearing an earring, without an explanation as to how this affected the juror's ability to be impartial, and a caucasian juror wearing an earring was accepted; (3) the state mischaracterized the third juror's testimony that the juror intended to go to Panama City to have a good time, when the juror testified that the juror was going on a family vacation before returning to college; and (4) the fourth juror was stricken to reach other jurors, which could not defeat a Batson claim. *George v. State*, 263 Ga. App. 541, 588 S.E.2d 312 (2003).

In a Batson challenge, the trial court found that defendant made a prima facie showing of racial discrimination and proceeded to an evaluation of the state's explanations for its strikes against two African-American members of the jury venire, but the state's explanations that: (1) it struck the first prospective juror because that juror's answers did not relate to the questions asked of the juror and were not well articulated, leading the prosecutor to suspect that the juror possessed limited intelligence; and (2) it struck the second juror because the second juror's perceptions of an incident at a water fountain with another juror and the second juror's decision to report it indicated undue attention to issues of race, and that it would have struck any potential juror who reported such an incident, regardless of that juror's race, were race neutral and did not show any discriminatory intent; therefore, the trial court's ruling that defendant did not carry defendant's burden of proof to show a discriminatory purpose in the state's exercise of its peremptory strikes was not clearly erroneous. *Roberts v. State*, 278 Ga. 541, 604 S.E.2d 500 (2004).

Defendant did not show that a peremptory challenge to an African-American on a jury panel violated due process because the juror was challenged for the race-neutral reason that the juror had

been arrested. *Hernandez v. State*, 274 Ga. App. 390, 617 S.E.2d 630 (2005).

Because the record did not support the defendant's Batson claim, the trial court did not err in denying the defendant's motion for a new trial. *Quillian v. State*, 279 Ga. 698, 620 S.E.2d 376 (2005).

Trial court properly denied a defendant's Batson challenge since the state indicated that it struck one juror because the juror indicated that the defendants are sometimes required to prove their innocence, which might have favorably disposed the juror toward the defendant because of the perception that it was unfair; the state struck a second juror because the juror was either non-responsive to questions, or would say one thing and then immediately contradict it, because the juror also stated that the juror felt that a criminal offense which required a two-year jail term was a small thing, and because many of the juror's answers could not be comprehended. *Scott v. State*, 280 Ga. 466, 629 S.E.2d 211 (2006).

Strength of the state's prima facie case of discrimination in response to the reasons the defendant gave for striking four jurors based on race supported a finding that the reasons given for the strikes were a pretext for racial discrimination; hence, the trial court did not clearly err by reseating these four jurors. *Hicks v. State*, 281 Ga. App. 217, 635 S.E.2d 830 (2006).

The trial court's finding that the defendant failed to set forth a prima facie case of racial discrimination sufficient to support a Batson challenge was not clearly erroneous, as the defendant failed to show that the totality of the relevant facts gave rise to an inference of discriminatory purpose. Moreover, the number of strikes by the state exercised against African-American veniremen did not give rise to an inference of discrimination. *Ludy v. State*, 283 Ga. 322, 658 S.E.2d 745 (2008).

Because the defendant waived any objection regarding an unsummoned juror, and because evidence supported the trial court's finding that the state's reasons for striking the challenged jurors were race-neutral, the defendant did not show that counsel's failure to object constituted ineffective assistance. *Allen v. State*, 299 Ga. App. 201, 683 S.E.2d 343 (2009).

Trial court did not abuse the court's discretion in ruling that the defendant failed to establish a prima facie case of discriminatory purpose based on gender by using seven of the prosecution's eight peremptory strikes against women. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Trial court did not abuse the court's discretion in ruling that the defendant failed to establish a case of unconstitutional race-based discrimination by the prosecution using three of the prosecution's eight peremptory strikes against African-Americans. The reasons offered for the three strikes were race neutral and not pretextual. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Trial court failed to make discriminatory intent finding. — Case was remanded to the trial court for the required Batson findings as the trial court incorrectly stated that the state's explanation for the strikes was that a juror had been accused of a crime charged in the case; further, the trial court did not address the arguably similar situations of two jurors who were not stricken. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Trial court erred in failing to consider discriminatory intent. — Trial court erred in ruling that the state's strike of a juror for an admission of illegal underage drinking was a legitimate reason under *Pickett v. State* as *Pickett* related to step 2 of the Batson procedure; the trial court failed to consider whether the state had a discriminatory intent in striking the juror and the case was remanded for such a finding. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Finding of no discriminatory intent proper. — Trial court did not err in finding that the defendants failed to show discriminatory intent in the state's strike of a juror because the juror was a diabetic, did not appear to be in total command of the defendant's faculties, believed in witchcraft, was difficult to understand, and did not appear to understand questions. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Use of peremptory strikes to exclude males. — Defendant's Batson challenge was properly rejected because one

venireman's perceived inattentiveness and mannerisms were gender-neutral reasons for exercising a peremptory strike; defendant failed to preserve the claim of error in another venireman's strike because defendant did not challenge the state's claim that the venireman had served in the military. *Reed v. State*, 279 Ga. 81, 610 S.E.2d 35 (2005).

Findings regarding discriminatory intent. — Trial court's finding of no discriminatory intent in striking a juror because the juror's father had been falsely accused of murder based on mistaken identity and the juror's brother had been accused of assault with a deadly weapon was not clearly erroneous; an issue of mistaken identity was raised in the armed robbery and aggravated assault case and a juror who was not stricken was not similarly situated as that juror's brother was convicted of manslaughter. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Juror properly disqualified for bias. — Because a prospective juror stated during voir dire that the juror did not know if the juror could set aside the juror's friendship with defendant and render a fair and impartial verdict based on the evidence and the law, the prospective juror was properly excused for cause. *Paul v. State*, 296 Ga. App. 6, 673 S.E.2d 551 (2009).

No error in refusal to strike for cause when prospective juror had not prejudged case. — When a prospective juror indicated that the prospective juror would expect a defendant to testify and would do the juror's best to follow the law if the court instructed the jury that no inference was to be drawn from the fact that the defendant chose not to testify, there was no error in the trial court's refusal to strike the prospective juror for cause, because nothing showed that the prospective juror had prejudged any issue in the case. *Johnson v. State*, 291 Ga. 621, 732 S.E.2d 266 (2012).

2. Qualifications

Editor's notes. — Some of the cases noted under this heading were decided under the 1976 Constitution (Art. VI, Sec. XV, Paras. I, II) and antecedent provi-

Jurors (Cont'd)**2. Qualifications (Cont'd)**

sions, which provided that grand jurors were to be “experienced, intelligent and upright” and that traverse jurors were to be “intelligent and upright.”

Standards of intelligence, uprightness, and experience established for jurors in this paragraph do not violate the Constitution. *White v. State*, 230 Ga. 327, 196 S.E.2d 849, appeal dismissed, 414 U.S. 886, 94 S. Ct. 222, 38 L. Ed. 2d 134 (1973).

Jurors must be upright. — This paragraph, in preserving inviolate the right of trial by jury, guarantees that every person charged with a crime shall be tried by upright jurors; hence, one who has been convicted of or has pleaded guilty to an offense involving moral turpitude is disqualified from serving as a juror; and, unless the disqualification is expressly or impliedly waived by both parties to the case, a verdict rendered by such juror is void. *Turnipseed v. State*, 53 Ga. App. 194, 185 S.E. 403, later appeal, 54 Ga. App. 442, 188 S.E. 260 (1936).

Juror was not disqualified pending certiorari decision. — However, a person who has not pled guilty nor served a sentence, but has certioraried the case, the certiorari being still pending, would not be disqualified to sit on a jury; the effect of the certiorari would be to supersede the judgment of the lower court, and whether or not the juror was disqualified would depend upon the ruling on the certiorari and further proceedings in the premises. *Turnipseed v. State*, 53 Ga. App. 194, 185 S.E. 403, later appeal, 54 Ga. App. 442, 188 S.E. 260 (1936).

Juror not disqualified when verdict superseded by certiorari and ultimate question of guilt not determined. — When the verdict and judgment finding a juror guilty of cheating and swindling has been superseded in the proper and legal way by certiorari, and the ultimate question of the juror’s guilt has not been determined, the juror is not disqualified for the reason that the juror is not an upright juror. *Turnipseed v. State*, 53 Ga. App. 194, 185 S.E. 403, later appeal, 54 Ga. App. 442, 188 S.E. 260 (1936).

Refusal to excuse upheld. — Trial court did not err by refusing to excuse certain jurors, since the subject jurors indicated that the jurors would be able to base the jurors’ decision on the evidence presented, would keep an open mind, and could consider all three sentencing options that would be available. *Rice v. State*, 292 Ga. 191, 733 S.E.2d 755 (2012).

Criminal record and impersonation of proper juror by fraudulent juror sufficient to justify new trial. — When it appeared from the extraordinary motion for a new trial, that the name of one of the persons who served as a member of the jury which convicted the accused of rape and sentenced the accused to electrocution was not in the jury box, that such person obtained a place on the jury by fraudulently impersonating another, that before the trial this “juror” had twice been convicted of the offense of larceny of an automobile, and had served sentences under such convictions, that neither the movant nor any of the movant’s attorneys had knowledge of these facts until after the movant’s conviction and the affirmation of the judgment overruling the movant’s original motion for a new trial, that they could not have discovered the facts earlier by the exercise of reasonable diligence, and that on discovering the facts they acted promptly in presenting the extraordinary motion for a new trial, the facts alleged therein were such as to require the grant of a new trial, in the absence of any showing to the contrary. *Wright v. Davis*, 184 Ga. 846, 193 S.E. 757 (1937).

Jurors were clients of opposing counsel. — Pursuant to O.C.G.A. § 15-12-134 and Ga. Const. 1983, Art. I, Sec. I, Para. XI(a), a trial court erred in failing to either grant a challenge for cause or to effectively rehabilitate two jurors who expressed a clear preference for opposing counsel because both were or had been clients of opposing counsel. *Harper v. Barge Air Conditioning, Inc.*, 313 Ga. App. 474, 722 S.E.2d 84 (2011).

Judges of Law and Fact

Decision is “settled law” on principle that jurors are judges of law and fact. — *Anderson v. State*, 42 Ga. 9 (1871)

is the “settled law” on the interpretation of the meaning of the principle that the jurors are the judges of the law and the facts, and earlier cases contradicting it, in particular, *Holder v. State*, 5 Ga. 441 (1848); *McGuffie v. State*, 17 Ga. 497 (1885); and *McPherson v. State*, 22 Ga. 478 (1857), are overruled. *Harris v. State*, 190 Ga. 258, 9 S.E.2d 183 (1940).

Court construes law and jury applies law to facts. — It is the province of the court to construe the law applicable in the trial of a criminal case, and of the jury to apply the law so construed to the facts in evidence; while the impaneled jurors are made absolutely and exclusively judges of the facts in the case, they are, in this sense only, judges of the law. *Harris v. State*, 190 Ga. 258, 9 S.E.2d 183 (1940); *Hall v. State*, 201 Ga. App. 133, 410 S.E.2d 448 (1991).

Defendant could not acquiesce in trial court’s preliminary statement and complain of it for the first time on appeal under O.C.G.A. § 5-5-24. The trial court’s preliminary instruction properly informed the jury that under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a): (1) it was absolutely and exclusively the judge of the facts in the case; (2) it was, in this sense only, the judge of the law; (3) it was the province of the court to construe the law and give it in the charge; and (4) it was the province of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict. *Whitehead v. State*, 258 Ga. App. 271, 574 S.E.2d 351 (2002).

Jury has no right to make law. — The jurors are the judges of the law and the facts so as to enable the jurors to apply the law to the facts and bring in a general verdict, but jurors have no right to make law; the law is laid down in the Code and it is the province of the court to construe the law and give it in the jury’s charge, and of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict. *Harris v. State*, 190 Ga. 258, 9 S.E.2d 183 (1940).

Jury determines under law given by court requirements for conviction. — The question as to the amount of the narcotic substance necessary to sustain a conviction is solely for jury determination under the law as given by the court in the

court’s charge. *Partain v. State*, 139 Ga. App. 325, 228 S.E.2d 292 (1976), *aff’d*, 238 Ga. 207, 232 S.E.2d 46 (1977).

Jury are judges of law and facts, but judge may refuse to charge. — Despite the fact that Ga. Const. 1983, Art. I, Sec. I, Para. XI provides that the jury are to be the judges of law and facts in a given case, there exists no error when the judge refuses to expressly charge the jury to that effect. *Drummond v. State*, 173 Ga. App. 337, 326 S.E.2d 787 (1985).

Jury selects between two, mutually exclusive, defense theories. — While mutual combat and self-defense are mutually exclusive, if there is evidence of both, the jury, as trier of fact, must select between the two propositions. *Simmons v. State*, 172 Ga. App. 695, 324 S.E.2d 546 (1984).

Court must be requested to charge jurors that they are judges of law and facts. *Reddick v. State*, 11 Ga. App. 150, 74 S.E. 901 (1912).

New trial not required when omission to make charge that jurors are judges of law and facts. — In the absence of a request to charge the jurors in a criminal case that they are the judges of the law and the facts, a new trial is not required by the omission of the court to charge to that effect. *Reddick v. State*, 11 Ga. App. 150, 74 S.E. 901 (1912).

Harmless error in charge of judges of law and facts. — Error in charging the jury that “You will determine both the law and the facts” was harmless since the court properly instructed on the presumption of innocence, the elements of the charged offenses, and the state’s burden of proof, and also charged the jury appropriately in response to their inquiries. *Young v. State*, 225 Ga. App. 208, 483 S.E.2d 636 (1997).

Court’s charge that “You ladies and gentlemen will determine the law and the facts” was not erroneous and, when considered within the context of the entire charge, did not give rise to reversible error. *Dasher v. State*, 229 Ga. App. 41, 494 S.E.2d 192 (1997).

Jury must accept law as laid down by presiding judge. — The interpretation made by the Supreme Court of this paragraph is that, while jurors are the

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judges of the law as well as of the facts in criminal cases, the jurors must accept the law as laid down and expounded to them by the presiding judge. *Moyers v. State*, 58 Ga. App. 237, 198 S.E. 283 (1938).

Instructions should not have misled jury to reject law charged by court. — The mere use of the words, “except that” in an instruction that “the charge of the court is the law of the case, and by it you are bound, except that you are the judges of the law in applying it to the facts as you find them to be,” could not have misled the jury into conceiving that they would be free to reject the law charged by the court. *Davis v. State*, 190 Ga. 100, 8 S.E.2d 394 (1940).

Instruction should not have prevented jury from considering offense. — When the defendant was charged with aggravated assault with a knife and possession of a knife during the assault, an instruction that required the jury to find the defendant guilty of the possession charge if the jury found the defendant guilty of the assault was erroneous because the instruction prevented the jury from independently considering the possession charge. *Johnson v. State*, 223 Ga. App. 294, 477 S.E.2d 439 (1996).

Duty of jury to take law from court and evidence from witnesses. — In the trial of criminal cases it is the duty of the jury to take the law from the court, as it is their duty to take the evidence from the witnesses. *Moyers v. State*, 58 Ga. App. 237, 198 S.E. 283 (1938).

Counsel may read and comment on law to jury in criminal case. See *Warmock v. State*, 56 Ga. 503 (1876); *Wiggins v. State*, 139 Ga. App. 98, 227 S.E.2d 895 (1976).

Effectiveness of counsel in requesting charge. — Trial counsel was not ineffective in failing to request a charge in the exact language of Ga. Const. 1983, Art. I, Sec. I, Para. XI providing that, in criminal cases, the jury shall be the judges of the law and the facts; the trial court properly instructed the jury on its role. *Whitehead v. State*, 258 Ga. App. 271, 574 S.E.2d 351 (2002).

Waiver of Rights

Provisions of this paragraph may be waived by defendant. *Fortson v. State*, 96 Ga. App. 350, 100 S.E.2d 129 (1957).

Right to separate trial in capital case may be waived. *Henderson v. State*, 207 Ga. 206, 60 S.E.2d 345 (1950), commented on in 13 Ga. B.J. 230 (1950).

Right to waive trial by jury. — This paragraph does guarantee the right of trial by jury, but this right may be waived and trial held before a judge alone. *Phillips v. Meadow Garden Hosp.*, 139 Ga. App. 541, 228 S.E.2d 714 (1976).

The right of civil litigants to a jury trial may be expressly waived by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, or impliedly waived by voluntary participation in a nonjury trial under O.C.G.A. § 9-11-39. *Raintree Farms, Inc. v. Stripping Ctr., Ltd.*, 166 Ga. App. 848, 305 S.E.2d 660 (1983).

The right to a jury trial is impliedly waived by participating in a bench trial and by failing to protest or object to a bench trial. *Goss v. Bayer*, 184 Ga. App. 730, 362 S.E.2d 768, cert. denied, 184 Ga. App. 909, 362 S.E.2d 768 (1987).

A criminal defendant has the right to waive a defendant’s constitutional right to be tried by a jury of 12. *Baptiste v. State*, 190 Ga. App. 451, 379 S.E.2d 165, cert. denied, 190 Ga. App. 451, 379 S.E.2d 165 (1989).

The power of municipal courts to try and dispose of misdemeanor traffic offenses is conditioned upon the defendant’s waiver of the right to a jury trial. *Kolker v. State*, 260 Ga. 240, 391 S.E.2d 391 (1990).

The defendant waived the right to a jury trial after the defendant proceeded with a bench trial even though the defendant and the defendant’s attorney knew that there had been no formal waiver of a jury trial, and asserted the right to a jury trial after conviction by the court, and then ignored the trial judge’s order to remain in the courtroom until such time as a jury trial could be arranged. *Slater v. State*, 251 Ga. App. 620, 555 S.E.2d 8 (2001).

Trial court told defendant of the right to a jury trial and that the jury had to return

a unanimous verdict in order to convict defendant on a charge, and the evidence showed that defendant then knowingly and intelligently waived the right to a jury trial in favor of having a bench trial before the trial court; accordingly, defendant waived the right to a jury trial and the convictions following the bench trial were affirmed. *Young v. State*, 273 Ga. App. 151, 614 S.E.2d 257 (2005).

Claim on appeal that the trial court erred by refusing to consider a request for a nonjury bench trial in a criminal matter was preserved for review despite the fact that the counsel did not state an exception or file an objection to the trial court's ruling, as the "bill of exceptions" requirement was abolished a long time ago pursuant to O.C.G.A. § 5-6-49(a); the trial court did not err, as there was no requirement that a defendant be given a nonjury trial upon a request and nothing prevented trial courts from ensuring that defendants were given their constitutional jury trial right pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XI. *Lindo v. State*, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Before a defendant could effectively waive the right to a jury trial and demand a bench trial, the state's consent had to be obtained, in addition to the trial court's agreement to conduct a bench trial pursuant to the defendant's demand. *Zigan v. State*, 281 Ga. 415, 638 S.E.2d 322 (2006).

Personal waiver by defendant of jury trial not necessary. — It is not necessary for the preservation of due process that a defendant personally waive the right to a jury trial. *Little v. Stynchcombe*, 227 Ga. 311, 180 S.E.2d 541 (1971).

While it may be a better practice, it is not necessary for an accused to personally waive the right to a jury of 12 and agree to be tried by a jury of less than 12. Counsel for the accused may validly waive this right for the accused if: (1) the waiver is made, without objection, in the accused's presence; or (2) the accused otherwise acquiesces in the waiver. *Davis v. State*, 192 Ga. App. 47, 383 S.E.2d 615 (1989).

Waiver of the right to a jury trial in open court is preferred, but it is not required. The record showed that the defendant personally, voluntarily, know-

ingly, and intelligently participated in the decision to waive the right to a jury trial since the defendant and the defendant's appointed counsel, who was also the defendant's counsel on appeal, signed an affidavit waiving that right. *Stanley v. State*, 267 Ga. App. 379, 599 S.E.2d 331 (2004).

Failure to request a trial by jury is waiver thereof. *Green v. Austin*, 222 Ga. 409, 150 S.E.2d 346 (1966).

Waiver of the right to confrontation cannot be presumed from a silent record; the record must show a knowing, intelligent, and voluntary waiver made with the accused's consent. *Aaron v. State*, 172 Ga. App. 700, 324 S.E.2d 564 (1984).

Implied waiver permitted by statute of one trial issue not sufficient to presume waiver of jury trial as to other issues. — Since there can be no presumption of waiver of trial by jury when such trial is provided by law, and since statute contains nothing to indicate that failure to demand a trial by jury upon issues of fact arising upon exceptions to an examiner's report should be considered as a waiver of anything except a trial by jury upon issues of fact so arising, such implied waiver cannot be treated as consent for the trial judge to embrace the entire case and try issues of fact which did not arise upon exceptions to the examiner's report, but which, after the sustaining of exceptions and the annulment of the report, will exist only in the general pleadings and the evidence. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

Case requiring express waiver of jury trial. — Exceptions of fact to an auditor's report in a law case must be decided by jury unless the jury trial is expressly waived. This does not mean an implied waiver but that there must be an express waiver. *Simonton Constr. Co. v. Pope*, 213 Ga. 360, 99 S.E.2d 216 (1957).

State bears burden of showing defendants waived rights. — Since the defendants' trial was not transcribed, and the record did not contain a written waiver of the defendants' right to a jury trial, the state bears the burden of showing the waiver was made both intelligently and knowingly, and, considering the record in its entirety, the state did not

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meet the state's burden of showing that the defendants were aware that the defendants waived their right to a jury trial and that the defendants personally and intelligently participated in that waiver. *Capelli v. State*, 203 Ga. App. 79, 416 S.E.2d 136 (1992), overruled on other grounds, *Barnes v. State*, 275 Ga. 499, 570 S.E.2d 277 (2002).

Defendant may revoke waiver of jury trial if timely and does not affect cause of justice. — While a defendant in a misdemeanor case on an accusation or indictment may waive trial by jury and cannot complain after trial and conviction of a denial of the right, nevertheless, at any time on or before trial, a defendant may revoke the waiver, provided a defendant acts timely and in such season as not substantially to delay or impede the cause of justice, especially when the state makes no point as to delay or prejudice. *Wilson v. State*, 60 Ga. App. 641, 4 S.E.2d 688 (1939).

Right to revoke waiver of jury trial subject to proof that it would delay or impede justice. — The right to revoke the waiver of the right to a jury trial is subject only to proof of special circumstances showing that its exercise would “substantially delay or impede the cause of justice.” *Brumbalow v. State*, 128 Ga. App. 581, 197 S.E.2d 380 (1973).

Proof needed to revoke waiver of right to jury trial. — The right to revoke the waiver of the right to a jury trial is subject only to proof of special circumstances showing that its exercise would “substantially delay or impede the cause of justice.” *Brumbalow v. State*, 128 Ga. App. 581, 197 S.E.2d 380 (1973).

Right to public trial may be waived by defendant by failure to make timely objection. *Henderson v. State*, 207 Ga. 206, 60 S.E.2d 345 (1950).

Entering guilty plea waives defense of right to speedy trial. — Having fully and voluntarily entered a plea of guilty, a criminal defendant cannot raise as a defense the defendant's right to a speedy and public trial because in the case of a plea of guilty, such plea waives any defense known and unknown. *Mason v.*

Banks, 242 Ga. 292, 248 S.E.2d 664 (1978).

Waiver of unanimous verdict permitted. — If the constitutional right to a jury may be waived, the right, if it exists, to a unanimous verdict, can also be waived. *Phillips v. Meadow Garden Hosp.*, 139 Ga. App. 541, 228 S.E.2d 714 (1976).

Acceptance of verdict returned by bare majority possible. — If the parties to a civil case may validly agree to have their rights determined without any jury or with a jury of 11 or less members, it follows that they may with equal validity consent to accept a verdict arrived at by a specified number of jurors, even that of a bare majority. A party may waive constitutional rights designed for a party's benefit. *Phillips v. Meadow Garden Hosp.*, 139 Ga. App. 541, 228 S.E.2d 714 (1976).

Counsel's advice to waive jury trial. — Counsel was not ineffective for advising a murder defendant to waive the right to a jury trial. This advice was based on reasonable trial strategy as the defendant testified that counsel believed that a judge, having been exposed to cases involving similar violence, would be more lenient than a jury; moreover, the defendant's acquittal of murder and conviction on the lesser offense of voluntary manslaughter strongly supported the conclusion that counsel was effective, and the defendant was advised by the trial court that the decision to waive a jury trial rested with the defendant. *Smith v. State*, 291 Ga. App. 725, 662 S.E.2d 817 (2008).

Motion to withdraw guilty plea denied. — Despite the defendant's age of 17 years and the defendant's claim that the defendant had not knowingly entered a guilty plea, the defendant's motion to withdraw the guilty plea to charges of child molestation and terroristic threats was properly denied because at a plea hearing the defendant testified that defense counsel explained the nature of the charges against the defendant and the possible defenses, the defendant testified that the defendant told defense counsel all the facts and circumstances known to the defendant about the charge, the trial court advised the defendant of the defendant's rights to a jury trial and all other rights that the defendant was waiving,

and the defendant acknowledged that the defendant was waiving those rights, the trial court also advised the defendant of the minimum and maximum sentence the defendant could serve, and the defendant stated that the defendant had no response to the state's sentencing recommendation. *Harland v. State*, 262 Ga. App. 803, 586 S.E.2d 705 (2003).

Waiver not shown. — When the state submitted the affidavit of trial counsel who averred only that at arraignment counsel waived a jury trial but the defendant also submitted an affidavit in which the defendant stated that trial counsel never discussed with the defendant at any time during the defendant's representation the advantages and disadvantages of a jury trial and further asserted that the defendant did not "knowingly, intelligently, and willingly" waive the defendant's right to a jury trial, nor did the defendant "ask or permit" trial counsel to make such a representation at arraignment, the defendant was granted a new trial since the state had not met the burden of showing the waiver was made both intelligently and knowingly. *Hill v. State*, 181 Ga. App. 473, 352 S.E.2d 651 (1987).

Upon a withdrawal of opposition by the state, because an inmate was not advised of the constitutional right to a jury trial, and the court could find no extrinsic evidence in the record to conclude that the inmate knowingly, intelligently, and voluntarily waived the right to a jury trial on the state drug charges at issue, an order denying habeas relief was reversed, and the case was remanded. *Sutton v. Sanders*, 283 Ga. 28, 656 S.E.2d 796 (2008).

Waiver shown. — Defendant intelligently, knowingly, and voluntarily waived the right to a jury trial in a criminal matter because the trial court made a thorough inquiry to ensure that defendant understood the right to a jury trial, a Spanish interpreter was used, and defendant indicated that defendant wanted a judge to hear the case. *Alvarado v. State*, 271 Ga. App. 714, 610 S.E.2d 675 (2005).

The trial court properly determined that the 16-year-old defendant waived the right to a jury trial; after being informed that the defendant wanted a bench trial, the trial court addressed both the defen-

dant and the defendant's mother directly, informed the defendant of the right to a jury trial, offered the defendant more time to discuss the issue with defense counsel, and confirmed that defense counsel had addressed the benefits and hazards of a jury trial with the defendant. *Edwards v. State*, 285 Ga. App. 227, 645 S.E.2d 699 (2007).

Because the record affirmatively showed that the defendant knowingly, voluntarily, and intelligently waived a right to a jury trial, remand for resolution of that issue was unnecessary. *Portilla v. State*, 285 Ga. App. 401, 646 S.E.2d 277 (2007).

A trial court did not err by finding that defendant made a personal, knowing, and intelligent waiver of the right to a jury trial with regard to defendant's convictions for aggravated child molestation and two counts of child molestation after a bench trial because, before trial began, defense counsel stated that defendant wished to waive the jury trial right and proceed with a bench trial, and the trial court questioned defendant, who confirmed that defendant wanted a bench trial and that defendant understood the choice. Further, at the hearing on defendant's motion for a new trial, defendant testified that defendant discussed the matter at length with defense counsel before trial and stated that defendant wanted the judge, not a jury, to decide defendant's fate. *Brumbelow v. State*, 289 Ga. App. 520, 657 S.E.2d 603 (2008).

In an auto dealer's suit against a car buyer, the buyer's waiver of the right to a jury trial under Ga. Const. 1983, Art. I, Sec. I, Para. XI(a) and O.C.G.A. § 9-11-38 was implied by the buyer's failure to make a written demand for a jury trial or to object to the case being specially set for a bench trial at a hearing on the buyer's successful motion to vacate a judgment entered in favor of the dealer. *Cole v. ACR/Atlanta Car Remarketing, Inc.*, 295 Ga. App. 510, 672 S.E.2d 420 (2008).

In a defendant's prosecution for criminal trespass, the defendant's waiver of the defendant's right to a jury trial was voluntary and intelligent because while the timing of the colloquy was unusual as a witness had already testified on direct, no

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indication was given that the trial court would not have honored the defendant's right to a jury trial and the defendant indicated that the defendant was comfortable with waiving that right. *Thomas v. State*, 297 Ga. App. 416, 677 S.E.2d 433 (2009).

Finding that the defendant voluntarily, knowingly, and intelligently waived the right to a jury trial was supported by a signed waiver of the right and trial counsel's testimony that counsel explained to the defendant that the defendant had a right to a jury trial and that counsel believed a judge would be more receptive than a jury to the technical legal defense they had discussed. *Seitman v. State*, 320 Ga. App. 646, 740 S.E.2d 368 (2013).

Record showed that the defendant knowingly and intelligently waived the defendant's constitutional right to a trial by jury as immediately before the trial began, the trial court asked the defendant if the defendant understood that the defendant had a right to a jury trial and asked whether the defendant was "voluntarily and knowingly waiving" that right, and defendant responded affirmatively to both questions. Only after receiving the defendant's oral assurance that the defendant wished to waive trial by jury and proceed to trial before the court did the trial court accept the defendant's waiver. *Simmons v. State*, 321 Ga. App. 743, 743 S.E.2d 434 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Action of waiving right to trial by jury is privilege and not absolute right. 1967 Op. Att'y Gen. No. 67-412.

No right to a jury trial exists in a civil action for the establishment of paternity. 1997 Op. Att'y Gen. No. 97-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d, Jury, §§ 6 et seq., 66 et seq.

C.J.S. — 50A C.J.S., Juries, § 4 et seq.

ALR. — Right to jury trial in proceeding in removal of public officer, 8 ALR 1476.

Right to jury trial in case of seizure of property alleged to be illegally used, 17 ALR 568; 50 ALR 97.

Constitutionality of statute requiring party demanding jury to pay jury fees or charges incidental to summoning or impaneling of jurors, 32 ALR 865.

Effect of, and remedies for, exclusion of eligible class or classes of persons from jury list in criminal case, 52 ALR 919.

Right to jury in will contest, 62 ALR 82.

Right to consent to trial of criminal case before less than twelve jurors; and effect of consent upon jurisdiction of court to proceed with less than twelve, 70 ALR 279; 105 ALR 1114.

Statutes in relation to subject matter or form of instructions by court as impairing constitutional right to jury trial, 80 ALR 906.

Waiver of right to jury trial as operative after expiration of term during which it was made, or as regards subsequent trial, 106 ALR 203.

Right to jury trial in suit to remove cloud, quiet title, or determine adverse claims, 117 ALR 9.

Constitutional or statutory right of accused to speedy trial as affected by his incarceration for another offense, 118 ALR 1037.

Waiver or loss of defendant's right to speedy trial in criminal cases, 129 ALR 572; 57 ALR2d 302.

Right of defendant to waive right of trial by jury where he is not represented by counsel, 143 ALR 445.

Eligibility of women as jurors, 157 ALR 461.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 ALR 383.

Exclusion of women from grand or trial jury panel in criminal case as violation of constitutional rights of accused or as

ground for reversal of conviction, 9 ALR2d 661.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity or for restoration, 33 ALR2d 1145.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 ALR2d 780.

Withdrawal of waiver of right to jury trial in criminal case, 46 ALR2d 919.

Waiver or loss of accused's right to speedy trial, 57 ALR2d 302.

Delay between filing of complaint or other charge and arrest of accused as violation of right to speedy trial, 85 ALR2d 980.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 ALR2d 1162.

Sufficiency of waiver of full jury, 93 ALR2d 410.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 ALR3d 1373.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 ALR3d 1321.

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury, 24 ALR3d 1236.

Applicability, in proceedings under statutes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Statute reducing number of jurors as violative of right to trial by jury, 47 ALR3d 895.

Validity of pyramid distribution plan, 54 ALR3d 217.

Separation of jury in criminal case before introduction of evidence — modern cases, 72 ALR3d 100.

Separation of jury in criminal case during trial — modern cases, 72 ALR3d 131.

Separation of jury in criminal case after submission of cause — modern cases, 72 ALR3d 248.

Law enforcement officers as qualified jurors in criminal cases, 72 ALR3d 895.

Former law enforcement officers as qualified jurors in criminal cases, 72 ALR3d 958.

Right to a jury trial on motion to vacate judgment, 75 ALR3d 894.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 ALR3d 769.

Illness or incapacity of judge, prosecuting officer, or prosecution witness as justifying delay in bringing accused speedily to trial — state cases, 78 ALR3d 297.

Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters, 80 ALR3d 869.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case, 94 ALR3d 15.

Religious belief, affiliation, or prejudice of prospective jurors as proper subject of inquiry or grounds for challenge on voir dire, 95 ALR3d 172.

Validity and efficacy of accused's waiver of unanimous verdict, 97 ALR3d 1253.

Excusing, on account of public, charitable, or educational employment, one qualified and not specifically exempted as juror in state criminal case as ground of complaint by accused, 99 ALR3d 1261.

Waiver, after not guilty plea, of jury trial in felony case, 9 ALR4th 695.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 ALR4th 1041.

Change of venue as justified by fact that inhabitants of local jurisdiction have interest adverse to party to civil action, 10 ALR4th 1046.

Validity of agreement, by stipulation or waiver in state civil case, to accept verdict by number or proportion of jurors less than that constitutionally permitted, 15 ALR4th 213.

Jury's discussion of parole law as ground for reversal or new trial, 21 ALR4th 420.

Propriety and effect of jurors' discussion of evidence among themselves before final submission of criminal case, 21 ALR4th 444.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial, 29 ALR4th 659.

Propriety of order forbidding news media from publishing names and addresses of jurors in criminal cases, 36 ALR4th 1126.

Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury, 37 ALR4th 304.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 ALR4th 11.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 ALR4th 367.

Jury trial waiver as binding on later state civil trial, 48 ALR4th 747.

Paternity proceedings: right to jury trial, 51 ALR4th 565.

Right to jury trial in action for retaliatory discharge from employment, 52 ALR4th 1141.

Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 ALR4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 ALR4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 ALR4th 1196.

Right to jury trial in state court divorce proceedings, 56 ALR4th 955.

Relief available for violation of right to counsel at sentencing in state criminal trial, 65 ALR4th 183.

Validity of law or rule requiring state court party who requires jury trial in civil case to pay costs associated with jury, 68 ALR4th 343.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time, 70 ALR4th 632.

Small claims: jury trial rights in, and on appeal from, small claims court proceeding, 70 ALR4th 1119.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed, 75 ALR4th 91.

When does delay in imposing sentence violate speedy trial provision, 86 ALR4th 340.

Threats of violence against juror in

criminal trial as ground for mistrial or dismissal of juror, 3 ALR5th 963.

Prospective juror's connection with insurance company as ground for challenge for cause, 9 ALR5th 102.

Right to jury trial in action under state civil rights law, 12 ALR5th 508.

Exclusion of public and media from voir dire examination of prospective jurors in state criminal case, 16 ALR5th 152.

Examination and challenge of state case jurors on basis of attitudes toward homosexuality, 80 ALR5th 469.

Right to jury trial in child neglect, child abuse, or termination of parental rights proceedings, 102 ALR5th 227.

Application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) to state death penalty proceedings, 110 ALR5th 1.

Validity and application of computerized jury selection practice or procedure, 110 ALR5th 329.

Adoption and application of "tainted" approach or "dual motivation" analysis in determining whether existence of single discriminatory reason for peremptory strike results in automatic Batson violation when neutral reasons also have been articulated, 15 ALR6th 319.

Determination of request for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer — issues of proof, consideration of alternatives, and scope of closure, 32 ALR6th 171.

Basis for exclusion of public from state criminal trial in order to preserve safety, confidentiality, or well-being of witness who is not undercover police officer, 33 ALR6th 1.

Stranger's alleged communication with juror, other than threat of violence, as prejudicial in federal criminal prosecution, 131 ALR Fed. 465.

Right to jury trial on issue of damages in copyright infringement actions under 17 USCA § 504, 163 ALR Fed. 467.

Construction and application of Speedy Trial Act, 18 USCS §§ 3161 to 3174 — United States Supreme Court cases. 46 ALR Fed. 2d 129.

Paragraph XII. Right to the courts.

No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person’s own cause in any of the courts of this state.

1976 Constitution. — Art. I, Sec. I, Para. IX.

Cross references. — Rights of citizens generally, § 1-2-6. Indigent’s access to courts, §§ 9-2-63 and 17-12-31. Court review of garnishment proceedings, § 18-4-45. Court review of administrative decisions, § 50-13-19.

Law reviews. — For article surveying Georgia cases in the area of criminal law from June, 1979 through May, 1980, see 32 Mercer L. Rev. 35 (1980). For article surveying developments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981).

For article, “The Georgia Bill of Rights: Dead or Alive?,” see 34 Emory L.J. 341 (1985). For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

For note, “Deadbeat Dads: Undeserving of the Right to Inherit from Their Illegitimate Children and Undeserving of Equal Protection,” see 34 Ga. L. Rev. 1773 (2000).

For comment, “Inappropriate Forum or Inappropriate Law? A Choice of Law Solution to the Jurisdictional Standoff Between the United States and Latin America,” see 60 Emory L.J. 1437 (2011).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- SELF-REPRESENTATION
- RIGHT OF ACCESS
- RIGHT TO BE PRESENT

General Consideration

Lawsuits and workers’ compensation cases. — Every party to a lawsuit or a workers’ compensation proceeding must be afforded the opportunity to be heard and to present a claim or defense, i.e., to have that party’s day in court. *Hart v. Owens-Illinois, Inc.*, 165 Ga. App. 681, 302 S.E.2d 701 (1983).

Reviewability of constitutionality claim. — Because the Court of Appeals of Georgia was bound by the Supreme Court of Georgia’s order transferring a personal injury plaintiff’s appeal and expressly held that the trial court did not rule on whether O.C.G.A. § 9-11-68(d) was constitutional, the Court of Appeals declined to consider the defendants’ arguments that the statute was constitutional. *Buchan v. Hobby*, 288 Ga. App. 478, 654 S.E.2d 444 (2007).

This paragraph does not guarantee to citizen of this state any particular form or method of state procedure. —

Its requirements are satisfied if the citizen has reasonable notice and opportunity to be heard, and to present a claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Zorn v. Walker*, 206 Ga. 181, 56 S.E.2d 511 (1949); *State v. Sanks*, 225 Ga. 88, 166 S.E.2d 19 (1969), appeal dismissed, 401 U.S. 144, 91 S. Ct. 593, 27 L. Ed. 2d 741 (1971).

The constitutional provision set forth in this paragraph is plainly subject to the inherent power of the court to prescribe the manner in which the business of the court shall be conducted and to preserve the order and decorum of the trial to the furtherance of justice; this discretion of the trial court in assuming the general superintendence and control of the litigation before it is a point of extreme delicacy with which the Court of Appeals is reluctant to interfere, and interference will not be had unless there appears in the case

General Consideration (Cont'd)

something to demand imperatively the corrective interposition of the Court of Appeals. *Davis v. Barnes*, 158 Ga. App. 89, 279 S.E.2d 330 (1981).

No requirement that prosecutor make evidence available before trial.

— There is no statute or rule of procedure of force in this state which requires a solicitor general (now district attorney) or other prosecuting officer to make evidence, documentary or otherwise, available to the accused or the accused's counsel before trial. *Blevins v. State*, 220 Ga. 720, 141 S.E.2d 426 (1965).

Argument of counsel to jury is a stage of trial. *Pierce v. State*, 47 Ga. App. 830, 171 S.E. 731 (1933).

Absence of counsel without consent of court will not prevent reception of verdict. *Nowell v. State*, 18 Ga. App. 143, 88 S.E. 909 (1916).

Argument of counsel may be limited. — Ruling of court limiting argument by counsel was not contrary to the constitutional rights of the defendant. *Lindsay v. State*, 138 Ga. 818, 76 S.E. 369 (1912).

Inquiry into counsel's failure to challenge jury arrays required. — When a defendant claimed ineffective assistance of counsel based on counsel's failure to pursue the defendant's requests to challenge the arrays of the grand and traverse juries and to secure the presence of certain defense witnesses, the trial court's summary overruling of the defendant's motions for change of counsel without a hearing or any further inquiry was error. *Heard v. State*, 173 Ga. App. 543, 327 S.E.2d 767 (1985).

No abuse of discretion by court in refusing extension of time for further argument after counsel consumed the hour allowed. *Port Wentworth Term. Corp. v. Leavitt*, 28 Ga. App. 82, 110 S.E. 686 (1922).

Preclusion of right of nonresident contractor to bring action for payment on contract not unconstitutional. — O.C.G.A. T. 48, C. 13, Art. 2 does not abridge a litigant's right to prosecute a cause of action in this state, as the same attack might lie logically against innumerable provisions of law which de-

fine the rights of litigants. *Gorrell v. Fowler*, 248 Ga. 801, 286 S.E.2d 13 (1982).

Right to be present at civil trial. — In a medical malpractice case in which the trial judge received and answered a note from the jury without advising the parties or counsel, the plaintiffs were entitled to a new trial because the plaintiffs substantial rights to be present under due process and Ga. Const. 1983, Art. I, Sec. I, Para. XII, had been infringed. Plaintiffs were unable to demonstrate harm because the note was destroyed and the trial judge and jurors disagreed on the note's contents, preventing supplementing the record under O.C.G.A. § 5-6-41. *Phillips v. Harmon*, 297 Ga. 386, 774 S.E.2d 596 (2015).

Right to testify not violated. — Defendant's constitutional right to testify in the defendant's own behalf had not been violated. The trial court established that the defendant knew that the defendant had the right to testify if the defendant wanted to but elected not to after consulting with defense counsel. *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

Recovery of attorney's fees. — Trial court erred in finding that the Tort Reform Act of 2005, O.C.G.A. § 9-11-68, violated Ga. Const. 1983, Art. I, Sec. I, Para. XII, since it permitted the recovery of attorney's fees absent the prerequisite showings of either O.C.G.A. § 9-15-14 or O.C.G.A. § 13-6-11, because there was no constitutional requirement that attorney's fees be awarded only pursuant to § 9-15-14 or § 13-6-11; in Georgia, attorney's fees are recoverable when authorized by some statutory provision or by contract, and § 9-11-68, is such a statutory provision authorizing the recovery of attorney's fees under specific circumstances. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Presentation of legitimate defense precludes awarding attorney's fees. — Ga. Const. 1983, Art. I, Sec. I, Para. XII right to defend one's own cause in court is a privilege granted to the defendant as well as the plaintiff; after a motorist being sued in a personal injury case testified that the rear-end collision at issue was caused when the injured person's car swerved suddenly into the motorist's lane,

the injured person's witness, the driver of the other car, was a long-time friend of the injured person and that witness's testimony could have been self-serving, the motorist's deposition was consistent with the trial testimony, and the only substantial variation in the motorist's versions of events was between the police report, of which the officer had no independent recollection, and the motorist's testimony, there was a bona fide dispute as to liability and a reasonable defense, which precluded the award of attorney fees and expenses under O.C.G.A. § 13-6-11. *Anderson v. Cayes*, 278 Ga. App. 592, 630 S.E.2d 441 (2006).

Right to counsel at restitution hearing. — Trial court erred in refusing to allow defendant's counsel, who was present in the defendant's absence at the restitution hearing, to cross-examine the victim, produce evidence, or present any argument on the defendant's behalf because a criminal defendant is entitled to representation by counsel at all critical stages of the proceeding, including sentencing, which included any hearing on restitution. *Gibson v. State*, 319 Ga. App. 627, 737 S.E.2d 728 (2013).

New trial warranted due to ex parte communication with jury. — In a medical malpractice case, the plaintiffs were entitled to a new trial because the communication between the court and the jury was not disclosed to the plaintiffs or plaintiffs' counsel until after the verdict, the note and response were not made a part of the record, recollections differed as to the nature and timing of the communication, and it was impossible for the appellate court to determine if a defense verdict would have been demanded regardless of the effect of the communication on the jury. *Phillips v. Harmon*, 328 Ga. App. 686, 760 S.E.2d 235 (2014), *aff'd* in part and *rev'd* on other grounds, 297 Ga. 386, 774 S.E.2d 596 (2015), vacated on other grounds, 335 Ga. App. 450, 780 S.E.2d 914 (2015).

Cited in *Boone v. Lord*, 38 Ga. App. 397, 144 S.E. 123 (1928); *Felker v. Still*, 176 Ga. 735, 169 S.E. 15 (1933); *Turner v. State*, 176 Ga. 823, 169 S.E. 21 (1933); *Adair v. Metropolitan Cas. Co.*, 48 Ga. App. 88, 171 S.E. 853 (1933); *Simmons v.*

Newton, 178 Ga. 806, 174 S.E. 703 (1934); *Johnson v. Walls*, 185 Ga. 177, 194 S.E. 380 (1937); *Mayor of Savannah v. Fawcett*, 186 Ga. 132, 197 S.E. 253 (1938); *Moyers v. State*, 186 Ga. 446, 197 S.E. 846 (1938); *West v. Haas*, 191 Ga. 569, 13 S.E.2d 376 (1941); *Morton v. Henderson*, 123 F.2d 48 (5th Cir. 1941); *White v. State*, 196 Ga. 847, 27 S.E.2d 695 (1943); *Steward v. Peerless Furn. Co.*, 70 Ga. App. 236, 28 S.E.2d 396 (1943); *Thomas v. Dumas*, 207 Ga. 161, 60 S.E.2d 356 (1950); *Hilliard v. State*, 209 Ga. 497, 74 S.E.2d 65 (1953); *Hilliard v. State*, 87 Ga. App. 769, 75 S.E.2d 173 (1953); *Porch v. Foster*, 209 Ga. 697, 75 S.E.2d 420 (1953); *Garland v. Tanksley*, 99 Ga. App. 201, 107 S.E.2d 866 (1959); *Cadle v. State*, 101 Ga. App. 175, 113 S.E.2d 180 (1960); *Ferguson v. State*, 219 Ga. 33, 131 S.E.2d 538 (1963); *Bryan v. State*, 224 Ga. 389, 162 S.E.2d 349 (1968); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969); *J. Bain, Inc. v. Poulos*, 121 Ga. App. 647, 175 S.E.2d 86 (1970); *Bush v. Morris*, 123 Ga. App. 497, 181 S.E.2d 503 (1971); *Ward v. Smith*, 228 Ga. 137, 184 S.E.2d 592 (1971); *Blocker v. Blackburn*, 228 Ga. 285, 185 S.E.2d 56 (1971); *Butts v. Davis*, 126 Ga. App. 311, 190 S.E.2d 595 (1972); *Doran v. Home Mart Bldg. Ctrs., Inc.*, 233 Ga. 705, 213 S.E.2d 825 (1975); *Revels v. Tift County*, 235 Ga. 333, 219 S.E.2d 445 (1975); *Tucker Door & Trim Corp. v. Fifteenth St. Co.*, 235 Ga. 727, 221 S.E.2d 433 (1975); *Bradley v. Tenneco Oil Co.*, 146 Ga. App. 161, 245 S.E.2d 862 (1978); *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1 (1979); *Weeks v. State*, 152 Ga. App. 629, 263 S.E.2d 513 (1979); *Brown v. Department of Human Resources*, 157 Ga. App. 106, 276 S.E.2d 155 (1981); *Mullins v. Lavoie*, 249 Ga. 411, 290 S.E.2d 472 (1982); *Banks v. Borg-Warner Acceptance Corp.*, 168 Ga. App. 46, 308 S.E.2d 54 (1983); *Dickerson v. State*, 180 Ga. App. 852, 350 S.E.2d 835 (1986); *Hanifa v. State*, 269 Ga. 797, 505 S.E.2d 731 (1998); *Colwell v. State*, 273 Ga. 634, 544 S.E.2d 120 (2001); *Crane v. State Farm Ins. Co.*, 278 Ga. App. 655, 629 S.E.2d 424 (2006); *Wheatley v. Moe's Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008); *DeLong v. State*, 310 Ga. App. 518, 714 S.E.2d 98 (2011); *Deal v. Coleman*, 294 Ga. 170, 751 S.E.2d 337 (2013).

Self-Representation

This provision was primarily intended to guarantee right of self-representation in courts of this state. *Dobbins v. Dobbins*, 234 Ga. 347, 216 S.E.2d 102 (1975).

Every citizen has a constitutional right to represent oneself in court. *Levadas v. Beach*, 119 Ga. 613, 46 S.E. 864 (1904).

Trial court's failure to engage in the required Faretta colloquy and failure to rule on the defendant's unequivocal request amount to a violation of the defendant's constitutional right to self-representation. *Wiggins v. State*, 298 Ga. 366, 782 S.E.2d 31 (2016).

Corporation does not have constitutional right to self-representation. — A corporation is not a person for purposes of exercising a constitutional right to legal self-representation and is not permitted to have as its legal representative an individual who is not licensed to practice law in the courts of this state. *Eckles v. Atlanta Tech. Group, Inc.*, 267 Ga. 801, 485 S.E.2d 22 (1997), overruling *Universal Scientific, Inc. v. Wolf*, 165 Ga. App. 752, 302 S.E.2d 616 (1983); *Knickerbocker Tax Systems, Inc. v. Texaco, Inc.*, 130 Ga. App. 383, 203 S.E.2d 290 (1973); *Dixon v. Reliable Loans, Inc.*, 112 Ga. App. 618, 145 S.E.2d 77 (1965).

Request in mid-trial. — Denial of defendant's request to represent oneself, a request made after the testimony of the state's third witness, could not serve as the basis for reversal since a defendant cannot frivolously change the defendant's mind in midstream by asserting the defendant's right to self-representation in the middle of the defendant's trial. *Thaxton v. State*, 260 Ga. 141, 390 S.E.2d 841 (1990).

Trial court did not err in denying the defendant's request for self-representation because the request was made in the middle of, not before, trial. *Mason v. State*, 325 Ga. App. 609, 754 S.E.2d 397 (2014).

Given the defendant's pre-trial equivocation, the defendant's outbursts during the trial, and the defendant's own statements indicating that the defendant never truly wished to finish the trial without the assistance of trial counsel, the defendant's

decision to change the defendant's mind about counsel midstream and request to proceed pro se was, at best, a frivolous response to the introduction of evidence which disturbed the defendant; thus, the trial court did not violate the defendant's right to proceed pro se. *Owens v. State*, No. S16A0058, 2016 Ga. LEXIS 264 (Mar. 7, 2016).

Right of defendant to act as co-counsel abolished. — Georgia Const. 1976, Art. I, Sec. I, Para. IX has been superseded by Ga. Const. 1983, Art. I, Sec. I, Para. XII; thus, a person no longer has the right to represent oneself and also be represented by an attorney, i.e., the right to act as co-counsel. *Jones v. State*, 171 Ga. App. 184, 319 S.E.2d 18 (1984).

Defendant is not entitled to have counsel and also to represent oneself. The defendant is entitled to either, not both. *Simmons v. State*, 186 Ga. App. 886, 369 S.E.2d 36, cert. denied, 186 Ga. App. 919, 369 S.E.2d 36 (1988).

Defendant does not have a right to be represented by counsel and also to be self represented. *Boyd v. State*, 195 Ga. App. 758, 395 S.E.2d 7 (1990); *Worley v. State*, 201 Ga. App. 704, 411 S.E.2d 760 (1991).

No right to simultaneous representation by counsel and self-representation. — Neither the state constitution nor the federal constitution provides a defendant with a right to simultaneous representation by counsel and self-representation. *Loden v. State*, 199 Ga. App. 683, 406 S.E.2d 103 (1991).

The trial court properly refused to accept plaintiff's pro se filings since the plaintiff was represented by counsel at the time of the filings. *Jacobsen v. Haldi*, 210 Ga. App. 817, 437 S.E.2d 819 (1993).

Representation by both counsel and self permitted. — As the right to represent oneself does not evaporate when an attorney is hired, the court erred in barring a party from self representation because an appearance had been made for the attorney by other attorneys. However, the court is not required to accept random appearance and filings by both the client and the client's attorneys. If a party and the attorneys are unable to coordinate their efforts so that they speak with one

voice, the court is empowered to appoint a leading counsel who shall be the spokesperson. *Cherry v. Coast House, Ltd.*, 257 Ga. 403, 359 S.E.2d 904 (1987), cert. denied, 484 U.S. 1060, 108 S. Ct. 1015, 98 L. Ed. 2d 981 (1988).

Refusal to permit co-counsel status constitutional. — Defendant was not deprived of the defendant's constitutional right of self-representation through the trial court's refusal to permit the defendant to serve as co-counsel in defendant's own defense. *Cargill v. State*, 255 Ga. 616, 340 S.E.2d 891 (1986), cert. denied, 479 U.S. 1101, 107 S. Ct. 1328, 94 L. Ed. 2d 180 (1987); overruled on other grounds, *Manzano v. State*, 282 Ga. 557, 651 S.E.2d 661 (2007).

Trial court's requiring lead counsel to conduct examination of witnesses does not evince denial of the defendant's right of self-representation. *Powers v. State*, 168 Ga. App. 642, 310 S.E.2d 260 (1983).

No error in requiring defendant to designate lead counsel. — It was not error to require the defendant in a criminal case to designate either the defendant or the defendant's attorney as lead counsel since the defendant was not denied the right to participate as co-counsel or required to elect whether the defendant wanted self representation or wanted to permit appointed counsel to defend the defendant. *Garvey v. State*, 176 Ga. App. 268, 335 S.E.2d 640 (1985).

Appointment of counsel when defendant refuses to cooperate not denial of right. — When the trial judge had originally given the defendant the right to self-representation but retracted that right and reappointed a public defender after the defendant refused to participate in the trial, the defendant was not denied the right to self representation. *Spencer v. State*, 176 Ga. App. 313, 335 S.E.2d 661 (1985).

Lawyer, but not lay person, may act as co-counsel. — A lay person does not have the right to self representation and also to be represented by an attorney, but a lawyer does have such a right, subject to the authority of the trial court to limit the exercise of that right in order to insure the orderly disposition of matters before it.

Seagraves v. State, 259 Ga. 36, 376 S.E.2d 670 (1989); *Miller v. State*, 219 Ga. App. 213, 464 S.E.2d 621 (1995); *Vick v. State*, 237 Ga. App. 762, 516 S.E.2d 815 (1999).

Right of attorney to represent self. — Attorney could not be disqualified from self representation in a pro se action even though the attorney had previously represented the defendant in defending similar allegations in another case. *Johnston v. Aderhold*, 216 Ga. App. 487, 455 S.E.2d 84 (1995).

Although rules of professional conduct preclude attorneys from engaging in certain behavior considered unethical when they are exercising their privilege of representing others, such prohibitions do not necessarily apply when attorneys exercise their right, either statutory or constitutional, to represent themselves as parties to litigation. *Johnston v. Aderhold*, 216 Ga. App. 487, 455 S.E.2d 84 (1995).

Voluntary, knowing, and intelligent waiver of right to counsel. — Trial court did not err in denying the defendant's pro se motion for new trial by failing to warn the defendant of the dangers of self-representation because the trial court's colloquy with the defendant supported a finding that the defendant voluntarily, knowingly, and intelligently waived the right to counsel; the defendant, who was charged with driving under the influence of alcohol to the extent that the defendant was a less safe driver, was a long-standing member of the Georgia Bar with experience in trying driving under the influence cases, and was assisted by a licensed member of the Bar sitting at counsel table. *Davis v. State*, 301 Ga. App. 484, 687 S.E.2d 854 (2009), cert. dismissed, No. S10C0633, 2010 Ga. LEXIS 339 (Ga. 2010).

Parent's right to represent themselves in appeal of child's delinquency adjudication. — Child's parents had the right to appeal the juvenile court's delinquency adjudication of their child, to participate in the appellate process, and to represent themselves. In the Interest of *J.L.B.*, 280 Ga. App. 556, 634 S.E.2d 514 (2006).

No abuse of discretion to refuse to allow defendant to cross-examine witness. — Since leading counsel was

Self-Representation (Cont'd)

conducting the cross-examination of a witness, the court did not abuse the court's discretion in refusing to allow the defendant (an attorney-at-law) also to conduct the cross-examination. *Moyers v. State*, 61 Ga. App. 324, 6 S.E.2d 438 (1939).

No right to address jury when pleading set up no defense. — When a person is sued, and the answer which the person makes sets up no defense, and under the person's own evidence the plaintiff is entitled to a verdict against the person, the person has no cause and no right to appear and address the jury to whom the case has been submitted. *Gunn v. Head*, 116 Ga. 325, 42 S.E. 343 (1902).

Judge has discretion to permit accused to conduct part or all of cause. — If a party is represented by counsel, it is a matter within the sound discretion of the trial judge upon timely request as to whether such party may or may not conduct part or all of the cause. Such limitation does not violate the constitutional right of an individual to defend oneself. *Hiatt v. State*, 144 Ga. App. 298, 240 S.E.2d 894 (1977).

Prohibition against deprivation of right to defend cause includes statutory rights of appeal. — Under the Constitution, no person may be deprived of the right to prosecute or defend a cause in any of the courts of the state. Although the right of appeal is wholly statutory, it is available to any party who comes within the statute granting the right, and cannot be denied or abridged by the courts except as authorized by the statute. *Hearing v. Johnson*, 105 Ga. App. 408, 124 S.E.2d 655 (1962).

Waiver of right to appellate counsel. — While a defendant has a right to pursue an appeal pro se under Ga. Const. 1983, Art. I, Sec. I, it must be preceded by an appropriate waiver of the right to appellate counsel. *Costello v. State*, 240 Ga. App. 87, 522 S.E.2d 572 (1999).

Right to self-representation on appeal. — Trial court erred in refusing to allow a defendant to represent oneself at the hearing for defendant's motion for new trial or on appeal because, while the federal constitution did not recognize a de-

fendant's right to self-representation on appeal, Georgia case law and Ga. Const. 1983, Art. I, Sec. I, Para. XII recognized a right to self-representation on appeal. *Cook v. State*, 296 Ga. App. 496, 675 S.E.2d 245 (2009).

Provision for self-representation incidentally recognizes right of court access. — This paragraph is intended to guarantee the right of self-representation in the courts of this state or by an attorney and as only incidentally recognizing the inherent right of access to the courts. *Bloomfield v. Liggett & Myers, Inc.*, 230 Ga. 484, 198 S.E.2d 144 (1973).

Plaintiff has right to sign plaintiff's own petition. *Lanier v. Lanier*, 79 Ga. App. 131, 53 S.E.2d 131 (1949).

No violation of right if defendant admits inability to represent oneself. — When the defendant requested self-representation at trial but, upon hearing the trial court's warnings about self-representation admitted to being incapable of self-representation, the trial court did not err by proceeding with the trial with the existing appointed counsel representing the defendant. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Failure to make unequivocal request for self-representation. — Defendant's conviction of theft by taking, O.C.G.A. § 16-8-2, was supported by sufficient circumstantial evidence pursuant to O.C.G.A. § 24-4-6 and the trial court also did not violate the defendant's right to self-representation under Ga. Const. 1983, Art. I, Sec. I, Para. XII, as the defendant made no unequivocal request for self representation. *Crutchfield v. State*, 269 Ga. App. 69, 603 S.E.2d 462 (2004).

Ineffective assistance of counsel. — When a criminal defendant elects self representation, either solely or in conjunction with representation or assistance by an attorney, the defendant will not thereafter be heard to assert a claim of ineffective assistance of counsel with respect to any stage of the proceedings wherein the defendant was counsel. *Mullins v. Lavoie*, 249 Ga. 411, 290 S.E.2d 472 (1982); *Bole v. State*, 178 Ga. App. 508, 343 S.E.2d 729 (1986).

Assertion of right to be represented by counsel does not constitute waiver of right of self-representation. Burney v. State, 244 Ga. 33, 257 S.E.2d 543, cert. denied, 444 U.S. 970, 100 S. Ct. 463, 62 L. Ed. 2d 385 (1979).

No waiver of right to self-representation. — Because there was no affirmative evidence that the defendant wavered or equivocated in the desire to proceed pro se, the defendant's mere silence at the start of trial was insufficient to establish a knowing and intelligent waiver of the defendant's already invoked right to self-representation. Wiggins v. State, 298 Ga. 366, 782 S.E.2d 31 (2016).

Denial of right to self representation not found. — Denial of a defendant's motion to participate at trial as co-counsel deprived the defendant of the defendant's state constitutional right of self-representation. However, when the evidence of guilt was overwhelming, in addition to the fact that the defendant was represented by two able counsel who conducted the defendant's defense in an extremely competent manner, denial of the motion constituted harmless error. Burney v. State, 244 Ga. 33, 257 S.E.2d 543, cert. denied, 444 U.S. 970, 100 S. Ct. 463, 62 L. Ed. 2d 385 (1979).

Defendant was not wrongfully denied the constitutional right to self-representation because inasmuch as the defendant's handwritten note sought to dismiss trial counsel and replace them with retained counsel, a public defender, or the defendant, the communication was not an unequivocal assertion of the defendant's right to self-representation. Danenberg v. State, 291 Ga. 439, 729 S.E.2d 315 (2012), cert. denied, U.S. , 133 S. Ct. 941, 184 L. Ed. 2d 726 (2013).

Trial court did not err by failing to allow the defendant to fire counsel mid-trial and proceed pro se as the trial court indicated that the court did so to protect the defendant's best interests and the defendant's decision to change the defendant's mind about counsel midstream was, at best, a frivolous response to the introduction of evidence which disturbed the defendant. Owens v. State, No. S16A0058, 2016 Ga.

LEXIS 264 (Mar. 7, 2016).

Right of Access

No general “right of access.” — The sole purpose underlying the revision and adoption of Ga. Const. 1983, Art. I, Sec. I, Para. XII was to define and protect the right of an individual to self representation in the courts of this state, and not to afford a general “right of access.” Nelms v. Georgian Manor Condominium Ass’n, 253 Ga. 410, 321 S.E.2d 330 (1984).

In a suit challenging a court's electronic filing fee system, the trial court did not err when the court granted the motion to dismiss the plaintiff's claims under Ga. Const. 1983, Art. I, Sec. I, Para. XII and O.C.G.A. § 1-2-6(a)(6) because Ga. Const. 1983, Art. I, Sec. I, Para. XII was never intended to provide a right of access to the courts and the Georgia Supreme Court has established that there is no express constitutional right of access to the courts under the Georgia Constitution. Best Jewelry Mfg. Co. v. Reed Elsevier Inc., 334 Ga. App. 826, 780 S.E.2d 689 (2015), cert. denied, 2016 Ga. LEXIS 286 (Ga. 2016).

Payment of damages into state treasury. — Paragraph (e)(2) of O.C.G.A. § 51-12-5.1, requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury, does not violate Ga. Const. 1983, Art. I, Sec. I, Para. XII. State v. Moseley, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994).

High-Voltage Safety Act, O.C.G.A. § 46-3-30 et seq., does not deprive injured persons of due process by abolishing a common law claim, since the legislature has the authority to abolish such claims prior to their accrual. Santana v. Georgia Power Co., 269 Ga. 127, 498 S.E.2d 521 (1998).

Ga. Const. 1983, Art. I, Sec. I, Para. XII is a right of choice between self-representation and representation by counsel provision, and not an access to the courts provision; thus, there is no express constitutional right of access to the courts under the Georgia Constitution. Couch v. Parker, 280 Ga. 580, 630 S.E.2d 364 (2006).

Trial court's dismissal of a driver's neg-

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ligence lawsuit filed against an insured's insurer did not deprive the driver of any Seventh Amendment right to a jury trial or right of access to the courts under Ga. Const. 1983, Art. I, Sec. I, Para. XII, given that the Seventh Amendment did not apply to suits in state courts and Ga. Const. 1983, Art. I, Sec. I, Para. XII dealt with a litigant's choice of either self-representation or representation by counsel, not access to the courts. *Crane v. Lazaro*, 281 Ga. App. 127, 635 S.E.2d 319 (2006), cert. denied, 2006 Ga. LEXIS 907 (Ga. 2006); cert. dismissed, mot. denied, 549 U.S. 1200, 127 S. Ct. 1278, 167 L. Ed. 2d 69 (2007).

In an action which represented the tenth time a litigant had made the same argument that summary disposition of a prior state court case deprived the litigant of a federal Seventh Amendment right to a jury trial, a motion for a new trial was properly dismissed, given that: (1) the claims therein had been previously addressed and rejected; (2) Ga. Const. 1983, Art. I, Sec. I, Para. XII was a right of choice provision, not a right of access provision; and (3) the motion was both untimely under O.C.G.A. § 5-5-40(a), and filed in the wrong county court, in violation of O.C.G.A. § 9-11-60(b). *Crane v. Poteat*, 282 Ga. App. 182, 638 S.E.2d 335 (2006), cert. denied, 2007 Ga. LEXIS 54 (Ga. 2007); cert. dismissed, 551 U.S. 1101, 127 S. Ct. 2912, 168 L. Ed. 2d 241 (2007).

Constitutional right to be heard in courts is granted defendants as well as plaintiffs. *Traders Ins. Co. v. Mann*, 118 Ga. 381, 45 S.E. 426 (1903).

Overbroad restrictions unconstitutional. — After the court required any future suits filed by the defendant to be certified as a prima facie case by an attorney, this condition compelled the defendant to incur an expense, albeit relatively minor, of hiring an attorney despite the constitutional right to self representation, and contravened constitutional bounds by its overbreadth. *In re Carter*, 235 Ga. App. 551, 510 S.E.2d 91 (1998).

Defendant should not be deprived of liberty without opportunity to be heard. — To deprive a defendant of lib-

erty upon the theory that the defendant has violated any of the rules and regulations prescribed in a suspended or probated sentence without giving the defendant a notice and opportunity to be heard upon the question of whether or not the defendant has violated such rules and regulations would be to violate one of the fundamentals of our system of jurisprudence that a person shall not be deprived of liberty without due process of law, which includes notice and an opportunity to be heard. *Lester v. Foster*, 207 Ga. 596, 63 S.E.2d 402 (1951).

When defendant has right to present case though not on time. — Although defendant might have been in contempt of court for failing to appear at the time set forth in the subpoena, to deny the defendant the right to present the defendant's case when the defendant arrives prior to the close of the plaintiff's evidence or before the defendant's counsel has waived the right to present evidence would constitute a violation of the defendant's due process rights under the Constitution. *Sawyer v. Dogwood Stables, Inc.*, 157 Ga. App. 534, 278 S.E.2d 115 (1981).

Law and Constitution require appointment of counsel for indigent and opportunity to consult client and prepare defense. — When the law of the state requires the appointment of counsel for indigent persons — and the law of Georgia does — certainly in a capital case when the defendant is unable to engage a lawyer and is incapacitated by ignorance, illiteracy, physical disability, or the like, to adequately make the defendant's own defense, due process of law requires that the court assign counsel for the defendant, competent to serve, and who shall give more than casual or perfunctory service to the prisoner. Lip service only will not do. Furthermore, the Constitution also requires that a fair opportunity shall be afforded such counsel to consult the client and to prepare a defense against the charge. *Coates v. Lawrence*, 46 F. Supp. 414 (S.D. Ga. 1942), aff'd, 131 F.2d 110 (5th Cir. 1942), cert. denied, 318 U.S. 759, 63 S. Ct. 532, 87 L. Ed. 1132 (1943).

Refusal of offer to appoint counsel in criminal case dispenses appoint-

ment. *Stokes v. State*, 73 Ga. 816 (1884).

Right of representation in court does not include layman inmate. — The right of a person to prosecute one's own cause in any court of this state, in person or by attorney, as guaranteed under this paragraph refers to an attorney-at-law in the commonly accepted meaning of the term and as defined by the laws of this state. It does not include a layman inmate of the Georgia State Prison. *Green v. Caldwell*, 229 Ga. 650, 193 S.E.2d 847 (1972).

Right to counsel does not guarantee representation by out-of-state counsel. — A defendant, although guaranteed the right to counsel by both the federal and state Constitutions, has no guarantee that the defendant can be represented by out-of-state counsel. *Williams v. State*, 157 Ga. App. 494, 277 S.E.2d 781 (1981).

Right to reasonably effective assistance of counsel, not errorless counsel. — The constitutional right to assistance of counsel ensures not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. *Austin v. Carter*, 248 Ga. 775, 285 S.E.2d 542 (1982).

Forum non conveniens could not be invoked because plaintiff chose to prosecute cause in Georgia courts. — Under the provisions of the Georgia Constitution, which provides that "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state," the trial courts are required to exercise jurisdiction of an action brought by a resident of Georgia, as administrator of a decedent who was a resident of Georgia, against a nonresident corporation having an office, agent, and place of doing business in Georgia, upon a cause of action arising in another state, and the rule of forum non conveniens could not be invoked by the defendant to oust the jurisdiction of the courts of this state. *Atlantic Coast Line R.R. v. Wiggins*, 77 Ga. App. 756, 49 S.E.2d 909 (1948).

Exercise of right of access subjects one to court's power to control proceedings. — One having exercised one's inherent right of access and having

pleaded one's case, in person, or by attorney, or both, subjects the person to the inherent power of the court to control its proceedings and to issue a stay in proceedings. *Bloomfield v. Liggett & Myers, Inc.*, 230 Ga. 484, 198 S.E.2d 144 (1973).

Broad discretion of trial court to regulate conduct must not result in deprivation of right. — This paragraph is plainly subject to the inherent power of the court to prescribe the manner in which the business of the court shall be conducted and to preserve the order and decorum of the trial to the furtherance of justice. The discretion of the trial judge in regulating the conduct of counsel, parties, and witnesses, and in prescribing the manner in which the business shall be conducted, is broad and is ample to enable the judge in any case to effect the purposes for which is inherently the judge's; but the judge's discretion is not unlimited, for it must not be abused and it may not be exercised in such a way as to involve a deprivation of right. *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948); *Jackson v. State*, 149 Ga. App. 496, 254 S.E.2d 739 (1979), but see *Vick v. State*, 237 Ga. App. 762, 516 S.E.2d 815 (1999); *Moody v. State*, 153 Ga. App. 866, 267 S.E.2d 291 (1980); *Jackson v. State*, 154 Ga. App. 367, 268 S.E.2d 418 (1980).

Prisoner not denied right to prosecute cause in habeas corpus court. — Ga. L. 1961, p. 835, § 3 (see now O.C.G.A. § 9-14-42) is not unconstitutional since it does not violate this paragraph because a prisoner is not denied the prisoner's right to prosecute the cause in the habeas corpus court. *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

Right to be Present

Every person charged with offense has right to be present during every stage of trial. *Frank v. State*, 142 Ga. 741, 83 S.E. 645, 1915D L.R.A. 817, writ of error denied, 235 U.S. 694, 35 S. Ct. 208, 59 L. Ed. 429 (1914); *Palmer v. State*, 155 Ga. App. 368, 271 S.E.2d 24 (1980).

Although the state's counsel had been arguing the case only about two minutes and it did not appear that any waiver of the defendant's presence, express or otherwise, had been made either by the de-

Right to be Present (Cont'd)

defendant or the defendant's counsel, the court could not say that the defendant's constitutional right was not violated. *Pierce v. State*, 47 Ga. App. 830, 171 S.E. 731 (1933).

The accused and the accused's counsel have the right to be present at every stage of the proceedings and personally see and know what is being done in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with good law and good practice. *Wilson v. State*, 212 Ga. 73, 90 S.E.2d 557 (1955).

Although defendants who were tried together were not present when the trial court discussed the issue of whether it would dismiss a charge of aggravated assault against one of them, both defendants acquiesced in the proceeding when their counsel did not object and they thereafter remained silent when the subject was brought to their attention, and the Georgia Supreme Court rejected their claim that their convictions for malice murder and other crimes had to be reversed because their right to be present during critical stages of trial was abridged. *Jackson v. State*, 278 Ga. 235, 599 S.E.2d 129 (2004).

Right to be present during hearings. — Defendant had the right to be present at a hearing in the separate trial of the defendant's coindictor at which the court addressed issues concerning a possible conflict of interest caused by the fact that the defendant and the defendant's coindictor had retained the same attorney. *Rice v. State*, 226 Ga. App. 770, 487 S.E.2d 517 (1997).

Right to be present during sentencing hearing. — Because both the defendant and defense counsel were present for the entire sentencing hearing when the information relied upon by the court for its sentencing decision was admitted, and the defendant had the opportunity to present evidence and to object, but did neither, the defendant's constitutional right to be present under Ga. Const. 1983,

Art. I, Sec. I, Para. XII was not violated. *Small v. State*, 285 Ga. App. 445, 646 S.E.2d 292 (2007), cert. dismissed, 2008 Ga. LEXIS 876 (Ga. 2008).

No right to be present at sidebar conference. — Defendant's right to be present was not violated due to the defendant's absence from sidebar conferences. *Smith v. State*, 319 Ga. App. 590, 737 S.E.2d 700 (2013).

In-chambers hearing. — Defendant's right to be present at trial under Ga. Const. 1983, Art. I, Sec. I, Para. XII was violated when the trial court questioned a juror in chambers without defense counsel or the prosecutor present, dismissed the juror, and replaced the juror with an alternate; defendant did not acquiesce in the illegal proceedings and repudiated counsel's silent waiver of the rights at the first opportunity, the hearing on the motion for a new trial, when defendant was represented by new counsel. *Sammons v. State*, 279 Ga. 386, 612 S.E.2d 785 (2005).

No right to be present at discussion of whether character in issue. — Discussion between the trial court and counsel over whether the defendant's character had been placed in issue by questions from the defense regarding the defendant's service in Vietnam and the defendant's work with children was not a critical stage of the proceeding at which the defendant had the right to be present. Defendant was present when defense counsel made a motion to strike the character evidence and when the judge ruled on the motion. *Lyde v. State*, 311 Ga. App. 512, 716 S.E.2d 572 (2011).

Right to be present inapplicable to voluntary absence of accused. — Principle that a person accused of a crime has the right to be present at all stages of the trial is not applicable when the accused is voluntarily absent on bail. *Wilson v. State*, 212 Ga. 73, 90 S.E.2d 557 (1955).

Voluntary absence from trial. — When the defendant was out on bail and was voluntarily absent from the proceedings, the defendant waived the defendant's confrontation rights and the defendant's right to be present during the trial. *Estep v. State*, 238 Ga. App. 170, 518 S.E.2d 176 (1999).

Right of accused to be present at all stages of trial ranks among defen-

dant's most substantial rights, and it ranks next in importance to, if not on a par with, the defendant's right to be presumed to be innocent until proven guilty. *Pierce v. State*, 47 Ga. App. 830, 171 S.E. 731 (1933).

Trial court erred in removing defendants from the courtroom during the testimony, out of the presence of the jury, or rebuttal witnesses for the state. *Perry v. State*, 216 Ga. App. 749, 456 S.E.2d 89 (1995).

Right to be present cannot be waived by attorney except by express authority of defendant. *Palmer v. State*, 155 Ga. App. 368, 271 S.E.2d 24 (1980).

Presence of defendant during voir dire of jury. — Defendant's absence during the voir dire of prospective jurors violated defendant's right to be present at trial and required reversal. *Goodroe v. State*, 224 Ga. App. 378, 480 S.E.2d 378 (1997), overruling *Smith v. State*, 182 Ga. App. 623, 356 S.E.2d 702 (1987).

Defendant was entitled to a hearing to determine whether the defendant knowingly acquiesced in the waiver by defense counsel of defendant's presence during the voir dire of certain jurors conducted in the judge's chambers. *Russell v. State*, 230 Ga. App. 546, 497 S.E.2d 36 (1998).

Objection to absence during voir dire waived. — Defendant waived error by the trial judge in questioning and dismissing a potential juror out of defendant's presence since the defendant was advised after the judge returned to the courtroom that the juror had been excused, yet made no objection until further voir dire was completed and the jury was selected and sworn. *Harmon v. State*, 224 Ga. App. 890, 482 S.E.2d 730 (1997).

Right to testify as witness is personal right and is an adjunct or portion of the fundamental concept of freedom and liberty protected by Ga. Const. 1945, Art. I, Sec. I, Para. III (see now Ga. Const. 1983, Art. I, Sec. I, Para. I) and Ga. Const. 1945, Art. I, Sec. I, Para. IX (see now Ga. Const. 1983, Art. I, Sec. I, Para. XII). *Carter v. Seaboard Coast Line R.R.*, 392 F. Supp. 494 (S.D. Ga. 1974).

Presence of counsel is no substitute for that of man on trial; both should be

present. *Pierce v. State*, 47 Ga. App. 830, 171 S.E. 731 (1933).

Defendant in this state may personally waive the right to be present or defense counsel may waive this right for the defendant when the waiver is made in the defendant's presence. *Wilson v. State*, 212 Ga. 73, 90 S.E.2d 557 (1955).

Waiver of right. — Defendant waived the right to be present at trial by choosing not to attend the first day of the sentencing phase after a medical expert examined the defendant, treated the defendant, and pronounced the defendant fit to proceed. *Dawson v. State*, 283 Ga. 315, 658 S.E.2d 755 (2008), cert. denied, 129 S. Ct. 169, 172 L.Ed.2d 122 (2008).

Defendant waived the right to be present during the bench conferences discussing the dismissal of a juror and the ultimate removal of the juror by failing to voice any objection regarding the defendant's absence from that portion of the trial until the proceedings before the Supreme Court of Georgia. *Zamora v. State*, 291 Ga. 512, 731 S.E.2d 658 (2012).

Requirements for effective waiver of right. — The right in a criminal trial to be present at all stages of the trial is an important right of the defendant, guaranteed by our Constitution, and in order for the waiver of counsel to be binding on the defendant, it must be made in the defendant's presence or by the defendant's express authority, or be subsequently acquiesced in by the defendant. *Wilson v. State*, 212 Ga. 73, 90 S.E.2d 557 (1955).

Deprivation of right to be present entitles defendant to new trial. — When the defendant was deprived of the right to be present at every stage and proceeding of the defendant's trial, the defendant is entitled to a new trial. *Palmer v. State*, 155 Ga. App. 368, 271 S.E.2d 24 (1980).

Because no evidence supported a finding that the defendants were aware of their right to be present in chambers during voir dire and jury selection, their convictions would be reversed and they would be granted a new trial. *Russell v. State*, 236 Ga. App. 645, 512 S.E.2d 913 (1999).

Because the defendant had a right to be present in the courtroom during voir dire

Right to be Present (Cont'd)

of the jury, regarding some suspicious telephone calls that some had been receiving, in order to assist trial counsel in effectively examining the jurors regarding their abilities to be fair and impartial, and the defendant did not waive said right, the trial court erred in denying the defendant's motion for a new trial. *Vaughn v. State*, 281 Ga. App. 475, 636 S.E.2d 163 (2006).

Defendant was entitled to a reversal of the defendant's convictions for improper lane change, serious injury by vehicle while driving under the influence, and misdemeanor obstruction of an officer as the trial judge violated the defendant's right to be present at all stages of the proceedings by responding to a jury inquiry in writing that the jury should continue to deliberate and try to reach an unanimous verdict without contacting defense counsel and defendant. Given the necessary considerations and significant ramifications, instructions to the deliberating jury concerning its reported deadlocked status on several counts constituted a substantive communication at a critical stage in the defendant's criminal prosecution. *Wells v. State*, 297 Ga. App. 153, 676 S.E.2d 821 (2009).

Motion for new trial should have been granted based upon defendant's absence from courtroom. — When a statement by counsel that counsel would waive the right of the defendant to be present during the argument of the solicitor general (now district attorney), up to that time, was not in the presence of the defendant, was not authorized by the defendant, and was made during the defendant's involuntary absence from the courtroom, and this alleged waiver of the defendant's presence by defense counsel was repudiated by the defendant at the first opportunity, upon information received by the defendant subsequently to the verdict, it was error to overrule the ground of the motion for new trial based upon the defendant's involuntary absence from the courtroom during the part of the argument of the solicitor general (now district attorney). *Wilson v. State*, 212 Ga. 73, 90 S.E.2d 557 (1955).

Conflict with ruling that counsel waived irregularity of receiving verdict in involuntary absence of defendant. — Statement in *Morris v. State*, 177 Ga. 365, 369, 170 S.E. 217 (1933), indicating that it was the opinion of the court that the silence of the defendant's counsel would waive the irregularity of receiving a verdict in the involuntary absence of the defendant, is in direct conflict with rulings in older, full-bench decisions and the case was decided on other points. *Wilson v. State*, 212 Ga. 73, 90 S.E.2d 557 (1955).

Reversible error for jury to view truck in absence of defendant. — After the trial court granted a request that the jury be allowed to view a truck, and directed the bailiff to take the jury to see the truck, but permitted no lawyers, no witnesses, and no parties to go with the jury, despite the request of defense counsel to go with the jury, this was reversible error. *Palmer v. State*, 155 Ga. App. 368, 271 S.E.2d 24 (1980).

Harmless error for judge's contact with jury. — Even if the defendant's right to be present at all stages of a trial under Ga. Const. 1983, Art. I, Sec. I, Para. XII was violated, any error was harmless in a situation in which the trial judge, with the approval of defense counsel, entered the jury room alone to respond to the jury's note, was told by the jury that it had reached a verdict but was unsure if it was proper, told the jury to return the verdict in the courtroom, and left the jury room. *Grimes v. State*, 280 Ga. App. 65, 633 S.E.2d 401 (2006).

Prisoner should be present for hearing for resentencing. — In a hearing for resentencing when the prisoner would have substantial rights, the prisoner should be allowed to be present in the trial court for resentencing. *Williams v. Ricketts*, 234 Ga. 716, 217 S.E.2d 292 (1975).

Involuntary absence of defendant does not affect date set for execution of sentence. — The order of a trial judge fixing a new date for the execution of the sentence after the original date has passed is not void because the defendant is involuntarily absent and has not waived or authorized anyone else to waive the defendant's right to be present at the

time and place of resentencing, and the passage of such order is not violative of the plaintiff's rights under the several provisions of the state and federal Constitutions. *McBurnett v. Balkcom*, 207 Ga. 452, 62 S.E.2d 180 (1950).

Proceeding in absence of accused does not always require new trial. — In some instances, because of the particular facts of the case, some proceedings in the trial of an accused in the accused's absence will not require the grant of a new trial. *Wanzer v. State*, 232 Ga. 523, 207 S.E.2d 466 (1974).

Although all persons accused of a crime in Georgia are guaranteed the right to be present at all stages of trial by Ga. Const. 1983, Art. I, Sec. I, Para. XII, and thus, the defendants on trial must be present when the court takes any action materially affecting their case, responding to a jury's request to see a transcript of testimony was held not to be prejudicial to the defendant, even though it was made outside the presence of the defendant, because the trial court simply denied the request in writing and told the jury to rely on their recollection of the evidence. *Buckner v. State*, 253 Ga. App. 294, 558 S.E.2d 823 (2002).

Because the defendant's right to be present at trial did not extend to any and all communications between the trial courts and potential jurors, the defendant had no right to be present for an out of court conversation between the trial judge and one of the jurors from the venire panel held while the judge was fulfilling the administrative duties as the presiding judge for the circuit. Thus, the defendant was not entitled to a new trial as a result. *Payne v. State*, 290 Ga. App. 589, 660 S.E.2d 405 (2008).

Trial court did not err by proceeding with the third day of trial in the defendant's absence because there was evidence that supported a finding that the defendant knowingly and voluntarily chose to be absent from the courtroom as jail personnel asked the defendant if the defendant wanted to go to court and the defendant responded in the negative. *LaGon v. State*, 334 Ga. App. 14, 778 S.E.2d 32 (2015).

Trial court committed no error by begin-

ning the defendant's trial in the defendant's absence, given that the defendant was in custody and was informed of the right to be present and that the trial would proceed without the defendant, but the defendant made clear that the defendant would not enter the courtroom without a fight. *LaGon v. State*, 334 Ga. App. 14, 778 S.E.2d 32 (2015).

Provision for appearance by brief meets constitutional requirement of this paragraph. *Finley v. Thompson*, 100 Ga. App. 508, 112 S.E.2d 166 (1959).

Court's sua sponte declaration of a mistrial in the absence of defendant and defense counsel did not deprive the defendant of the defendant's right to be present when all events upon which the court would rule had occurred in the defendant's presence and only legal consideration, not further proceeding, was called for. *Bishop v. State*, 176 Ga. App. 357, 335 S.E.2d 742 (1985).

Communication with jury outside presence of defendant. — Trial court erred in communicating with the jury outside the presence of the appellant and appellant's counsel when the court denied the jury's request to see the transcript of an eyewitness' statements to police in writing without notifying or consulting either side. *Burtts v. State*, 269 Ga. 402, 499 S.E.2d 326 (1998).

Trial court committed reversible error by having a colloquy with a juror in the judge's chambers in defendant's absence and, since an attempted waiver by counsel was made without the knowledge or consent of defendant, it was not a valid waiver of defendant's right to be present at all stages of the trial proceedings. *Pennie v. State*, 271 Ga. 419, 520 S.E.2d 448 (1999).

Defendant failed to rebut the trial court's findings that no communication between the trial court and the jury regarding the return of a verdict by the jury occurred outside of the presence of defendant and the counsel and that the trial court did not in the case, or in any other case, call for the return of a verdict until the parties and their counsel were present in the courtroom; it could be inferred from the notation in the transcript cited by defendant only that the court reporter

Right to be Present (Cont'd)

was not present, not the whereabouts of defendant and the counsel. *Hall v. State*, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

Defendants' rights to be present under Ga. Const. 1983, Art. I, Sec. I, Para. XII were violated because a trial court excused a juror during ex parte proceedings in the defendants' absence and without the defendants' knowledge or consent, and the defendants' absence was neither consented to nor waived; although neither counsel objected to the trial court's action, such inaction on the part of counsel did not constitute a waiver for the clients, and since the defendants were not informed of the ex parte excusal of the juror, the defendants' could not knowingly acquiesce to the waiver on the part of defense counsel. *Ward v. State*, 288 Ga. 641, 706 S.E.2d 430 (2011).

Bench conference. — Bench conference which took place when a bailiff informed the trial court that a juror thought that the juror might know the victim's parents, was not a critical stage of the proceedings at which the defendant had a right to be present since the juror was not actually present during this brief colloquy, since the judge asked the attorneys if they wanted to question this juror further and since, when defense counsel indicated that the counsel wanted to ask the juror some more questions, the conference ended. *Bennett v. State*, 279 Ga. App. 371, 631 S.E.2d 402 (2006).

Because, at the bench conference, the trial court resolved a purely legal question of whether a first-offender felon was qualified to serve on a jury, the defendant had no constitutional right to be present. *Pack v. State*, 335 Ga. App. 783, 783 S.E.2d 146 (2016).

Harmless error. — After a lunch break during the guilt phase of the trial, the trial court made a few remarks to the jury while awaiting the return of the defendant, and the trial judge later restated the judge's comments, as well as the judge could remember them, into the record, relating that the judge had told the jury that the trial would be slightly delayed because the defendant had eaten late and had congratulated one of the jurors for

having been elected to the board of education, there was no violation of O.C.G.A. § 5-6-41 or O.C.G.A. § 17-8-5, and any possible constitutional error relating to the defendant's right to be present during all stages of the defendant's trial was clearly harmless beyond a reasonable doubt. *Westbrook v. State*, 256 Ga. 776, 353 S.E.2d 504 (1987).

When, in a criminal trial, the trial court responded to a jury question during deliberations outside of the presence of defendant or defendant's counsel, this was an error, but the error did not require the reversal of defendant's conviction because it was not shown that anything about the communication was prejudicial or that the nature of the communication hastened the verdict finding defendant guilty or caused a juror to yield, as each juror affirmed that the juror arrived at the verdict freely and voluntarily, that the verdict remained the juror's own, and the trial court instructed the jurors to consult with each other during deliberations, but not to surrender an honest opinion to reach a verdict, so there was no reasonable probability that the trial court's erroneous communication contributed to the jury's verdict. *Barnett v. State*, 276 Ga. App. 238, 623 S.E.2d 136 (2005).

Because the trial transcript failed to support the defendant's claim that the trial court erroneously ordered the defendant be excluded from the courtroom during a critical stage of the proceeding, and in front of the jury, and given what transpired during the brief period that the defendant was absent from the courtroom, no due process violation occurred. *Arnold v. State*, 284 Ga. App. 598, 645 S.E.2d 68 (2007).

No ineffective assistance of counsel shown by waiver of arraignment. — Waiver of arraignment provides a basis for a claim of ineffective assistance of counsel only if the defendant can show the defendant was unaware of the charges against the defendant. *Biggs v. State*, 281 Ga. 627, 642 S.E.2d 74 (2007).

In the absence of any claim or evidence that the defendant was not aware of the charges against the defendant, the defendant failed to show that defense counsel's performance was deficient; therefore, the

defendant's claim that the waiver of arraignment violated the defendant's right to be present at all critical stages of the proceedings against the defendant was rejected on appeal. *Biggs v. State*, 281 Ga. 627, 642 S.E.2d 74 (2007).

Failure to consult before responding to deadlocked jury. — A defendant's right to be present under Ga. Const. 1983, Art. I, Sec. I, Para. XII was not violated by the trial court's failure to consult with the defendant and counsel prior to responding to the jury's communication that the jury was deadlocked. *Lowery v. State*, 282 Ga. 68, 646 S.E.2d 67, cert. denied, 552 U.S. 999, 128 S. Ct. 508, 169 L. Ed. 2d 355 (2007).

No right to be present at charge conference during jury deliberations. — There was no violation of the defendant's right to be present at all proceedings under Ga. Const. 1983, Art. I, Sec. I,

Para. XII when the defendant was excluded from a charge conference that occurred during jury deliberations as that was not a stage of a criminal proceeding that invoked the right to be present. *Milligan v. State*, 307 Ga. App. 1, 703 S.E.2d 1 (2010).

Right to be present regardless of whether the party's physical or mental condition may evoke sympathy. — Party may not be excluded from the party's own trial simply because the party's physical and mental condition may evoke sympathy. Instead, trial courts can and should address the risk of undue sympathy using jury instructions and other common and time-tested means of ensuring that both parties receive a fair trial, without infringing on the parties' right to be present. *Kesterson v. Jarrett*, 291 Ga. 380, 728 S.E.2d 557 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Right of self-representation before probate court. — Since a court of ordinary (now probate court) is a court of this

state, a person has a constitutional right to self representation therein. 1973 Op. Att'y Gen. No. U73-66.

RESEARCH REFERENCES

Am. Jur. 2d. — 16B Am. Jur. 2d, Constitutional Law, § 667 et seq.

C.J.S. — 16B C.J.S., Constitutional Law, §§ 1207, 1372 et seq. 16C C.J.S., Constitutional Law, § 1840 et seq. 16D C.J.S., Constitutional Law, § 1912 et seq.

ALR. — Validity of contract by attorney to prosecute or assist in prosecution of criminal case on contingent fee, 11 ALR 1192.

Removal or dismissal of public officers or employees for bringing or defending an action affecting personal rights or liabilities, 74 ALR 500.

Punishment of civil contempt in other than divorce cases by striking pleading or entering default judgment or dismissal against contemner, 14 ALR2d 580.

Constitutionality of arbitration statutes, 55 ALR2d 432.

Power to try, in his absence, one charged with misdemeanor, 68 ALR2d 638.

Counsel's right, in consulting with ac-

cused as client, to be accompanied by psychiatrist, psychologist, hypnotist, or similar practitioner, 72 ALR2d 1120.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

Right to counsel in insanity or incompetency adjudication proceedings, 87 ALR2d 950.

When criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 ALR3d 462.

What constitutes "custodial interrogation" within role of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation, 31 ALR3d 565.

Censorship of convicted prisoners' "legal" mail, 47 ALR3d 1150.

Censorship of convicted prisoners' "non-legal" mail, 47 ALR3d 1192.

Right of accused to have press or other media representatives excluded from criminal trial, 49 ALR3d 1007.

Right of indigent to proceed in marital action without payment of costs, 52 ALR3d 844.

Right to counsel in contempt proceedings, 52 ALR3d 1002.

Power of private citizen to institute criminal proceedings without authorization or approval by prosecuting attorney, 66 ALR3d 732.

Appointment of counsel for indigent husband or wife in action for divorce or separation, 85 ALR3d 983.

Propriety and prejudicial effect of gagging, shackling, or otherwise physically restraining accused during course of state criminal trial, 90 ALR3d 17.

Religious belief, affiliation, or prejudice of prospective jurors as proper subject of inquiry or grounds for challenge on voir dire, 95 ALR3d 172.

Adequacy of defense counsel's representation of criminal client regarding argument, 6 ALR4th 16.

Existence and extent of right of litigant in civil case, or of criminal defendant, to represent himself before state appellate courts, 24 ALR4th 430.

Physical condition of plaintiff in personal injury action as affecting right to be present at trial, 27 ALR4th 583.

Application of statute denying access to courts or invalidating contracts where corporation fails to comply with regulatory statute as affected by compliance after commencement of action, 23 ALR5th 744.

Hospital as within constitutional provision forbidding unreasonable searches and seizures, 28 ALR6th 245.

Application in state narcotics cases of collective knowledge doctrine or fellow officers' rule under Fourth Amendment — marijuana cases, 35 ALR6th 497.

Validity of search of cruise ship cabin, 43 ALR6th 355.

Validity of search and reasonable expectation of privacy as affected by no trespassing or similar signage, 45 ALR6th 643.

Construction and application of "automatic companion rule" or person's "mere propinquity" to arrestee to determine propriety of search of person for weapons or firearms, 47 ALR6th 423.

Construction and application of consent-once-removed doctrine, permitting warrantless entry into residence by law enforcement officers for purposes of effectuating arrest or search where confidential informant or undercover officer enters with consent and observes criminal activity or contraband in plain view, 50 ALR6th 1.

Sufficiency of showing to support no-knock search warrant — cases decided after *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 l. Ed. 2d 615 (1997), 50 ALR6th 455.

Construction and application of Supreme Court's holding in *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 47 A.L.R. Fed. 2d 657 (2009), that police may search vehicle incident to recent occupant's arrest only if arrestee is within reaching distance of passenger compartment at time of search or it is reasonable to believe vehicle contains evidence of offense — substantive traffic offenses, 55 ALR6th 1.

Sufficiency of information provided by anonymous informant to provide probable cause for federal search warrant — cases decided after *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), 178 ALR Fed. 487.

Paragraph XIII. Searches, seizures, and warrants.

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.

1976 Constitution. — Art. I, Sec. I, Para. X.

Cross references. — Unreasonable

searches and seizures, U.S. Const., amend. IV and § 1-2-6. Searches without a warrant: livestock, § 4-4-62; new mobile

homes in transit, § 8-2-140; petroleum products, § 10-1-148; antifreeze businesses, § 10-1-204; hazardous waste management, § 12-8-70; enforcing air quality laws, § 12-9-10; criminal searches, § 17-5-1; fire safety inspections, § 25-2-22; food establishments, § 26-2-36; meat processors, § 26-2-81; soft drink businesses, § 26-2-355; drug treatment facilities, § 26-5-13; commercial hunting and trapping operations, § 27-1-23; ambulance services, § 31-11-9; clinical laboratories, § 31-22-8; insurance records, § 33-22-7; used motor vehicle parts businesses, § 43-48-16; blood samples, § 45-16-46. Inadmissibility in evidence of improperly obtained information, §§ 15-11-31, 16-11-67, and 16-11-68. Prohibited intrusions on privacy, §§ 16-11-62 and 16-11-68. Private surveillance permitted under authority of warrant, § 16-11-64. Emergency situation; application for an investigative warrant, § 16-11-64.3. Procedures for obtaining warrants: administrative inspections, § 16-13-46; arrest warrants, §§ 17-4-40 and 17-4-41; criminal searches, § 17-5-20 et seq. Arrest without warrant: police arrests, § 17-4-20; citizen's arrest, § 17-4-60; fugitive arrest, § 17-13-34; arrest by the militia, § 38-2-342.

Law reviews. — For article, "Personal Rights, Property Rights and Due Process: A Comparison of Constitutional Protection in the Georgia Supreme Court and the United States Supreme Court," see 9 Mercer L. Rev. 253 (1958). For article discussing past and present trends in the admissibility of illegally obtained evi-

dence in Georgia criminal trials and advocating a state exclusionary rule, see 11 Ga. L. Rev. 105 (1976). For article surveying judicial developments in Georgia Criminal Law, see 31 Mercer L. Rev. 59 (1979). For annual survey of constitutional law, see 40 Mercer L. Rev. 117 (1988). For annual survey of criminal law, see 56 Mercer L. Rev. 153 (2004). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For article, "Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law," see 57 Mercer L. Rev. 511 (2006). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006).

For note, "Third Party Consent to Search and Seizure: A Reexamination," see 20 J. of Pub. L. 313 (1971). For note on airport searches of drug couriers, see 33 Mercer L. Rev. 433 (1981). For note, "Padgett v. Donald: Why Not So Special," see 57 Mercer L. Rev. 673 (2006). For note, "The Online Zoom Lens: Why Internet Street-Level Mapping Technologies Demand Reconsideration of the Modern-Day Tort Notion of 'Public Privacy'," see 43 Ga. L. Rev. 575 (2009).

For comment criticizing *McIntyre v. State*, 190 Ga. 872, 11 S.E.2d 5 (1940), permitting admission of illegally seized evidence, see 3 Ga. B.J. 53 (1941). For comment on *Johnson v. State*, 111 Ga. App. 298, 141 S.E.2d 597 (1965), see 17 Mercer L. Rev. 479 (1966). For comment on *Talbert v. State*, 224 Ga. 291, 161 S.E.2d 279 (1968), see 5 Ga. St. B.J. 256 (1968). For comment on warrantless search of defendant's home, see 41 Emory L.J. 321 (1992).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION	
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EVIDENCE

General Consideration

Implied consent provision unconstitutional. — Implied consent provision in O.C.G.A. § 40-5-55(a) is unconstitutional as violative of Ga. Const. 1983, Art. I, Sec. I, Para. XIII, and the Fourth and Fourteenth Amendments of the United States Constitution because it authorizes a search and seizure, chemical testing of a suspect's blood, without probable cause that the suspect had been driving while impaired when the suspect was involved in an accident involving serious injuries or fatalities. *Cooper v. State*, 277 Ga. 282, 587 S.E.2d 605 (2003).

Right of privacy is derived from natural law and embraced within the absolute right of personal security and liberty. The unlawful entry by an officer of the home, if it is such as to constitute an invasion of the right of privacy of the wife of the head of the family and results in fright and shock to her, is such a willful and intentional tort as to give her cause of action. *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951).

State must be able to point to facts which warrant intrusion on right of privacy. — The mere fact that an officer feels it is unlikely that an individual has regular business where the individual is found is not sufficient alone to authorize an intrusion into an individual's right of privacy. The state must be able to point to specific and articulable facts which, together with rational inferences drawn therefrom, reasonably warrant an intrusion. *Howard v. State*, 150 Ga. App. 847, 258 S.E.2d 652 (1979).

Public interest in privacy subordinated to public interest in law enforcement. — When the police have reasonable cause to believe that public toilet stalls are being used in the commission of crime, and when they confine their activities to the times when such crimes are most likely to occur, they are entitled to

institute clandestine surveillance, even though they do not have probable cause to believe that the particular persons whom they may thus catch in flagrante delicto have committed or will commit the crime. The public interest in its privacy must, to that extent, be subordinated to the public interest in law enforcement. *Mitchell v. State*, 120 Ga. App. 447, 170 S.E.2d 765 (1969).

Commercial sexual activity. — The right of privacy conferred by the Georgia constitution, like that in the federal constitution, does not extend to commercial sexual activity. *Morrison v. State*, 272 Ga. 129, 526 S.E.2d 336 (2000).

Police agents' listening to conversations outside apartment door in public hallway to ascertain probable cause is proper. — Police agents' entry into a public hallway and listening to conversations inside an apartment by placing their ears to the front door was proper to ascertain if probable cause existed for the issuance of a search warrant. *Cox v. State*, 160 Ga. App. 199, 286 S.E.2d 482 (1981).

Looking through window unreasonable. — Police officer unreasonably invaded defendants' privacy by looking through their window before knocking on their door when executing an arrest warrant for a third party since: (1) there was insufficient evidence that the third party lived with defendants; (2) even if the police were authorized to enter defendants' home, looking through the window was unreasonable as the officer did not reach the window by traveling the route any visitor would travel to reach the front door; and (3) the officer did not have articulable facts which would warrant a reasonably prudent officer to believe that the third party was a danger. A police officer must have a reasonable belief that forewarning would jeopardize the officer's safety before actions, such as peering through a window, would be justified.

State v. Schwartz, 261 Ga. App. 742, 583 S.E.2d 573 (2003).

Use of “narcotics” dog authorized. — Use of a “narcotics” dog, specially trained to detect marijuana and narcotics, is an authorized investigative technique. Lockhart v. State, 166 Ga. App. 555, 305 S.E.2d 22 (1983).

Use of choke-hold unauthorized in obtaining evidence. — There is nothing in the text, history, or structure of the Fourth Amendment, or for that matter in Ga. Const. 1983, Art. I, Sec. I, Para. XIII, remotely suggesting that the right of the people to be free from unreasonable seizures also includes a concomitant privilege for state actors to use certain neck restraints or force (however reasonable) against the very people the right protects. Therefore, the police officer was properly suspended for using a choke-hold on a handcuffed suspect in an attempt to prevent the suspect from swallowing narcotics in violation of department rules. Mercure v. City of Atlanta Civil Service Board, 327 Ga. App. 840, 761 S.E.2d 393 (2014).

Standard of review. — Because a trial court credited a police officer’s testimony and decided the defendant’s suppression motion on an issue of law rather than on any issue of conflicting evidence, the Court of Appeals correctly used the de novo standard of review. Silva v. State, 278 Ga. 506, 604 S.E.2d 171 (2004).

When, in a hearing on a motion to suppress filed in a case in which a defendant was charged with driving under the influence of alcohol to the extent it was less safe for the defendant to drive, when the trial court found there was no evidence that the defendant was an impaired or “less safe” driver, the court’s ruling involved a mixed question of fact and law, and a de novo standard of review did not apply, and, as there was some evidence supporting the trial court’s factual findings made in granting the defendant’s motion to suppress, that ruling would not be disturbed. State v. Sanders, 274 Ga. App. 393, 617 S.E.2d 633 (2005).

Excessive force claim. — Sheriff’s deputies were entitled to summary judgment on a claim of excessive force when the plaintiff alleged that because the ar-

rest was unlawful, any force used was unlawful, because the plaintiff did not present a discrete excessive force claim, and the claim failed as a matter of law. Bashir v. Rockdale County, 445 F.3d 1323 (11th Cir. 2006).

Claim of error raised for first time on appeal not reviewed. — Because the defendant on appeal abandoned the “second-tier” argument raised at the suppression hearing, and instead argued that the evidence should have been suppressed because the state failed to show that the officer was in the lawful discharge of any official duty during questioning, the latter argument was not addressed, as it was raised for the first time on appeal. Harper v. State, 285 Ga. App. 261, 645 S.E.2d 741 (2007).

Cited in Huff v. State, 82 Ga. App. 545, 61 S.E.2d 787 (1950); Green v. State, 250 Ga. 610, 299 S.E.2d 544 (1983); State v. Roberson, 165 Ga. App. 727, 302 S.E.2d 591 (1983); Whittington v. State, 165 Ga. App. 763, 302 S.E.2d 617 (1983); Mosley v. State, 180 Ga. App. 30, 348 S.E.2d 555 (1986); Midura v. State, 183 Ga. App. 523, 359 S.E.2d 416 (1987); Ford v. State, 183 Ga. App. 566, 359 S.E.2d 435 (1987); Newsome v. State, 189 Ga. App. 329, 386 S.E.2d 887 (1989); Cole v. State, 254 Ga. App. 424, 562 S.E.2d 720 (2002).

Fourth Amendment Rights

This paragraph is similar to U.S. Const., amend. 4, and applies to all departments of government. Smoot v. State, 160 Ga. 744, 128 S.E. 909, 41 A.L.R. 1533 (1925).

Federal good-faith exception inapplicable. — The good-faith exception to the exclusionary rule enunciated by the U.S. Supreme Court in United States v. Leon, 468 U.S. 897 (1984), is not applicable in Georgia in light of the legislatively-mandated exclusionary rule found in O.C.G.A. § 17-5-30. Gary v. State, 262 Ga. 573, 422 S.E.2d 426 (1992).

There is nothing inherent in “papers” which immunizes them from searches otherwise proper under the Fourth Amendment. Mooney v. State, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct.

Fourth Amendment Rights (Cont'd)

472, 62 L. Ed. 2d 391 (1979).

Searches by private persons not protected against. — Fourth Amendment, though textually not so limited, actually afforded protection only against unreasonable searches and seizures made by governmental officers, so however unreasonable a search by a private person may be, absent participation by governmental agents, the Fourth Amendment is totally uninvolved. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Upon a de novo review of the trial court's application of the law to the facts, because a warrantless search of the defendant's gym locker was conducted by private citizens, and not by law enforcement, those acts did not implicate the Fourth Amendment; hence, the trial court did not err in denying the defendant's motion to suppress the evidence seized as a result of that search. *Hobbs v. State*, 272 Ga. App. 148, 611 S.E.2d 775 (2005).

Consensual and voluntary encounter. — Because the defendant's encounters with the police remained consensual and voluntary, and the defendant consented to a continued detention for further questioning, a motion to suppress the evidence seized based on an illegal detention by the police was properly denied. *Smith v. State*, 281 Ga. 185, 640 S.E.2d 1 (2006).

Legitimate expectation of privacy controls claims of Fourth Amendment protection. — The capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. *Cuevas v. State*, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980); *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Right to be free from police intrusion. — In the absence of evidence to the contrary, there is a presumption that a co-occupant has waived the co-occupant's right of privacy as to other co-occupants when consenting to the search of a prem-

ises; but, when police are confronted with an unequivocal assertion of that co-occupant's Fourth Amendment right, such presumption cannot stand as the right involved is the right to be free from police intrusion, not the right to invite police into one's home. *Randolph v. State*, 264 Ga. App. 396, 590 S.E.2d 834 (2003).

With regard to the defendant being charged with driving under the influence based on a report received from an off-duty officer, a trial court erred by denying the defendant's motion to suppress because the arresting officer's entry into the defendant's garage was not authorized since the threat to public safety had ended and the entry was not supported by probable cause or exigent circumstances. *Corey v. State*, 320 Ga. App. 350, 739 S.E.2d 790 (2013).

Omission of county name in warrant had no effect on Fourth Amendment rights. — When a copy of a warrant which omits the name of the county which is used to be directed to the executing officers, and since "the affidavit" included the name of the county along with the other description, the "omission" of the name of the county does not affect the substantial Fourth Amendment rights. *Cuevas v. State*, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980).

Consideration of property concepts along with totality of circumstances. — Although property concepts are no longer controlling in application of Fourth Amendment rights, property concepts should be considered in conjunction with the totality of all the circumstances surrounding claimed violations of Fourth Amendment rights. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Evidence seized as result of illegal police activity. — Because the State of Georgia failed to carry the state's burden of establishing exigent circumstances existed to justify the entry of the police into defendants' trailer to arrest persons for underage drinking, the trial court properly granted defendants' motion to suppress the evidence seized from the unlawful entry. *State v. Ealum*, 283 Ga. App. 799, 643 S.E.2d 262 (2007).

While non-custodial and custodial statements were properly admitted, as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

Trial court did not err in granting the defendant's motion to suppress statements, drugs, paraphernalia, and cash the police found after searching the defendant's home as fruit of the poisonous tree because although the police had authority to enter the house for the purpose of apprehending the defendant, the subsequent reentry by the police was illegal since an officer reentered the house without a warrant, valid consent, or exigent circumstances; both before and at the time of the defendant's arrest, the defendant told the police not to enter the house, and it could not be assumed that the victim's need for assistance justified the officer's reentry because the exigent circumstances authorizing entry for the limited purpose of effecting the defendant's arrest had expired. *State v. Driggers*, 306 Ga. App. 849, 702 S.E.2d 925 (2010).

No Fourth Amendment violation when evidence discovered through reasonable search and inventory. — When police officers acting in good faith and while carrying out an inventory procedure without investigative intent, discovered and read "death note" contained in the defendant's open ended shopping bag, the search was deemed reasonable and, therefore, was not violative of the defendant's Fourth Amendment rights. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct. 472, 62 L. Ed. 2d 391 (1979).

Restraint reasonable. — Neck restraint a narcotics investigator used in an effort to have the defendant spit out a baggy of suspected drugs was not unreasonable under the Fourth Amendment because the application of a neck restraint maneuver was reasonable under the cir-

cumstances; the investigator observed the defendant make a series of furtive attempts at concealing the clear plastic baggy, which the investigator believed contained drug contraband, from placing the baggy in the defendant's mouth to attempting to chew it up while the investigator sought to question the defendant. *Lewis v. State*, 317 Ga. App. 391, 730 S.E.2d 757 (2012).

Police custody of arrested person's property. — Fourth Amendment is not violated when police take custody of property of persons they arrest to store that property for safekeeping. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct. 472, 62 L. Ed. 2d 391 (1979).

Violation of rights by seizure and recording of telephone conversations unrelated to crime investigated. — A general and wide ranging search through all of the telephone conversations conducted on telephone lines during a period covering approximately 20 days, and seizure and recording of matters in no way related to the crime investigated, constituted a violation of the defendants' right to privacy guaranteed to them under the terms of U.S. Const., amend. 4 and by this paragraph. *Cross v. State*, 225 Ga. 760, 171 S.E.2d 507 (1969).

Arrest before investigation complete. — Janitorial service owner's 42 U.S.C. § 1983 claim against a police detective, a police chief, and a police department could not withstand summary judgment when the police detective properly relied upon a trustworthy source to establish probable cause to arrest the owner for a theft from a customer's spa without investigating; thus, there was no violation of the Fourth or Fourteenth Amendments. *Means v. City of Atlanta Police Dep't*, 262 Ga. App. 700, 586 S.E.2d 373 (2003).

No infringement of rights of individual aggrieved by illegal search and seizure of third party's property. — A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by search of a third person's premises or property has not had any of that person's Fourth Amendment rights infringed.

Fourth Amendment Rights (Cont'd)

Cuevas v. State, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980).

When unannounced entry authorized. — Unannounced entry by Georgia Bureau of Investigation agents was authorized when evidence could have been otherwise easily destroyed and when agents requested of the judge who issued the search warrant to include a no-knock provision. *Cox v. State*, 160 Ga. App. 199, 286 S.E.2d 482 (1981).

Probable cause for warrantless arrest. — Defendant's suppression motion was properly denied as: (1) the police personally heard an individual say to the informant on the telephone that the individual had a kilogram of cocaine in the individual's hotel room that the individual intended to sell to the informant if the informant would come to that certain hotel at a certain time, where that individual would be waiting on the third-floor balcony to throw the informant a key; (2) when the informant arrived at the designated hotel at the designated time, the police observed the defendant standing on the third-floor balcony and further observed the defendant respond favorably to the informant's request not to throw down the key and instead to come to the back door to let the informant in; (3) the police did not arrest the defendant until the defendant appeared at that back door; and (4) the information received from an untested informant might have been helpful and corroborating, but the personal observations and perceptions of the police alone more than sufficed to supply the probable cause needed for a warrantless arrest. *Fleming v. State*, 282 Ga. App. 373, 638 S.E.2d 769 (2006).

Because the trial court could have concluded that the state failed to prove beyond a reasonable doubt that the defendant had been given the requisite notice to not return to a train station without facing the risk of an arrest, some evidence supported the trial court's conclusion that the arrest, which was based solely on the violation of an invalid criminal trespass warning, lacked probable cause; hence,

the suppression order was not disturbed on appeal. *State v. Morehead*, 285 Ga. App. 320, 646 S.E.2d 308 (2007).

Upon a de novo review of the trial court's erroneous application of the law to the evidence presented on the defendant's motion to suppress, the appeals court found that because law enforcement had probable cause to suspect that the defendant possessed cocaine, a warrantless arrest of the defendant was lawful; thus, an order granting suppression was reversed. *State v. Bryant*, 284 Ga. App. 867, 644 S.E.2d 871 (2007), cert. denied, 2007 Ga. LEXIS 540 (Ga. 2007).

Trial court did not err in denying the defendant's motion to suppress, as a stop by a police officer qualified as a first level police-citizen encounter, and that upon learning of an outstanding warrant for the defendant, the officer had probable cause to make an arrest and conduct a search incident thereto; further, the state was not required to introduce the warrant into evidence in order to establish its validity. *Lucas v. State*, 284 Ga. App. 450, 644 S.E.2d 302 (2007).

Probable cause authorized the defendant's arrest for criminal attempt to manufacture methamphetamine, despite no illegal drugs being found on the defendant, based on the similarities between the descriptions broadcasted in a be-on-the-look-out dispatch matched the defendant's truck and passengers, the items found in the truck coincided with the manufacturing, and the opinion of one of the arresting officers, who had experience as a narcotics agent. *Kohlmeier v. State*, 289 Ga. App. 709, 658 S.E.2d 261 (2008).

Waiver may not be condition of probation. — Although the trial court should not have imposed a waiver of defendant's Fourth Amendment rights as a condition of defendant's probation, the trial court's action in doing so was harmless since no warrantless search took place that cited defendant's Fourth Amendment waiver and the appellate court was unwilling to presume that such a search would take place in the future. *Millsap v. State*, 261 Ga. App. 427, 582 S.E.2d 568 (2003).

Waiver could be condition of drug court contract. — Under the terms of a

drug court contract, the defendant waived any right to suppress evidence seized as a result of a warrantless search, and absent evidence to the contrary and bad faith on the part of law enforcement, that waiver remained enforceable. *Wilkinson v. State*, 283 Ga. App. 213, 641 S.E.2d 189 (2006).

Search proper after Fourth Amendment waiver. — Waiver by the defendant, while free on bond for drug offenses, of rights under U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII as a bond condition, was constitutional under U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII; it was a reasonable exercise of the trial court's function of balancing the rights of the accused with public safety interests; thus, the investigators and officers did not violate the defendant's rights when investigating information that the defendant was still involved in drug activity. *Rocco v. State*, 267 Ga. App. 900, 601 S.E.2d 189 (2004).

Roadblocks. — Trial court erred in denying defendant's motion to suppress in a case in which defendant was subsequently convicted of three offenses based on evidence that was obtained at a roadblock that a police officer working in the field had authorized; the trial court should have granted the motion because supervisory personnel, and not an officer in the field, were required to approve roadblocks given the fact that a roadblock involved a warrantless stop of a vehicle. *Thomas v. State*, 277 Ga. App. 88, 625 S.E.2d 455 (2005).

Trial court properly denied a defendant's motion to suppress the evidence obtained from a police roadblock with regard to the defendant's conviction for driving under the influence as the trial court properly determined that the roadblock was conducted for a legitimate primary purpose, namely to check for valid licenses, insurance, impaired drivers, and safety concerns, which were consistent with the purposes set forth in the initiation form. Further, a variance in the location of the roadblock to an intersection of a street instead of on the actual street was insignificant and did not invalidate the roadblock. *Coursey v. State*, 295 Ga. App. 476, 672 S.E.2d 456 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence obtained during a roadblock because the evidence was sufficient to show that the decision to implement the roadblock was made by a supervisory officer, which prevented the field officers from exercising unfettered discretion in stopping the drivers since the lieutenant and corporal who implemented the roadblock testified that they were supervisors in the traffic unit of the county sheriff's office; the trial court was authorized to find that the purposes of the roadblock, which were to serve as a traffic safety checkpoint and to check driver's licenses and to identify drivers driving under the influence, were as stated by the lieutenant and corporal, and each of the identified purposes set forth in the order for the roadblock was a legitimate primary purpose. *Rappley v. State*, 306 Ga. App. 531, 702 S.E.2d 763 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence obtained at a roadblock because, given the evidence presented, the trial court was authorized to conclude that the sergeant issued the order for the roadblock properly and initiated, authorized, and supervised the roadblock and that the sergeant's decision to implement the roadblock was made at the programmatic level for a legitimate primary purpose; the evidence supported the trial court's findings of fact that the information on the roadblock approval form, which stated the reasons for the roadblock, did not conflict with any evidence presented as to when the roadblock was to be conducted or by whom the roadblock was authorized. *Owens v. State*, 308 Ga. App. 374, 707 S.E.2d 584 (2011), cert. denied, No. S11C1036, 2011 Ga. LEXIS 498 (Ga. 2011).

Trial court did not err in denying the defendant's motion to suppress evidence seized at a roadblock because the state met the state's burden of establishing the legitimate purpose of the roadblock by introducing a certified copy of a department of public safety roadblock approval form; the programmatic purposes set out in the roadblock form were supported by the other evidence at the suppression hearing, and the police officers' actions at the scene were in line with those pur-

Fourth Amendment Rights (Cont'd)

poses. *Hite v. State*, 315 Ga. App. 221, 726 S.E.2d 704 (2012), cert. denied, No. S12C1286, 2012 Ga. LEXIS 1020 (Ga. 2012).

Suppression of evidence from sobriety checkpoints. — Appellate court erred by reversing a trial court decision granting the appellant's motion to suppress evidence resulting from a traffic safety checkpoint stop of the appellant's vehicle because the checkpoint at which the appellant was stopped was unconstitutional since it did not meet the case law requirement that supervisory personnel made the decision to implement the checkpoint. The Georgia Supreme Court adheres to the holding that the decision to implement a particular sobriety checkpoint may be made by any authorized supervisor. *Brown v. State*, 293 Ga. 787, 750 S.E.2d 148 (2013).

Sobriety checkpoints. — Georgia Supreme Court holds that traffic safety checkpoints can be a valid and important means of law enforcement but that police checkpoint programs must have an appropriate primary purpose other than general crime control, and each checkpoint must be implemented and operated so as to control the risks of unconstrained discretion that would be abused by some officers in the field, and of oppressive interference by enforcement officials with the privacy and personal security of individuals. *Brown v. State*, 293 Ga. 787, 750 S.E.2d 148 (2013).

DNA sample collection from convicted felons. — Former O.C.G.A. § 24-4-60 (see now O.C.G.A. § 35-3-160) did not violate the Fourth Amendment, the search and seizure provisions of the Georgia Constitution, or a convicted felons' rights to privacy under the United States or Georgia Constitutions. *Quarterman v. State*, 282 Ga. 383, 651 S.E.2d 32 (2007).

Statement by juvenile questioned by school official, who was state's agent. — Juvenile court properly suppressed one incriminating statement made by a juvenile, regarding the robbery of two students in a bathroom during a basketball game, as the juvenile was

questioned by an agent of the police with the involvement and participation of the school resource officer. Further, the juvenile was in custody and, thus, entitled to Miranda warnings, which had not been given. In the Interest of T.A.G., 292 Ga. App. 48, 663 S.E.2d 392 (2008).

Searches and Seizures**1. In General**

Same protection as provided by United States Constitution. — The protection against unreasonable searches provided in the Georgia Constitution is the same as that provided by the United States Constitution. *Wells v. State*, 180 Ga. App. 133, 348 S.E.2d 681 (1986).

Expression of common-law rights. — This paragraph, being the constitutional provision under reasonable searches and seizures, is but an expression of common-law rights. *Hollinshed v. Shadrick*, 95 Ga. App. 88, 97 S.E.2d 165 (1957).

Constitution prohibits only searches which are unreasonable, and reasonableness is to be decided on its own facts and circumstances. *Gugliotta v. State*, 117 Ga. App. 212, 160 S.E.2d 266 (1968).

General searches are prohibited. *Hogan v. State*, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

The officer cannot use a warrant as a pretext for launching a full scale investigation as to the origins of an item which is not incriminating on its face. *Hogan v. State*, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

Sheriff not permitted to violate rights against unlawful search and seizure. — The office of sheriff carries with it the duty to preserve the peace and protect the lives, persons, property, health, and morals of the people. But in the exercise of these duties, the sheriff is not permitted to violate the constitutional guaranties against unlawful search and seizure. *Elder v. Camp*, 193 Ga. 320, 18 S.E.2d 622 (1942).

Right to be free from unreasonable searches and seizures extends to all persons, including probationers. *Adams v. State*, 153 Ga. App. 41, 264

S.E.2d 532 (1980), overruled on other grounds, *State v. Thackston*, 289 Ga. 412, 716 S.E.2d 517 (2011).

Defendant has standing to challenge searches. — When the defendant was charged with an offense, the essential element of which is possession, the defendant is endowed with automatic standing to challenge the validity of the searches of which the defendant complains. *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Defendant lacked standing. — Trial court erroneously granted a motion to suppress, concluding that: (1) police had no particularized objective basis for seizing the men, including the defendant; (2) the officer had no reason to pat down the first man and did so as a pretext to search for drugs; and (3) the defendant did not voluntarily consent to the search; the defendant lacked standing to object to the search, the defendant had no reasonable expectation of privacy in the bag which contained the contraband, and the stop, which led to the seizure, as a first tier encounter, was reasonable. *State v. Robinson*, 278 Ga. App. 511, 629 S.E.2d 509 (2006).

A defendant lacked standing to contest the seizure of cocaine that was found abandoned in a wooded area. *Maldonado v. State*, 284 Ga. App. 26, 643 S.E.2d 316 (2007).

In a prosecution for, inter alia, felony murder, a defendant did not have standing to suppress the evidence of a gun recovered from a hotel room pursuant to a search warrant as the defendant was not the registered guest at the hotel but merely visited the guest on three occasions and, thus, had no reasonable expectation of privacy in the room. *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence an officer seized from the defendant's vehicle because the evidence undisputedly showed that the defendant had abandoned the vehicle, and since the defendant abandoned the defendant's car, the defendant had no standing to assert the claim that the search was invalid as a warrantless search incident to an arrest; the defendant abandoned the defendant's vehi-

cle when the defendant fled to escape police, leaving the vehicle parked in a stranger's driveway with the door open, and before searching the open vehicle, an officer even confirmed with the landowner that the defendant's vehicle was not parked there with the owner's permission. *Johnson v. State*, 305 Ga. App. 635, 700 S.E.2d 612 (2010).

Defendant's motions to suppress were properly denied because the defendant did not show that the defendant had standing to challenge the search of the apartment where the defendant was apprehended as the evidence showed that the apartment was leased to a third party; there was no evidence of how long the defendant had been in the apartment or whether the defendant was an overnight guest; there was no evidence of any of the defendant's personal belongings in the apartment; and the mere presence of miscellaneous papers in the apartment bearing the defendant's name, without any further evidence connecting the defendant to the apartment, was insufficient to create a legitimate expectation of privacy for the defendant to contest the search. *Brown v. State*, 295 Ga. 695, 763 S.E.2d 710 (2014).

Encounter with police officer not a seizure. — Fact that officer activated blue lights when parking behind the defendant, whose car was parked in front of a closed business with its motor running and its headlights on, did not turn the encounter into a seizure requiring reasonable suspicion; given the late hour, darkness, officer's intention to offer assistance, and fact that both the officer and defendant were parked in the travel lane, it could not be said that the defendant was not free to leave. *Darwicki v. State*, 291 Ga. App. 239, 661 S.E.2d 859 (2008).

Officer had reasonable suspicion warranting investigation. — Trial court did not err in denying the defendant's motion to suppress, as the officer who stopped the defendant possessed sufficient reasonable suspicion to warrant further investigation of the defendant, based on: the number of burglaries in the area; the early morning hour; the closed business; the posted no trespassing signs; and the defendant's attempt to drive away as the police vehicle pulled in behind the

Searches and Seizures (Cont'd)**1. In General (Cont'd)**

defendant. *Cox v. State*, 263 Ga. App. 266, 587 S.E.2d 205 (2003).

Motion to suppress was properly denied when an officer, who pulled over a van on a traffic stop for following too closely, had justification to investigate the driver and the passenger since a reasonable suspicion of criminal activity accompanied the totality of the facts on the stop: (1) the officer noticed an unusual amount of activity when the officer turned the officer's lights on to pull the car over; (2) the van did not pull over for a mile or two after the officer turned the officer's lights on, which was highly unusual; and (3) the driver and the passenger were extremely nervous when questioned and they gave conflicting reports on why they were traveling in the area. *Rucker v. State*, 266 Ga. App. 293, 596 S.E.2d 639 (2004).

Because police officers saw a vehicle matching a dispatcher's description shortly after receiving the dispatch, and the vehicle attempted to elude them, in violation of O.C.G.A. § 40-6-395(a), the officers had a specific and articulable reason to stop the vehicle; consequently, the trial court properly denied defendant's motions to suppress, in limine, and for a new trial. *Francis v. State*, 275 Ga. App. 164, 620 S.E.2d 431 (2005).

Defendant's motion to suppress drug evidence found in a vehicle search was properly denied because the trial court was authorized to reject the testimony of an expert for the defendant that a state trooper could not have seen whether the defendant was wearing a seat belt and to believe the trooper's testimony that the trooper had a clear and unobstructed view of the defendant through the car's windshield; the expert based the opinion on a re-enactment which did not exactly match the conditions of the observation because the driver in the test was wearing a dark rather than a light shirt, the expert did not park in the median perpendicular to oncoming traffic, and the expert did not observe the test driver through the front windshield. *Bailey v. State*, 283 Ga. App. 365, 641 S.E.2d 548 (2006).

Defendant's motion to suppress drug

evidence found in a vehicle search was properly denied because a state trooper did not impermissibly exceed the scope of an original traffic stop when, after stopping the defendant's vehicle, the trooper smelled marijuana smoke in the vehicle, asked the defendant about it, and soon thereafter requested that a K-9 unit be dispatched; the testimony of an expert for the defendant that the trooper could not have smelled the unburned marijuana found in the defendant's vehicle did not necessarily overcome the trooper's testimony because the trial court could have concluded that the trooper smelled marijuana smoke rather than unburned marijuana in the vehicle, which gave the trooper a reasonable articulable suspicion of criminal activity warranting continued detention of the defendant. *Bailey v. State*, 283 Ga. App. 365, 641 S.E.2d 548 (2006).

Trial court did not err in denying the defendant's suppression motion, as the arresting officer was authorized to conclude that in turning off a roadway to evade a roadblock, the defendant committed a possibly illegal backing maneuver, upon which the officer was permitted to investigate; moreover, the officer's honest belief that a traffic violation was committed, even if ultimately proven incorrect, could nevertheless demonstrate the existence of at least an articulable suspicion and reasonable grounds for a traffic stop. *Terry v. State*, 283 Ga. App. 158, 640 S.E.2d 724 (2007).

The trial court did not err in denying the defendant's motion to suppress cocaine seized after a valid traffic stop had essentially concluded, as a state trooper's objective observations, when combined with the extensive experience the trooper possessed in drug interdiction and knowledge of drug smuggling patterns, supplied sufficient facts to conclude that the defendant might have been engaged in criminal activity. *Giles v. State*, 284 Ga. App. 1, 642 S.E.2d 921 (2007).

Because a police officer possessed sufficient information regarding both the defendants via a police dispatcher, who was relaying information from a 9-1-1 caller, and after signaling for the defendants to pull the vehicle over, the officer observed

both the defendants switch places, the officer observed sufficient and particular facts to investigate both men for driving under the influence; hence, the trial court erroneously ordered suppression of the evidence obtained from the resulting traffic stop. *State v. Bingham*, 283 Ga. App. 468, 641 S.E.2d 663 (2007).

Because a detective's suspicions were raised by the defendant's odd behavior and the detective thought that something might be hidden in the defendant's shoes, the detective was permitted to detain the defendant in order to maintain the status quo while obtaining more information concerning that suspicion; thus, when combined with the defendant's valid consent, suppression of the evidence seized was unwarranted. *Lane v. State*, 287 Ga. App. 503, 651 S.E.2d 798 (2007), cert. denied, No. S08C0187, 2008 Ga. LEXIS 185 (Ga. 2008).

Because an officer was authorized to: (1) detain the defendant for investigatory purposes based on a 9-1-1 call reporting a domestic disturbance; (2) pat the defendant down for weapons; (3) seize the cocaine from the defendant's pocket under the plain feel doctrine; (4) search the defendant's vehicle; and (5) seize the contraband found during that search, the trial court properly denied the defendant's motion to suppress. *Lester v. State*, 287 Ga. App. 363, 651 S.E.2d 766 (2007).

It was error to suppress evidence obtained from a warrantless search of a defendant's truck; information from a reliable informant, much of whose information had been confirmed before officers stopped the truck, provided officers with reasonable suspicion to make an investigative stop of the truck, after which the alerting of a drug dog further corroborated the source's information and provided probable cause for the search of the truck. *State v. Jones*, 287 Ga. App. 259, 651 S.E.2d 186 (2007).

Given that an officer, responding to a disturbance call in a remote location of the precinct involving the defendant, had a reasonable safety concern, and because the call described the defendant as loud, belligerent, and possibly intoxicated, the officer had a sufficient basis to conduct a pat-down search of the defendant; hence,

the defendant's motion to suppress the evidence of a concealed weapon and drugs found following a search was properly denied. *Walker v. State*, 289 Ga. App. 657, 658 S.E.2d 207 (2008).

Because law enforcement officers were given permission to enter a landowner's land in order to investigate the presence of possible trespassers for engaging in other illegal activity on the landowner's property, the officers gained a reasonable and articulable suspicion that the two individuals were involved in some form of criminal activity, the very least of which was criminal trespass, and therefore had the authority to detain the defendant and a cohort in a brief investigative stop; thus, suppression of the evidence seized as a result of the encounter was properly denied, after the cohort ran, and the defendant failed to comply with the officers' orders, given that those actions amounted to probable cause to support a warrantless arrest and a search thereafter. *Burgess v. State*, 290 Ga. App. 24, 658 S.E.2d 809 (2008).

Trial court order suppressing drug evidence seized after a Terry stop of the defendant for parking in the middle of the road was error because O.C.G.A. § 40-6-200(a) made it improper to park in the middle of a two-way roadway, and provided a sound basis for the officer's decision to stop the defendant; as a result, the stop of the defendant was proper. *Stafford v. State*, 284 Ga. 773, 671 S.E.2d 484 (2008).

An officer had reasonable suspicion to stop the defendant's vehicle, which matched the description of one the officer had been told to be on the lookout for, as it was connected with previous suspicious activity and with a suspect who was wanted by police, and it was described with great particularity. Furthermore, as the officer was justified in detaining the defendant long enough to determine whether an outstanding warrant was valid, the extent of the stop did not exceed the permissible scope of the investigation; having already effected a valid stop, the officer could request consent to search the vehicle. *Edmond v. State*, 297 Ga. App. 238, 676 S.E.2d 877 (2009).

Because a concerned citizen reported

Searches and Seizures (Cont'd)**1. In General (Cont'd)**

that a suspected drunk driver was driving a specific vehicle in a specific location, a police officer had a reasonable, articulable suspicion to justify an investigative traffic stop; accordingly, defendant did not show a basis for reversing the trial court's order denying defendant's motion to suppress. *Adcock v. State*, 299 Ga. App. 1, 681 S.E.2d 691 (2009).

Defendant's convictions for trafficking in cocaine and possession of a firearm during the commission of a felony were appropriate because an officer testified that the officer detected the odor of burnt marijuana coming from inside the defendant's vehicle; that the officer retrieved the dog to conduct a free-air sniff; and that after the dog alerted at the vehicle, the officer noticed tears pouring down the defendant's face. The evidence was sufficient to support the finding that the defendant had knowledge of the cocaine in the car and that the defendant was guilty of trafficking in cocaine. *Perkins v. State*, 300 Ga. App. 464, 685 S.E.2d 300 (2009).

Trial court did not err in denying the defendant's motion to exclude evidence obtained as a result of the defendant's detention, specifically the defendants' responses to an officer's questions and the victim's identification of defendant at the scene, because the investigatory stop of the defendant was based on reasonable suspicion arising from a particularized and objective basis for suspecting the defendant of criminal activity. While the victim's description of the assailants was not very specific, the defendant matched the description in build, height, race, and clothing color; with the assistance of a tip from a concerned citizen, the defendant was found at 3:00 or 4:00 A.M. within walking distance of the crime shortly after the crime was committed, within the perimeter law enforcement officials had established; there were no other pedestrians or traffic in the area; the defendant was out of breath and sweaty despite being underdressed for the weather; and the defendant gave conflicting accounts of where the defendant was coming and going. *Hall v. State*, 309 Ga. App. 179, 710 S.E.2d 146 (2011).

Trial court did not err in denying the defendant's motion to suppress after finding that the excessive-window-tinting statute, O.C.G.A. § 40-8-73.1(b), was unconstitutional because an officer had a reasonable articulable suspicion to justify the traffic stop; the officer observed that the defendant's vehicle had darkly tinted windows and reasonably believed that to be in violation of § 40-8-73.1, and the fact that the statute was later found to be unconstitutional did not render the stop invalid. *Christy v. State*, 315 Ga. App. 647, 727 S.E.2d 269 (2012).

Officer had reasonable suspicion to conduct an investigatory stop of the defendant based on the report of a concerned citizen, who described a suspect involved in illegal drug activity the citizen witnessed and the suspect's location; the officer immediately identified the defendant as matching the description reported by the citizen. *Durden v. State*, 320 Ga. App. 218, 739 S.E.2d 676 (2013).

Police lacked reasonable suspicion for stop. — Defendant's motion to suppress suspected cocaine was properly granted as: (1) police officers lacked probable cause to arrest the defendant for obstruction of justice upon the defendant's flight; (2) an initial uncoercive encounter with the police did not constitute a seizure, and defendant was free to leave at any time; and (3) the record was devoid of any evidence about the details of an anonymous tip that defendant was seen selling drugs in the area of the encounter; moreover, given the tip's lack of detail and failure to predict future behavior, observation of defendant's conduct might have warranted further investigation, but it did not rise to the level of reasonable suspicion needed to briefly detain or even arrest. *State v. Dukes*, 279 Ga. App. 247, 630 S.E.2d 847 (2006).

In a prosecution for driving under the influence, the trial court erroneously denied the defendant's motion to suppress evidence seized as a result of traffic stop made by an officer armed with only a "be on the lookout" warning, as the officer lacked a particularized and objective basis for suspecting that the defendant was involved in any criminal activity, but admitted to possessing only scant informa-

tion about the driver, the year and make of the vehicle being driven, and the vehicle's direction of travel; moreover, the mere fact that the defendant's gold Ford truck was located in the vicinity of the alleged crime did not necessarily give rise to articulable suspicion. *Murray v. State*, 282 Ga. App. 741, 639 S.E.2d 631 (2006).

Because: (1) an investigating officer did not have a particularized and objective reason to suspect the defendant of any criminal activity before stopping the defendant's vehicle; (2) the act of driving at night, lawfully, on a public road, and in a high crime area, did not justify the stop in the absence of additional circumstances; and (3) the state failed to provide any evidence of any such additional circumstances, the trial court erred in denying the defendant's motion to suppress. *Young v. State*, 285 Ga. App. 214, 645 S.E.2d 690 (2007).

The trial court properly granted the defendant's motion to suppress, as the investigating officer lacked any particularized basis to suspect the defendant of any criminal activity, and information contained in a "be on the lookout" alert for a certain vehicle failed to supplant the officer's belief that the defendant was involved in a reported burglary, given that: (1) the description of the vehicle being driven and the suspect were inadequate; (2) no information was provided about the lapse of time between the crime occurring and the traffic stop; (3) no information was provided about the number of persons about in the area; and (4) the defendant was not engaged in any activity which would have otherwise authorized a traffic stop. *State v. Dias*, 284 Ga. App. 10, 642 S.E.2d 925 (2007).

Because a traffic stop of the defendant's vehicle was not based on the commission of a traffic violation or illegal act, but instead was based on the unreliable information provided by a concerned citizen to a police sergeant which amounted to hearsay gleaned from an overheard conversation, and did not provide the officer with the type of "inside information" that would not have been known to the public at large, the defendant's motion to suppress the marijuana seized as a result of the traffic stop was properly granted. *State v.*

Holloway, 286 Ga. App. 129, 648 S.E.2d 473 (2007).

An officer who stopped the defendant's vehicle because the officer saw the defendant and a passenger "flailing their arms around pretty aggressively" and thought that the two were having a heated argument did not have a reasonable suspicion of criminal activity that justified the stop. The officer did not testify that the officer saw any blows being struck, that the officer observed any potential traffic infraction, that either the defendant or the passenger was making threatening gestures, or that the argument was impairing the defendant's ability to drive. *State v. Martin*, 291 Ga. App. 548, 662 S.E.2d 316 (2008).

Denial of suppression was error since there was no valid basis for initiation of a traffic stop of the defendant's vehicle, the further detention of the defendant without evidence of criminal activity was improper, and the defendant's consent to a search was invalid because the consent was not sufficiently attenuated from the taint of the unreasonable stop. *Adkins v. State*, 298 Ga. App. 229, 679 S.E.2d 793 (2009).

Officer lacked a reasonable articulable suspicion to conduct a traffic stop because the officer did not see the defendant engage in any drug transaction at the motel, talk to anyone who was a known drug dealer, or commit a traffic offense as the defendant left the motel. *Adkinson v. State*, 322 Ga. App. 1, 743 S.E.2d 563 (2013).

Officer never said to stop running. — Defendant, upon seeing a police officer, ran away. As the officer never told the defendant to stop running, there was no probable cause to arrest the defendant for obstruction. *State v. Fisher*, 293 Ga. App. 228, 666 S.E.2d 594 (2008).

Vehicle stops. — A traffic stop was not "pretextual" when an officer saw a traffic offense occur, even if the officer had ulterior motives in initiating the stop, and even if a reasonable officer would not have made the stop under the same circumstances. *Clark v. State*, 243 Ga. App. 362, 532 S.E.2d 481 (2000).

Police dispatcher who reports a crime at a specified location gives police an

Searches and Seizures (Cont'd)**1. In General (Cont'd)**

articulable suspicion to investigate and detain individuals at the scene. When a police officer received a dispatch on suspicion of drunk driving describing the defendant and the defendant's vehicle, and the officer saw the defendant in the defendant's vehicle matching that description immediately after receiving the dispatch, the officer had a reasonable, articulable suspicion to justify a Terry stop and it was error to grant the defendant's motion to suppress the stop even though the stop was made without the officer observing any traffic violations. *State v. Harden*, 267 Ga. App. 381, 599 S.E.2d 329 (2004).

When law enforcement received two anonymous tips that the defendant would be traveling from another state with cocaine in a certain model car licensed in the other state, would be taking a certain route, and would be staying in a certain hotel, the tips' range of details relating to future acts not easily predicted allowed police to conduct an investigatory stop of the defendant. *Solis v. State*, 268 Ga. App. 493, 602 S.E.2d 166 (2004).

Defendant's motion to suppress was properly denied; the stop of the defendant was reasonable because the defendant was exceeding the speed limit and crossed the center line twice. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, *aff'd*, 280 Ga. 222, 626 S.E.2d 500 (2006).

After a police officer validly stopped the defendant's vehicle for speeding, and the defendant got out of the vehicle, and informed the police officer that there was a lawful gun with a permit in the vehicle, the defendant's rights were not violated by the officer's entry into the vehicle in order to seize the gun for safety purposes. *Megesi v. State*, 277 Ga. App. 855, 627 S.E.2d 814 (2006).

Because the trial court had ample evidence to support the court's conclusion that the reason police officers supplied as the basis to stop the defendant's vehicle, specifically, an alleged computer insurance inquiry, was "suspect and insufficient," the court did not clearly err in disbelieving the evidence; hence, the court properly granted the defendant's motion

to suppress the evidence seized from the vehicle as a result of the stop. *State v. Starks*, 281 Ga. App. 15, 635 S.E.2d 327 (2006).

Trial court properly denied the defendant's motion to suppress, as the search was valid under Ga. Const. 1983, Art. I, Sec. I, Para. XIII; the officer stopped the defendant based on a reasonable suspicion that the defendant was driving with an invalid drive-out tag in violation of O.C.G.A. § 40-2-8, and the defendant's tag was suspicious because the tag did not have a strip on the bottom to prevent tampering with the expiration date. *Green v. State*, 282 Ga. App. 5, 637 S.E.2d 498 (2006).

Because an officer had probable cause to arrest a vehicle's occupants, including the defendant, after encountering a truck matching the description in a be-on-the-lookout bulletin, with the same number of occupants as advised therein, traveling on the road and in the direction identified, and from a location known by the officer to be the scene of an armed robbery, a search based on the lawful arrest was upheld; as a result, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of a search incident to the arrest. *Boone v. State*, 282 Ga. App. 67, 637 S.E.2d 795 (2006).

Because the defendant committed two traffic violations, an ensuing stop of the defendant's vehicle was not unjustifiably extended, the defendant voluntarily granted the officers consent to search, and a canine free-air search was undertaken immediately and as a result of the defendant's consent, the trial court properly denied suppression of the evidence seized as a result of the stop. *Noble v. State*, 283 Ga. App. 81, 640 S.E.2d 666 (2006).

Trial court properly denied the defendant's motion to suppress the methamphetamine seized as a result of a traffic stop on the vehicle the defendant was a passenger in as sufficient evidence supported the trial court's finding that an officer's stop of that vehicle was justified by the officer's reasonable articulable suspicion of a crime, specifically, a violation of O.C.G.A. § 40-8-20. *Richardson v. State*, 283 Ga. App. 89, 640 S.E.2d 676 (2006).

Trial court erred in granting the suppression motions filed by both the first and second defendant, who occupied the vehicle stopped, as a violation of O.C.G.A. § 40-2-41 provided a sufficient reason for the traffic stop; moreover, the trial court erred in ruling that some portions of O.C.G.A. § 40-2-41 did not apply to the out-of-state license plate on the subject vehicle and by ruling that even though the word “Carolina” on the license plate was not legible, and hence, there was no violation of the statute because the police officer testified about an inability to recognize it as a South Carolina license plate. *State v. Davis*, 283 Ga. App. 200, 641 S.E.2d 205 (2007).

There was probable cause to stop and search a drug defendant’s car based on recorded conversations between the defendant and an informant detailing plans for a drug exchange, a call from the informant’s wife telling an officer that two males had arrived with drugs and would be following the informant to a prearranged destination, corroboration of this information by an agent, and the defendant’s evasion of a roadblock. *Maldonado v. State*, 284 Ga. App. 26, 643 S.E.2d 316 (2007).

Despite the defendant’s claim that a sheriff’s deputy lacked a specific and articulable suspicion of criminal activity necessary to execute a traffic stop of the defendant’s vehicle, and thus that the evidence seized thereafter had to be suppressed, the appeals court found otherwise, as sufficient facts were conveyed to the deputy prior to the stop for the deputy to have a reasonable belief that the defendant was involved in a domestic dispute, and might be under the influence of alcohol thereby justifying a finding that the resulting stop was valid; hence, suppression was properly denied. *Lacy v. State*, 285 Ga. App. 647, 647 S.E.2d 350 (2007), cert. denied, No. S07C1514, 2007 Ga. LEXIS 620 (Ga. 2007).

A traffic stop was justified when officers noticed that a defendant’s car had a ten-inch “starburst” crack in its windshield; under O.C.G.A. § 40-8-73(e), a vehicle was not to be operated with a windshield or rear window having a starburst or spider webbing effect greater than

three inches by three inches. *Glenn v. State*, 285 Ga. App. 872, 648 S.E.2d 177 (2007).

When an officer received a call from an off-duty police captain who stated that the captain was following a white pickup truck with dual rear tires that was weaving, and the officer went on the road and in the direction indicated and found such a truck illegally parked in an intersection, the officer was warranted in stopping the truck; that the manufacturer of the truck was not the same manufacturer named by the captain did not, in light of the other circumstances, demonstrate that the intrusion was not reasonably warranted. *Ingram v. State*, 286 Ga. App. 436, 649 S.E.2d 576 (2007).

The trial court did not err in denying the defendant’s motion to suppress, despite a claim that an informant used to apprehend the defendant was not previously known to police and had never provided any information until helping in the prosecution of the defendant, because the informant’s tip predicted some aspects of the defendant’s future behavior and contained information not available to the general public that was corroborated by the observations of officers; moreover, the defendant’s reckless driving and flight from a congested parking lot, which caused a short high-speed chase to ensue, and the fact that the police learned that the defendant often carried a gun, provided the officers with an additional basis to stop the defendant and make an arrest. *Patton v. State*, 287 Ga. App. 18, 650 S.E.2d 733 (2007).

Drugs were lawfully seized because the defendant’s commission of a traffic offense pursuant to O.C.G.A. § 40-2-6.1 allowed an officer to make a valid traffic stop of the defendant’s vehicle and thus allowed the officer to ask for consent to search and use a drug-sniffing dog to sniff the exterior of the vehicle. Thus, the defendant’s motion to suppress was properly denied. *Thomas v. State*, 289 Ga. App. 161, 657 S.E.2d 247 (2008), cert. dismissed, No. S08C0959, 2008 Ga. LEXIS 491 (Ga. 2008).

Because an officer was authorized to stop vehicles for traffic violations under both the Fourth Amendment and the Georgia Constitution, it was proper for

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the officer to stop the defendant, whose vehicle bore the license plate of another vehicle in violation of O.C.G.A. § 40-2-6. *Thompson v. State*, 289 Ga. App. 661, 658 S.E.2d 122 (2007).

Because the defendant committed a traffic violation by crossing a solid yellow line in the roadway, and was not legitimately faced with an obstruction, despite claiming that it was undoubtedly convenient to pass the slow moving van driving ahead, a police officer had a reasonable and articulable suspicion to initiate a traffic stop of the defendant's vehicle; thus, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of that stop. *Przyjemski v. State*, 290 Ga. App. 22, 658 S.E.2d 807 (2008).

Traffic stop of defendant was justified when an officer saw defendant's car hit a large pothole, which the officer testified a car could not hit if it were entirely within its lane; even if the officer's honest belief that a traffic violation had occurred was incorrect, the officer's decision to stop defendant was made in good faith and was not unreasonable or harassing. *Camacho v. State*, 292 Ga. App. 120, 663 S.E.2d 364 (2008), cert. denied, No. S08C1769, 2008 Ga. LEXIS 872 (Ga. 2008).

In a driving under the influence case, there was no merit to the defendant's argument that an officer lacked articulable suspicion to stop the defendant's vehicle. Testimony that the defendant was swerving showed that the defendant was not stopped because of mere inclination, caprice, or harassment, and the trial court accepted the officer's testimony that the full extent of the defendant's actions was not reflected on a video shown to the jury. *Hann v. State*, 292 Ga. App. 719, 665 S.E.2d 731 (2008).

An officer in an unmarked car who had been following the defendant based on a tip that the defendant was transporting methamphetamine was authorized to stop the defendant under the Fourth Amendment and the Georgia Constitution after the officer saw the defendant illegally cross the center line. *Sapp v. State*, 297 Ga. App. 218, 676 S.E.2d 867 (2009).

There was reasonable suspicion to stop the defendant's vehicle. The defendant was the only person who had been in physical contact with a drug dealer whom police were watching; the defendant took a package from the dealer; and a search of the dealer's car indicated that the dealer no longer had the drugs, giving rise to a reasonable suspicion that the defendant possessed the drugs. *Garza v. State*, 298 Ga. App. 332, 680 S.E.2d 175 (2009).

When the only evidence to support a traffic stop was that defendant's car was in front of a residence that had been previously raided by the police, this did not constitute an objective manifestation that defendant was, or was about to be, engaged in criminal activity sufficient to warrant the intrusion of a traffic stop. *Pritchard v. State*, 300 Ga. App. 14, 684 S.E.2d 88 (2009).

Trial court did not err in denying the defendants' motions to suppress drug evidence because the defendants failed to establish that the actions of the arresting officer unreasonably expanded the scope or duration of the traffic stop; because the officer's suspicions were piqued by observations of a truck's condition, the strong scent of perfume emanating from the cab, the demeanor of one the defendants, and the other defendant's responses to the officer's brief questioning, the officer was then prompted and authorized to request a K-9 unit and to run criminal histories on both defendants, and there was no evidence to suggest that the officer delayed in making either query. *Young v. State*, 310 Ga. App. 270, 712 S.E.2d 652 (2011).

Officer was permitted to continue initial authorized detention while the officer verified the defendant's license, insurance, and registration, completed paperwork, and checked for outstanding warrants, and the defendant's own actions, including exhibiting extreme nervousness, prevented the officer from completing the citations earlier; thus, the scope and duration of the stop were not impermissibly expanded. *Moore v. State*, 321 Ga. App. 813, 743 S.E.2d 486 (2013).

Roadblock stop is reasonable within requirements of Georgia Constitution when the decision to implement the roadblock is made by supervisory per-

sonnel rather than the officers in the field, all vehicles are stopped as opposed to random vehicle stops, the delay to motorists is minimal, the roadblock operation is well identified as a police checkpoint, and the screening officer's training and experience is sufficient to qualify the officer to make an initial determination as to which motorists should be given field tests for intoxication. *Brent v. State*, 270 Ga. 160, 510 S.E.2d 14 (1998); *Boyce v. State*, 240 Ga. App. 388, 523 S.E.2d 607 (1999).

Primary purposes for roadblock. — A roadblock was constitutional when its primary purposes were to check for driver's licenses, insurance, and impaired drivers and when its secondary purposes were to check tags, observe seat belt use, and check the safe condition of vehicles. The fact that officers were checking for multiple violations did not make the primary purposes invalid. *Kellogg v. State*, 288 Ga. App. 265, 653 S.E.2d 841 (2007), cert. denied, No. S08C0458, 2008 Ga. LEXIS 229 (Ga. 2008).

Testimony about implementation and purposes of roadblock established by multiple agencies. — To show the constitutionality of a roadblock set up by city police, county police, and the state highway patrol, it was not necessary that officers from all three jurisdictions testify about its implementation and primary purpose. Testimony from a city officer that the officer was the primary supervisor at the roadblock and in which the officer addressed these matters sufficed to meet the evidentiary requirements. *Kellogg v. State*, 288 Ga. App. 265, 653 S.E.2d 841 (2007), cert. denied, No. S08C0458, 2008 Ga. LEXIS 229 (Ga. 2008).

Trial court properly denied suppression motions filed by two defendants because a well-identified roadblock initiated to conduct vehicle safety checks was constitutional, stopped every vehicle, and was authorized by supervisory personnel at the programmatic level; further, when an officer detected an odor of marijuana from the inside of the defendant driver's vehicle, continued detention of the defendant and the defendant's passenger was authorized. *Harwood v. State*, 262 Ga. App. 818, 586 S.E.2d 722 (2003).

The trial court did not err in denying

the defendant's motion to suppress on grounds that a roadblock was unlawful, as the state presented sufficient evidence that the checkpoint was set up for a legitimate purpose and the decision to implement the roadblock was made by law enforcement supervisory personnel. *Wright v. State*, 283 Ga. App. 393, 641 S.E.2d 605 (2007).

A roadblock implemented by a lieutenant in a city police department as part of a statewide safety campaign was not unconstitutional; the lieutenant testified that the lieutenant was a supervisor with the authority to order a roadblock, the fact that policy was set at a statewide level did not mitigate the lieutenant's independent authority to implement a roadblock for a permissible purpose, and the purposes of the roadblock, to check for seatbelt infractions and to check for intoxicated drivers, were permissible. Furthermore, although the lieutenant stated that implementation of the roadblock would depend upon the number of officers available to support the roadblock, this practical consideration did not transform a pre-planned checkpoint into a roving patrol. *Bennett v. State*, 283 Ga. App. 581, 642 S.E.2d 212 (2007).

Stop based on be-on-the-lookout bulletin. — Motion to suppress was properly denied in a defendant's trial for driving under the influence of alcohol and violating the open container law, as an officer's be-on-the-lookout (BOLO) bulletin provided reasonable suspicion of criminal activity sufficient to authorize the stop of defendant's vehicle; the BOLO provided particularized information describing the color, manufacturer, and model of the vehicle, the number and race of its occupants, and its location and direction of travel. *Faulkner v. State*, 277 Ga. App. 702, 627 S.E.2d 423 (2006).

Continued detention after traffic stop. — A deputy who asked to search the defendant's vehicle had a reasonable suspicion to warrant the defendant's continued detention after a warning citation was issued pursuant to a traffic stop; the deputy testified that both the defendant and the defendant's sibling were extremely nervous, especially the sibling while reaching into the glove compartment to

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get the vehicle's registration, and the two gave conflicting stories as to their destination. *Medvar v. State*, 286 Ga. App. 177, 648 S.E.2d 406 (2007).

On appeal from a conviction for possession of cocaine with intent to distribute, the court held that despite the fact that the police were authorized to conduct a brief investigatory stop of the defendant's vehicle, the resulting detention beyond that authorized as a Terry stop evolved into an illegal arrest. Hence, the evidence seized thereafter became the fruit of the poisonous tree and should have been suppressed. *Grandberry v. State*, 289 Ga. App. 534, 658 S.E.2d 161 (2008).

Trial court did not err in denying the defendant's motion to suppress evidence obtained at a roadblock after finding that the defendant's detention by the officers was not excessive because the trial court was authorized to conclude that the brief detention of the defendant was neither unreasonable nor illegal; the trial court's findings that the arresting officer detained the defendant for 20 minutes after the initial portable breath test to conduct an additional test and that the 20 minute delay was for the defendant's benefit to insure that the portable alcohol test was not affected by residual alcohol due to the defendant's recent consumption of alcoholic beverages were supported by the evidence. *Owens v. State*, 308 Ga. App. 374, 707 S.E.2d 584 (2011), cert. denied, No. S11C1036, 2011 Ga. LEXIS 498 (Ga. 2011).

Trial court erred in denying the defendant's motion to suppress evidence deputies seized from the defendant's car because the deputies did not have reasonable grounds upon which to continue to detain the defendant after the deputies called for a drug dog; the state offered no evidence that the deputies still were investigating the defendant's failure to properly signal a right turn when the deputies called for a canine unit to come to the scene and detained the defendant until the dog arrived or that the deputies had a reasonable suspicion that the defendant was involved in some criminal activity

besides the traffic violation when the deputies called for the drug dog and continued to detain the defendant until the dog arrived and sniffed the car. *Dominguez v. State*, 310 Ga. App. 370, 714 S.E.2d 25 (2011).

Police officer impermissibly extended a traffic stop without specific and articulable facts to warrant the detention; while the officer observed nervousness in the defendant, that was not sufficient to extend the stop and there was no other evidence from which the officer could have formed reasonable and articulable suspicion of illegal activity. *Weems v. State*, 318 Ga. App. 749, 734 S.E.2d 749 (2012), overruled on other grounds, *State v. Allen*, 298 Ga. 1, 779 S.E.2d 248 (2015).

Stop of vehicle not unreasonably prolonged. — Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from the defendant's vehicle because the evidence supported the trial court's finding that the officer did not unreasonably prolong the stop of the vehicle, and once the drug dog alerted to the vehicle, the officer had probable cause to search the vehicle; a brief detention was authorized because it was reasonable for the officer to be suspicious in light of the defendant's furtive movement at the initial point of the stop, and that suspicion was heightened when the defendant attempted to explain that the defendant was looking for the defendant's wallet but then retrieved the defendant's license from a different part of the car, and when the defendant revoked the defendant's consent to search. *Hardaway v. State*, 309 Ga. App. 432, 710 S.E.2d 634 (2011).

Passenger in car owned by another has no interest in car and no standing to object to search. *Autry v. State*, 150 Ga. App. 584, 258 S.E.2d 268, overruled on other grounds, *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Objection to search not available to one who makes no claim to ownership. — Objection that an automobile was illegally searched without a warrant is not available to one who makes no claim to the ownership or possession of the automobile or its contents and who was not present at the time of the search.

Gugliotta v. State, 117 Ga. App. 212, 160 S.E.2d 266 (1968).

There is nothing unlawful in government's appropriation of abandoned property, which does not constitute a search or seizure in the legal sense. *Marshall v. State*, 153 Ga. App. 198, 264 S.E.2d 718 (1980).

Stolen items in plain view but not mentioned in warrant. — Seizure of items in plain view suspected to have been derived from recent area burglaries while executing a search warrant for documents proving theft of services was valid when the incriminating character of the items was immediately apparent and the officer had a lawful right to visual and physical access of the objects themselves. *Nichols v. State*, 210 Ga. App. 134, 435 S.E.2d 502 (1993).

Invalid arrest warrant. — Because a search yielding evidence used against the defendant was incident to the execution of an arrest warrant which was later invalidated, and no good faith exception existed, the evidence seized against the defendant should have been suppressed, as the arresting officer had no other basis to search the car in which the defendant was a passenger. *Register v. State*, 281 Ga. App. 822, 637 S.E.2d 761 (2006), cert. denied, 2007 Ga. LEXIS 216 (Ga. 2007).

Nature of offense has bearing on objects seized as incidental to arrest. — The nature of the offense for which the accused is arrested has an important bearing upon what objects may be seized as incidental to the arrest. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Inapplicability of constitutional inhibition to confiscation of illegally kept devices. — The constitutional inhibition against unlawful searches and seizures has no application to a confiscation of illegally kept devices for the hazarding of money in a place of business open to the general public. *Elder v. Camp*, 193 Ga. 320, 18 S.E.2d 622 (1942).

The protection afforded by this paragraph will not prevent a seizure and confiscation by a proper legal officer of "slot machines" for evidence or destruction when such machines are found unlawfully kept by a person, and when their seizure does not involve a search of private prem-

ises. *Elder v. Camp*, 193 Ga. 320, 18 S.E.2d 622 (1942).

No aid from court to owner seeking to retain implements of crime. — Regardless of the nature of the place where a portion of illegal instrumentalities was seized, the court did not err in granting the interlocutory injunction and in continuing in force the writ of prohibition, sought by the sheriff and the solicitor general (now district attorney) against the owner who was suing to regain possession of the seized devices, since the courts will not lend their aid to assist or protect an owner seeking to retain implements of crime such as gaming or lottery paraphernalia. *Elder v. Camp*, 193 Ga. 320, 18 S.E.2d 622 (1942).

"Mere presence" rule not applicable to accused's residence. — Rule that "mere presence" of individual in area where contraband is seized will not support conviction has no application when the area involved is the accused's permanent residence. *McDade v. State*, 175 Ga. App. 204, 332 S.E.2d 672 (1985).

"Equal access" rule application to permanent residence of accused. — "Equal access" rule, precluding conviction where contraband is found in a common area to which many people have access, had no application if the contraband was discovered in the permanent residence of the three accuseds (father, mother, and son), all three were alleged to be in joint constructive possession of the contraband, and the three had had no visitors during the period after the search warrant was issued and before it was executed. *McDade v. State*, 175 Ga. App. 204, 332 S.E.2d 672 (1985).

Voluntary consent of head of household. — The voluntary consent of the head of a household to the search of premises owned or controlled by such head of the household is sufficient to authorize a search of the premises without a search warrant, and such search does not violate the constitutional prohibition against unreasonable searches and seizures. *Crawford v. State*, 181 Ga. App. 454, 352 S.E.2d 635 (1987).

Because the defendant's grandfather, as the head of household, possessed the authority over the entire house, including

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the defendant's bedroom where the defendant lived rent-free, the trial court properly found that the consent given by the grandfather was properly granted, and hence served as the proper basis to deny the defendant's motion to suppress the evidence seized in the bedroom; as a result, the defendant's armed robbery conviction was upheld on appeal. *Rhone v. State*, 283 Ga. App. 553, 642 S.E.2d 185 (2007).

Defendant's appearance and a cut in defendant's jacket shoulder, defendant's proximity to the burglary site, the observation of a running person believed by the officer to be the same one stopped pursuant to the description by the other officer a few minutes later, the short time between the report of the burglar alarm and the apprehension of defendant, the absence of anyone else in the area matching the suspect's description, defendant's nervousness, and the deputy's knowledge of defendant's prior record of burglary and escape, added up to probable cause to arrest the defendant. *State v. Wilson*, 179 Ga. App. 334, 346 S.E.2d 111 (1986).

Coercion not established by mere fact of arrest. — The mere fact that an accused is under legal arrest when the consent to a search is given does not establish the consent was made involuntarily or by coercion. *Wright v. State*, 189 Ga. App. 441, 375 S.E.2d 895 (1988).

Recent possession justified search. — Upon the defendant's arrest for simple battery, and after the arresting officer had been told that the defendant was known to carry a gun, a search of a bag within the defendant's immediate possession was lawful as a search incident to the defendant's arrest; it did not matter that the defendant was in handcuffs at the time the police searched the bag; the decisive factor was whether the defendant was, at the time of arrest, in recent possession of the item being searched. *Hill v. State*, 263 Ga. App. 365, 587 S.E.2d 843 (2003).

Detention reasonable after officer noticed sawed off shotgun in defendant's vehicle. — Because a police officer

noticed that a shotgun in defendant's vehicle had been sawed off, the officer acted reasonably in further detaining defendant to determine whether defendant had, in fact, violated O.C.G.A. § 16-11-122. *Castleberry v. State*, 275 Ga. App. 37, 619 S.E.2d 747 (2005).

Guilty plea waives suppression issue on appeal. — Because the defendant pled guilty to the charges of possession of a firearm by a convicted felon, the defendant waived any claim that the trial court erred in denying the defendant's motion to suppress evidence of said firearm found in the defendant's residence. *Stuart v. State*, 267 Ga. App. 463, 600 S.E.2d 629 (2004).

Pretrial detainees. — When the search of a pretrial detainee's cell is instigated or conducted by the prosecution solely for the purpose of uncovering incriminating evidence which could be used against the detainee at trial, rather than out of concern for any legitimate prison objectives, the detainee retains a limited but legitimate expectation of privacy that the detainee would be protected in such circumstances from an unreasonable search. *State v. Henderson*, 271 Ga. 264, 517 S.E.2d 61 (1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680 (2000).

Prisoners. — The ruling in *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984), making the Fourth Amendment of the United States Constitution inapplicable to searches of convicted prisoners' cells, reflects the proper interpretation of Ga. Const. 1983, Art. I, Sec. I, Para. XIII. *State v. Henderson*, 271 Ga. 264, 517 S.E.2d 61 (1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680 (2000).

Equal access rule inapplicable. — Because the defendant was not charged with possessing cocaine and no presumption of ownership of the premises arose, the equal access rule was not applicable. *Jackson v. State*, 271 Ga. App. 278, 609 S.E.2d 207 (2005).

Tipster. — Trial court erred in failing to suppress evidence seized in the wake of an invalid stop of the defendant's car; although a police officer was able to corroborate a tipster's description of the vehicle, the vehicle's location, and the fact

that there was a black male driver and female passenger, the tip did not provide any information concerning the defendant's future behavior. *Rucker v. State*, 276 Ga. App. 683, 624 S.E.2d 259 (2005).

Because the trial court found that officers acting on an anonymous tip that marijuana was being grown at the defendant's residence were within their rights when they saw marijuana from the adjoining property, when they smelled marijuana from the driveway, and when they went to both the front and the back doors of the house in an attempt to make contact with someone, and the grounds given in the affidavit supporting a search warrant application were wholly unconnected with the defendant's arrest and the two protective sweeps, the trial court did not err in denying the defendant's motion to suppress. *Padgett v. State*, 287 Ga. App. 789, 653 S.E.2d 102 (2007), cert. denied, No. S08C0415, 2008 Ga. LEXIS 209 (Ga. 2008).

Because the information provided by a confidential informant was reliable and substantially corroborated by police officers, probable cause to search the defendant existed; accordingly, because the warrantless search was authorized with or without defendant's consent, there was no basis to suppress the drug evidence found on the defendant's person. *Hall v. State*, 310 Ga. App. 397, 714 S.E.2d 7 (2011).

Exigent circumstances found. — Because evidence of sufficient exigent circumstances were presented to law enforcement officers to justify a warrantless search of the defendant's home, and if a warrant would have been obtained, many of those individuals, if left to their own devices, could have attempted to drive home, placing both themselves and the general public at risk, the warrantless search of the defendant's residence was justified; moreover, if a warrant would have been obtained, evidence of the crime of furnishing alcohol to minors could have easily been destroyed when the minors left the scene of the crime. *Burk v. State*, 284 Ga. App. 843, 644 S.E.2d 914 (2007).

Because sufficient exigent circumstances existed to authorize a sheriff's deputy to enter the defendant's backyard

and seize a number of animals the officer observed were malnourished and mistreated, and given the harsh weather conditions and impending holiday, obtaining a warrant would have been unreasonable, the defendant's motions to suppress and in limine seeking to preclude admission of the evidence seized were properly denied. Moreover, the evidence seized after the defendant's lawful arrest, and observed in plain view by the officer upon being allowed to enter the defendant's residence, was also properly admitted. *Morgan v. State*, 289 Ga. App. 209, 656 S.E.2d 857 (2008).

Contrary to the defendant's argument, the trial court did not err in failing to grant the defendant's motion for a directed verdict of acquittal in the defendant's trial for obstruction of a law enforcement officer, O.C.G.A. § 16-10-24(a), based on the defendant's claim that the defendant was entitled to resist an unlawful search of the defendant's premises; among other things, exigent circumstances existed to justify the officers' warrantless entry onto the defendant's property because officers observed that the defendant's dogs did not have their required rabies tags, and further investigation, including the capturing of the animals, was necessary to protect the public against a risk of rabies. *Jarvis v. State*, 294 Ga. App. 482, 669 S.E.2d 477 (2008).

Trial court did not err in denying the defendant's motion to suppress photographs obtained subsequent to police officers' entry into the defendant's home because the officers' entry was authorized by the exigent circumstances exception to the warrant requirement of the Fourth Amendment; the trial court was authorized to find that the age of the defendant's children, the children's undisputed inability to care for themselves, and the lack of adult supervision due to the defendant's absence and their father's arrest constituted an exigent circumstance that authorized the officers' entry into the residence for the purpose of temporarily supervising the children until a responsible adult arrived to relieve the officers, and once the officers were legally in the house pursuant to the exigent circumstances, the officers were authorized to photograph

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items of potential evidentiary significance that were in plain view, specifically, the family's living conditions. *Staib v. State*, 309 Ga. App. 785, 711 S.E.2d 362 (2011).

Trial court did not err in admitting into evidence the murder weapon and photographs of the crime scene because the search of the defendant's residence was authorized due to the exigent circumstances; officers arrived at the residence to conduct a welfare check and knocked on the door, which caused the door to open slightly, allowing the officers to see the victim lying motionless on the couch, and after the victim failed to respond to the officers' calls, the officers were authorized to proceed into the residence immediately to come to the victim's aid. *Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

Warrant supported by probable cause. — Defendant's motion to suppress was properly denied as to an arrest warrant as the warrant was supported by probable cause since a witness identified the defendant and stated that the defendant was present at the murder scene and another witness confirmed the identification through a photo lineup and testified to observing the defendant carry out the actual crime; even if the affidavit contained allegedly misleading information that one witness was the victim's cousin and that the defendant was identified by witnesses via a six-photo lineup was redacted, the remaining information was still sufficient to support the probable cause finding. *Waters v. State*, 281 Ga. 119, 636 S.E.2d 538 (2006).

There was probable cause supporting a warrant to arrest the defendant for a homicide; although the defendant claimed that the victim had committed suicide, evidence pointed to a homicide, and the defendant had been found kneeling over the victim in an apparent attempt to stage a suicide. *Hulsey v. State*, 284 Ga. App. 461, 643 S.E.2d 888 (2007).

Probable cause shown. — There was probable cause for a murder defendant's arrest since police officers had been informed by other residents in the home where the defendant was living that the

defendant had admitted killing the victims and that the defendant had shown the residents a tooth from one of the victims. *Stinski v. State*, 281 Ga. 783, 642 S.E.2d 1 (2007).

The trial court did not err in denying the defendant's motion to suppress evidence seized by a state trooper who was lawfully investigating a serious injury accident the defendant was involved in, as evidence the trooper found, specifically, some steel wool and prescription drugs, when coupled with other information the trooper possessed concerning the nature and cause of the crash, provided sufficient probable cause for the trooper to believe that the defendant was driving under the influence; further, the appeals court agreed that the evidence would have been inevitably discovered. *Cunningham v. State*, 284 Ga. App. 739, 644 S.E.2d 878 (2007).

Given the evidence that the defendant was unable to offer a credible explanation for being on the grounds of a housing project, and failed to provide a law enforcement officer with a clear answer when asked about the ownership of a car the defendant had been leaning on, the officer had probable cause to make a warrantless arrest of the defendant for loitering; thus, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of that arrest. *Boyd v. State*, 290 Ga. App. 34, 658 S.E.2d 782 (2008).

There was no merit to a defendant's argument that the trial court should have suppressed evidence because police lacked probable cause for the defendant's arrest. Officers knew that within minutes of a carjacking, three people matching an eyewitness's description were seen in the vicinity of the crime driving vehicles also matching the eyewitness's description; the suspects were followed by police until the suspects abandoned their vehicles and fled across a highway and through a muddy, overgrown area; almost immediately, the officers found the defendant on the other side of the highway, at a closed business, with muddy shoes and debris on the defendant's clothes, sweating profusely; the defendant generally matched the description given of one of the fleeing

suspects; and the defendant could not give a logical explanation for the defendant's presence at that location. *Daugherty v. State*, 291 Ga. App. 541, 662 S.E.2d 318 (2008), cert. denied, 2008 Ga. LEXIS 792 (Ga. 2008).

2. Searches

Plain view. — No abuse of discretion resulted from the admission of similar transaction evidence because the state established a sufficient similarity between the crimes charged and the similar transaction; and the defendant failed to show that the evidence in the similar transaction was obtained as a result of an illegal search and seizure, as the officer involved in the seizure did so through a lawful non-search plain view situation. *Sherrer v. State*, 289 Ga. App. 156, 656 S.E.2d 258 (2008), cert. denied, 2008 Ga. LEXIS 391 (Ga. 2008).

Photographs of items in plain view. — Juvenile court did not err by admitting photographs of a parent's home during deprivation proceedings because pretermittting whether a purported violation of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para XIII would preclude the admission of photographs in a child deprivation action, police officers were authorized to take photographs of items observed in plain view as long as the officer was in a place where the officer was entitled to be; even assuming that the admission of the photographs was erroneous, the parent failed to show that the parent was harmed thereby in light of the remaining evidence supporting the juvenile court's determination that the children were deprived. *In the Interest of R. C. H.*, 307 Ga. App. 774, 706 S.E.2d 686 (2011).

Warrant required to search curtilage. — It is the general rule that a warrant is required to search the curtilage, and the yard immediately surrounding one's dwelling is well within the curtilage. *Black v. State*, 119 Ga. App. 855, 168 S.E.2d 916 (1969).

Public safety exception. — When the "public safety" exception allowed a police officer to ask the defendant about the location of a knife prior to giving the Miranda warnings, the trial court did not

err in admitting the defendant's statements and the knife into evidence. *Martin v. State*, 277 Ga. 227, 587 S.E.2d 650 (2003).

Prima facie search made within curtilage of owner without warrant is unconstitutional and void. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

"Curtilage" defined. — "Curtilage" includes the yards and grounds of a particular address, its gardens, barns, buildings, etc. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Enclosure is unnecessary to mark boundary of curtilage. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Search of curtilage. — Defendant's consent to search the defendant's house impliedly included consent to search the curtilage, in which a "hobo," or garbage can, was located. *Woods v. State*, 258 Ga. 540, 371 S.E.2d 865 (1988).

It is confusing to combine the concepts of "common area" and "curtilage" in deciding whether a particular area adjoining an apartment building is entitled to protection. The test should be the reasonableness of the resident's expectation of privacy and the officer's reasons for being in the yard. *Espinoza v. State*, 265 Ga. 171, 454 S.E.2d 765 (1995).

Evidence was not within the curtilage shared by two units in a duplex since the evidence was not found in the hallway leading to both units or in the front yard between two driveways leading to the dwelling. Evidence located in the yard outside the driveway leading to the defendant's unit, an area where the defendant had a reasonable expectation of privacy, i.e., a part of the curtilage of the defendant's unit, for which police did not have a search warrant, should have been suppressed. *Espinoza v. State*, 265 Ga. 171, 454 S.E.2d 765 (1995).

Trial court properly granted defendants' motions to suppress evidence of drugs and drug paraphernalia found at the residence owned by one defendant as officers had already learned that the person they were looking for stayed at a trailer next door, and thus officers engaged in impermissible search of the curtilage when officers found a bag of drugs 45 feet from the

Searches and Seizures (Cont'd)**2. Searches (Cont'd)**

defendants' house; as a result, all evidence seized in course of subsequent searches of the property was obtained as a direct result of the impermissible intrusion into the curtilage and had to be suppressed as fruit of the poisonous tree. *State v. Gravitt*, 289 Ga. App. 868, 658 S.E.2d 424 (2008).

Vehicles parked within the curtilage of a dwelling to be searched pursuant to a warrant may also be searched pursuant to that warrant. *Midura v. State*, 183 Ga. App. 523, 359 S.E.2d 416 (1987).

Continued detention when driver unable to produce driver's license. — Trial court did not err in denying the defendant's motion to suppress when a police officer was authorized to stop the vehicle the defendant was driving because of a perceived traffic violation and to continue the officer's investigation because the defendant did not have a driver's license; the particularized and objective basis for the initial stop was the information from the Georgia Crime Information Center that the male owner of the registered vehicle defendant was operating had a suspended driver's license, and once the stop was made, and it was ascertained that the defendant was not the owner of the car, the officer had a duty to further investigate only because defendant could not produce a driver's license. *Humphreys v. State*, 304 Ga. App. 365, 696 S.E.2d 400 (2010).

Search of passengers on commercial bus. — Trial court properly denied a defendant's motion to suppress evidence of drugs found in a bag that the defendant acknowledged belonged to the defendant during a bus search conducted by the Motor Carrier Compliance Division of the Georgia Department of Motor Vehicle Safety as the defendant was not in custody when the defendant answered an officer's questions that the bag belonged to the defendant and that the officer could search the bag. As a result, no seizure under the Fourth Amendment occurred, and it was not necessary for the officer to advise the defendant of the defendant's

Miranda rights since no arrest or seizure took place. *Solano-Rodriguez v. State*, 295 Ga. App. 896, 673 S.E.2d 351 (2009).

Marijuana field not in curtilage. — Marijuana patch was not within the curtilage of the defendant's home since the patch was between 30 feet and 30 yards from the house, no fences or enclosures surrounded the patch and the home, and officers had legally viewed the patch from the air and knew before entering the area that it was used to grow marijuana and not for an intimate domestic activity; the marijuana plants were not growing inside a structure of any kind or shielded by any covering, but were located in a 30 to 40 acre kudzu field and surrounded by a mesh hog-wire fence. *Gordon v. State*, 277 Ga. App. 247, 626 S.E.2d 214 (2006).

Apartment renter or owner in Georgia has reasonable expectation of privacy in curtilage surrounding the apartment. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Seizure invalid when intrusion into curtilage without probable cause. — An intrusion by police officers into curtilage, without probable cause to search or arrest, without a warrant, and without exigent circumstances, renders the subsequent seizure invalid. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980).

Because the seizure of cash found on the defendant's person was conducted based on a lawful arrest for a domestic violence act of assault, given information by the defendant's girlfriend, the girlfriend's obvious injuries, and the defendant's attempt to flee, the trial court properly denied suppression of the evidence; however, because the defendant maintained a reasonable expectation of privacy in the curtilage surrounding the defendant's residence, absent a warrant or exigent circumstances, suppression of cocaine found in that area was erroneously denied. *Rivers v. State*, 287 Ga. App. 632, 653 S.E.2d 78 (2007).

Evidence connecting vehicle with premises required before authorized search pursuant to warrant. — In order to authorize a search of a vehicle parked within the curtilage of the premises which are to be searched pursuant to

a warrant, there must be some evidence to connect the vehicle with the premises. *Albert v. State*, 155 Ga. App. 99, 270 S.E.2d 220 (1980).

Probable cause for belief that certain articles subject to seizure are in dwelling cannot of itself justify search without warrant. *Black v. State*, 119 Ga. App. 855, 168 S.E.2d 916 (1969).

Person's presence at suspect place. — A citizen does not, by mere presence at a suspect place, lose the constitutional right from unreasonable search of the citizen's person and the citizen's property to which the citizen otherwise would be entitled. *Collins v. State*, 187 Ga. App. 430, 370 S.E.2d 648 (1988).

Warrant usually required before search of luggage seized from automobile. — In the absence of exigent circumstances or some exception to the warrant requirement other than that applicable to automobiles, a warrant must be obtained before searching personal luggage seized from a lawfully stopped automobile. *Buday v. State*, 150 Ga. App. 686, 258 S.E.2d 318 (1979).

Consent to search invalid. — Trial court did not err in granting defendant's motion to suppress evidence of cocaine found during a search incident to a traffic stop because defendant's consent to search was not valid since the defendant was under arrest for loud music; the fact that defendant was nervous after being stopped by a state trooper was not in and of itself sufficient articulable suspicion which would result in probable cause to search defendant's vehicle. *State v. McCloud*, 261 Ga. App. 37, 581 S.E.2d 679 (2003).

Trial court properly granted the defendant's motion to suppress evidence seized by law enforcement which showed that the first officer on the scene lacked a particularized and objective basis for suspecting that the defendant was involved in criminal activity, and after a back-up officer arrived, neither officer was placed in fear of their safety by the defendant's actions; thus, the first officer's acts of detaining the defendant and asking for consent to search were unlawful. *State v. Lanes*, 287 Ga. App. 311, 651 S.E.2d 456 (2007), cert. denied, 2008 Ga. LEXIS 85 (Ga. 2008).

Search of visitor's bag. — Trial court properly suppressed evidence gathered in connection with a warrantless search of a bag owned by the defendant after the defendant's arrest at a friend's house. The search was not incident to the defendant's arrest under O.C.G.A. § 17-5-1, as the defendant was already secured in a patrol car and there was no contention that the bag was related to the outstanding warrant on which the defendant had been arrested; the consent given by the defendant's friend to the search of the friend's home did not override the privacy interest that the defendant, a visitor, had in the bag; and there was no testimony that the bag was searched as part of an inventory of the defendant's personal effects. *State v. McCarthy*, 288 Ga. App. 426, 654 S.E.2d 239 (2007).

Search of lost wallet. — A trial court erred in denying defendant's motion to suppress the drug evidence found in defendant's wallet, which defendant lost at a concert, and the shell of a plastic pen in defendant's pocket after being searched, since by losing the wallet and not abandoning the wallet, the defendant never lost the expectation of privacy regarding the wallet. *Wolf v. State*, 291 Ga. App. 876, 663 S.E.2d 292 (2008).

Search of purse during booking process. — Upon the defendant's arrest based on a warrant for failure to appear, the defendant was subject to being transported to jail for booking and the trial court did not err in concluding that the contents of the defendant's purse would have been inevitably discovered as part of the booking process associated with the defendant's lawful arrest. *Schweitzer v. State*, 319 Ga. App. 837, 738 S.E.2d 669 (2013).

Search of desk at work. — A trial court erred by failing to suppress the evidence seized by the police from defendant's desk at work and concluding that no warrant was required for the search of the desk because it was unlocked and was in a workspace shared by numerous co-workers. A warrant was required for the search of the desk and, since the warrant authorizing the search was issued without a showing of probable cause based on the tip of an unidentified caller, and there was

Searches and Seizures (Cont'd)**2. Searches (Cont'd)**

no exception to the warrant requirement shown, the fruits of the search of the desk had to be suppressed. *Harper v. State*, 283 Ga. 102, 657 S.E.2d 213 (2008).

Search of vehicle of corrections officer in prison parking lot. — Trial court properly denied a motion to suppress filed by the defendant, a corrections officer, whose car was searched after a drug-detecting dog alerted in the parking lot of the prison where the defendant worked. Signs posted outside the prison informed those entering that they would be subject to search once inside the guard line; by driving onto the premises, the defendant consented to such a search. *Bradley v. State*, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

Breath test admissible in DUI. — Defendant's breath test was admissible because the defendant consented after being read an implied consent warning as required by O.C.G.A. § 40-5-67.1(b)(2), and there was no evidence that the officers used fear, intimidation, threat, or lengthy detention to obtain the defendant's consent, although the defendant was arrested and in handcuffs when the notice was read. *Kendrick v. State*, 335 Ga. App. 766, 782 S.E.2d 842 (2016).

Roadblocks. — Police roadblock for driving under the influence (DUI) was proper, and defendant's motion to suppress evidence collected at the roadblock was properly denied, since: the decision to set up the roadblock was made by a supervisory officer who also approved the time and the place of the roadblock; the roadblock served a legitimate purpose; all vehicles were stopped at the roadblock; the screening officer had prior training and experience with respect to field sobriety testing, police checkpoint implementation, and DUI detection; the delay to motorists was minimal; and the roadblock was well-identified by several signs, an emergency vehicle, a police car with flashing lights, and officers at the scene. *Carson v. State*, 278 Ga. App. 501, 629 S.E.2d 487 (2006).

Despite the defendant's claim on appeal that evidence was obtained by police con-

ducting an illegal roadblock and that an arbitrary desire to keep officers busy was not a sufficient purpose to justify the roadblock, the trial court properly denied a motion to suppress evidence seized from the roadblock, as its primary purpose was to check for drivers' licenses, seat belts, and vehicle registrations, and not general law enforcement. *Cater v. State*, 280 Ga. App. 891, 635 S.E.2d 246 (2006).

Roadblock, implemented by a lieutenant in the police department with 19 years of experience in order to check for drunk drivers and drivers without a license or insurance, was valid under Ga. Const. 1983, Art. I, Sec. I, Para. XIII; the lieutenant was a supervisor authorized to plan a roadblock, and the roadblock had a valid purpose. *Giacini v. State*, 281 Ga. App. 426, 636 S.E.2d 145 (2006).

Because a form document, entitled the "Henry County Police Department Roadblock & Safety Checkpoint Record," introduced at a motion to suppress hearing by the state was properly admitted as a business record under former O.C.G.A. § 24-3-14 (see now O.C.G.A. § 24-8-803), and the testimonial evidence regarding the primary purpose of the roadblock passed constitutional muster, in that it was legitimately conducted as part of a statewide "zero tolerance" campaign, the defendant's motion to suppress the evidence seized as a result was properly denied. *Yingst v. State*, 287 Ga. App. 43, 650 S.E.2d 746 (2007).

Trial court did not err by denying the defendant's motion to suppress evidence obtained during a traffic stop because there was some evidence that the defendant attempted to avoid a roadblock; the defendant made an immediate, sudden turn into a driveway, reversed course, and drove away from the checkpoint at the same time that the police officer noticed the defendant's headlights. *Blakely v. State*, 316 Ga. App. 213, 729 S.E.2d 434 (2012).

Motion to suppress evidence obtained at a highway roadblock was properly denied because the supervisory officer did not lose supervisory status while assisting subordinates when traffic was backed up, and the officer's uncontradicted testimony that the officer was expressly authorized

to plan and implement roadblocks was sufficient to establish supervisory authority. *Williams v. State*, 317 Ga. App. 658, 732 S.E.2d 531 (2012).

Articulable suspicion insufficient to validate warrantless search. — An articulable suspicion is not sufficient in and of itself to validate an otherwise invalid warrantless search of a stopped or detained automobile. *McKinney v. State*, 155 Ga. App. 930, 273 S.E.2d 888 (1980).

Absence of articulable suspicion. — When an officer had the defendant put the defendant's hands on the truck during a traffic stop and began to frisk the defendant, a seizure occurred, and since there was no articulable suspicion of criminal activity, the detention and search were illegal; the evidence belied any supposed threat, so the officer's frisk of the defendant was not a justified Terry stop and frisk. *Debord v. State*, 276 Ga. App. 110, 622 S.E.2d 460 (2005).

Failure of the police to knock and give verbal notice may be excused if the police have reasonable grounds to believe that forewarning would either greatly increase their peril or lead to the immediate destruction of the evidence. *Martin v. State*, 165 Ga. App. 760, 302 S.E.2d 614 (1983).

Van parked in adjoining lot not subject to search authorized of house. — Since the defendant's van was parked in the driveway of a vacant lot adjoining the residence mentioned in the search warrant, the search of the van was not conducted within the dwelling described in the warrant or the dwelling's curtilage and was therefore unauthorized. *Landers v. State*, 250 Ga. 808, 301 S.E.2d 633 (1983).

Search held contemporaneous to arrest. — When the defendant's arrest was lawful, the fact that the arresting officer took the time to write out two traffic tickets before searching the defendant's vehicle did not render the search noncontemporaneous to the arrest. *Oswell v. State*, 181 Ga. App. 35, 351 S.E.2d 221 (1986).

Search of the defendant's clothes, during which crack cocaine was found in the defendant's pocket, was proper as it was incident to a lawful arrest. *Finney v.*

State, 270 Ga. App. 422, 606 S.E.2d 637 (2004).

Since an officer had probable cause to arrest a juvenile from the time that a cellophane bag, still warm to the touch and filled with marijuana, was found near where the juvenile had been standing, a search of the juvenile's pocket, which yielded a bag of methamphetamine powder, was permissible as a search incident to lawful arrest, even though arrest formalities had not yet occurred. In the *Interest of J.D.G.*, 278 Ga. App. 672, 629 S.E.2d 397 (2006).

Warrantless arrest of the defendant was authorized on the ground that a sale of cocaine was committed in the officers' presence, and after the defendant retreated into a motel room, the exigencies of the situation demanded and excused an immediate entry into the room for the officer to arrest the defendant without a warrant; hence, suppression of the evidence seized thereafter would not have been granted. *Fortson v. State*, 283 Ga. App. 120, 640 S.E.2d 693 (2006).

Trial counsel did not render ineffective assistance by failing to move to suppress evidence found on the defendant's person because any motion to suppress would have been without merit; when the officers lawfully approached and questioned the defendant, the smell of alcohol on the defendant's person and emanating from a cup, and the officers' earlier observations of the defendant staggering and stumbling in the middle of the roadway, gave the officers probable cause to arrest the defendant for unlawfully walking upon the roadway while under the influence of alcohol, O.C.G.A. § 40-6-95, and the cocaine and digital scales subsequently found in the defendant's pockets were discovered pursuant to a lawful search incident to an arrest. *White v. State*, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Search of vehicle following arrest not improper. — Although there may have been technical violations of former O.C.G.A. § 40-5-121(b)(1) in an officer's arrest of a driver for driving with a suspended license, the driver's statement that the driver's license was suspended provided the officer with probable cause to arrest, and any violation of

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§ 40-5-121(b)(1) did not render the subsequent search of the van improper. *Agnew v. State*, 298 Ga. App. 290, 680 S.E.2d 141 (2009).

Use of a trained drug detection dog, in a location where the dog is entitled to be, to sniff the exterior of a container, is not an unreasonable search. *O'Keefe v. State*, 189 Ga. App. 519, 376 S.E.2d 406 (1988), cert. denied, 189 Ga. App. 519, 376 S.E.2d 406 (1989); *State v. Montford*, 217 Ga. App. 339, 457 S.E.2d 229 (1995).

"Free air search" by a drug sniffing dog around the exterior of a vehicle stopped during a purportedly valid traffic stop in which the police did not have an articulable, reasonable suspicion of any illegal drug activity was valid under Ga. Const. 1983, Art. I, Sec. I, Para. XIII. *Bowens v. State*, 276 Ga. App. 520, 623 S.E.2d 677 (2005).

Trial court properly denied the defendant's suppression motion, as the evidence showed that once an officer obtained the defendant's consent to conduct a free air search around the vehicle the defendant was driving, a drug dog alerted to contraband that would be contained therein, and once this occurred, the officer had probable cause to believe the defendant was transporting drugs. *Garvin v. State*, 283 Ga. App. 242, 641 S.E.2d 176 (2006).

A urinalysis constitutes a search and seizure. *Smith v. City of E. Point*, 183 Ga. App. 659, 359 S.E.2d 692 (1987), rev'd on other grounds, 258 Ga. 111, 365 S.E.2d 432 (1988).

City's urinalysis testing of employees with police powers was constitutionally reasonable since a compelling need for the use of urinalysis was demonstrated by reports of marijuana use, the interest the city had in preventing that use, and the fact that the city first attempted to solve the problem by conventional means. *City of E. Point v. Smith*, 258 Ga. 111, 365 S.E.2d 432 (1988).

Taking saliva samples for DNA testing not unconstitutional. — Former O.C.G.A. § 24-4-60 (see now O.C.G.A. § 35-3-160) did not violate the Fourth

Amendment or Ga. Const. 1983, Art. I, Sec. I, Para. XII, as Georgia's legitimate interest in creating a permanent identification record of convicted felons for law enforcement purposes outweighs the minor intrusion involved in taking prisoners' saliva samples and storing DNA profiles, given their reduced expectation of privacy in their identities. *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005).

Terry search of auto passenger. — A Terry pat-down search is authorized when the officer reasonably believes that it is necessary to protect the officer from attack, including the search of passengers in vehicles omitted from the original police notifications. *Dowdy v. State*, 209 Ga. App. 311, 433 S.E.2d 293 (1993).

Passenger had standing to contest seizure and detention. — Because the passenger had standing to contest the passenger's own allegedly illegal seizure and detention in connection with a traffic stop, and because evidence or contraband discovered in a search of the car during the traffic stop could be considered the fruits of the passenger's illegal detention, the passenger could move to suppress the evidence or contraband and could thus indirectly challenge the search of the car. *State v. Menezes*, 286 Ga. App. 280, 648 S.E.2d 741 (2007).

Pat-down search held proper. — Trial court did not err in denying the defendant's motion to suppress the evidence seized by law enforcement, given the totality of the circumstances presented, including: (1) an anonymous tip; (2) the two responding officers' personal observations of the defendant's actions at the scene; and (3) their brief investigative detention of the defendant; thus, a pat-down of the defendant's outer clothing was reasonable. *Carter v. State*, 287 Ga. App. 597, 651 S.E.2d 759 (2007), cert. denied, 2008 Ga. LEXIS 172 (Ga. 2008).

An officer was justified in being concerned for the officer's safety and in conducting a pat-down search of the defendant based upon the officer's observations of the defendant's earlier behavior of repeatedly tugging at the defendant's waistband to pull up the defendant's sagging

pants, the bulge in the defendant's waistband that appeared to be a pistol grip, and the defendant's actions of raising the defendant's left hand and reaching toward that bulge when the officer approached the defendant. *Davis v. State*, 290 Ga. App. 1, 658 S.E.2d 788 (2008).

Trial court did not err in denying the defendant's motion to suppress because the search of the defendant's pockets was valid; the officers had a particularized and objective basis for suspecting that the defendant was involved in criminal activity, and because the pat-down was brief, yielded no evidence, and was not a basis for the further investigative detention, it did not taint the defendant's subsequent consent to the search of the pockets. *Mwangi v. State*, 316 Ga. App. 52, 728 S.E.2d 729 (2012).

Trial court did not err in denying the defendant's motion to suppress because the initial encounter was a first-tier encounter requiring no suspicion since the defendant was already stopped and the officer did not block the defendant's vehicle, activate the blue lights, or otherwise indicate that the defendant was unable to leave; the subsequent pat-down was proper because the pat-down was performed pursuant to the defendant's consent, which the defendant freely gave when requested by the officer. *Kirkland v. State*, 316 Ga. App. 310, 728 S.E.2d 907 (2012).

Pat-down search held improper. — Trial counsel was ineffective for not seeking to suppress evidence; before conducting a pat-down, officers had not obtained any information that would support a reasonable belief that the defendant was armed or dangerous, and there was prejudice in that the evidence supporting the convictions all resulted, directly or indirectly, from the search. *Perez v. State*, 284 Ga. App. 212, 643 S.E.2d 792 (2007).

When a defendant was asked to leave a car and was patted down while a warrant was being served on the driver, the Terry pat-down was unconstitutional when the officer who conducted the pat down acknowledged that the officer had no reason to believe that the defendant was armed but that it was the officer's general practice to pat down anyone the officer asked

to leave a car. Accordingly, drugs discovered as a result of the pat-down should have been suppressed. *Teal v. State*, 291 Ga. App. 488, 662 S.E.2d 268 (2008).

Trial court erred in denying the defendant's motion to suppress a gun police officers found on the defendant's person because although the officers had a sufficient basis for a brief initial Terry stop since the defendant partially fit the description given by the victim of the person who attacked the victim, the officers had no authority to conduct the pat-down that discovered the weapon on the defendant's person; the fact that the officers suspected that the defendant could have been the one that assaulted the victim did not reasonably give rise to a belief that the defendant was armed and a threat to the officers, and because the record revealed no proof of other circumstances known to the officers when the officers commenced the frisk that would lead a reasonable officer to conclude that the defendant had a weapon or instrument capable of being used as a weapon on the defendant's person, the state did not carry the state's burden of proving the propriety of the search. *Daniels v. State*, 307 Ga. App. 216, 704 S.E.2d 466 (2010).

Pat-down search exceeded permissible scope. — Because the state introduced no evidence that the defendant consented to an officer's opening of a matchbox retrieved from the defendant's pants, the officer was not concerned that a weapon was hidden in the box, and the box was not readily identifiable as contraband, the search of the defendant's person exceeded the permissible scope of a pat-down for weapons, requiring suppression of the cocaine found inside the matchbox. *Mason v. State*, 285 Ga. App. 596, 647 S.E.2d 308 (2007).

Third-tier detention. — Trial court erred in finding that a narcotics investigator only escalated an encounter to a second-tier detention by using a neck restraint maneuver and ordering the defendant to spit out what was in the defendant's mouth because by placing the defendant in a neck restraint and ordering the defendant to spit out the baggy, the investigator escalated the encounter to a third-tier detention requiring a show-

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ing of probable cause; thus, the trial court erred in treating the encounter as a second-tier detention requiring only a showing of reasonable suspicion. *Lewis v. State*, 317 Ga. App. 391, 730 S.E.2d 757 (2012).

Pat-down of pocket of coat found hanging in hotel. — Marijuana was properly seized from the pocket of a coat hanging outside the bathroom door in the defendant's hotel room; the officer who needed to enter the closed bathroom was justifiably concerned for safety and was worried if a bulge in the coat was a gun. A pat-down of the coat pocket was a reasonable step, and the officer was authorized to seize a baggie found in the pocket. *Johnson v. State*, 285 Ga. 571, 679 S.E.2d 340 (2009).

Search incident to arrest. — Defendant's Fourth Amendment rights were not violated when drug agents searched the bag defendant was carrying after defendant got off a train in a Georgia city and defendant fit the profile of a drug courier who a confidential informant told one drug agent would be on the train; defendant's actions in attempting to flee after defendant consented to speak with another drug agent and the totality of the circumstances in general showed that the drug agents had probable cause to search the bag and, thus, the search was part of a valid arrest. *Higdon v. State*, 261 Ga. App. 729, 583 S.E.2d 556 (2003).

When evidence showed that the first defendant's cell phone was an instrumentality of the crime of cocaine trafficking and that the details of the drug transaction were arranged by telephone, the trial court did not err in denying the motion to suppress the search of the defendant's cell phone because the defendant's cell phone was confiscated during a lawful search incident to the defendant's arrest and because it was an instrumentality of the crime that was probative of criminal conduct. *Lopez v. State*, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

Officer's search of the defendant's vehicle incident to the defendant's arrest was lawful because the crime of arrest was the

possession of bagged marijuana in the defendant's pocket, and it was reasonable to believe that evidence relevant to the offense could be found in the vehicle from which the defendant exited. *Kirkland v. State*, 316 Ga. App. 310, 728 S.E.2d 907 (2012).

Probable cause existed to search passenger. — It was error to suppress evidence seized pursuant to a search of the car in which the defendant had been a passenger on the ground that the driver had not voluntarily consented to the search; an officer was authorized to make a traffic stop because of a traffic violation, and after the stop, the occupants' behavior and visible drug paraphernalia gave the officer probable cause to search the car. *State v. Menezes*, 286 Ga. App. 280, 648 S.E.2d 741 (2007).

Search after stop for seat belt violation authorized. — Because sufficient evidence existed to support a finding that the arresting officer had a clear and unobstructed view of the defendant not wearing a seat belt as required by O.C.G.A. § 40-8-76.1(f), the officer's subsequent stop of the defendant's vehicle was supported by probable cause, making suppression of the evidence thereafter seized unwarranted. *Schramm v. State*, 286 Ga. App. 156, 648 S.E.2d 392 (2007).

Motion to suppress properly denied. — Trial court did not err in denying defendant's motion to suppress items that were found in the trunk of defendant's car after defendant was apprehended on suspicion of shoplifting despite defendant's claim that defendant did not consent to the search of the car, as the trial court weighed the credibility of the testimony and the record supported the trial court's finding that defendant freely and voluntarily consented to the search; moreover, even if defendant did not consent to the search, the search was valid under the automobile exception to the warrant requirement, which allows a warrantless search of a vehicle when there is probable cause, because the police had probable cause to search the vehicle in light of information from a store manager who saw the defendant place store items in the defendant's trunk without paying for them and in light of defendant's subse-

quent conduct of shoplifting at another store down the road 30 minutes later. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Driving under the influence of alcohol conviction was upheld as the trial court properly denied the defendant's motion to suppress breath test results taken from an officer posted at a secondary roadblock since the evidence supported the fact that the officer was part of the primary roadblock, and thus had legitimate authority to stop the defendant; the fact that the officer may have served as the chase car was irrelevant as the chase car was also part of the primary roadblock. *Fischer v. State*, 261 Ga. App. 44, 581 S.E.2d 680 (2003).

Appellate court's finding that O.C.G.A. § 40-8-73.1 was unconstitutional as no rational connection existed between the residence of the driver of a vehicle and the goal of improving law enforcement officer safety during traffic stops, did not warrant suppression of evidence seized during a traffic stop of the defendant's vehicle, because the investigating officer had reason to believe that the vehicle's windows were tinted darker than that permitted by the statute. *Ciak v. State*, 278 Ga. 27, 597 S.E.2d 392 (2004).

When a police officer learned that defendant's license was suspended and the officer had just seen defendant driving a car, the officer had probable cause to arrest defendant for driving without a license; because the officer could thereafter search defendant incident to arrest, the trial court did not err in denying defendant's motion to suppress. *Edge v. State*, 269 Ga. App. 88, 603 S.E.2d 502 (2004).

Defendant's suppression motion was properly denied as an officer did not exceed the scope of the officer's initial traffic stop since officer had a reasonable and articulable suspicion when the officer smelled the "very" strong odor of marijuana coming from the truck; the conflict between defendant's answers to the officer's questions and the strong odor of burnt marijuana detected by the officer constituted probable cause to search defendant's truck for marijuana; the search was not based upon the traffic violation that caused the initial stop and defen-

dant's attempt to distinguish between the odor of "burnt" marijuana and "burning" marijuana was also rejected. *Williams v. State*, 273 Ga. App. 637, 615 S.E.2d 789 (2005).

Defendant's motion to suppress was properly denied as the totality of the circumstances gave rise to an articulable suspicion, justifying the police officers' detention of the defendant. *O'Neal v. State*, 273 Ga. App. 688, 616 S.E.2d 479 (2005).

Defendant was not in custody simply from being pulled over and temporarily detained; since the defendant was not in custody at the time that the officer pulled the defendant over, there was no need for the officer to give a Miranda warning prior to asking the defendant about drugs found in the defendant's car, and the defendant's motion to suppress was properly denied. *Connell v. State*, 279 Ga. App. 413, 631 S.E.2d 456 (2006).

Because officers had probable cause to arrest the defendant, based on the officers' awareness of the defendant's prior arrest following an explosion at a methamphetamine lab and that the defendant was subject to bond requirements related to such arrest, and, at the time of the search, the defendant was in the company of an individual who was driving on a suspended license and carrying methamphetamine, which was in violation of the defendant's bond conditions, the trial court properly denied the defendant's motion to suppress the evidence seized pursuant to the search incident to a valid arrest. *Collins v. State*, 281 Ga. App. 240, 636 S.E.2d 32 (2006).

Trial court properly denied the defendant's motion to suppress marijuana seized as a result of a pat-down search conducted by an investigating officer as: (1) the officer observed sufficient, articulable facts to believe that an aggravated assault suspect might be leaving town; and (2) upon smelling burnt marijuana, and the possibility that weapons might be present, a pat-down of those individuals present, including the defendant, was supported by the totality of the circumstances known to the officer at the time. *Brown v. State*, 283 Ga. App. 250, 641 S.E.2d 551 (2006).

Because the totality of the circum-

Searches and Seizures (Cont'd)**2. Searches (Cont'd)**

stances known to the law enforcement officers participating in the drug investigation and the undercover purchase of narcotics supplied sufficient probable cause that contraband would be found inside the vehicle the defendant was driving, suppression of the drug evidence seized during the search of this vehicle was properly denied. *Stroud v. State*, 286 Ga. App. 124, 648 S.E.2d 476 (2007).

Trial court did not err in denying the defendant's motion to suppress as officers could lawfully search the interior of the defendant's car. A sergeant who had received a report of a speeding car had a reasonable and articulable suspicion of criminal activity having occurred, and after the defendant fled and disobeyed an order to stop, a second officer had probable cause to arrest the defendant for obstruction following which the car interior could be lawfully searched under O.C.G.A. § 17-5-1. *Spence v. State*, 295 Ga. App. 583, 672 S.E.2d 538 (2009).

Trial court did not err in denying the defendant's motion to suppress cocaine a detective found in the defendant's pocket because the defendant's presence on the premises being searched and defendant's apparent attempt to flee from the premises provided probable cause for the detective to believe that the defendant possessed or was, at least, a party to the crime of possessing, the unlawful contraband specified in the warrant, which authorized the detective to detain defendant and to conduct a warrantless search of the defendant's person. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Trial court did not err in denying the defendant's motion to suppress marijuana a police officer found in a vehicle in which the defendant was a passenger because the defendant was legally detained when the officer sought the driver's consent to search, and the officer made the officer's request shortly after completing the officer's check of the occupants' identification, which was within six minutes of initiating the stop; having found that the defendant was not subject to an illegal detention, the trial court did not err in further concluding

that the defendant lacked standing to challenge the search on other grounds. *Baker v. State*, 306 Ga. App. 99, 701 S.E.2d 572 (2010).

Trial court did not err in denying the defendants' motion to suppress evidence police officers seized pursuant to search warrants for a residence and vehicles and a traffic stop because all of the facts, taken together, justified the stop based on a reasonable articulable suspicion that the occupants of the vehicles were involved in an active marijuana growing operation; a search warrant for the residence was pending based on probable cause to believe that an active marijuana growing operation was being conducted inside, the officers had information from multiple sources that the residence was a marijuana grow house, the house exhibited the physical characteristics of other grow houses that had been recently discovered, and the officers observed the defendants driving away from the residence in tandem with a truck and large recreational trailer, which had been obscured in the backyard behind a privacy fence. *Prado v. State*, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Because an inventory search of a codefendant's vehicle after impoundment was reasonable, and because the search was performed incident to the codefendant's lawful arrest, there was no basis to suppress the evidence seized from the search. *Williams v. State*, 308 Ga. App. 464, 708 S.E.2d 32 (2011).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer obtained through a traffic stop of a driver's vehicle because the stop of the defendant and the driver was valid since the officer's observation that the vehicle was traveling 40 miles per hour in a 35-mile-per-hour zone authorized the officer to initiate the traffic stop, and the officer was on the lookout for the vehicle based on information relayed by the county drug squad; the stop was not illegally extended because it did not matter whether the request to search came during the traffic stop or immediately thereafter, and there was no illegal detention since the questioning was almost instantaneous, all indications were that the

search of the vehicle was by consent of the driver. *Hammont v. State*, 309 Ga. App. 395, 710 S.E.2d 598 (2011).

Trial court did not err in denying the defendant's motion to suppress because an officer did not extend the duration of a traffic stop; the officer's testimony supported the conclusion that the officer asked for consent to search during the time that the officer was issuing citations, and the officer's questioning did not extend the duration of the defendant's detention. *Arroyo v. State*, 309 Ga. App. 494, 711 S.E.2d 60 (2011).

Trial court did not err in denying the defendant's motion to suppress because the evidence provided sufficient reasonable articulable suspicion to support a brief detention of the defendant; an officer had a particularized and objective basis for suspecting that the defendant was involved in criminal activity when the officer told the defendant to leave a residence because the officer was aware that the owner of the residence was known for dealing narcotics from a number of prior cases the officer had personally worked on, and the officer believed that the defendant was at the residence to buy marijuana. *Hilbun v. State*, 313 Ga. App. 457, 721 S.E.2d 656 (2011).

Trial court properly denied the defendant's motion to suppress, as the officer was authorized to initiate the traffic stop after observing the defendant's seat belt violation and was thereafter authorized to make a reasonable inquiry and investigation. After learning that the defendant did not have a valid driver's license, the officer had probable cause to arrest the defendant and after observing the defendant reach into a pocket, retrieve a plastic bag, and attempt to conceal the bag, the officer had probable cause to search the vehicle for contraband. *Horne v. State*, 318 Ga. App. 484, 733 S.E.2d 487 (2012).

Defendant's motion to suppress was properly denied when the officer's stop of the defendant was based on the officer's reasonable articulable suspicion that the defendant was operating a bicycle in violation of O.C.G.A. § 40-6-296(a), and marijuana was discovered in a bag on the handlebars of the bicycle during the stop, which was not unreasonably prolonged.

Bolen v. State, 320 Ga. App. 3, 739 S.E.2d 11 (2013).

Harmless error. — When the defendant was subjected to a pat-down search and the defendant's wallet was removed from the defendant's pocket, after which the defendant fled, leaving the wallet behind, any error in failing to suppress the wallet was harmless because its contents only showed the defendant's identity, which was not an issue. *Ramirez v. State*, 279 Ga. 569, 619 S.E.2d 668 (2005), cert. denied, 546 U.S. 1217, 126 S. Ct. 1435, 164 L. Ed. 2d 138 (2006).

Probable cause for arrest. — When the defendants were convicted of trafficking in cocaine, the trial court did not err in finding that there was probable cause to arrest the two defendants because after the codefendant met the two defendants in a nearby apartment complex, the defendant returned with the package of cocaine to sell to the undercover agent, and the second defendant parked that defendant's truck facing the area of the anticipated exchange, apparently so that the second defendant and the first defendant could watch the drug deal; therefore, the trial court did not err by denying the first defendant's motion to suppress. *Lopez v. State*, 267 Ga. App. 532, 601 S.E.2d 116 (2004).

Defendant's suppression motion was properly denied, even though an officer lacked a reasonable suspicion of criminal activity to support a first investigatory stop, as the defendant's flight after the officer's general questions, the defendant's suspicious claim that the defendant was biking home from a job 10 miles away, and the defendant's proximity to a car with flashing lights consistent with a triggered car alarm, supported a second investigatory stop; the evidence the defendant sought to suppress was obtained after the second investigatory stop. *Crowley v. State*, 267 Ga. App. 718, 601 S.E.2d 154 (2004).

Defendant's suppression motion was properly denied as the arresting officer radioed in and was told that there was an outstanding arrest warrant for the defendant; whether the information later proved incorrect or invalid was immaterial. *Howard v. State*, 273 Ga. App. 667, 615 S.E.2d 806 (2005).

Searches and Seizures (Cont'd)**2. Searches (Cont'd)**

Trial court did not err in denying a motion to suppress, as the defendant's presence at the scene of an ongoing robbery, coupled with the defendant's flight from police, supplied sufficient probable cause justifying an arrest, and police thereafter conducted a lawful Terry pat-down. *Vega v. State*, 285 Ga. App. 405, 646 S.E.2d 501 (2007).

Trial court did not err in failing to suppress all the evidence discovered as a result of the defendant's arrest because the arresting officer had probable cause to make an arrest for DUI. *Caraway v. State*, 286 Ga. App. 592, 649 S.E.2d 758 (2007), cert. denied, 2007 Ga. LEXIS 686 (Ga. 2007).

A deputy had probable cause to arrest a defendant for DUI independent of field sobriety tests; when the deputy arrived on the scene and before the deputy conducted the tests, the deputy was told by another officer that the defendant had been driving on the wrong side of the road and had been drinking, the deputy noticed that the defendant was unsteady and nervous and smelled strongly of alcohol, and the defendant admitted to having been drinking two or three hours before. *Tune v. State*, 286 Ga. App. 32, 648 S.E.2d 423 (2007).

Officer had probable cause to believe that, by lying about whether weapons were in a vehicle, the defendant had violated O.C.G.A. § 16-10-20 because, at the time the defendant produced the rental agreement for the vehicle, the officer saw a firearm in the center console of the rental car, which the defendant apparently tried to conceal by quickly closing the console; when the officer asked the defendant whether any weapons were in the car, the defendant denied it, and that was a reason for the officer to detain the defendant and to secure the firearm for the officer's own safety. *Culpepper v. State*, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer recovered from a rental car because the officer had reasonable grounds for detaining the defendant since

the officer found the defendant and a friend in the parking lot of a closed business late at night, knew that several burglaries and thefts had occurred in the area recently, and observed that the defendant and the friend appeared to be nervous when the officer spoke with them; in the course of securing a firearm the officer saw a firearm in the center console of the rental car, the officer saw in plain view a digital scale with white residue, affording the officer probable cause to effect a custodial arrest of the defendant. *Culpepper v. State*, 312 Ga. App. 115, 717 S.E.2d 698 (2011).

Motion to suppress improperly denied. — Trial court erred in denying the defendant's motion to suppress evidence, as the evidence that the police officer either observed or seized as a result of entry into the defendant's apartment without consent and without the existence of exigent circumstances violated the defendant's constitutional right to be free from unreasonable searches. *Leon-Velazquez v. State*, 269 Ga. App. 760, 605 S.E.2d 400 (2004).

Motion to suppress improperly granted. — Trial court erroneously granted suppression of the evidence seized in a traffic stop involving two defendants in which an officer, after arresting the first defendant for obstruction, searched the car and found a substance which a field test showed to be cocaine, as the stopping officer was authorized to make the stop based on a violation of O.C.G.A. § 40-6-202 and because the officer could search the passenger compartment of the car incident to the arrest of the first defendant. *State v. Stafford*, 288 Ga. App. 309, 653 S.E.2d 750 (2007), aff'd, 284 Ga. 773, 671 S.E.2d 484 (2008).

With regard to the defendant's conviction for trafficking in methamphetamine, the defendant failed to establish that defense counsel was ineffective for failing to pursue a motion to suppress the evidence found in the defendant's room as the evidence showed that a preliminary motion to suppress was filed and that trial counsel concluded that, based on the Fourth Amendment waivers of the defendant and others involved, pursuit of the motion would have been fruitless. *Corn v. State*, 290 Ga. App. 792, 660 S.E.2d 782 (2008).

Trial court erred in granting a defendant's motion to suppress crack cocaine police officers found in the defendant's pants' pocket during a pat-down search because the officers made a valid Terry stop, and the defendant was not free to leave; the undisputed testimony from the officers was that based on the officers' experience, outside window tinting was often performed on stolen cars, defendant and other men were working on a car in a vacant lot, the car had no tag, and the men were gathered around the car in a way that could be construed as trying to conceal a stolen automobile. *State v. Miller*, 300 Ga. App. 55, 684 S.E.2d 80 (2009).

Trial court erred in granting the defendant's motion to suppress evidence resulting from a police officer's search and seizure because, although the defendant was subjected to a tier-two Terry-type investigative detention, the defendant was not in custody, and the defendant was detained for a reasonable time to investigate in conjunction with the valid stop, and the officer's question regarding whether the defendant was in possession of contraband occurred within a few seconds of the stop, such that no reasonable person could believe that they were under arrest and that they were not free to leave after the officer had been afforded a reasonable time to finish conducting a traffic investigation. *State v. Hammond*, 313 Ga. App. 882, 723 S.E.2d 89 (2012).

Reentry not justified by earlier arrest. — On review, the court agreed with the plaintiff that the sheriff's deputies violated the Fourth Amendment when they unlawfully entered the house and arrested the plaintiff; a reasonable police officer in the deputies' positions could not show that their presence in the home was justified, either by exigent circumstances or consent or that the reentry was a lawful extension of the initial entry 20 minutes earlier to arrest the plaintiff's wife. *Bashir v. Rockdale County*, 445 F.3d 1323 (11th Cir. 2006).

Probable cause for stop. — Trial court erred in granting the defendants' motion to suppress the drug evidence seized following a traffic stop for a violation of O.C.G.A. § 40-8-73.1, as an offi-

cer's observations of a vehicle's dark tinted windows, and belief that such violated the statute were sufficient to justify the stop; moreover, a free air search by a drug-sniffing dog did not violate the defendants' Fourth Amendment rights. *State v. Simmons*, 283 Ga. App. 141, 640 S.E.2d 709 (2006).

Proper basis existed for an investigative stop as a police officer was given a description of the vehicle used by the perpetrators of an armed robbery, which matched that of the defendant's vehicle; a protective sweep of the vehicle, which revealed, inter alia, a handgun, was justified as the crime was committed at gunpoint. *Billingsley v. State*, 294 Ga. App. 661, 669 S.E.2d 699 (2008).

No justification for stop. — Trial court properly granted the defendant's motion to suppress evidence a deputy sheriff obtained in the course of a traffic stop because the court found that the deputy did not really believe at the time of the stop that the absence of side view mirrors supplied proper grounds for a stop and that the deputy did not, in fact, see anyone toss anything from the car were not clearly erroneous; the factual findings were based not only upon a video that was absent from the record on appeal but also upon an assessment of the credibility of the deputy. *State v. Reid*, 313 Ga. App. 633, 722 S.E.2d 364 (2012).

No probable cause when defendant could not identify owner of vehicle. — An officer improperly arrested a defendant for sitting in a car, the owner of which the defendant could not identify. As the officer had no report of a stolen vehicle, nor was there any evidence that the vehicle had been broken into, the officer had no probable cause to remove the defendant from the vehicle and arrest the defendant; therefore, evidence consequently discovered in the vehicle was illegally obtained and properly suppressed. *State v. Fisher*, 293 Ga. App. 228, 666 S.E.2d 594 (2008).

Entry into car upheld after officer saw object in plain view. — Based on an unusual metal pipe an officer saw through a defendant's window after the officer made a traffic stop, its resemblance to other pipes the officer knew to be used

Searches and Seizures (Cont'd)**2. Searches (Cont'd)**

to smoke marijuana, the officer's experience in a drug interdiction unit, and the defendant's nervous behavior, the officer was authorized to enter the defendant's vehicle based on the officer's viewing of the metal pipe; the officer was then lawfully in a position to observe in plain view a glass pipe containing methamphetamine. *Glenn v. State*, 285 Ga. App. 872, 648 S.E.2d 177 (2007).

Consent given by outbuilding owners and property deemed abandoned.

— With regard to a defendant's convictions for sexual abuse of a child, the trial court properly denied the defendant's motion to suppress various items found in an outbuilding that the defendant, the victim, and the victim's parent had been living in as the owners of the outbuilding consented to the entry by the police as well as had brought certain items to the police themselves. The defendant's failure to retrieve the items for over three months, despite repeated requests on the part of the owners to get the items, as well as the defendant moving out of state sufficiently established that the defendant had abandoned the property, thus, no illegal search and seizure was possible. *Driggers v. State*, 295 Ga. App. 711, 673 S.E.2d 95 (2009).

Officers had no knowledge of bond order when conducting search. — Defendant's drug-related convictions were reversed on appeal as the trial court erred by taking judicial notice of a bond order against the defendant to justify the search of the defendant's person by two officers on patrol in a high crime area when the officers had no knowledge of the bond order at the time the search was conducted. The trial court should have conducted a hearing to determine the validity of the defendant's waiver of the defendant's Fourth Amendment rights and the reasonableness of imposing such a waiver as a condition of the defendant's pretrial release on the bond. *Cantrell v. State*, 295 Ga. App. 634, 673 S.E.2d 32 (2009).

Search of vehicle after illegal detention not justified despite probable cause for initial stop. — Trial court

erred by denying two defendants' motion to suppress the drug evidence found in the vehicle in which one defendant was driving, and the other defendant was a passenger, because the search of the vehicle was conducted after the defendants were illegally detained after a traffic stop. The officers were justified in stopping the vehicle upon observing the vehicle speeding but by only observing nervousness and an expandable baton, the officers exceeded the scope of a permissible search by continuing to detain the defendants without any cause to believe the defendants were dangerous; thus, the search was not justified. *Bell v. State*, 295 Ga. App. 607, 672 S.E.2d 675 (2009).

Search of vehicle in parking lot of closed gas station proper. — Officers were authorized to search the defendants' vehicle for weapons to ensure the officers' safety under circumstances in which an officer investigating a burglary call found the defendants parked in the dark lot of a closed gas station, the defendants claimed that the defendants had mechanical difficulty but there were other open gas stations nearby, the defendants were unduly nervous and appeared to have been hiding the interior of the vehicle while the defendants kept moving in and out of the vehicle, and the officer saw bags in the vehicle; additionally, the officer's concern increased when the men separated and one of them "got around behind" the officer's patrol car. The fact that the defendants were outside the vehicle when the search was conducted did not change the result because a suspect re-entering a suspect's car after an investigative detention would have had access to any weapon therein. *Kennedy v. State*, 298 Ga. App. 372, 680 S.E.2d 478 (2009).

Unlawful search of vehicle in apartment complex. — Trial court did not err in granting the defendant's motion to suppress all evidence seized after the vehicle the defendant was driving was stopped because the defendant did not abandon the car or lose any reasonable expectation of privacy with regard to the car; when the defendant ran away after the traffic stop, the police officer had just observed the defendant park the car within a parking space of an apartment complex, where the

person to whom the car's registered owner had entrusted the vehicle lived, and because the evidence from which the officer ascertained the defendant's identity derived from documents found during the unlawful search of the car, the trial court did not err in rejecting the state's argument that the items retrieved from the sidewalk were admissible in a trial against the defendant. *State v. Nesbitt*, 305 Ga. App. 28, 699 S.E.2d 368 (2010).

Search of hotel room. — Contraband found by police officers in the defendant's hotel room was properly seized under the Fourth Amendment because the hotel manager had the authority to terminate the defendant's rental agreement without prior notice on the ground the defendant was selling drugs from the room and creating a disturbance at the hotel, and did so before the officers went to the room; thus, the defendant no longer had a reasonable expectation of privacy in the room. The officers had to determine if anyone was in the room before the clerk could lock the door and effectuate the eviction, and thus properly entered the room to search in places where someone could be hiding and properly seized marijuana found on a table in plain view, as well as marijuana located under the bed. *Johnson v. State*, 285 Ga. 571, 679 S.E.2d 340 (2009).

Trial court erred in granting the defendants' motion to suppress evidence found in a hotel room and by assuming that the defendants had a continuing expectation of privacy in a hotel room because a guest services agent had the authority to evict the defendants from the room once the agent learned that the defendants had checked into the hotel using a fraudulent credit card, and because the defendants had obtained the room through a fraudulent credit card that would not be honored by the credit card company, the defendants were not paying a fee for the room and were not guests within the meaning of O.C.G.A. § 43-21-1(1); therefore, the defendants could be evicted from the room for cause, and if the defendants were being evicted from the hotel for cause, under O.C.G.A. § 43-21-3.1(b), the defendants were not entitled to notice of the eviction. *State v. Delvechio*, 301 Ga. App.

560, 687 S.E.2d 845 (2009).

Search of commercial establishment. — Night club and owner's U.S. Const., amends. IV and XIV and Ga. Const. 1983, Art. I, Sec. I, Para. XIII claims against two police officers survived summary judgment after the club and the owners alleged that the officers entered the club without a warrant, probable cause, or exigent circumstances, ordered the lights turned on and the music stopped, frisked the club's patrons and handcuffed some of the patrons without making any arrests, and acted in an intimidating manner. *Illusions of the South, Inc. v. City of Valdosta*, No. 7:07-cv-6 (HL), 2009 U.S. Dist. LEXIS 27154 (M.D. Ga. Mar. 30, 2009).

Items in plain view seen through open door to residence. — In a cocaine trafficking prosecution, though the defendant testified that an officer kicked in the door to the defendant's residence, as the defendant's landlord testified that there was no damage to the front door, and the trial court was entitled to believe the officer's testimony that the door was open, the officer was entitled to seize drugs seen in plain view through the open door. Therefore, the defendant's motion to suppress the drugs was properly denied. *Reid v. State*, 298 Ga. App. 889, 681 S.E.2d 671 (2009).

3. Consent Searches

a. In General

Test as to whether or not consent to search was freely given is "totality of the circumstances". *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) *United States v. Scott*, 578 F.2d 1186 (6th Cir.), cert. denied, 439 U.S. 870, 99 S. Ct. 201, 58 L. Ed. 2d 182 (1978); *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Impact of alcohol on consent to search. — Based on the United States Supreme Court decision in *Missouri v. McNeely*, in which the court rejected a per se rule that the natural metabolism of alcohol in a person's bloodstream constitutes an exigency justifying an exception

Searches and Seizures (Cont'd)**3. Consent Searches (Cont'd)****a. In General (Cont'd)**

to the U.S. Const., amend. 4's search warrant requirement for nonconsensual blood testing in all driving under the influence cases, the Georgia Supreme Court overruled *Strong v. State*, 231 Ga. 514 (1973) to the extent that decision holds otherwise. *Williams v. State*, 296 Ga. 817, 771 S.E.2d 373 (2015).

Defendant's driving under the influence case was remanded to the trial court because in considering the defendant's motion to suppress, the court failed to address whether the defendant gave actual consent to the procuring and testing of blood, which would require a determination of the voluntariness of the consent under the totality of the circumstances. *Williams v. State*, 296 Ga. 817, 771 S.E.2d 373 (2015).

State must carry burden on issue of consent to search. — Whether or not consent to search was freely given is an issue on which the state must carry the burden of proof. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Consent to search must be product of essentially free and unrestrained choice by its maker. *Williams v. State*, 151 Ga. App. 833, 261 S.E.2d 720 (1979).

Consent to search properly imposed as probation condition. — Trial court did not err in denying the defendant's motion to suppress, as a consent to search was properly imposed as a condition of the defendant's probation and did not amount to a waiver of rights; thus, the defendant's tacit acceptance of this special condition provided the police with the authority to search. *Peardon v. State*, 287 Ga. App. 158, 651 S.E.2d 121 (2007).

Probable cause and warrant not required for search and seizure conducted pursuant to consent. *Williams v. State*, 151 Ga. App. 833, 261 S.E.2d 720 (1979).

Probationer waives rights when probationer consents to periodic searches. — When a person voluntarily agrees, as a condition of probation, to the

possibility that periodic "shake down" searches would be conducted, the probationer consents to a search of the probationer's person, the probationer's property, and the probationer's room and waives the probationer's Fourth Amendment rights. *Dean v. State*, 151 Ga. App. 847, 261 S.E.2d 759 (1979).

Trial court did not err in denying the defendant's motion to suppress the results of a search of the defendant's person and home because the defendant validly waived the defendant's Fourth Amendment rights under the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, when the defendant entered into a negotiated guilty plea to possession of a firearm and possession of marijuana; the transcripts of the defendant's guilty plea revealed that the defendant was informed by the assistant district attorney that a Fourth Amendment waiver was part of the negotiation, neither the defendant nor the attorney objected to the Fourth Amendment waiver during the plea, the trial court explained the Fourth Amendment waiver to the defendant on the record, and the defendant signed a waiver as a special condition of probation. *Morrow v. State*, 311 Ga. App. 323, 715 S.E.2d 744 (2011), cert. denied, No. S11C1872, 2011 Ga. LEXIS 993 (Ga. 2011).

Requiring consent to periodic search as condition of parole is not unreasonable. *Dean v. State*, 151 Ga. App. 847, 261 S.E.2d 759 (1979).

Absent target of search assumes risk of third party permitting search. — When the absent target of search and consenting third party do not have common authority over and mutual use of premises, third party has the right to permit inspection in the third party's own right and the absent target has assumed the risk that the third party may grant this permission to others. *Fears v. State*, 152 Ga. App. 817, 264 S.E.2d 284 (1979).

State may show that permission to search was obtained from third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. *Park v. State*, 154 Ga. App. 348, 268 S.E.2d 401 (1980).

b. Consent Searches of People

Scope of consent to search pockets.

— Given that a police officer was granted consent to search the defendant's hotel room to search for the victim's stolen truck keys, upon the officer's receipt of an inconclusive response that a set of keys found could belong to the victim, a continued search, which yielded methamphetamine, was reasonable, and did not exceed the original scope of consent granted; thus, the trial court did not err in denying the defendant's motion to suppress the drug evidence that officers found as a result of a continued search. *Shuler v. State*, 282 Ga. App. 706, 639 S.E.2d 623 (2006).

Trial court properly denied the defendant's motion to suppress the evidence seized as a result of a pat-down search, because the defendant consented to the search and, under the plain-feel doctrine, the officer conducting the search was authorized to retrieve a plastic bag suspected to be illegal contraband from the defendant's watch pocket. *Dunn v. State*, 289 Ga. App. 585, 657 S.E.2d 649 (2008), cert. denied, 2008 Ga. LEXIS 496 (Ga. 2008).

An officer exceeded the permissible scope of a consent frisk for weapons as nothing indicated that a cigar box that the officer removed from the defendant's pocket felt like a gun or other weapon, and the officer pointed to no particularized facts that reasonably led the officer to believe that the defendant might have a weapon. Thus, crack cocaine found in the box was inadmissible. *Brown v. State*, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

Trial court properly denied the defendant's suppression motion as drug evidence was properly seized during a pat-down search of defendant's person for weapons, which was justified under O.C.G.A. § 17-5-28 because police were in the process of executing a search warrant to search for drugs; a deputy's removal of a package from the defendant's pants pocket was within the scope of defendant's consent. *Brint v. State*, 306 Ga. App. 10, 701 S.E.2d 507 (2010).

Scope of consent did not extend to looking down defendant's pants. — Trial court erred in denying defendant's motion to suppress evidence a police offi-

cer found while conducting a search of defendant's person because the purportedly consensual search of defendant's person was unlawful when the consent was the product of an illegal detention; even if defendant's consent was not the product of an illegal detention, the search exceeded the scope of defendant's consent because defendant's indication that the defendant did not "have a problem" with the officer searching the defendant's pockets could not be interpreted as having extended so far as to have authorized the officer to, after searching all of defendant's pockets and finding nothing, push defendant's abdomen, pull defendant's waistband forward, and look down inside defendant's pants for narcotics. *Walker v. State*, 299 Ga. App. 788, 683 S.E.2d 867 (2009).

Removal of contents of pockets. — Because the consent received by an officer to search the defendant's pockets for weapons did not extend to allowing the officer to remove the contents of those pockets, when the officer testified that the contents did not feel like a weapon or an object immediately identifiable as contraband, the defendant's motion to suppress should have been granted. *Foster v. State*, 285 Ga. App. 441, 646 S.E.2d 302 (2007), cert. denied, 2007 Ga. LEXIS 625 (Ga. 2007).

Sufficient evidence to support non-verbal consent to patdown. — See *Borda v. State*, 187 Ga. App. 49, 369 S.E.2d 327 (1988).

Implied consent statute. — Order denying suppression of chemical test results admitted against a defendant was proper under the implied consent statute, O.C.G.A. § 40-5-55, and was based on sufficient probable cause and valid consent, given evidence that a formal arrest of defendant prior to reading the implied consent rights was not warranted, and defendant was being administered medical care. *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

Trial court properly suppressed the alco-sensor tests taken by the defendant because the officer incorrectly informed defendant that defendant did not have the right to refuse the test; O.C.G.A. § 40-5-55 gave the defendant the right to withdraw implied consent, as, pursuant to

Searches and Seizures (Cont'd)**3. Consent Searches (Cont'd)****b. Consent Searches of People (Cont'd)**

Ga. Const. 1983, Art. I, Sec. I, Para. XIII, a reasonable person in the defendant's position would have thought the defendant, who was ordered to turn around and place the defendant's hands behind the defendant's back after refusing the test, was being placed under arrest. *State v. Norris*, 281 Ga. App. 193, 635 S.E.2d 810 (2006).

Under Ga. Const. 1983, Art. I, Sec. I, Para. XIII, defendant could not suppress the evidence of the blood test taken while the defendant was under suspicion for driving under the influence under O.C.G.A. § 40-6-391; because the state complied with the statutory implied consent requirements, the defendant was deemed under the implied consent provisions of O.C.G.A. § 40-5-55 to have given the defendant's consent to a test of the defendant's blood. *Meiklejohn v. State*, 281 Ga. App. 712, 637 S.E.2d 117 (2006).

Blood test results. — Test results of a sample taken from a suspect may not be used for purposes for which the suspect was not advised and to which the suspect did not consent, and while it is not always essential for a person to be told that he or she may refuse to consent to a warrantless search, informing an individual of the right to refuse consent is a factor a trial court may consider in determining whether such consent was voluntary; a trial court's suppression of blood test results obtained from the defendant without a warrant was affirmed when any consent given by the defendant before the blood draw did not include testing and when the defendant was not informed of the defendant's right to refuse consent and did not give a free and voluntary consent after the blood was drawn. *State v. Poppell*, 277 Ga. 595, 592 S.E.2d 838 (2004).

Consent to search of body. — Trial court erred in granting defendant's motion to suppress evidence of contraband, namely, defendant's possession of marijuana, as the police officer's discovery of the marijuana was not pursuant to an impermissible pat-down search that two

other officers conducted on a group of students, including defendant, but was pursuant to defendant's invitation for the officer to search defendant after the officer asked defendant why defendant's license had been suspended; however, a remand was necessary to determine whether defendant's consent to search was voluntarily given. *State v. Baker*, 261 Ga. App. 258, 582 S.E.2d 133 (2003).

Upon questioning from outside of a parked car in which defendant was a passenger, defendant's act of voluntarily and immediately pulling a plastic bag from defendant's pants' crotch area and giving it to police, constituted a voluntary encounter, and not a search, implicating any constitutional protections; thus, defendant's suppression motion was properly denied. *Carrera v. State*, 261 Ga. App. 832, 584 S.E.2d 2 (2003).

Because the defendant was not detained or subjected to prolonged questioning or physical punishment, the police officers were lawfully on the premises, explained the basis for their suspicion, and asked for permission to search the defendant's pants, the defendant's consent to the search was voluntary; consequently, the trial court erred in granting the defendant's motion to suppress. *State v. Kinsey*, 272 Ga. App. 723, 613 S.E.2d 232 (2005).

When the defendant freely and voluntarily consented to an officer's pat-down search, and, upon the officer encountering a hard object in the defendant's pocket, jumped back from the officer, the defendant's act did not constitute a revocation of the defendant's consent to the search, under an objective standard of reasonableness. *Whiting v. State*, 275 Ga. App. 251, 620 S.E.2d 480 (2005).

Trial court erred in finding that the defendant's continued detention after a license check was illegal and without legal justification, as a police sergeant, after detecting an odor of alcohol from the defendant's vehicle, was legally justified to determine whether the defendant was driving while under the influence, and could not do so without conducting field sobriety tests; moreover, a search of the defendant occurred only after the defendant granted the officer consent to do so, and consent was voluntarily given. *State*

v. Johnson, 282 Ga. App. 102, 637 S.E.2d 825 (2006), cert. denied, 2007 Ga. LEXIS 58 (Ga. 2007).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer found in the defendant's wallet during a traffic stop of the vehicle in which the defendant was a passenger because the defendant voluntarily consented to the officer's search of the wallet; although the officer did not have a proper basis to frisk the defendant after asking the defendant to exit the automobile, the contraband was not uncovered during the unlawful pat-down, and the prior unlawful pat-down did not operate to invalidate the defendant's later consent to the search of the wallet. *Rogue v. State*, 311 Ga. App. 421, 715 S.E.2d 814 (2011).

Trial court did not err in failing to grant the defendant's motion to suppress a pistol because the search of a residence was properly conducted when the police obtained the consent of the homeowner; the defendant, who was a visitor at the residence, was physically present but failed to express any refusal of consent or any objection to a police search. *Rockholt v. State*, 291 Ga. 85, 727 S.E.2d 492 (2012).

Search of vehicle passenger not product of illegally expanded traffic stop and not expansion of consent given. — Trial court properly denied defendant's motion to suppress the evidence of pills found on the defendant's person during a traffic stop and convicted the defendant of possession of dihydrocodeinone, since the pat down search of the defendant did not exceed the scope of the consent search and was authorized to ensure the officer's safety, and the safety of others, based on the vehicle driver identifying various weapons in the car. Further, the traffic stop was not illegally expanded since the defendant's arrest occurred nine minutes into the stop and the driver's radar check remained outstanding at the time. *Stagg v. State*, 297 Ga. App. 640, 678 S.E.2d 108 (2009).

Pointing of stun gun at defendant waives consent. — Trial court properly granted the defendant's motion to suppress both the evidence seized upon being stopped and detained by sheriff's officers and all statements made to any law en-

forcement officer following such detention given that: (1) law enforcement exceeded the authority to search the defendant; and (2) the evidence showed that any consent given by the defendant was coerced, as such was obtained when one of the officers pointed a stun gun at the defendant. *State v. Williams*, 281 Ga. App. 187, 635 S.E.2d 807 (2006).

Consent to pat down not valid when defendant was not free to go. — Since an officer was still in possession of the defendant's driver's license, the defendant did not feel free to leave when the officer asked the defendant to exit the parked vehicle; the officer had no reason to suspect criminal activity, the defendant's license was valid, and there were no warrants, so, despite the defendant's initial lie about the reason for being where the defendant was, the continued detention was wrongful, and the defendant's consent to the officer's pat down did not validate the search. *Ward v. State*, 277 Ga. App. 790, 627 S.E.2d 862 (2006).

Mere acquiescence to authority of officer did not substitute for free and voluntary consent. — Despite the fact that the trial court concluded that the second of two defendant's warrantless arrest was unauthorized under O.C.G.A. § 17-4-20(a) because mere acquiescence to the authority asserted by a police lieutenant by both the defendants could not substitute for a free and voluntary consent to search, the trial court erred in finding that the acquiescence granted valid consent to the officer. Thus, the trial court's grant of the motions to suppress filed, in part, was reversed. *Hollenback v. State*, 289 Ga. App. 516, 657 S.E.2d 884 (2008).

c. Consent Searches of Places

Legal search may be made incident to lawful arrest or by consent of owner of premises or property. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Lack of authority to consent to search of residence. — After accessing a defendant's residence from a person that was not authorized to allow access and making no attempt to question anyone's authority to allow access by use of an

Searches and Seizures (Cont'd)**3. Consent Searches (Cont'd)****c. Consent Searches of Places (Cont'd)**

automatic door opener, the subsequent warrantless search of the defendant's residence was unjustified and, likewise, the subsequent search by warrant was illegal. *State v. Gray*, 285 Ga. App. 124, 645 S.E.2d 598 (2007).

Seizure of evidence from locked gun cabinet. — Evidence seized from defendant's locked gun cabinet during a warrantless search of defendant's residence was properly suppressed because defendant's spouse lacked authority to consent to search of the locked cabinet since the spouse informed an officer that the cabinet belonged to defendant and that the defendant was the only one who possessed a key to the cabinet. *State v. Parrish*, 302 Ga. App. 838, 691 S.E.2d 888 (2010).

Authority to consent to search of home. — Evidence was sufficient to support the trial court's finding that the defendant's stepparent had authority to consent to a warrantless entry and search of the stepparent's home; it was undisputed that the stepparent owned the home, and the state was not required to produce a deed. *Thomas v. State*, 290 Ga. App. 10, 658 S.E.2d 796 (2008).

Parent's consent to search of home. — Suppression of dark clothing found in a crawl space in the home of the defendant's parent was not required because the evidence supported the finding that, when a police officer stopped and questioned the defendant's parent at a grocery store soon after the defendant was identified as a suspect in the robbery of the store, the officer's actions were perfectly reasonable given the totality of the circumstances, and there was nothing presented to rebut the evidence that the parent's consent to search the parent's home was voluntary. *Jupiter v. State*, 308 Ga. App. 386, 707 S.E.2d 592 (2011).

Person who consents cannot complain of illegal search and seizure. — When undisputed evidence shows that a person freely and voluntarily authorized a search of the person's automobile, the per-

son cannot complain of an illegal search and seizure. *Hightower v. State*, 228 Ga. 301, 185 S.E.2d 82 (1971).

Defendant's claim that the statements defendant made to an officer as to defendant's intent to buy drugs and ownership of the jacket defendant was wearing, which contained a digital scale, should have been excluded as defendant had not been advised of defendant's Miranda rights was rejected as defendant made the statements after a consensual search revealed that defendant was carrying the scale, which gave the officer a reasonable suspicion to momentarily detain defendant to inquire about the scale. *Lewis v. State*, 268 Ga. App. 547, 602 S.E.2d 278 (2004).

When defendant, after being properly stopped for a traffic violation, was asked for consent to search defendant's vehicle and replied, "I don't care," none of the circumstances surrounding the consent showed it was involuntary, as a videotape of the encounter showed no hint of fear, intimidation, coercion or deceit, there was no evidence of a lengthy detention, and defendant suffered no physical punishment; therefore, an officer's failure to advise defendant of defendant's constitutional rights did not invalidate the consent, as questioning was limited to defendant's lack of a valid driver's license, whether defendant had drugs in the car, and whether defendant consented to a search. *Goodman v. State*, 272 Ga. App. 639, 613 S.E.2d 190 (2005).

Trial court properly denied a defendant's motion to suppress two videotapes seized from the defendant's residence that displayed the defendant engaging in sexual acts with two minors because the defendant had consented to the deputies playing the first videotape, thereby obviating the need for a search warrant, and a third party had spontaneously and voluntarily handed the videotape to the deputies. *Mitchell v. State*, 289 Ga. App. 55, 656 S.E.2d 145 (2007), cert. dismissed, No. S08C0770, 2008 Ga. LEXIS 499 (Ga. 2008).

Consent to limited search. — Given defendant's consent to the limited search of the premises, the officers were lawfully in a position to plainly view the items

associated with the manufacture of methamphetamine; as a result, the officers developed the probable cause necessary to obtain a warrant and search for additional evidence, supporting denial of the defendant's motion to suppress. *Wesson v. State*, 279 Ga. App. 428, 631 S.E.2d 451 (2006).

Scope of consent extended to trunk.

— Defendant was not entitled to suppression of, *inter alia*, marijuana seized from the trunk of a car in which the defendant was a passenger because a police officer did not exceed the scope of the driver's consent to search, which allegedly was limited to looking in the car, by opening the trunk as the officer had discussed the problems with contraband being transported on the state highways prior to requesting the driver's consent; thus, the driver was on notice that the officer was looking for contraband. *Davis v. State*, 297 Ga. App. 319, 677 S.E.2d 372 (2009).

Consent to search included bed of truck. — Search of the defendant's truck did not exceed the scope of the defendant's consent as a reasonable person would have understood the defendant's consent, given after the officer asked if there was anything in the vehicle the defendant should be concerned with, to include a search of the passenger compartment of the truck and the bed of the truck. *Berry v. State*, 318 Ga. App. 806, 734 S.E.2d 768 (2012).

Search of glove box. — Deputy who searched the defendant's car had probable cause to believe that contraband was behind the dashboard near the glove compartment and did not exceed the scope of the defendant's consent by prying open the glove compartment; the deputy observed before the search that both the defendant and the defendant's sibling were extremely nervous, after the search began, the deputy noticed that screws securing the glove compartment were scratched or missing, the deputy smelled marijuana while using a screwdriver to lift the glove compartment to allow the deputy to see behind the dashboard, and the defendant consented to a "complete" search of the vehicle. *Medvar v. State*, 286 Ga. App. 177, 648 S.E.2d 406 (2007).

Evidence sufficiently attenuated from illegality in search of residence.

— Because: (1) evidence seized from the defendant's residence as a result of an interrogation was sufficiently attenuated from any illegality to be admissible; (2) the duration of the search had no bearing on the subsequent consent given by the defendant's roommate; (3) the consent was not a product of any illegal conduct; and (4) there was no evidence of any flagrant misconduct and coercion on the part of the investigating law enforcement officers involved, the evidence was properly admitted. *Spence v. State*, 281 Ga. 697, 642 S.E.2d 856 (2007).

Handcuffed defendant gave free and voluntary consent to search property.

— Trial court did not err in denying the defendant's motion to suppress evidence police officers seized from the defendant's apartment because the state satisfied the state's burden of showing that the defendant's consent to the search was not the product of coercion, express or implied, and although the defendant was handcuffed at the time the defendant consented to the search, voluntary consent could be given while a suspect was handcuffed; the evidence supported a finding that one of the officers requested and received the defendant's consent to search under permissible circumstances, and the officer testified that the officer's gun was not drawn and that the defendant was compliant. *Silverio v. State*, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

Defendant's conviction for possession of cocaine with the intent to distribute was upheld on appeal as the defendant failed to establish that the motion to suppress would have been granted had counsel not waived the issue because, even in handcuffs, the defendant voluntarily consented to the search of the vehicle and the defendant failed to show that the consent was invalid. *Blitch v. State*, 323 Ga. App. 677, 747 S.E.2d 863 (2013).

Sufficient evidence of free and voluntary consent to search of property.

— Since the defendant gave free and voluntary consent for the police to search both the defendant's apartment and vehicle, as evidenced by the defendant's handwritten waiver, and police did not coerce the defendant into doing so, the trial court

Searches and Seizures (Cont'd)**3. Consent Searches (Cont'd)****c. Consent Searches of Places (Cont'd)**

did not err in denying the defendant's motion to suppress. *Watson v. State*, 263 Ga. App. 95, 587 S.E.2d 243 (2003).

Defendant's consent to warrantless searches of the defendant's car and apartment were consensual as the defendant was a well-educated college senior, able to read, write, and understand the English language, and had driven personally to the police station for questioning; after defendant signed the consent forms giving permission to the searches, defendant followed the police to defendant's apartment in defendant's own car. *Ray v. State*, 273 Ga. App. 656, 615 S.E.2d 812 (2005).

Fact that police requested permission to enter the defendant's home several times and pointed out that neighbors could see them on the porch did not make the defendant's consent involuntary when there was no coercion involved; once inside, the police were entitled to inquire about apparent drug paraphernalia that was sitting in plain sight, even though they had originally been inquiring about the reported presence of an assault weapon. *Saadatdar v. State*, 277 Ga. App. 339, 626 S.E.2d 552 (2006).

Search of the defendant's motel room did not violate Ga. Const. 1983, Art. I, Sec. I, Para. XIII or U.S. Const., amend. 4; comparing the officers' testimony, that the defendant gave them permission to enter the motel room and to search the pants that were lying on the floor, with the defendant's companion's uncertain testimony, the trial court did not err in crediting the officers' testimony, and since the officers searched defendant's wallet after they arrested defendant for possession of methamphetamine, the search of the wallet was authorized as a search incident to an arrest. *Johnson v. State*, 281 Ga. App. 7, 635 S.E.2d 278 (2006).

Consensual search upon a traffic stop for a seatbelt violation supported the trial court's denial of a motion to suppress, as the search conducted pursuant to the defendant's consent was not a search based solely on the defendant's failure to wear a

seatbelt; thus, the trial court did not err by ruling that law enforcement did not violate the Fourth Amendment during an officer's traffic stop for a violation of O.C.G.A. § 40-8-76.1. *Blitch v. State*, 281 Ga. 125, 636 S.E.2d 545 (2006).

Because the defendant's consent to search was not obtained by deceit, the defendant voluntarily accompanied officers to the motel room searched, and the consent was not the product of an illegal detention, suppression of the contraband seized was unwarranted. *Miller v. State*, 287 Ga. App. 179, 651 S.E.2d 103 (2007).

A trial court did not err in denying either defendant's motion to suppress the methamphetamine seized during the consensual search of defendant's vehicle or a motion to suppress defendant's voluntary custodial statement, as the testimony of the arresting and investigating officers established that defendant did not display any problems with the understanding of the English language as did videotapes of the vehicle search and the in custody interview, which likewise showed defendant having no problems with the English language. Therefore, defendant's consent to the search of the vehicle nor defendant's waiver of defendant's Miranda rights were invalidated. *Serrano v. State*, 291 Ga. App. 500, 662 S.E.2d 280 (2008).

Because the defendant waived the defendant's Miranda rights and because the defendant freely and voluntarily consented to a search of the defendant's premises, to a drug test, and to an interview, the defendant's consent was not the product of coercion; accordingly, the trial court properly denied the defendant's motion to suppress. *Handy v. State*, 298 Ga. App. 633, 680 S.E.2d 646 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence seized during the warrantless search of the defendant's residence because the evidence supported the trial court's finding that the defendant and the defendant's roommate freely and voluntarily consented to the search of their residence, and the officers testified that the officers did not coerce, threaten, or offer any hope of benefit to obtain the consents; the roommate gave the officers consent to search the common areas of the residence, and

after the defendant arrived at the residence, the defendant likewise consented to the searches of the defendant's bedroom and of the defendant's person. *Park v. State*, 308 Ga. App. 648, 708 S.E.2d 614 (2011).

Trial court did not err in denying a motion to suppress evidence a police officer seized in a hotel room because the trial court was authorized to find that the state satisfied the state's burden of showing that the defendant's consent to enter the hotel room was voluntary and not the product of coercion, express or implied; the officer's testimony and the defendant's statement supported a finding that the officer requested and received the defendant's consent to enter the hotel room under circumstances that did not suggest either coercion or threat, and the trial court was authorized to infer that the defendant's consent to search was freely given in the calculated hope that the officer would not find the hidden contraband. *Liles v. State*, 311 Ga. App. 355, 716 S.E.2d 228 (2011).

Consent to auto search. — Trial court erred in granting defendant's motion to suppress since the police had probable cause to search the driver's vehicle because a police officer smelled the odor of burning marijuana coming from the car following a valid traffic stop and the driver gave consent to search the car, the police did not need to establish that probable cause existed to search individual containers in the car which might contain contraband since the probable cause that existed to search the car gave them the right to also search each of the car's containers, and, thus, the trial court should not have suppressed evidence of contraband found in the book bag of the passenger, the defendant. *State v. Selph*, 261 Ga. App. 541, 583 S.E.2d 212 (2003).

Because the defendant's consent to search was validly obtained during a traffic stop rather than afterward, and the trial court could conclude that the defendant consented to the car's search despite an alleged limited understanding of English, the trial court properly denied the defendant's motion to suppress. *Salmeron v. State*, 273 Ga. App. 55, 614 S.E.2d 177 (2005), *aff'd*, 280 Ga. 735, 632 S.E.2d 645 (2006).

Suppression motion was properly denied as defendant was properly stopped for running a stop sign, an outstanding arrest warrant was found during a license check, and defendant consented to the search of defendant's truck after defendant's arrest. *Brooks v. State*, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Denial of the defendant's motion to suppress evidence was proper because the evidence at the suppression hearing showed that an officer's suspicions were aroused during a traffic stop due to the defendant's erratic behavior and the fact that, on the floorboard behind the driver's seat of the defendant's car, the officer observed a bag similar to others the officer had seen used to transport illegal drugs; after the officer filled out the citation and returned it to the defendant to sign, the officer asked the defendant for consent to search the car which the defendant gave. *Dowd v. State*, 280 Ga. App. 563, 634 S.E.2d 509 (2006).

Trial court properly denied the defendant's motion to suppress the marijuana seized as the search of the defendant's truck was conducted after a valid traffic stop after the defendant gave the officer consent to conduct the search, and nothing supported the defendant's claim that this consent was coerced because it was obtained during a custodial interrogation and without the benefit of Miranda warnings as the officer's questioning did not unduly prolong the traffic stop and did not result in an unauthorized seizure or an equivalent custodial detention for which Miranda warnings were required. *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

A trial court did not err in denying a defendant's motion to suppress the evidence gathered in the search of the defendant's vehicle, which resulted in the seizure of a plastic bag containing additional baggies that tested positive as to containing methamphetamine, in light of the state's evidence indicating that the defendant had been driving under the influence; while the state introduced evidence indicating that the defendant had been driving under the influence, the state's

Searches and Seizures (Cont'd)**3. Consent Searches (Cont'd)****c. Consent Searches of Places (Cont'd)**

evidence also showed that the arresting officer asked for and got the defendant's consent only after the defendant convinced the officer that the defendant was in full possession of the defendant's faculties. *Davis v. State*, 287 Ga. App. 478, 651 S.E.2d 750 (2007), cert. denied, 2008 Ga. LEXIS 179 (Ga. 2008).

Because a police officer was authorized to stop defendant's vehicle based on a suspicion that defendant had illegally dumped trash, and because defendant consented to a search of the vehicle, the items seized from the vehicle would not have been suppressed; accordingly, defendant's ineffective assistance claim failed, and the trial court properly denied defendant's motion to withdraw defendant's Alford plea. *Bishop v. State*, 299 Ga. App. 241, 682 S.E.2d 201 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence a police officer found in the defendant's vehicle because the defendant's consent to search the vehicle was not the product of an illegal detention since after returning the defendant's driver's license and issuing a warning ticket, the officer told the defendant that the defendant was free to leave, but the defendant remained on the scene and engaged in casual conversation about the high level of drug activity in the area and the fact that the defendant worked nearby; the defendant's conduct showed that the defendant did not feel intimidated by the officer's presence, and under the circumstances, the initial traffic stop had de-escalated into a consensual encounter when the officer requested consent to search, which the defendant readily provided, and there was no evidence that the officer coerced the defendant's consent, tricked the defendant, or conveyed a message that the defendant's consent to search was required. *Davis v. State*, 306 Ga. App. 185, 702 S.E.2d 14 (2010).

Trial court did not err in denying the defendant's motion to suppress marijuana a police officer found during the search of

the defendant's car because the evidence showed that the defendant was legally detained when the officer requested consent to search; the officer's testimony reflected that the officer sought consent to search immediately after issuing a verbal warning. *Nix v. State*, 312 Ga. App. 43, 717 S.E.2d 550 (2011).

Trial counsel was not deficient for failing to move to suppress evidence an officer obtained during a traffic stop because there was no illegal detention that would have supported a motion to suppress since the officer's uncontradicted testimony that the officer observed the defendant's car failing to maintain the car's lane provided the reasonable suspicion necessary to support the traffic stop; immediately after checking the defendant's license and insurance, the officer asked for and obtained the defendant's consent to search the vehicle, after which the defendant fled from the scene. *Ross v. State*, 313 Ga. App. 695, 722 S.E.2d 411 (2012).

A trial court erred by denying a defendant's motion to suppress the evidence seized from the defendant's vehicle, despite the defendant consenting to the search of the vehicle, as the police's detention of the defendant was unlawful in as much as no warrant existed since the seizure of the defendant arose from the defendant arriving at a location under surveillance for drug manufacturing based on an anonymous tip regarding a codefendant, and the tip had nothing to do with the defendant. By an officer, who knew the defendant, forcibly opening the defendant's vehicle door, the defendant's movement was physically restrained and the fact that the defendant consented to the search did not validate the search since the consent was the product of a wrongful detention. *Smith v. State*, 288 Ga. App. 87, 653 S.E.2d 510 (2007).

Consent to search vehicle coerced. — Trial court erred by denying defendants' motion to suppress drug and weapon evidence found in defendants' vehicle during a search after a routine traffic stop as the driver's consent to search was coerced in violation of defendants' Fourth Amendment rights by an officer's intimidating, harassing, and threatening words of arrest used to convince the driver to

consent. A videotape of the stop showed that the officer threatened the driver with obstruction of justice and that the officer would bring a dog to the scene if the driver did not consent to the search. *Cuaresma v. State*, 292 Ga. App. 43, 663 S.E.2d 396 (2008).

Withdrawal of consent not shown. — An investigator's testimony that the defendant "got kind of upset a little bit" upon being questioned regarding the things which had been found at the defendant's trailer did not demonstrate that the defendant withdrew consent to a search. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

4. Inventory Searches

Inventory is not for exclusive protection of owner, but also serves to protect police, and, therefore, it is not necessary that police ask a prisoner whether the prisoner wants the prisoner's items to be inventoried. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Inventory searches have two purposes: to protect the vehicle and the property in it, and to safeguard the police or other officers from claims of lost possessions. *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Custodial seizures and accompanying inventory searches are reasonable. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Police seizure and inventory is not dependent for its validity upon absolute necessity for police to take charge of property to preserve it. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Inventory must not be done with investigative intent, but it should be incident to caretaking function of police. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Inventory is permissible intrusion when scope of search is reasonable. — Only so long as the scope of the search is reasonable, taking into consideration the

three interests to be protected by the inventory: the protection of the owner's property while it remains in police custody; the protection of police against claims or disputes over lost or stolen property; and the protection of the police from potential danger, will it be held to be a constitutionally permissible intrusion. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

Inventories pursuant to standard police procedures are reasonable. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116 (1979).

When the police take custody of any sort of container such as an automobile, it is reasonable to search the container to itemize the property to be held by the police. *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Police permitted broad circumstances for valid seizure and inventory of property. — A police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve it. They are permitted to take charge of property under broader circumstances than that. *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Inventory and impoundment may be invalid and unreasonable. — Even though the decision to seize and inventory need not be based upon the "absolute necessity" to do so, unless the rationale for an inventory search inheres in the decision to seize and inventory, the impoundment itself may be "unreasonable" and the resulting inventory search invalid. *State v. Thomason*, 153 Ga. App. 345, 265 S.E.2d 312 (1980), overruled on other grounds, *State v. Stilley*, 261 Ga. App. 868, 584 S.E.2d 9 (2003); *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Inventory rationale is one which may be abused and stretched to cover unnecessary searches; but even some suspicion that contraband will be found will not avoid an otherwise valid inventory search. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979).

Discovery and disclosure of "death note" were pursuant to valid inven-

Searches and Seizures (Cont'd)**4. Inventory Searches (Cont'd)**

tory. — When one officer pursuant to a valid and proper inventory had read and called attention to a “death note” found in the defendant’s possessions and since the discovery and disclosure of the note were appropriate police actions, the subsequent acts of other officers, in rereading and perusing the documents in question were plainly justified under the “second glance doctrine.” *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337 (1979).

Inventory search authorized both as search of properly impounded vehicle and as search incident to lawful arrest. *State v. Gilchrist*, 174 Ga. App. 499, 330 S.E.2d 430 (1985).

A police officer’s decision to impound a car and to conduct an inventory search was upheld after the car was involved in a parking lot collision; the defendant was arrested after driving with a suspended driver’s license and a license tag issued to another vehicle and driving without insurance; the officer was unable to reach anyone locally who could take custody of the car; and other alternatives to impoundment would have incurred the risk of theft or damage to the car or its contents. *State v. Gilchrist*, 174 Ga. App. 499, 330 S.E.2d 430 (1985).

Trial court did not err in denying defendant’s motion to suppress evidence found during the inventory of defendant’s car, which was parked on private property as: (1) defendant was arrested, at night, for carrying a concealed weapon while walking away from a motel after a clerk had reported defendant to the police as a suspicious person; (2) the motel clerk testified that the motel’s policy was to tow unclaimed cars parked in their lot; (3) a detective testified that it was the police department’s policy to impound a suspect’s car so that it would not be stolen or towed by the motel; (4) it was the police department’s policy to inventory the contents of the car before impounding it to protect the department from a suspect later claiming that valuable items were missing from the suspect’s car; and (5) the detective’s decision to impound the car was reasonable within the meaning of the

Fourth Amendment. *Johnson v. State*, 263 Ga. App. 443, 587 S.E.2d 775 (2003).

Impound search of defendant’s car was reasonably necessary to protect the car and its contents where defendant, who was arrested for driving under the influence, was the lone occupant of defendant’s car, the car was parked at the side of the road at 4 A.M., defendant did not ask for an alternative disposition to impoundment, and absent a reasonable request, officers were not obligated to offer impound alternatives to those individuals placed under arrest. *Evans v. State*, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

Defendant’s motion to suppress was properly denied as a search of defendant’s wallet was conducted during an inventory of defendant’s personal items after defendant was arrested and the search was not investigatory. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, *aff’d*, 280 Ga. 222, 626 S.E.2d 500 (2006).

Defendant’s suppression motion was properly denied as the police stopped a rental truck, late at night, and discovered that defendant, the only authorized driver, had a suspended license; the truck was properly impounded and an inventory search conducted as the officer could not allow defendant to continue driving the truck, nor could defendant leave the truck at the scene, creating a potential hazard. *Wiley v. State*, 274 Ga. App. 60, 616 S.E.2d 832 (2005).

Defendant’s motion to suppress evidence of cocaine and crack pipes found during an inventory search of the car was properly denied, as: (1) the police impound was not unlawful; (2) waiting a reasonable time, usually 20 minutes, prior to having the car towed, was not unreasonable as a matter of law; and (3) the officers were not required to call defendant’s relatives first. *Carlisle v. State*, 278 Ga. App. 528, 629 S.E.2d 512 (2006).

Because an officer was authorized to arrest the defendant for weaving, a decision to impound the vehicle the defendant was driving was not unreasonable, and an inventory search of the vehicle was authorized; thus, the trial court did not err in denying the defendant’s motion to suppress the evidence seized as a result of the search. *Lopez v. State*, 286 Ga. App. 873, 650 S.E.2d 430 (2007).

Trial court did not err in denying the defendant's motion to suppress because there was evidence to support the trial court's finding that the officers' search of a zippered, red bag found during the inventory search of the defendant's motorcycle was conducted pursuant to State Patrol procedures, which required that all items of value be listed and, thus, did not exceed the permissible scope of the inventory search; there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation. *Grizzle v. State*, 310 Ga. App. 577, 713 S.E.2d 701 (2011).

Trial court did not err in denying the defendant's motion to suppress because the trial court's finding that the impoundment of the defendant's motorcycle was reasonably necessary under the circumstances was supported by the evidence because the defendant was arrested for attempting to elude police and for several traffic offenses, including driving with an expired license, and the defendant was not going to be allowed to drive the motorcycle under any circumstances. *Grizzle v. State*, 310 Ga. App. 577, 713 S.E.2d 701 (2011).

Inventory search of vehicle pursuant to impoundment. — Trial court erred in denying the defendant's motion to suppress because the inventory search of a van was unreasonable under the Fourth Amendment due to a lack of evidence of police policy; the record contained no evidence about the police department's policy or procedures on inventory searches, but rather, the officers simply testified that the officers' searches of a flatbed wrecker, the van, and the van's contents were inventory searches pursuant to the impoundment. *Capellan v. State*, 316 Ga. App. 467, 729 S.E.2d 602 (2012).

Order to apprehend for a mental health evaluation does not authorize full inventory search. — Search of a civil detainee under O.C.G.A. § 37-3-41, before being placed in a patrol car, absent some valid reason for the officer conducting the search to take custody of the clothing, container, or bag searched, does not come within the ambit of allowable inventory searches because such an in-

ventory presupposes some valid reason for taking custody of the object being searched; an inventory search which is not necessary to achieve the recognized custodial goals of such a search is not permissible, and no controlling precedent authorizes a full inventory search on the basis that a detainee will be transported to another location in a patrol car for a mental health evaluation. *Lindsey v. State*, 282 Ga. App. 644, 639 S.E.2d 584 (2006).

Drug evidence found in a defendant's pocket by a police officer who was executing a civil order to apprehend the defendant for a mental health evaluation under O.C.G.A. § 37-3-41 should have been suppressed because the search in which the officer found the evidence did not come within the ambit of allowable inventory searches; no full inventory search was authorized on the basis that the defendant was to be transported in a patrol car to the location of the evaluation. *Lindsey v. State*, 282 Ga. App. 644, 639 S.E.2d 584 (2006).

Search Warrants

1. In General

Compelled testing after defendant's invocation of right to refuse under implied consent law. — Police do not have the authority to seek a search warrant to compel a defendant to submit blood and urine samples for drug testing after a defendant has invoked the defendant's right under the implied consent law to refuse the testing. *State v. Collier*, 279 Ga. 316, 612 S.E.2d 281 (2005).

General exploratory warrants are void. — By definition, a general warrant is one which does not sufficiently specify the person, place, or thing to be searched. *Lockhart v. State*, 166 Ga. App. 555, 305 S.E.2d 22 (1983).

Search warrants unavailable to individual for maintenance of private right. — Search warrants are criminal in nature, having no relation to civil process and are unavailable to an individual for the maintenance of a mere private right. *Johnson v. State*, 111 Ga. App. 298, 141 S.E.2d 574 (1965), commented on in 17 Mercer L. Rev. 479 (1966).

Search Warrants (Cont'd)**1. In General (Cont'd)**

No prohibition against legislature designating other persons power to issue search warrants. — At common law, justices of the peace had general power to issue search warrants for stolen goods. So long as a judicial determination of the existence of probable cause is made, there is no constitutional inhibition against designation by the General Assembly of persons other than a justice of the peace for doing it. *Johnson v. State*, 111 Ga. App. 298, 141 S.E.2d 574 (1965), commented on in 17 Mercer L. Rev. 479 (1966).

Sufficiency of description contained in warrant. — It is enough if the description of the place to be searched is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended. *Steele v. State*, 118 Ga. App. 433, 164 S.E.2d 255 (1968).

When a search warrant fails to name an individual and describes incorrectly the street number, county, and city, naming only the street name correctly, it is defective. *State v. Hatch*, 160 Ga. App. 384, 287 S.E.2d 98 (1981).

Warrant references adjacent buildings. — Even though a search warrant may have been issued for premises which were described in commercial terms, the express scope of the warrant nevertheless also extended to “adjacent buildings”. Thus, the trial court did not err in failing to grant the motion to suppress the evidence that was discovered in the search of the residence pursuant to the warrant. *Hamil v. State*, 198 Ga. App. 869, 403 S.E.2d 828, cert. denied, 198 Ga. App. 898, 403 S.E.2d 828 (1991).

A description in a search warrant used to seize pornographic tapes was so open-ended that the warrant violated both the United States and Georgia Constitutions. As a result, the search warrant was invalid and the tapes should have been suppressed as the fruits of an illegal search. *Dobbins v. State*, 262 Ga. 161, 415 S.E.2d 168 (1992).

Trial court properly suppressed videotapes that were seized from the defen-

dant's home during the execution of a search warrant as the description in the warrant that the items sought were videotapes that were instruments used in the crimes of molesting and sexually exploiting children did not meet the particularity requirements of U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, especially in light of the fact that the videotapes involved activity protected by U.S. Const., amend. 1, since there was no evidence of any videotape activity involving the victim, and the warrant did not elaborate on what types of videotapes were to be seized, leaving that determination solely to the discretion of the officers, which amounted to an impermissible general warrant. Circumstances may make an exact search warrant description of instrumentalities a virtual impossibility and, in those circumstances, the searching officer can only be expected to describe the generic class of items sought, but a warrant authorizing the seizure of “videotapes” with nothing more does not pass constitutional muster. *State v. Kramer*, 260 Ga. App. 546, 580 S.E.2d 314 (2003).

When a search warrant affidavit incorrectly described the house to be searched as the second house on the right, when it was actually the third house on the right, and a warrant containing the incorrect description had been issued, when a magistrate who did not issue the warrant corrected the errors in the affidavit and warrant, the change was clearly typographical and not so material as to destroy the integrity of the affidavit or the validity of the warrant, and the change did not affect any substantive rights. *Marshall v. State*, 273 Ga. App. 17, 614 S.E.2d 169 (2005).

Evidence seized from defendant at place of work was properly suppressed since the search warrant did not authorize the search of the defendant at the defendant's place of employment and only covered searches at the defendant's residence. *State v. Dills*, 237 Ga. App. 165, 514 S.E.2d 917 (1999).

A search warrant is not invalid for want of description of the premises to be searched if the description sufficiently permits a prudent officer executing the warrant to locate the place definitely

and with reasonable certainty, and without depending upon the officer's discretion. *Chambless v. State*, 165 Ga. App. 194, 300 S.E.2d 201 (1983).

Effect of incorrect street number in warrant. — Even though a street number is incorrect, where there are other elements of description sufficiently particular, the search warrant may be valid. *Chambless v. State*, 165 Ga. App. 194, 300 S.E.2d 201 (1983).

Incorrect street address invalidated warrant. — A search warrant containing the wrong street address was defective under both the federal and Georgia constitutions as the defect was not a mere technical irregularity under O.C.G.A. § 17-5-31 because it did not incorporate the affidavit and application and thus could not be construed with reference to them; furthermore, the warrant did not contain other descriptive elements that would allow an officer to locate the place with reasonable certainty. *Thomas v. State*, 287 Ga. App. 262, 651 S.E.2d 183 (2007).

Sufficient particularity. — Search warrant which defined the person, premises, and vehicle to be searched with sufficient particularity was not subject to attack as a general warrant because it authorized the search and seizure of "the person, premises or property" — the use of the word "or" did not give the officers unbridled discretion in what to search. *Minter v. State*, 206 Ga. App. 692, 426 S.E.2d 169 (1992).

When law enforcement received two anonymous tips that the defendant would be traveling from another state with cocaine in a certain model car licensed in the other state, would be taking a certain route, and would be staying in a certain hotel, the tips' range of details relating to future acts not easily predicted, combined with information obtained while defendant was lawfully detained that \$150,000.00 was seized from a concealed compartment in defendant's vehicle and defendant was deceptive during a conversation with a police officer, allowed the issuance of a search warrant for the defendant's house. *Solis v. State*, 268 Ga. App. 493, 602 S.E.2d 166 (2004).

Trial court properly denied suppression

of the defendant's blood sample for a DNA comparison pursuant to a particularized search warrant seeking the sample as the warrant and the attached affidavit when read together particularly described the evidence to be seized and gave the executing officers adequate notice of the search warrant's scope and command. *Holloway v. State*, 287 Ga. App. 655, 653 S.E.2d 95 (2007).

Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because the fact that the investigator who submitted the affidavit for the search warrant did not leave a copy of the affidavit with the warrant at the premises did not render the warrant invalid; the warrant satisfied the particularity requirement of the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIII on the warrant's face because the warrant listed the address of the place to be searched and contained a description of the home, and the warrant also listed items to be seized, including marijuana, weighing devices, and other paraphernalia used in the distribution of drugs. *Pass v. State*, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

Effect of incorrect date in warrant. — Because affidavit accompanying a search warrant contained sufficient probable cause and resulting search was not rendered illegal merely because the date on the warrant post-dated the search by one day, trial court did not err in denying defendant's motion to suppress evidence seized pursuant to the warrant. *Jones v. State*, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

"Curtilage" does not include neighboring or nearby property which is beyond the property lines of the dwelling specified in the warrant. *Landers v. State*, 250 Ga. 808, 301 S.E.2d 633 (1983).

A driveway is properly considered within the curtilage of the dwelling it services, at least when the driveway is located on the dwelling owner's property. *Landers v. State*, 250 Ga. 808, 301 S.E.2d 633 (1983).

When a search warrant was issued allowing a search of defendant's house, this extended by implication to areas within

Search Warrants (Cont'd)**1. In General (Cont'd)**

the curtilage of the dwelling, and to a vehicle parked within that curtilage. *Solis v. State*, 268 Ga. App. 493, 602 S.E.2d 166 (2004).

Warrant valid which requires officer to make determination of fact. — If the warrant calls for the search and seizure of intoxicating liquors at a described location, the executing officer may be required to determine as a matter of fact which of several different containers found on the premises searched contained intoxicating liquors or which contained other beverages of a nonintoxicating character. In the very nature of things, the officer cannot be relieved of making this determination, and so long as the determination which the officer is required to make is a determination of a matter of fact as distinguished from a determination of a matter of opinion the warrant is valid. *Strauss v. Stynchombe*, 224 Ga. 859, 165 S.E.2d 302 (1968).

Warrant valid when sufficient description and limited scope permits prudent officer to locate person and place. — Even though the execution of a warrant is directed to all peace officers, a search pursuant to the warrant meets the requirements of the United States and Georgia Constitutions if the warrant was limited in the warrant's scope to physically described persons in a specific vicinity, and the description sufficiently permitted a prudent officer with a search warrant to be able to locate the person and place definitely and with reasonable certainty. *Fomby v. State*, 120 Ga. App. 387, 170 S.E.2d 585 (1969), cert. denied, 397 U.S. 1008, 90 S. Ct. 1236, 25 L. Ed. 2d 421 (1970).

To be valid, search warrant must contain description of person and premises to be searched with such particularity as would enable a prudent person executing the warrant to locate the person and premises definitely and with reasonable certainty. *Anderson v. State*, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

Searches of persons on premises but not named in search warrant are illegal absent independent justifica-

tion for a personal search. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Search of person not named in warrant outside home was permissible. — Officer who saw the defendant asleep in a car parked at a house as the officer was headed to the house to execute an arrest warrant for the defendant's brother was entitled to initiate a "first-tier" encounter by approaching the car and asking the defendant to step out; marijuana seen in plain view in the car gave probable cause to arrest the defendant for drug possession, and to search the car, and, incident to the arrest, the officers were also authorized to search the entire passenger compartment of the automobile and any closed containers therein. *Mauge v. State*, 279 Ga. App. 36, 630 S.E.2d 174 (2006).

Searches treated as searches of person. — Searches of a paper bag carried under a person's arm and of a plastic bag in a person's pocket have been treated as searches of the person. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Constitutional protection of visitor's personal belonging. — Personal belongings brought by their owner on a visit to a friend's house retain their constitutional protection until their owner meaningfully abdicates control or responsibility. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Whether police had notice of searching visitor's effects requires factual determination. — Whether the police had notice that the police were searching the personal effects of a visitor to searched premises must be determined on the facts of each case. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Without notice of ownership, police can assume objects subject to search. — Without notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within premises lawfully subject to search under a warrant are part of those premises for the purpose of executing the warrant. *Childers v. State*, 158 Ga. App. 613, 281 S.E.2d 349 (1981).

Failure to record information in affidavit will not invalidate search warrant. — If information sufficient to up-

hold a determination of probable cause is presented under oath to a state magistrate, the failure to record the information in the form of an affidavit will not invalidate the search warrant. *Marshall v. State*, 113 Ga. App. 143, 147 S.E.2d 666 (1966).

Failure to include affidavit or warrant in record on appeal. — Although a defendant challenged the validity of an affidavit supporting a search warrant, neither the warrant nor the affidavit was in the record; thus, the court had to assume that the trial court's decision as to the exclusion of the search results was correct. *Williams v. State*, 287 Ga. App. 361, 651 S.E.2d 768 (2007).

When automobile inventory search was not illegal, later search warrant based upon this information is not invalid. *Anglin v. State*, 244 Ga. 1, 257 S.E.2d 513 (1979).

Search warrant held not overbroad and general. — A search warrant is not impermissibly overbroad and general when the warrant authorizes the agents to search “any other person found on said premises who reasonably might be involved in the commission of the aforesaid violation of the laws” as well as “any motor vehicle found on said premises” and both clauses appear in the preprinted portion of the search warrant form, since a warrant which identifies the premises and its owners or occupants is not void as a general warrant because it authorizes the search of other persons found there who may reasonably be involved in the commission of the crime for which the warrant is issued, and the scope of the search is sufficiently limited by the specific language typed in the blank spaces on the form, describing two vehicles by color, make, type, and license plate number and stating they are at the premises described. *Castillo v. State*, 166 Ga. App. 817, 305 S.E.2d 629 (1983).

Warrant which authorized the seizure of “all items contained within a specified room and motel at the time of the fire on February 17, 2001, and which remain therein which is evidence of the crime of Insurance Fraud” was not impermissibly vague because the warrant included detailed information about the removal of

cats and a dog from defendant's home and taken to the motel room prior to a fire at the home allegedly started by defendant's son with the knowledge and consent of defendant; in the warrant application, an investigator testified that CD's, tapes, stereo equipment, and other electronics were witnessed being taken to the specified motel and room number and were noticeably absent from the fire scene, and an insurance investigator further testified that in a recorded statement, defendant said that there were no items removed from the house prior to the fire. *Maddox v. State*, 272 Ga. App. 440, 612 S.E.2d 484 (2005).

Facts in an affidavit supporting a request for a search warrant, which stated, among other things, that the defendant had bought video tapes known to have child pornography, that the defendant admitted to investigators that the defendant had received and partially viewed the tapes, and that, based on law enforcement experience, it was likely that the defendant would store these items on a computer, the magistrate was authorized to make a pragmatic, common-sense judgment that there was a fair probability that computer equipment in the defendant's residence contained illegal images; the trial court erred in later ruling that the officers only demonstrated probable cause to search for the original tapes and that the warrant should not have included the general items listed, including the defendant's computer. *State v. Henley*, 279 Ga. App. 326, 630 S.E.2d 911 (2006).

Search may not exceed scope of warrant. — A search in execution of a warrant may not exceed in scope the particular article or things to be seized. *Lockhart v. State*, 166 Ga. App. 555, 305 S.E.2d 22 (1983).

When a warrant authorized seizure of “Cruelly treated animals who are sick and are not being treated medically, animals in overcrowded and diseased environment, business records which document condition of animals; euthanizing drugs,” there was no judicial authorization for seizure of drugs other than euthanizing drugs, business records which did not document the condition of animals, and any animal which was not in perfect health.

Search Warrants (Cont'd)**1. In General (Cont'd)**

Military Circle Pet Ctr. No. 94, Inc. v. State, 181 Ga. App. 657, 353 S.E.2d 555, rev'd on other grounds, 257 Ga. 388, 360 S.E.2d 248, vacated on other grounds, 184 Ga. App. 805, 363 S.E.2d 360 (1987).

No knock requirement inappropriately applied. — Because a search warrant affidavit did not contain specific facts indicating a risk of peril to police officers or of destruction of the evidence, there was no probable cause for issuance of a no-knock warrant; consequently, the trial court did not err in granting the defendant's motion to suppress. *State v. Williams*, 275 Ga. App. 612, 621 S.E.2d 581 (2005).

Knock and talk procedures. — Officers' knock-and-talk procedure at a house was permissible, even though an officer used a plastic cup to hit the door of the house because the officer was not standing directly in front of the door for safety reasons and for the preservation of contraband inside the house; once the door was opened, the officer saw drugs in plain view inside the house, permitting the officer's entry. *Herring v. State*, 279 Ga. App. 162, 630 S.E.2d 776 (2006).

Items seized under warrant were properly related to the crime. — Evidence seized pursuant to a valid warrant following the commission of an armed robbery, murder, and related offenses was properly admitted as the items found were of the type which might be employed in the commission of those crimes. *Grimes v. State*, 280 Ga. 363, 628 S.E.2d 580 (2006).

Effect of magistrate's prior issuance of blank warrants. — When the defendant contended the search warrant was invalid because the executing magistrate was not neutral and detached, because the magistrate admitted, after first having denied, that at sometime in the past in an unrelated incident or incidents, the magistrate had signed blank warrants to accommodate an officer when the magistrate was to be at a family dinner, it was held that the incident suggested by the defendant was an isolated incident or incidents in the past and that there was no evidence except remote speculation that

the magistrate's posture in issuing the search warrant in this case was not neutral and detached. *Lang v. State*, 165 Ga. App. 576, 302 S.E.2d 683, cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

Non-issuing magistrate's corrections of errors in warrant. — When a search warrant affidavit incorrectly described the house to be searched as the second house on the right, when it was actually the third house on the right, and a warrant containing the incorrect description had been issued, a magistrate who did not issue the warrant was authorized to correct the errors in the affidavit and warrant, and was not required to take evidence under oath to do so. *Marshall v. State*, 273 Ga. App. 17, 614 S.E.2d 169 (2005).

Not invalid when signed by de facto magistrate. — In a defendant's prosecution on charges of possession of marijuana with intent to distribute and possession of cocaine with intent to distribute, a search warrant issued by an assistant magistrate at the magistrate's direction was invalid because the assistant magistrate could not be considered a de factor officer as no such office had been created by the county commissioners or by the superior court judges under O.C.G.A. § 15-10-20(a). *Beck v. State*, 283 Ga. 352, 658 S.E.2d 577 (2008).

"Staleness" of warrant. — Time alone is inadequate to resolve questions of staleness of information in warrants because the ultimate question is whether, under the facts and circumstances of a particular case, information about evidence is so fresh that there is probable cause to believe the evidence still exists in the same place or is so stale that such a conclusion of probable cause is unreasonable. *McDade v. State*, 175 Ga. App. 204, 332 S.E.2d 672 (1985).

An informant's tip was not stale because the officer waited 72 hours after receiving the tip to seek a search warrant. Regardless of whether the methamphetamine seen by the informant was still in the house, the information provided a substantial basis for believing that when the magistrate issued the warrant, methamphetamine was being manufactured

there. *Zorn v. State*, 291 Ga. App. 613, 662 S.E.2d 370 (2008).

Sufficient facts to issue warrant for defendant's medical records. — Search warrant for the defendant's medical records was proper because the affidavit listed the crimes that were believed to have been committed, including DUI, and averred that the defendant caused an accident and had open and empty beer cans inside the defendant's vehicle; the affidavit included sufficient facts to support a finding that evidence of the crime was in the medical records, and the evidence supported the magistrate's finding of probable cause. Therefore, the defendant's argument that the warrant was invalid because the warrant omitted relevant information and contained false and misleading information was rejected. *Brogdon v. State*, 299 Ga. App. 547, 683 S.E.2d 99 (2009), *aff'd*, 287 Ga. 528, 697 S.E.2d 211 (2010).

Search warrant authorizing a search of defendant's hospital records relating to the defendant's treatment on the night of a shooting was constitutional under U.S. Const., amend. IV and Ga. Const. 1983, Art. I, Sec. I, Para. XIII because the defendant could not claim an expectation of privacy in the medical records to the extent that the records contained information the defendant disclosed to medical personnel or medical personnel disclosed to the defendant in the presence of two police officers. *Bowling v. State*, 289 Ga. 881, 717 S.E.2d 190 (2011).

2. Informants' Reliability and Affidavits

An informant is established as reliable if the informant has previously, on more than one occasion, given to the sheriff truthful information which led to at least one conviction. *Lang v. State*, 165 Ga. App. 576, 302 S.E.2d 683, cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

Independent police work can corroborate details of tip, if a tip is sufficiently detailed so as to show a reliable basis for the informant's information. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Determination of "sufficient detail" test based solely on information coming from informant. — In determining the reliability of the manner in which an informant obtained information, determination of whether the tip meets the "sufficient detail" test is based exclusively on what information came from the informant without reference, at this point, to independent verification of the informant's information. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Suppression motion properly denied. — Trial court properly denied the defendant's motion to suppress the evidence seized pursuant to a search warrant, as: (1) there was a presumption of reliability as to the report of a police officer or undercover agent in the line of duty to a fellow officer in support of the warrant; (2) the affidavit attached to the warrant set forth sufficient facts to establish the reliability of the informant; and (3) a search warrant for the defendant's home was not even necessary because at the time of the search the defendant was on probation. *McTaggart v. State*, 285 Ga. App. 178, 645 S.E.2d 658 (2007).

Trial court properly denied a motion to suppress evidence found pursuant to a search warrant. An informant's predictions that a third person would go to a house near a certain highway and buy drugs from a person with the defendant's first name was confirmed by police; incorrect statements in an officer's affidavit that a vehicle did not stop on the way to and from the defendant's house did not change the determination that probable cause existed to issue the warrant; and the failure of the officer to state that the informant had pending criminal charges did not require a different result. *Spaeth v. State*, 293 Ga. App. 608, 667 S.E.2d 449 (2008).

Trial court did not err in denying the defendant's motion to suppress evidence seized in a hotel suite because the affidavit supporting the search warrant for a hotel suite recited probable cause to believe that drugs would be found on the premises under the defendant's possession, custody, and control, namely the two-room suite that the hotel designated and rented to the defendant. *Glass v.*

Search Warrants (Cont'd)**2. Informants' Reliability and Affidavits (Cont'd)**

State, 304 Ga. App. 414, 696 S.E.2d 140 (2010).

Reliability of informants justifies issuance of search warrant. — When an officer's investigation of the information received from the informants corroborates their allegations against the defendant, the reliability of the informants is sufficiently established to justify the issuance of a search warrant. *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

With regard to a defendant's convictions on drug-related offenses, the trial court properly denied the defendant's motion to suppress the evidence seized from the defendant's apartment upon execution of a search warrant since the affidavit of a deputy, which was based on an informant's tip, sufficiently established probable cause as the informant had been in the defendant's apartment and had personally viewed the drugs. *Rocha v. State*, 284 Ga. App. 852, 644 S.E.2d 921 (2007).

Lack of reliability outweighed by detail. — Search warrant was properly issued under Ga. Const. 1983, Art. I, Sec. I, Para. XIII based on the information provided in the affidavit, as the affidavit's strong showing as to the basis of the informant's knowledge compensated for any deficiency in detail as to the informant's reliability; the informant provided the defendant's first name, the location, quantity, and packaging of the cocaine, and details of the sale of cocaine that the informant had witnessed. *State v. Donaldson*, 281 Ga. App. 51, 635 S.E.2d 345 (2006).

Local law enforcement officers participating in common investigation are reliable informants. *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981).

Magistrate may rely on law enforcement officer's knowledge of suspect's reputation in issuing search warrant. *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981).

Affidavit defective when nothing recited therein shows reliability of informant. — An affidavit based on an informer's tip is fatally defective as the

basis for a search warrant when the affidavit recites absolutely nothing which would show the informer's reliability nor states how the informer obtained the information, and under Ga. L. 1966, p. 567, § 13 (see now O.C.G.A. § 17-5-30) evidence obtained must be suppressed. *Grebe v. State*, 125 Ga. App. 873, 189 S.E.2d 698 (1972).

Determination of whether individual supplying information is truthful person. — Reliable manner of the acquisition of the information having been demonstrated, it must now be determined whether the individual supplying this "reliable" information is a truthful person. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Informant's lack of previous contact with authorities is not fatal to the informant's veracity. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

Requirement that magistrate be informed of underlying circumstances. — Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the articles were where the informant claimed they were. *Maddox v. State*, 133 Ga. App. 709, 213 S.E.2d 1 (1975).

Underlying circumstances requirement is designed to locate original source of incriminating information and to examine the validity or reliability of that information, but is not concerned with the overall reliability of the informant personally. *Shaner v. State*, 153 Ga. App. 694, 266 S.E.2d 338 (1980).

In marginal cases, preference is for validation of warrant. — Recital of some of the underlying circumstances in the affidavit for a search warrant is essential if the magistrate is to perform the magistrate's detached function and not serve merely as a rubber stamp for the police; however, if these circumstances are detailed, if reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hyper-

technical, rather than a common-sense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

Hearsay and even hearsay upon hearsay may be sufficient to furnish basis for issuance of valid warrant if the magistrate is informed of some of the underlying circumstances supporting the affiant's underlying conclusions and the affiant's belief that the informant was credible or the affiant's information reliable. *Smith v. State*, 136 Ga. App. 17, 220 S.E.2d 11 (1975), cert. denied, 425 U.S. 938, 96 S. Ct. 1671, 48 L. Ed. 2d 179 (1976); *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (1979); *State v. Griffin*, 154 Ga. App. 361, 268 S.E.2d 412 (1980).

An affidavit supporting a search warrant may be based on hearsay information so long as there is a substantial basis for crediting the hearsay. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

That there is "hearsay upon hearsay" for information upon which affidavit is based does not preclude finding of probable cause. *Gordon v. State*, 150 Ga. App. 862, 258 S.E.2d 664 (1979).

Mere existence of "hearsay upon hearsay" was not fatal to a search warrant because, under the totality of the circumstances, the magistrate was informed of the underlying circumstances involving an undercover buy from the defendant, independent of the double hearsay, which did not depend upon the reliability of the hearsay declarations; further, a known informant's statements to police against a penal interest elevated the statements' reliability. *Cochran v. State*, 281 Ga. 4, 635 S.E.2d 701 (2006).

Showing required in affidavit as to noninformant hearsay declarant. — As to a noninformant hearsay declarant, the affidavit for a search warrant must contain a showing: (1) that the hearsay information is based on personal observations of the hearsay declarant, and not rumor and speculation, or conclusory allegations of the affiant; and (2) that the

hearsay declarant is reliable — as by stating that he or she is a police officer, the victim of the crime, a law-abiding and trustworthy citizen, or even a declarant against penal interest. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

When hearsay declarant is interested citizen. — On the defendant's contention that the affidavit on which the search warrant was based was defective because the hearsay declarants were not shown to be reliable, since the hearsay declarants are identified interested citizens, the mere averments of those who provided the information are enough to support a presumption of reliability, credibility, and accuracy, and the hearsay statements therefore may serve as the foundation for probable cause. *Cash v. State*, 166 Ga. App. 835, 305 S.E.2d 618 (1983).

Oath covers only truthfulness of statements contained in written affidavit and not the oral statements given to show probable cause when the magistrate does not administer any oath until after the affidavit is signed. *Riggins v. State*, 136 Ga. App. 279, 220 S.E.2d 775 (1975).

Void search warrant cannot be validated and property illegally seized introduced in evidence merely because the officers were in fact reliably informed and did in fact recover contraband, nor can a deficiency be supplied by facts discovered in making the search, for the sufficiency of the affidavit must be determined as of the time the warrant issued. *Anderson v. State*, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

Effect of false statements in affidavit. — When the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request; in the event at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining con-

Search Warrants (Cont'd)**2. Informants' Reliability and Affidavits (Cont'd)**

tent is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to that extent as if probable cause was lacking on the face of the affidavit. *Cuevas v. State*, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980).

Magistrate had probable cause to issue a search warrant for the defendant's vehicle because a crime victim identified the vehicle as the location of defendant's rape of another victim, and the fact that the victim who provided the information on which the affidavit used to obtain this warrant had previously given false information to obtain another warrant did not change the fact that the magistrate had probable cause to issue the second warrant. *Cole v. State*, 279 Ga. App. 219, 630 S.E.2d 817 (2006).

Information substantiating informant was sufficiently detailed to show that it was more than a mere casual rumor or accusation made on reputation when it stated that the informant had been on the property "in the very recent past" and that defendant "is presently storing marijuana in the described building." The information was, on its face and by its own terms, not stale. *Lang v. State*, 165 Ga. App. 576, 302 S.E.2d 683, cert. denied, 464 U.S. 937, 104 S. Ct. 346, 78 L. Ed. 2d 312 (1983).

Stop of the appellant's vehicle was lawful because it was based on a reasonable suspicion of criminal activity from a tip of an informant of some past indication of reliability. *Knight v. State*, 242 Ga. App. 363, 528 S.E.2d 855 (2000).

Affiant's erroneous substitution of the name of the victim of a burglary for the name of the burglar in the portion of the affidavit showing the reliability of a confidential informant, from a change in filing systems, did not make the warrant void under either the federal or state Constitution. *Wells v. State*, 180 Ga. App. 133, 348 S.E.2d 681 (1986).

Obscenity cases. — Warrants authorizing the seizure of materials presump-

tively protected by the First Amendment to the United States Constitution may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may focus searchingly on the question of obscenity. *State v. Kramer*, 260 Ga. App. 546, 580 S.E.2d 314 (2003).

Absence of informant's personal information. — Totality of the circumstances test for reviewing search warrants involves a practical, common-sense approach to the requirement of probable cause relative to the issuance of search warrants and, with respect to information obtained from an informant, three types of information are needed to support an application for a search warrant: (1) the type of information previously supplied by the informant; (2) the use to which that information has been put; and (3) the length of time since the previous information was furnished. A search warrant was properly based on probable cause since the warrant was supported by an affidavit from a sheriff's investigator who disclosed all information, including why the informant's information was reliable, details of a controlled buy of drugs from the defendant, and the investigator's previous dealings with the defendant; the only information left off the affidavit was personal information regarding the informant. *Burke v. State*, 265 Ga. App. 38, 592 S.E.2d 862 (2004).

Omission of material information in affidavit for search warrant. — Trial court properly suppressed contraband found in the defendant's home pursuant to a search warrant which indicated that the defendant's baby had been taken to a hospital by a sitter and had cocaine in the baby's system; the affidavit omitted material information, including the fact that the sitter had the baby for nine hours before taking the baby to the hospital and was seeking custody, the fact that an officer had gone to the defendant's home the day before without seeing any evidence of contraband, and the fact that the defendant's parents and the sitter had not indicated seeing drugs at the defendant's

home. *State v. Owens*, 285 Ga. App. 370, 646 S.E.2d 340 (2007).

Failure of affiant to sign affidavit. — Since the officers' warrant to search a safe deposit box was based upon a previous warrant that was issued upon an affidavit in which the Georgia officer was the affiant, but the Tennessee officer signed the affidavit, the jewelry should have been suppressed under Ga. Const. 1983, Art. I, Sec. I, Para. XIII, as the affiant did not sign the affidavit. *Henry v. State*, 277 Ga. App. 302, 626 S.E.2d 511 (2006).

Sufficient address shown. — When a defendant said that an affidavit used to obtain a search warrant for the defendant's apartment did not state the defendant's correct address, the address stated in the affidavit was sufficient because there was no probability that it identified another apartment, particularly since law enforcement agents observing the defendant's apartment were able to establish that the informant had gone to and come from the defendant's apartment immediately before the informant was arrested and was found in possession of a quantity of drugs. *Evans v. State*, 263 Ga. App. 572, 588 S.E.2d 764 (2003).

Tip from confidential informant (CI) provided sufficient probable cause for a search warrant for defendant's home because the CI, in jail on pending drug charges, gave a statement against penal interest by admitting to buying drugs from the defendant at the defendant's home, and the officer confirmed the location and the ownership of the home, and the officer identified the CI to the magistrate. *Elliott v. State*, 275 Ga. App. 359, 620 S.E.2d 584 (2005).

Tip from known reliable informant. — Police had a reasonable, articulable suspicion that justified stopping the defendant's truck based on a tip from a known, reliable informant and there was no requirement to provide a basis for predicting specific future behavior of the suspect. *Steed v. State*, 273 Ga. App. 845, 616 S.E.2d 185 (2005).

Informant observed in controlled buy of drugs. — Search warrant was properly issued after an informant returned from a controlled buy to the prearranged meeting place, handed officers the

crack, and said that it was purchased from an unknown black male in the presence of the defendant and two others; even if the informant had no known credibility, the controlled buy conducted under the observation of the officer, alone, established probable cause. *Richardson v. State*, 277 Ga. App. 429, 626 S.E.2d 518 (2006).

Trial court properly denied the defendant's motion to suppress evidence seized pursuant to the search warrant although the agent's affidavit in support of the search warrant did not indicate that the confidential informant whose information provided the basis for the affidavit was hoping to receive a sentence reduction for cooperating with police; the warrant was valid under Ga. Const. 1983, Art. I, Sec. I, Para. XIII, as the omission was offset by independent corroboration of the defendant's criminal activity based upon surveillance of events leading up to a controlled buy. *Davis v. State*, 281 Ga. App. 855, 637 S.E.2d 431 (2006), cert. denied, 2007 Ga. LEXIS 151 (Ga. 2007).

Trial court did not err in denying the defendant's motion to suppress evidence police officers found at a residence because, under the totality of the circumstances, the magistrate had a substantial basis for concluding that there was a fair probability contraband would be found at the residence; the affidavit for the search warrant revealed that an informant participated in a drug buy using law enforcement funds, and an officer transported the informant to the premises, where the informant made the purchase, and the informant provided the purchased contraband to the officer. *Pass v. State*, 309 Ga. App. 440, 710 S.E.2d 641 (2011).

Informant's reliability not established and information was not correct. — Trial court erred by denying two separate defendants' motions to suppress after the male defendant's vehicle was stopped based on an informant's tip and the defendant was not committing a crime when stopped, the tip was too vague as to the time of the alleged future drug transaction and the vehicle description, and drugs other than those that the informant had said would be there were found. *Baker v. State*, 277 Ga. App. 520, 627 S.E.2d 145 (2006).

Search Warrants (Cont'd)**2. Informants' Reliability and Affidavits (Cont'd)****Information in affidavit sufficient.**

— An affidavit in support of a search warrant was not insufficient because an officer had not told the magistrate about an informant's criminal history and that the informant would be paid \$20 if the tip led to an arrest. Nothing indicated that the affidavit contained deliberate falsehoods, that the officer made it with reckless disregard for the truth, or that the officer consciously omitted material information which, if it had been included in the affidavit, would have been indicative of the absence of probable cause; furthermore, the informant's previous work with police, which was set forth in the affidavit, provided a substantial basis for deeming the informant reliable. *Zorn v. State*, 291 Ga. App. 613, 662 S.E.2d 370 (2008).

Affidavit filed in support of a search warrant of the defendant's home established probable cause because, inter alia, information received from one confidential informant (CI) was corroborated, and an admission against penal interest made by a second CI supported a finding of reliability; further, the affidavit established that a third informant was truly a concerned citizen, and the information provided by the concerned citizen corroborated the information provided by the CIs. Considering the totality of the circumstances and the facts that the concerned citizen had training in recognition and effects of various illegal drugs and had seen, within 72 hours at the premises to be searched, a powder substance said to be drugs that belonged to the defendant, the state established probable cause for the warrant. *Price v. State*, 297 Ga. App. 501, 677 S.E.2d 683 (2009).

Trial court did not err in denying the defendant's motion to suppress evidence a detective found in the defendant's home because given the totality of the circumstances, the magistrate who issued the search warrant was authorized to conclude that there was a fair probability that contraband would be found at defendant's home; the detective's affidavit in support of the warrant contained ample

facts by which the magistrate could independently evaluate the veracity and reliability of anonymous informants and their information, and a confidential informant's controlled buy of marijuana from the defendant at the defendant's residence on the day the detective applied for the warrant independently confirmed that illegal drug activities were taking place at the home. *Taylor v. State*, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Even assuming that material evidence was omitted from the affidavit supporting the search warrant, the magistrate nevertheless had probable cause for issuance of the search warrant because the affidavit stated that the defendant had possibly fathered the victim's child, the defendant had a sexual relationship with the victim from the time the victim was 10 years old until the victim was 15 years old, the victim's son was conceived during that time period, and the son's father had not been scientifically identified. *Rhodes v. State*, 319 Ga. App. 684, 738 S.E.2d 135 (2013).

Trial counsel was not ineffective for failing to file a motion to suppress the evidence obtained from the appellant's cell phone because although the search warrant affidavit did not specify to whom each of the cell phones belonged, it provided the issuing magistrate with sufficient information to make a practical, common sense decision that there was a fair probability that evidence of the crime would be found on the items to be searched. *Smith v. State*, 296 Ga. 731, 770 S.E.2d 610 (2015).

3. Probable Cause

Probable cause defined. — Probable cause means reasonable grounds and is that apparent state of facts which seems to exist after reasonable and proper inquiry. *Hogan v. State*, 140 Ga. App. 716, 231 S.E.2d 802 (1976).

Requirements for probable cause.

— The provisions of U.S. Const., amend. 4 and this paragraph, requiring "no warrant shall issue except upon probable cause ... particularly describing the place, or places to be searched, and the persons or things to be seized" are met "if the description sufficiently permits a prudent

officer with a search warrant to be able to locate the person and place definitely and with reasonable certainty.” Cuevas v. State, 151 Ga. App. 605, 260 S.E.2d 737 (1979), cert. denied, 445 U.S. 943, 100 S. Ct. 1338, 63 L. Ed. 2d 776 (1980).

Finding of probable cause may rest upon evidence not competent in criminal trial. — While a warrant may issue only upon a finding of probable cause, the term “probable cause” means less than evidence which would justify condemnation, a finding of probable cause may rest upon evidence which is not legally competent in a criminal trial. Johnson v. State, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

Test of probable cause is whether it would justify a man of reasonable caution in believing that an offense has been or is being committed, and this requires merely a probability — less than a certainty but more than a mere suspicion or possibility. Gordon v. State, 150 Ga. App. 862, 258 S.E.2d 664 (1979).

Two-pronged tests for determination of probable cause. — When hearsay, such as an informer’s tip, is relied upon for probable cause, the sworn information placed before the justice of the peace must adequately set forth: (1) the underlying circumstances necessary to enable the magistrate independently to judge the validity of the information; and (2) the informant’s credibility or reliability. Shaner v. State, 153 Ga. App. 694, 266 S.E.2d 338 (1980); Law v. State, 165 Ga. App. 687, 302 S.E.2d 570, aff’d, 251 Ga. 525, 307 S.E.2d 904 (1983).

When the hearsay of an informer is relied upon, an affidavit as to probable cause must meet two tests: (1) the reasons for the informer’s reliability must be furnished; and (2) it must either state how the informer obtained the information or the tip must describe the criminal activity in such detail that the magistrate may know it is more than a casual rumor circulating in the underworld or an accusation based merely on the individual’s general reputation. Maddox v. State, 133 Ga. App. 709, 213 S.E.2d 1 (1975).

Two-pronged test satisfied. — When the affidavit provided the justice of the peace (now magistrate) with the knowl-

edge that the informant had personally observed the defendants in possession of the cocaine and the informant’s reliability was demonstrated within the affidavit by statements that the informant had furnished information in the previous six months leading to the issuance of three felony warrants for possession of illegal drugs and that all information provided by the informant had proven to be true, both prongs of the test for a showing of probable cause based upon an unidentified informant’s tip were met in the affidavit. Law v. State, 165 Ga. App. 687, 302 S.E.2d 570, aff’d, 251 Ga. 525, 307 S.E.2d 904 (1983).

Controlled buy observed by officer. — Controlled buy conducted under the observation of the officer alone was sufficient to establish probable cause, and there was no evidence that the officer knew, or should have known, that more than one person resided at the residence. Ibekilo v. State, 277 Ga. App. 384, 626 S.E.2d 592 (2006).

Probable cause set forth in affidavit. — Trial court did not err in denying defendant’s suppression motion as the affidavit provided probable cause for the issuance of a search warrant under the totality of the circumstances test since: (1) a controlled buy from the defendant was described; (2) the defendant’s willingness to turn over the cocaine at the defendant’s residence was set forth; and (3) a statement from an individual who was with the defendant at the time of the defendant’s arrest that the defendant had taken the individual to the residence to pick up cocaine was set forth. Johnson v. State, 267 Ga. App. 549, 600 S.E.2d 667 (2004).

Search warrant was based on probable cause because Clayton County investigators had purchased an illegal video poker machine from a subject in Clayton County, who said the machine was obtained from a particular address in DeKalb County, and both DeKalb and Clayton investigators observed “several other illegal video poker machines” at that address; while the investigators could not tell from looking at the machines whether they were legal or not, the test was only whether the evidence established a fair probability that contraband would be found. Jones v.

Search Warrants (Cont'd)
3. Probable Cause (Cont'd)

State, 276 Ga. App. 810, 625 S.E.2d 4 (2005).

In a murder prosecution, an affidavit in support of a search warrant stated that the victim and defendant left a ballpark where they worked in close temporal proximity; that the victim's car was found abandoned at a gas station next to the park; that a man fitting defendant's voice characteristics made two telephone calls claiming to have the victim; that the victim's ring was found near the pay phone from which the second call was made; and that defendant had a history of assaults on females, having abducted a victim and secreted the victim to the defendant's home, gave the magistrate a substantial basis for concluding there was probable cause that evidence pertaining to the victim's disappearance would be found in defendant's home. *Hinton v. State*, 280 Ga. 811, 631 S.E.2d 365 (2006).

Defendant's suppression motion was properly denied as: (1) the search warrant affidavit outlined the information provided by a New Hampshire detective's investigation, including the fact that the defendant had electronically sent the detective sexually explicit photographs of young boys; (2) the officer's affidavit also included information regarding the New Hampshire detective's extensive background and vast experience in the investigation of child sexual exploitation cases; (3) the New Hampshire detective's investigation provided probable cause to search the defendant's residence wherever that was; (4) the warrant sought sexually explicit photographs and other sexually explicit visual depictions of children, as well as the computer hardware and software used to create, store, and distribute those depictions; and (5) the affidavit contained information based on the New Hampshire detective's contact and electronic correspondence with the defendant indicating the likelihood that defendant's computer files would contain evidence of child sexual exploitation, given that the affidavit stated that those who sexually exploited children often kept sexually explicit photographs and other images in their posses-

sion and often stored those images in computer files. *Walthall v. State*, 281 Ga. App. 434, 636 S.E.2d 126 (2006).

Trial court properly denied the defendant's motion to suppress evidence found during the execution of a search warrant as the appellate court found that, after reviewing all of the information in the affidavit as a whole, the affidavit provided sufficient probable cause for the magistrate to issue the search warrant and that the information provided was not stale. The warrant was executed the same day that it was issued and was supported by a law enforcement affidavit reciting a stop made of the defendant's vehicle for a failure to have tags and various drugs and drug-related items found in the vehicle that served as the basis for obtaining the search warrant for the defendant's home. *Cleveland v. State*, 290 Ga. App. 835, 660 S.E.2d 777 (2008).

Because the information in an affidavit provided the magistrate a substantial basis for concluding that probable cause existed for issuing the search warrant, a motion to suppress the search warrant would have been futile; accordingly, the defendant failed to show that counsel was ineffective. *Jarrett v. State*, 299 Ga. App. 525, 683 S.E.2d 116 (2009).

Trial court properly found that under the totality of the circumstances the affidavit in support of a search warrant for a residence suspected of being a marijuana "grow house" gave the magistrate a substantial basis for concluding that probable cause existed because the affidavit set forth the fact that similar investigations and seizures had taken place in several grow houses in the area, the house under surveillance had characteristics similar to those houses, and two men fled from the residence and were apprehended with large amounts of cash; the information from the stop was not excludable as "stale" because there was a substantial basis for believing that the electrical ballasts and light fixtures identified in the search warrant could still be found at the residence and the items were not perishable. *Prado v. State*, 306 Ga. App. 240, 701 S.E.2d 871 (2010).

Trial court did not err in denying the defendant's motion under O.C.G.A.

§ 17-5-30 to suppress evidence seized pursuant to search warrants because the applications for search warrants to search the defendant's apartment and the car for which registration information was given in the detective's affidavit contained sufficient information from which a judicial officer could determine there was a fair probability that evidence of a crime would be found at those sites as the sites were likely methods of transporting the victim and the likely destination of appellant and the victim; in the detective's affidavit, the detective related the discovery of the victim's body and the statements of the victim's friend and roommate concerning the victim's relationship with the defendant, and the victim's pregnancy and identification of the defendant as the father, who was not pleased about the pregnancy. *Glenn v. State*, 288 Ga. 462, 704 S.E.2d 794 (2010).

Trial court did not err in denying the defendant's motion to suppress evidence seized from a search warrant authorizing entry into the defendant's home because the affidavit submitted in support of the warrant provided a sufficient basis for the magistrate to make a practical, common-sense decision that there was a fair probability that evidence of sexual exploitation of children would be found at the defendant's residence; the National Center for Missing and Exploited Children forwarded the information it received from a security specialist employed by the host of the website to the Georgia Bureau of Investigation (GBI), and the affidavit of a special agent with the GBI set forth facts that showed both the reliability and basis of knowledge of the specialist. *James v. State*, 312 Ga. App. 130, 717 S.E.2d 713 (2011), cert. denied, No. S12C0347, 2012 Ga. LEXIS 227 (Ga. 2012).

Evaluation of evidence by magistrate. — Task of the issuing magistrate is simply to make a practical, common-sense decision, whether, given all the circumstances set forth in the affidavit before the magistrate, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Farmer*, 177 Ga. App. 18, 338 S.E.2d 489 (1985).

Because the magistrate was presented with a substantial basis for concluding that evidence of child molestation would be found in the cameras and film located in the defendant's car, and such enabled the magistrate to form a sufficient finding of probable cause to support the issuance of a search warrant, the trial court properly denied the defendant's motion to suppress the evidence seized as a result of the warrant. *Manders v. State*, 281 Ga. App. 786, 637 S.E.2d 460 (2006).

Because a search warrant affidavit provided the issuing magistrate with sufficient probable cause connecting the defendant to the residence of a female friend for the magistrate to logically conclude that there was a fair probability that evidence of a crime would be found therein, despite the omission of additional evidence by the affiant, an order granting suppression of the evidence seized therein was reversed. *State v. Hunter*, 282 Ga. 278, 646 S.E.2d 465 (2007).

Showing to be made to magistrate when affidavit is based on information from confidential informant. — When an affidavit for a search warrant is based on information received from a confidential informant, there must be a showing made to the magistrate of: (1) the reliability of the informant; and (2) the underlying facts and circumstances corroborative of the informant's tip. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

Quantum of evidence necessary to establish probable cause does not require proof of guilt when the facts and circumstances known to the arresting officer are such as to warrant a man of prudence and caution in believing an offense has been committed. *Hood v. State*, 122 Ga. App. 547, 178 S.E.2d 44 (1970).

When dealing with probable cause — as the name implies, we deal with probabilities — not certainty, and the quantum of proof necessary to establish probable cause is not that level which is necessary for proof of guilt in a trial. *Bradford v. State*, 149 Ga. App. 839, 256 S.E.2d 84, cert. denied, 444 U.S. 936, 100 S. Ct. 285, 62 L. Ed. 2d 195 (1979).

Difference between requirements for proving guilt and showing probable cause. — There is a great difference

Search Warrants (Cont'd)**3. Probable Cause (Cont'd)**

between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968).

Probable cause cannot be made out by affidavits which are purely conclusory. *Veasey v. State*, 113 Ga. App. 187, 147 S.E.2d 515 (1966).

Speculation, conjecture, or opinion insufficient for warrant. — Whether by recitals in the affidavit or by an independent showing before the magistrate, the facts must be such as to lead a man of prudence and caution to believe that the offense has been committed. Mere speculation, conjecture, or opinion is not enough, nor is mere rumor. *Johnson v. State*, 111 Ga. App. 298, 141 S.E.2d 574 (1965).

Information supporting finding of probable cause may be presented to magistrate by means of affidavit or by oral testimony. *Marshall v. State*, 113 Ga. App. 143, 147 S.E.2d 666 (1966).

Information provided by police, arising out of official investigation, may be used to establish probable cause for a search warrant. *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981).

Warrant may be based on police officer's knowledge of suspect's reputation. — Officer's knowledge of a suspect's reputation is a practical consideration of everyday life upon which a magistrate may properly rely in issuing a search warrant. *Law v. State*, 165 Ga. App. 687, 302 S.E.2d 570, *aff'd*, 251 Ga. 525, 307 S.E.2d 904 (1983).

National Crime Information Center printouts as basis of reasonable belief to establish probable cause. — While National Crime Information Center printouts are not alone sufficient evidence to permit convictions, the cases uniformly recognize that NCIC printouts are reliable enough to form the basis of the reasonable belief which is needed to establish probable cause for arrest. *Paxton v. State*, 160 Ga. App. 19, 285 S.E.2d 741 (1981).

Determination of probable cause by magistrate. — Determination as to

whether there is probable cause is not to be made by one who applies for issuance of the warrant; it must be made by the magistrate from a consideration of the facts submitted under oath. It must exist before the search is made, and cannot be supplied by after-discovered facts. *Johnson v. State*, 111 Ga. App. 298, 141 S.E.2d 574 (1965), commented on in 17 Mercer L. Rev. 479 (1966).

Affidavit ineffective to provide basis for magistrate's finding of probable cause. — See *Poole v. State*, 175 Ga. App. 374, 333 S.E.2d 207 (1985).

Reviewing court will give substantial deference to magistrate's finding of probable cause. — When an application for a search warrant has been made by the police to a neutral and detached magistrate, and the magistrate has issued the warrant based on a finding of probable cause, a reviewing court will pay substantial deference to the magistrate's finding. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981).

Facts showing probable cause should be incorporated in affidavit. — While probable cause may be made to appear by a showing under oath before the magistrate when issuance of the warrant is sought, it is the better, even necessary, practice that the facts then made to appear as showing probable cause be incorporated in the affidavit. *Johnson v. State*, 111 Ga. App. 298, 141 S.E.2d 574 (1965), commented on in 17 Mercer L. Rev. 479 (1966).

Magistrate may consider both affidavit and oral testimony as to probable cause. — Magistrate in considering whether to issue a search warrant may consider both the affidavit and oral testimony as to probable cause. However, in considering a matter other than that contained in the affidavit, such proof must be under oath or affirmation. *Maddox v. State*, 133 Ga. App. 709, 213 S.E.2d 1 (1975).

Legislative intent that probable cause relate to current information. — Requirement for timely execution of a search warrant under Ga. L. 1966, p. 567, § 6 (see now O.C.G.A. § 17-5-25) indicates the legislative intent, as well as constitutional demand, that probable

cause relate to current and not stale information. *Fowler v. State*, 121 Ga. App. 22, 172 S.E.2d 447 (1970).

“Staleness” as it relates to probable cause is measured by the probability that the thing to be seized is located at the place to be searched and it involves the interval between (i) the time when the thing to be seized is indicated by the evidence or information to be at the place to be searched and (ii) the time when the search warrant is issued. *Caffo v. State*, 247 Ga. 751, 279 S.E.2d 678 (1981); *Shrader v. State*, 159 Ga. App. 522, 284 S.E.2d 37 (1981).

Information provided in the search warrant affidavit by a confidential informant was not stale and did not render the issuance of the warrant unconstitutional under Ga. Const. 1983, Art. I, Sec. I, Para. XIII; the informant contacted the federal agent a short time after leaving the defendant’s home where the informant had witnessed a sale of drugs by the defendant, and the federal agent had contacted the affiant within 24 hours of the presentation of the affidavit. *State v. Donaldson*, 281 Ga. App. 51, 635 S.E.2d 345 (2006).

Sufficient probable cause found. — Defendant’s suppression motion was properly denied as a magistrate’s issuance of a search warrant for the defendant’s home was supported by probable cause for purposes of the Fourth Amendment, Ga. Const. 1983, Art. I, Sec. I, Para. XIII, and O.C.G.A. § 17-5-30 when: (1) witnesses reported seeing the defendant at the victim’s home near the time that the victim disappeared; (2) the farm manager who located the victim’s body told police that the defendant commonly used the farm for hunting; (3) the defendant had a tumultuous relationship with the victim; and (4) the defendant’s mailbox was painted in a similar camouflage as the cattle trough in which the victim was found; as the warrant for the house was proper, the warrant for the defendant’s truck was not fruit of the poisonous tree. *Fortson v. State*, 277 Ga. 164, 587 S.E.2d 39 (2003).

Trial court properly denied a motion to suppress evidence seized upon execution of a search warrant of a residence, whereupon various sexual materials and a computer, containing pornographic photo-

graphs of the defendant with a child victim, were obtained and admitted in trial on multiple sexual offenses, as the warrant was based on probable cause and described with sufficient particularity the location of the premises and the items to be seized. *Daniels v. State*, 278 Ga. App. 332, 629 S.E.2d 36 (2006).

Trial court properly denied the defendant’s motion to suppress evidence seized pursuant to a warrant, in a prosecution filed against the defendant for various sex crimes, when despite alleging specific ages, given the totality of the circumstances, the affidavit sought information of sexual activity involving minor children and was predicated on information provided by a parent involving sexual activity between defendant and the parent’s daughter, the victim. *Phillips v. State*, 283 Ga. App. 319, 641 S.E.2d 294 (2007).

A magistrate had probable cause to issue a search warrant for a defendant’s car the day after the victim was kidnapped and murdered; there was a fair probability that evidence of the crimes would be found in the car, which the defendant had parked in the victim’s driveway. *Dalton v. State*, 282 Ga. 300, 647 S.E.2d 580 (2007).

A trial court did not err by limiting the admissibility of admissible items in a defendant’s felony murder trial to those items seized incident to the defendant’s arrest in the early morning hours and in plain view during the processing of the crime scene as an approximately 15-minute video recording of the premises, which was viewed by the trial court, supported the officers’ testimony that guns, shell casings, significant amounts of cash, and items appearing to be crack cocaine were all in plain view and, under the circumstances, presented probable cause as being contraband or evidence of the crime of the felony murder of an officer. *Fair v. State*, 284 Ga. 165, 664 S.E.2d 227 (2008).

Because the application for a search warrant established that the victim lived in a residence at a specific address, that defendant lived in the basement apartment located in the residence, that defendant had severely beaten the victim, and that there was a fair probability that evidence of the crime could be found either

Search Warrants (Cont'd)**3. Probable Cause (Cont'd)**

in defendant's apartment or in the victim's part of the residence, probable cause existed to search defendant's basement apartment and the victim's part of the residence; accordingly, the trial court properly denied defendant's motion to suppress the evidence found in the apartment. *Fletcher v. State*, 284 Ga. 653, 670 S.E.2d 411 (2008).

Search warrant was properly issued based on information from a caller to social services that methamphetamine was being made in the defendant's home in the presence of a six-year-old and on information from an officer that the defendant had been investigated for the drug, that the defendant had a reputation of dealing, using, and making methamphetamine, and that numerous tips about the defendant's manufacturing methamphetamine had been received. Moreover, the information was not stale as the information received from multiple sources indicated a long-term involvement in the manufacture of the drug and therefore a likelihood that the equipment for the drug's production would remain in place over time. *Chambliss v. State*, 298 Ga. App. 293, 679 S.E.2d 831 (2009).

Insufficient probable cause found. — Because: (1) the state conceded that its informant was not reliable, as the informant never previously provided information to its investigator; and (2) the police failed to independently investigate and corroborate the information provided to them by that informant in support of a search warrant affidavit, the magistrate lacked a substantial basis for determining that probable cause existed to search the defendant's home; thus, the evidence seized as a result should have been suppressed. *St. Fleur v. State*, 286 Ga. App. 564, 649 S.E.2d 817 (2007).

Trial court did not err in denying the defendant's motion to suppress the DNA evidence obtained pursuant to a search warrant, as the warrant, given the totality of the circumstances, was based upon sufficient fingerprint evidence which provided an accurate foundation for identifying the defendant as a suspect in all four

crimes. *Carruth v. State*, 286 Ga. App. 431, 649 S.E.2d 557 (2007).

Because the evidence gathered while the defendant's residence was under surveillance, including the contents of the defendant's garbage as well as an officer's specific testimony regarding marijuana residue found on a piece of plastic wrap, supported a finding of probable cause necessary to justify the issuance of a search warrant for the defendant's residence, suppression of the evidence seized as a result of the execution of the search warrant was improper. *State v. Davis*, 288 Ga. App. 164, 653 S.E.2d 311 (2007).

Improper use of fact that contraband was found to justify search. — Since a trial court found probable cause for a vehicle search based, in part, on the discovery of contraband in the vehicle, and it was unclear whether the trial court would have reached the same result absent this factor, the trial court's order denying the defendant's motion to suppress in this regard was improper. *Quick v. State*, 279 Ga. App. 835, 632 S.E.2d 742 (2006).

Victim's identification. — Victim's identification of the defendant as the robber, corroborated by other witnesses, was sufficient to provide probable cause for a search warrant; because it was proper for the witnesses to identify the defendant from a videotape, the trial court did not err by denying the defendant's motions to suppress and in limine. *Bradford v. State*, 274 Ga. App. 659, 618 S.E.2d 709 (2005).

Compelled testing after defendant's invocation of right to refuse under implied consent law. — Defendant's conviction was properly reversed as the police improperly threatened to obtain blood and urine for testing through a catheter, after defendant invoked defendant's right under the implied consent law to refuse to the testing. *State v. Collier*, 279 Ga. 316, 612 S.E.2d 281 (2005).

4. Exceptions to Warrant Requirement

"Probable cause" same for warrantless search as for issuance of warrant. — "Probable cause" requirements for a search without a warrant are the same requirements necessary for the issuance

of a warrant by a magistrate and the court must look to the parameters of police knowledge at the time the search occurred to determine if that knowledge was such as would justify a man of reasonable caution in believing that an offense has been or is being committed. *Bogan v. State*, 165 Ga. App. 851, 303 S.E.2d 48 (1983).

Search without warrant but incident to lawful arrest may be lawful. *Black v. State*, 119 Ga. App. 855, 168 S.E.2d 916 (1969).

Search incident to arrest. — Search of a vehicle was authorized as a search incident to a lawful arrest as it was reasonable for the officers to believe that the vehicle possibly contained evidence of the crime under investigation, in that the officers saw the defendant and another individual, for whom the officers had an arrest warrant, driving in a vehicle similar to the one seen leaving a crime scene, and the officers saw clothing on the backseat matching the description of the clothing worn by the two gunmen at the time of the crime. *Williams v. State*, 316 Ga. App. 821, 730 S.E.2d 541 (2012).

When defendant was handcuffed to ensure the officers' safety after a pistol-like device was found and the handcuffs were removed before the agent spoke with defendant, defendant's statement to the agent that defendant had used drugs that evening gave the agent probable cause for defendant's arrest; defendant was then searched incident to a lawful arrest. *Bond v. State*, 271 Ga. App. 849, 610 S.E.2d 609 (2005).

Scope of permissible warrantless searches. — An officer at the time of a lawful custodial arrest may, without a warrant, make a full search of the person of the accused, a limited area within the control of the person arrested, and of an automobile in the person's possession at the scene of the arrest for the discovery and preservation of criminal evidence. *Williams v. State*, 150 Ga. App. 852, 258 S.E.2d 659 (1979); *Stoker v. State*, 153 Ga. App. 871, 267 S.E.2d 295 (1980).

It is reasonable for officer to search area surrounding arrest area into which suspect might reach to obtain weapon. *Banks v. State*, 246 Ga. 178, 269 S.E.2d 450 (1980).

"Plain view" doctrine permits warrantless search and seizure. — The "plain view" doctrine will support a warrantless search and seizure if the agents are lawfully in position to obtain the view, the discovery is inadvertent, and the object viewed is immediately seen to be incriminating. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct. 472, 62 L. Ed. 2d 391 (1979).

When the initial intrusion that brings the police within "plain view" of an article is supported not by a warrant but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct. 472, 62 L. Ed. 2d 391 (1979).

For the "plain view" exception to the warrant requirement to be invoked, the sighting of things not specified in the warrant must have been "inadvertent." *Lockhart v. State*, 166 Ga. App. 555, 305 S.E.2d 22 (1983).

"Plain view" exception to the requirement for a search warrant applied since no one answered the officer's knock at the front door and the officer discovered marijuana plants and other items when the officer walked around toward the back to make certain no one was home. *Galbreath v. State*, 213 Ga. App. 80, 443 S.E.2d 664 (1994).

"Plain view" doctrine authorizes seizure of illegal or evidentiary items visible to a police officer only if the officer's access to the object itself has some prior Fourth Amendment justification. *State v. David*, 269 Ga. 533, 501 S.E.2d 494 (1998).

After receiving a report from the victim of a property damage incident describing the defendant's truck as involved in that incident, police had a right to approach the defendant's house to investigate; police were also authorized to walk around to the back of the defendant's house where they saw a truck fitting the victim's description in plain view in a partially open shelter; no warrant was needed for the officers to take photos of the defendant's truck. *Phillips v. State*, 279 Ga. App. 243, 630 S.E.2d 844 (2006).

Search Warrants (Cont'd)
4. Exceptions to Warrant Requirement (Cont'd)

Because the police were authorized to seize marijuana found in plain view, seen through the window of an apartment where they were executing an arrest warrant on another individual, once the defendant answered a knock on the apartment door, police also had the right to search incident to the defendant's arrest for possession of marijuana and based on the exigency of the circumstances; hence, the trial court erred in granting a motion to suppress the marijuana without explaining its interpretation of the evidence or ruling on the credibility of the witnesses. *State v. Venzen*, 286 Ga. App. 597, 649 S.E.2d 851 (2007).

When a deputy serving an arrest warrant on a probationer had reason to believe from the warrant that the probationer resided at the address given, the officer had the limited authority to enter the home to search for the probationer after the defendant, who answered the door, said that the probationer had moved. Once inside, the officer had the authority to seize marijuana that was in plain view. *Wall v. State*, 291 Ga. App. 278, 661 S.E.2d 656 (2008).

Marijuana contained in operating, closed refrigerator was not in "plain view" of a police officer. *State v. Gallup*, 236 Ga. App. 321, 512 S.E.2d 66 (1999).

Fear evidence will be destroyed sufficient for warrantless search. — When testimony presented at the motion to suppress hearing supported the conclusion that the officers feared that evidence would be destroyed if their actions were delayed in order to obtain a warrant, such evidence supported the trial court's denial of the defendant's motion to suppress premised on the assertion that the police conducted an illegal warrantless search of the defendant's house. *Bogan v. State*, 165 Ga. App. 851, 303 S.E.2d 48 (1983).

After an officer observed contraband in an apartment from the outside, and saw one of the occupants attempt to conceal it, the officer's warrantless intrusion into the apartment was justified by the exigent circumstance that the contraband was in

danger of immediate destruction. *State v. David*, 269 Ga. 533, 501 S.E.2d 494 (1998).

Exigent circumstances justified the officers' warrantless entry of a residence to prevent the destruction of evidence since the police initially came to the home to execute an arrest warrant for a third party, the defendant answered the door, and told the officers that the third party did not live there, and, when the officers asked for consent to search for the third party, defendant did not answer and walked away from the officers, went to the mantle, picked up a plastic bag that appeared to contain crack cocaine, and threw it into a fire burning in the fireplace, and the officers then entered the home and removed the plastic bag from the fire to prevent the destruction of evidence. *Simmons v. State*, 278 Ga. App. 7, 627 S.E.2d 928 (2006).

Denial of a defendant's suppression motion was proper as the police officers were authorized to immediately enter a residence, without announcing their presence as required by O.C.G.A. § 17-5-27, as the occupants fled upon seeing the police, into a residence where the police had recently conducted controlled drug buys and the officers had a reasonable belief that the fleeing occupants might retrieve weapons or destroy evidence; once legally inside the residence, the police were authorized to execute a search warrant that led to the discovery of the defendant's involvement in the drug sales. Further, suppression of evidence was not a constitutionally-required remedy for an improper entry pursuant to an otherwise valid search warrant. *Jackson v. State*, 280 Ga. App. 716, 634 S.E.2d 846 (2006).

No amount of probable cause can justify warrantless search or seizure absent exigent circumstances. *Bunn v. State*, 153 Ga. App. 270, 265 S.E.2d 88 (1980); *Bogan v. State*, 165 Ga. App. 851, 303 S.E.2d 48 (1983).

Because no exigency existed to justify a search after the defendant was handcuffed and placed under the watchful eye of a police officer, and even assuming that the defendant was under arrest while being detained in the kitchen, a search of the defendant's bedroom which yielded a shot-

gun, found under the bed in the bedroom, a box of unspent shotgun shells, and some loose unspent shotgun shells, was not one incident to the arrest; thus, the defendant's possession of a firearm while a convicted felon conviction was reversed, and the case was remanded for a new trial in which the illegally-obtained evidence could not be introduced. *Hicks v. State*, 287 Ga. App. 105, 650 S.E.2d 767 (2007).

Warrantless search of refrigerator not justified. — When a police officer opened the door of an operating, closed refrigerator in a storage unit, after having been called to investigate vandalism and possible burglary, these circumstances did not rise to the level of emergency involving immediate threats to life or limb, and the warrantless search of the refrigerator was not justified. *State v. Gallup*, 236 Ga. App. 321, 512 S.E.2d 66 (1999).

Circumstances under which detentions made without probable cause have been approved. — When investigatory detentions made without probable cause have been approved, the police have had some reason to suspect that criminal activity had either taken place, was in progress, or was about to take place at the time of the detention. *Brooks v. State*, 144 Ga. App. 97, 240 S.E.2d 593 (1977).

Officers had sufficient articulable suspicion to authorize an investigatory detention of a drug suspect after a known, reliable informant had arrived in person at the police station with the suspect's name, a description of the suspect's operative locale, and recent observation of activities within the previous 24 hours. *Burse v. State*, 209 Ga. App. 276, 433 S.E.2d 386 (1993).

Since a police officer believed in good faith that the defendant had committed the crime of disorderly conduct, the stop of the defendant's vehicle was justified, in that it was based on a reasonable suspicion of wrongdoing, even though it was later determined that the defendant had not, in fact, committed the crime of disorderly conduct. *Turner v. State*, 274 Ga. App. 731, 618 S.E.2d 607 (2005).

Tip by unknown informant justified investigatory stop. — Defendant was not entitled to suppression of the evidence seized by a police officer making an inves-

tigatory stop, as the information provided to the officer by a reliable and anonymous tip contained explicit details of the defendant's travel itinerary, which was not known by the general public. *Daniels v. State*, 278 Ga. App. 263, 628 S.E.2d 684 (2006).

Distinction made between warrantless search of car and house. — A distinction has long been drawn between a warrantless search of an automobile as opposed to a house or other structure due to the mobility of the car. *Whitlock v. State*, 124 Ga. App. 599, 185 S.E.2d 90 (1971).

Wherein an individual commits an offense in his or her home and that offense is committed in the presence of a law enforcement officer, the officer is authorized to arrest the individual in the home without a warrant only if the officer's entry into the home is by consent or if there are exigent circumstances. *Carranza v. State*, 266 Ga. 263, 467 S.E.2d 315 (1996).

Warrantless search inside apartment improper. — Defendant's motion to suppress evidence seized by a police officer who entered an apartment without a warrant was properly granted because a residential alarm call did not create exigent circumstances justifying the entry since the officer had no reasonable belief that an emergency situation existed given the officer's delay in reaching the apartment, the officer's decision to allow a parent and two children to enter the apartment, and the lack of any signs of distress once the officer reached the residence. *State v. Merit*, 262 Ga. App. 687, 586 S.E.2d 393 (2003).

Circumstances under which probable cause would exist for warrantless search of residence. — Trial court's denial of the defendant's motion to suppress evidence seized during a warrantless search of the defendant's residence was proper as the defendant was a supplier in a drug deal that was observed by drug enforcement agents, the defendant was being followed to defendant's residence when the drug dealer and another were stopped and one of them escaped, and a man on the defendant's driveway was seen talking on a cell phone; the officers

Search Warrants (Cont'd)**4. Exceptions to Warrant Requirement (Cont'd)**

properly secured the residence in order to avoid possible destruction of evidence or the arming or fleeing of occupants, as the cell phone call could have been a warning that the investigators were aware of the drug transaction. *Alvarado v. State*, 271 Ga. App. 714, 610 S.E.2d 675 (2005).

Search warrants not required in noncriminal inventory searches. — In circumstances involving noncriminal inventory searches, when probable cause to search is irrelevant, search warrants are not required, linked as the warrant requirement textually is to the probable cause concept. *Garner v. State*, 154 Ga. App. 839, 269 S.E.2d 912 (1980).

Warrant not required to conduct search of prisoner's room. — No one can rationally doubt that search of prisoner's rooms represent an appropriate security measure and neither the district court nor the Court of Appeals prohibited such searches, and even the most zealous advocate of prisoner's rights would not suggest that a warrant is required to conduct such a search. *Riden v. State*, 151 Ga. App. 654, 261 S.E.2d 409 (1979).

Hotel personnel authorized to open items found on their premises. — It is not an unauthorized search for hotel management personnel, including security personnel, to open unlocked items found on their premises in an attempt to determine ownership so that the lost or misplaced property can be returned to its proper owner. *Berger v. State*, 150 Ga. App. 166, 257 S.E.2d 8 (1979), cert. denied, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980).

Open fields. — Special protection against unlawful search and seizure in one's home, pursuant to U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, extended to the curtilage of defendant's home but not into the open fields; accordingly, where police officers were in an unoccupied, undeveloped densely wooded/swamp area on defendant's property, it was part of the open fields and they had a right to be there and evidence observed thereon was not subject

to suppression for constitutional violations. *State v. Clark*, 263 Ga. App. 480, 588 S.E.2d 254 (2003).

Defendant had no expectation of privacy in an area behind the defendant's house where marijuana plants grew because the area was separated by trails leading away from the defendant's mowed lawn, the plants were not growing inside any structure nor were they protected from view, and many of the plants were protected by mesh wire; the warrantless seizure of the plants did not violate the Fourth Amendment. *Smithson v. State*, 280 Ga. App. 421, 634 S.E.2d 184 (2006).

Serving of arrest warrant and looking into open door of shed. — Defendant's drug convictions were appropriate because the brother lived with the defendant and would be present in the home when the officers returned to serve the arrest warrant. Thus, the trial court did not err when the court concluded that the police were authorized to enter the backyard of the premises and look into the open door of the shed. *Carter v. State*, 308 Ga. App. 686, 708 S.E.2d 595 (2011), cert. denied, No. S11C1141, 2011 Ga. LEXIS 573 (Ga. 2011).

Exigent circumstances found. — Given the existence of exigent circumstances, law enforcement officers were justified in searching the defendant's home without a warrant in order to determine if a child was present and in need of medical attention or in danger of imminent harm; as a result, the trial court properly denied the defendant's motion to suppress evidence seized as a result of that search. *Richards v. State*, 286 Ga. App. 580, 649 S.E.2d 747 (2007), cert. denied, 2007 Ga. LEXIS 702 (Ga. 2007).

A warrantless entry of the house owned by the defendant's stepparent was justified by exigent circumstances, given that a violent felony, from which the suspect fled on an orange bicycle, had occurred nearby just minutes before and that a person matching the suspect's description and riding an orange bicycle had just entered the stepparent's house. *Thomas v. State*, 290 Ga. App. 10, 658 S.E.2d 796 (2008).

Exigent circumstances issue not addressed. — Defendant's suppression motion was properly granted since: (1) an

officer executing an arrest warrant for a third person had unreasonably looked through the defendants' window, discovering the defendants using marijuana; (2) the officers did not identify themselves as police officers when the officers knocked at the defendants' door; (3) defendants hid the marijuana before opening the door; (4) the police confronted the defendants about the marijuana after the police determined that the third person was not in the house; and (5) the appellate court could not conclude, as a matter of law, that there were exigent circumstances justifying the warrantless seizure of the drugs, in that the drugs were in danger of being destroyed, simply because the defendants hid the drugs before opening the door. *State v. Schwartz*, 261 Ga. App. 742, 583 S.E.2d 573 (2003).

In a criminal case wherein the defendant was convicted on eight counts of cruelty to animals, an officer's initial plain view observations from a driveway and road of uncared for and sickly animals did not authorize the officer to make a warrantless entry into the defendant's backyard; since consent was not given by the defendant, the case required remand as the trial court never addressed whether exigent circumstances existed to justify the warrantless search, which the trial court should have addressed when it denied the defendant's motion to suppress and motion in limine. *Morgan v. State*, 285 Ga. App. 254, 645 S.E.2d 745 (2007).

Improper Terry stop. — Defendant was subjected to an improper Terry stop when defendant was stopped and ordered to exit the vehicle as the police did not have specific articulable facts sufficient to give rise to a reasonable suspicion that the defendant was engaged in criminal conduct since the defendant was not a subject of a search warrant the officers were executing, the defendant had not committed any traffic violations, and the defendant's vehicle was not within the curtilage of the home subject to the search warrant. *Reynolds v. State*, 280 Ga. App. 712, 634 S.E.2d 842 (2006).

Hot pursuit. — Since the evidence was sufficient to support the trial court's conclusion that the officers had probable cause to arrest the codefendant, that po-

lice were in hot pursuit of the codefendant who fled upon seeing the officers, and that the officers reasonably believed that the codefendant fled to the apartment shared by the defendant and the codefendant to escape the officers and avoid arrest, exigent circumstances supported the officers' warrantless entry of the apartment, where contraband was in plain view, and no taint attached to the search warrant for the complete search of the apartment and the seizure of the additional evidence which followed. *Ahmed v. State*, 322 Ga. App. 154, 744 S.E.2d 345 (2013).

Seizure of farm animals was justified when officials, entering the property to investigate a report that deprived animals were observed from the highway, immediately observed additional, clearly deprived animals in need of immediate care in plain view. *Sirmans v. State*, 244 Ga. App. 252, 534 S.E.2d 862 (2000), cert. denied, 534 U.S. 831, 122 S. Ct. 76, 151 L. Ed. 2d 40 (2001).

Reasonable suspicion not established. — Trial court erred in denying defendant's motion to suppress as the officer simply did not have reasonable suspicion that the defendant was engaged in or about to be engaged in a violation of the law. When the officer found the defendant sleeping in a car in the parking lot of a funeral home, with the permission of the funeral home's owner, the officer did not see or smell any illegal substances; the officer did not question the defendant regarding the defendant's appearance or demeanor; the officer did not determine if the defendant had consumed alcohol; and the officer did not perform any field tests to determine if the defendant was under the influence of anything. *Martin v. State*, 316 Ga. App. 220, 729 S.E.2d 437 (2012).

a. Applied to Vehicles

Search of passenger compartment. — Once passenger was placed under arrest, the officer could lawfully search the entire passenger compartment of the defendant's vehicle as a search incident to arrest. *Tutu v. State*, 252 Ga. App. 12, 555 S.E.2d 241 (2001).

Reasonable suspicion to stop car. — As a reliable confidential informant (CI) told police that the defendant would be

Search Warrants (Cont'd)**4. Exceptions to Warrant****Requirement (Cont'd)****a. Applied to Vehicles (Cont'd)**

driving one of three vehicles to a subdivision to deliver cocaine, and an officer saw the defendant and a car, both of which matched CI's description, in that subdivision, the officer had reasonable suspicion to stop the car. After a drug dog alerted to the car's passenger door, and the officer saw a digital scale of the type used to weigh drugs in plain view on the car's seat, the officer had probable cause to search the car; thus, cocaine found during the search was admissible. *Alford v. State*, 293 Ga. App. 512, 667 S.E.2d 680 (2008).

Plain view of drugs inside car. — Trial court did not err by denying the defendant's motion to suppress evidence an officer seized from the defendant's vehicle because the suspected contraband was in plain view from outside the vehicle, and once the officer smelled the odor of marijuana on the recovered item, the officer had even stronger grounds to search the vehicle; because the officer saw the item before returning the defendant's license or issuing the ticket, the officer was not exceeding the scope of the initial traffic stop by seizing the object. *Arnold v. State*, 315 Ga. App. 798, 728 S.E.2d 317 (2012).

Smell of marijuana. — A trial court properly denied a defendant's motion to suppress the evidence of drugs and a handgun found during the warrantless search of the defendant's vehicle as the arrest of the defendant's passenger on an outstanding warrant authorized the stop of the defendant's vehicle and the mobility of the car, coupled with the existence of probable cause to believe the car contained marijuana, based on the officer smelling the marijuana upon approaching the vehicle, authorized the search. *Somesso v. State*, 288 Ga. App. 291, 653 S.E.2d 855 (2007), cert. denied, 2008 Ga. LEXIS 281 (Ga. 2008).

Circumstances under which probable cause would exist for warrantless search of vehicle. — Probable cause would exist for the warrantless search of a vehicle only if the facts and circumstances

would cause a reasonably prudent person to believe that contraband was present in the vehicle. *Barlow v. State*, 148 Ga. App. 717, 252 S.E.2d 214 (1979).

Officer's continued detention of a driver and defendant after issuing the driver a speeding ticket was lawful as the driver's nervousness, claimed ignorance of a destination and the passenger's identity, furtive conduct, and the absence of an authorized driver under an auto rental agreement, taken together, gave the officer a reasonable, articulable suspicion of criminal activity based on more than a mere hunch. *State v. Whitt*, 277 Ga. App. 49, 625 S.E.2d 418 (2005).

Evidence in the record supported the denial of a motion to suppress as officers testified regarding their observations, surveillance techniques, experience with drug sales, and the general modes of operation of persons involved in drug sales, the officers were authorized to stop defendant's vehicle as one involved in a drug sale, acting in concert with another vehicle as counter-surveillance and showing an obvious interest in the endeavor; further, because the detention lasted at most, fifteen minutes, such was not unreasonable and did not amount to an impermissible seizure. *Hickman v. State*, 279 Ga. App. 558, 631 S.E.2d 778 (2006).

Despite the defendant's claim that an officer's detention was illegal and, thus, any statement uttered while detained should have been suppressed, suppression of the defendant's statement was properly denied, given that: (1) the officer encountered the defendant after responding to a 9-1-1 call reporting a crime at a specific location; and (2) the officer's personal observations, when coupled with the defendant's admission as to being drunk and driving a car onto the curb, as the 9-1-1 dispatcher had stated, supplied the officer with probable cause to arrest the defendant. *Moore v. State*, 281 Ga. App. 141, 635 S.E.2d 408 (2006).

Because law enforcement had the authority to conduct a warrantless search of the defendant's automobile based upon information supplied to them from a reliable, honest, and law-abiding informant, which was independently confirmed by officers investigating the tip, the trial

court did not err when the court denied a motion to suppress the evidence seized in the defendant's car. *Fleming v. State*, 281 Ga. App. 207, 635 S.E.2d 823 (2006).

Circumstances short of probable cause for arrest may justify stopping of pedestrian or motorist for limited questioning. *State v. Thomason*, 153 Ga. App. 345, 265 S.E.2d 312 (1980), overruled on other grounds, *State v. Stilley*, 261 Ga. App. 868, 584 S.E.2d 9 (2003).

When an officer saw the defendant traveling at 30 miles per hour below the posted speed limit, and saw the defendant weaving within the defendant's own lane, while this conduct was not illegal, it provided the officer with a reasonable, articulable suspicion that the defendant was violating the laws prohibiting driving under the influence of alcohol, so the officer properly initiated an investigatory stop of the defendant's vehicle. *Veal v. State*, 273 Ga. App. 47, 614 S.E.2d 143 (2005).

It is well established that weaving, both out of one's lane and within one's own lane, particularly when combined with other factors, may give rise to a reasonable articulable suspicion on the part of a trained law enforcement officer that the driver is violating the driving under the influence laws, and the conduct forming the basis of the reasonable suspicion need not be a violation of the law. *Veal v. State*, 273 Ga. App. 47, 614 S.E.2d 143 (2005).

Officer had a reasonable suspicion that the occupants of a car stopped at 3:40 A.M. were, or were about to be, engaged in criminal activity at a closed store, and that the oddly circuitous route to a motel taken by the car was an attempt by the driver to evade the officer. *Rolfe v. State*, 278 Ga. App. 605, 630 S.E.2d 438 (2006).

Officers' initial approach of defendant's vehicle and request for consent to search were warranted, even without an articulable suspicion of criminal activity at the time of their approach; moreover, even if a reasonable articulable suspicion of criminal activity had been required to briefly detain the defendant, the officers had such suspicion upon seeing: (1) individuals approach the defendant's car in an area known for drug activity; (2) the individuals turn and walk away upon seeing

the police; and (3) the defendant's passenger swallowing what appeared to be a crack rock as the police approached. *Sego v. State*, 279 Ga. App. 484, 631 S.E.2d 505 (2006).

Because the defendant was witnessed crossing the white traffic line on two occasions, the stop of the defendant's vehicle was valid under Ga. Const. 1983, Art. I, Sec. I, Para. XIII; the defendant's weaving without reason into nearby lanes violated O.C.G.A. § 40-6-48(1) and justified the stop, and the officer's actual motive in stopping the defendant was inconsequential. *Rayo-Leon v. State*, 281 Ga. App. 74, 635 S.E.2d 368 (2006).

Traffic stop by a sheriff's deputy was not unreasonably prolonged without a reasonable articulable suspicion of criminal activity based on evidence that: (1) a rental agreement in the defendant's possession had, in fact, expired; (2) the officer was justified in calling for the drug dog because the officer did not know whether the car was stolen and because the defendant was nervous, backed toward the car when the defendant declined consent to search, and had confessed to an open container violation; and (3) the trial court properly credited testimony from the dog's handler that the dog alerted when the dog showed interest in the passenger door, although the dog's response was not an active alert; thus, the trial court properly rejected the defendant's argument that a motion to suppress should have been granted due to an unreasonably prolonged traffic stop which was not based on a reasonable suspicion of criminal activity. *Tanner v. State*, 281 Ga. App. 101, 635 S.E.2d 388 (2006).

Constitutional protection against search and seizure of car lost by fleeing defendant. — When a fleeing defendant, pursued by the police, abandoned the defendant's car on a public street and started running, the defendant lost the defendant's constitutional protection against the search and seizure of the defendant's car. *Whitlock v. State*, 124 Ga. App. 599, 185 S.E.2d 90 (1971).

Search of vehicle is proper for purpose of obtaining evidence of the basis of a suspect's intoxication. *Stoker v. State*, 153 Ga. App. 871, 267 S.E.2d 295 (1980).

Search Warrants (Cont'd)**4. Exceptions to Warrant****Requirement (Cont'd)****a. Applied to Vehicles (Cont'd)**

When a person is lawfully arrested for driving under the influence of any substance, the officer may conduct a warrantless search of the passenger compartment of the vehicle for the purpose of obtaining evidence of intoxication as an incident to that lawful arrest. *Knox v. State*, 216 Ga. App. 90, 453 S.E.2d 120 (1995).

Stop of vehicle justified by officer's observations. — A trial court properly denied defendant's motion to suppress drug evidence because the stop of defendant's vehicle was justified based on the police having observed defendant at a residence under surveillance for suspected drug activity: (1) defendant went in and out of the residence under surveillance in under five minutes; (2) defendant had a drug seller as a passenger in defendant's vehicle; and (3) defendant drove to the passenger's residence. The stop was a second-tier encounter that required reasonable suspicion, and the collective knowledge of the officers involved, based on the officers' observations, justified defendant's stop. *Satterfield v. State*, 289 Ga. App. 886, 658 S.E.2d 379 (2008).

Trial court did not err by denying a motion to suppress because the evidence supported the trial court's conclusion that a police officer, who responded to a report of a fight in a parking lot, had an articulable suspicion to stop the defendant when the officer saw the defendant driving fast from the parking lot, and investigate further the defendant's connection to the reported fight. *Hines v. State*, 308 Ga. App. 299, 707 S.E.2d 534 (2011).

Search of vehicle justified by officer's observations. — Search of a van was lawful under the independent basis of the automobile exception to the warrant requirement since the objective facts known to the deputy after the deputy lawfully stopped the van, including needle marks on the occupants' arms, drug paraphernalia, and evidence of drug usage on the floor of the front seat, gave the deputy probable cause to believe that the van

contained contraband. *Autry v. State*, 277 Ga. App. 305, 626 S.E.2d 528 (2006).

Officers' initial approach to a car occupied by the defendant as a passenger was a first-tier encounter which did not invoke the Fourth Amendment; after that approach, an officer saw, in plain view in the car, bags, a scale, and a pill bottle, known as items used for drug sales, which authorized a pat-down of the defendant, uncovering a drug pipe, and which validated the driver's consent to search the car, yielding drugs. *Chapman v. State*, 279 Ga. App. 200, 630 S.E.2d 810 (2006).

When an officer stopped the defendant's car in the belief that the defendant was violating a noise ordinance, saw in plain view what appeared to be illegally recorded material, and placed the defendant under arrest for violating O.C.G.A. § 16-8-60, the subsequent search of the car was legal, based on the justified traffic stop and the plain view doctrine, which gave the officer probable cause to arrest the defendant for illegally reproducing recorded materials, to seize the viewed contraband, and to search the vehicle for contraband. *Hayward-El v. State*, 284 Ga. App. 125, 643 S.E.2d 242 (2007).

When an officer arrested the defendant for violating O.C.G.A. § 16-8-60 and later obtained permission from the defendant's spouse to search the couple's house and saw what appeared to be illegal recordings in plain view in the defendant's parked car, the subsequent search of the car, to which the spouse consented, was legal. *Hayward-El v. State*, 284 Ga. App. 125, 643 S.E.2d 242 (2007).

Trial court properly denied suppression of drug evidence obtained from a search of the defendant's person after a police officer conducted an investigatory stop of the defendant's vehicle and noted a strong odor of marijuana as the officer stopped the vehicle based on a reasonable suspicion that the defendant was violating O.C.G.A. § 40-6-14(a) by the loud music emanating from the defendant's vehicle while parked in a convenience store parking lot pursuant to O.C.G.A. § 40-6-3(a)(2). *Jackson v. State*, 297 Ga. App. 615, 677 S.E.2d 782 (2009), cert. denied, No. S09C1461, 2009 Ga. LEXIS 409 (Ga. 2009).

Defendant failed to establish that trial counsel's failure to timely file a motion to suppress evidence a police officer seized from the defendant's vehicle prejudiced the case because the warrantless search of the vehicle was lawful under the automobile exception to the warrant requirement; the objective facts known to the officer after the car was lawfully stopped gave the officer probable cause to believe that the car contained contraband, and those facts included the smell of marijuana in the car, flakes of what the officer suspected to be marijuana on the floorboards of the car, and the defendant's visible agitation during the traffic stop. *Brown v. State*, 311 Ga. App. 405, 715 S.E.2d 802 (2011).

Drug-sniffing dog. — During an investigative detention, the bringing of a drug dog to the scene was proper, and when the drug dog alerted to the vehicle as containing drugs, the subsequent warrantless search of the vehicle was justified. *Bowden v. State*, 279 Ga. App. 173, 630 S.E.2d 792 (2006).

Counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to file a motion to suppress marijuana and identification found in an idling car, as the search did not violate Ga. Const. 1983, Art. I, Sec. I, Para. XIII; it was proper for a drug sniffing dog to walk around the outside of defendant's vehicle, a location in which police and the dog were permitted to be, and to alert to the presence of drugs. *Jackson v. State*, 281 Ga. App. 83, 635 S.E.2d 372 (2006).

Search of vehicle not justified. — Suppression motion was properly granted after the vehicle that the defendant and others were riding in was stopped on school property on suspicion of truancy and the search based on the finding that one occupant possessed marijuana and that the defendant had lied about the location of another vehicle; the stop of the vehicle was tenuous at best, the search of the occupants was even more tenuous, and any consent given by the defendant to search the other vehicle was a direct product of the illegality of the stop and the taint thereof was not sufficiently attenuated. *State v. Scott*, 279 Ga. App. 52, 630 S.E.2d 563 (2006).

Officer approaching stopped vehicle. — Motion to suppress evidence seized from the defendant's car was properly denied because a uniformed officer's initial approach to the car, which had been driven to the scene of a controlled drug buy by a codefendant, was a first-tier police-citizen encounter, the car was already stopped when the uniformed officer approached and asked the codefendant for identification, the codefendant admitted that the codefendant had no driver's license or other identification, and thus the officer had reasonable suspicion that the codefendant was violating the law by driving without a license and was justified in detaining the codefendant from driving off in the vehicle. *Bowden v. State*, 279 Ga. App. 173, 630 S.E.2d 792 (2006).

Search of vehicle not justified by generalized suspicion. — Police officer's stop of the defendant's vehicle based on the officer's generalized suspicion that any vehicle on that particular road late at night was involved in illicit activity did not meet the standard for an investigative stop. *Lyttle v. State*, 279 Ga. App. 659, 632 S.E.2d 394 (2006).

b. Applied to People

Pat-down permitted. — Officer's pat-down of defendant, during which the officer seized credit cards from defendant's person, was lawful as defendant had been seen in a stolen car, had previously fled police, knew the officer was investigating a crime, put defendant's hands in defendant's pockets, the officer knew defendant had lied about two items in defendant's pockets that could be used as weapons, and the objects the officer felt in defendant's pocket were ones that, in the officer's experience, had been known to have been fashioned into weapons by attaching razor blades to them. *Mohamed v. State*, 276 Ga. 706, 583 S.E.2d 9 (2003).

During the execution of a search warrant at a residence where defendant was visiting, the sheriff's deputy felt what appeared to be marijuana in a plastic bag while searching defendant for weapons which search was permissible under the "plain feel" doctrine; thus, the trial court properly denied defendant's motion to

Search Warrants (Cont'd)**4. Exceptions to Warrant****Requirement (Cont'd)****b. Applied to People (Cont'd)**

suppress. *Kinder v. State*, 269 Ga. App. 99, 603 S.E.2d 496 (2004).

Brief investigative stop and pat-down search of defendant was justified by a reasonable and articulable suspicion that defendant was attempting to commit a crime when, while on patrol because of a rash of vehicle break-ins in the area of certain parking lots, an officer observed defendant looking into a parked car and defendant gave conflicting stories about where defendant was coming from. *Woods v. State*, 275 Ga. App. 340, 620 S.E.2d 609 (2005).

Since officers knew that the defendant was armed and considered dangerous, since the officers learned that the defendant had a machete and knives on the defendant's person, and since the defendant was nervous and moving around during an officer's pat down search, the officers did not exceed the permissible scope of the pat down search by opening a box found on defendant's person during the pat down search. *Vaughan v. State*, 279 Ga. App. 485, 631 S.E.2d 497 (2006).

Pat-down for safety reasons was proper after the defendant arrived at the scene of a stop of a reported carjacked vehicle since the defendant was identified as having previously been in possession of the carjacked vehicle, and incriminating documents found during the pat-down were properly seized from the defendant; the defendant's later statement admitting to having been in possession of the vehicle was not rendered inadmissible by the proper pat-down. *Montgomery v. State*, 279 Ga. App. 419, 631 S.E.2d 717 (2006).

Trial court did not err in denying the defendant's motion to suppress the cocaine found by an officer after a precautionary pat-down, as the officer's actions in responding to a suspicious-person complaint and immediately encountering the defendant were reasonable and neither arbitrary nor harassing; hence, the seizure was authorized as incident to a lawful arrest. *Simmons v. State*, 281 Ga. App. 654, 637 S.E.2d 70 (2006), cert. denied, 2007 Ga. LEXIS 77 (Ga. 2007).

Statement by a defendant who had been stopped for speeding that the defendant had a knife, and the defendant's overly-nervous demeanor, authorized a trooper to pat the defendant down for the trooper's safety. A "plain feel" of an apparent methamphetamine pipe in the defendant's pocket authorized the trooper to remove the pipe; therefore, the pipe and methamphetamine found pursuant to a search of the defendant's pockets were admissible. *Hicks v. State*, 293 Ga. App. 745, 667 S.E.2d 715 (2008).

Flight from improper Terry stop. — Denial of a defendant's motion to suppress was affirmed as the defendant's flight from an improper Terry stop gave the police officers an independent basis to arrest the defendant; thus, the methamphetamine found in close proximity was admissible. *Reynolds v. State*, 280 Ga. App. 712, 634 S.E.2d 842 (2006).

Instrumentalities used in commission of crime may be seized at time of arrest without search warrant. *Abrams v. State*, 223 Ga. 216, 154 S.E.2d 443 (1967).

Police may search person under custodial arrest for weapons or contraband. — Once a defendant has been placed under custodial arrest, police may search the defendant's person, incident to that arrest, for weapons or contraband. *Buday v. State*, 150 Ga. App. 686, 258 S.E.2d 318 (1979).

Reasonable for officer to remove weapons during lawful arrest. — It is reasonable that when a lawful arrest is made the arresting officer may remove any weapons that the suspect might seek to use to try to resist arrest or to escape. *Banks v. State*, 246 Ga. 178, 269 S.E.2d 450 (1980).

Search of juvenile not proper. — Law enforcement officer, who was acting as an agent for a school principal in searching a juvenile, upon reports that the juvenile had been overheard making arrangements to sell drugs on school grounds, was not authorized to search the juvenile absent probable cause to do so; thus, when the juvenile was searched and drugs were found, the court properly granted the juvenile's motion to suppress. *State v. K.L.M.*, 278 Ga. App. 219, 628 S.E.2d 651 (2006).

Level-one, non-coercive encounter and resultant search of person. — Since an officer made no show of force, and did not threaten, coerce, or restrain the defendant, the officer's initial approach to the defendant and two others and the officer's questioning of the defendant was a level-one, non-coercive encounter, and the officer did not need articulable suspicion to justify the conduct, to question the defendant, or to ask for consent to search the defendant's person; the defendant's consent to a search thus was not tainted by an illegal stop and met constitutional muster. *Postell v. State*, 279 Ga. App. 275, 630 S.E.2d 867 (2006).

Officer's observation of the defendant's unusual, evasive behavior, coupled with the defendant's ensuing confrontation of the officer near a place where a burglar alarm had recently sounded, followed by defendant's unresponsive replies to the officer's questions provided the officer a particularized and objective basis for suspecting that the defendant was engaged in wrongdoing, thereby justifying, under Ga. Const. 1983, Art. I, Sec. I, Para. XIII, a Terry-style investigative detention; once the defendant was subdued after attempting to flee the scene, probable cause to arrest existed. *Franklin v. State*, 281 Ga. App. 409, 636 S.E.2d 114 (2006).

Search of defendant's pocket after traffic stop. — Because an officer stopped the defendant for suspected drunk driving, but did not smell alcohol on the defendant's breath and did not administer sobriety tests, and because the officer soon realized during the stop that the license tag was valid, the officer never testified that the officer was in fear for the officer's safety, and did not conduct a Terry pat-down search, the trial court was authorized to find that the officer failed to articulate the reasonable suspicion necessary to sustain a second tier search. during which the officer found marijuana in the defendant's pocket. *State v. Brown*, 278 Ga. App. 457, 629 S.E.2d 123 (2006).

Consent nor warrant required for taking of blood sample. — A blood sample is not taken from a defendant unconstitutionally because a defendant does not freely consent to the taking of the sample and because it is taken without a search

warrant. *Corn v. Hopper*, 244 Ga. 28, 257 S.E.2d 533 (1979).

Evidence

Change in admissibility of evidence rules. — Law as to admissibility of evidence obtained pursuant to an unlawful search and seizure as stated in *Winston v. State*, 79 Ga. App. 711(2a), 54 S.E.2d 354 (1949) and similar cases is determined to be no longer valid. *Raif v. State*, 109 Ga. App. 354, 136 S.E.2d 169 (1964).

All evidence obtained by searches and seizures in violation of Constitution is inadmissible in state court. *Carson v. State ex rel. Price*, 221 Ga. 299, 144 S.E.2d 384 (1965).

Evidence of guilt which the defendant, either directly or indirectly, is compelled to disclose by an unlawful search and seizure of the defendant's person under illegal arrest, is not admissible in a criminal prosecution of the person illegally arrested. *Raif v. State*, 109 Ga. App. 354, 136 S.E.2d 169 (1964).

Evidence of DUI investigation admissible. — Because a reasonable person in the defendant's position would not have believed any freedom of action had been more than temporarily curtailed by an officer's investigation for a possible DUI, and the defendant was not in custody or arrested until after the field sobriety tests were performed, at which point the officer had probable cause for the arrest and read the implied consent rights, the trial court did not err in denying suppression of the defendant's statement made to the officer and the field sobriety evaluations conducted. *Amin v. State*, 283 Ga. App. 830, 643 S.E.2d 4 (2007).

Because a defendant was arrested for driving under the influence under O.C.G.A. § 40-6-391 based on probable cause and the state had complied with the implied consent requirements of O.C.G.A. § 40-5-55, the defendant could not complain that drug and alcohol testing violated the search and seizure provisions of the Fourth Amendment or the Georgia Constitution because the implied consent statute allowed for the warrantless compelled testing of bodily fluids based on the existence of probable cause, but without proof of the existence of exigent circum-

Evidence (Cont'd)

stances. *Cornwell v. State*, 283 Ga. 247, 657 S.E.2d 195 (2008).

Evidence obtained from aerial search is admissible and not product of illegal search. — Since the special protection accorded by the Fourth Amendment to the people in their “persons, houses, papers and effects” is not extended to open fields, evidence obtained from an aerial search of an open field is not inadmissible as the product of an illegal search. *Reece v. State*, 152 Ga. App. 760, 264 S.E.2d 258 (1979).

Test for fruit of the poisonous tree. — Evidence is not “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which an objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. *McKinney v. State*, 261 Ga. App. 218, 582 S.E.2d 463 (2003).

Though evidence would not have been admissible if discovered as the result of police officers’ unconstitutional roadblock and illegal Terry stop of defendant’s car before defendant reached the roadblock, defendant’s gratuitous shoving of police was an aggravated battery, and the discovery of drugs defendant threw while fleeing from that battery meant the discovery of the evidence was sufficiently attenuated from the illegal stop to justify its admission into evidence and denial of defendant’s motion to suppress. *Strickland v. State*, 265 Ga. App. 533, 594 S.E.2d 711 (2004).

Taint of illegal procurement of evidence under void warrant forbids its use. — Evidence obtained under a void warrant is evidence illegally obtained and it has been settled once and for all that the taint of illegal procurement forbids its use as evidence. *Anderson v. State*, 155 Ga. App. 25, 270 S.E.2d 263 (1980).

Suppression of evidence when impermissible intrusion on rights. — When no circumstances at all appear which might give rise to an articulable

suspicion (less than probable cause, but greater than mere caprice) that the law has been violated, the act of following and detaining a vehicle and its occupants must be judged as an impermissible intrusion on the rights of the citizen. When this occurs, the penalty exacted by the law is that evidence turned up as a result of such intrusion may not be introduced against the defendant on the trial of the defendant’s case. *Brooks v. State*, 144 Ga. App. 97, 240 S.E.2d 593 (1977).

Trial court properly granted a defendant’s motion to suppress a firearm — a hunting rifle that was in the cab of the defendant’s pick-up truck — that was seized from the vehicle after a traffic stop, because no evidence was presented of any danger to justify the warrantless search of the vehicle for weapons, and the officer acknowledged the search was conducted merely to see if the firearm was stolen, with no basis shown that criminal activity existed. *State v. Jones*, 289 Ga. App. 176, 657 S.E.2d 253 (2008).

Suppression motion properly denied when probable cause to arrest the defendant for driving under the influence existed after: (1) the defendant was stopped for speeding; (2) an officer noticed that the defendant’s eyes were bloodshot, that the defendant’s speech was slow, and that the defendant smelled of alcohol; and (3) field sobriety tests indicated that the defendant was under the influence of alcohol. *Moody v. State*, 273 Ga. App. 670, 615 S.E.2d 803 (2005).

Because: (1) it was reasonable for the arresting officers to act upon an investigating deputy’s observations; (2) law enforcement had reasonably trustworthy information to warrant their belief that the defendant had committed or had participated in committing a burglary; and (3) a determination of probable cause to arrest the defendant could rest on the collective knowledge of the police, given the communication between them, probable cause supported the defendant’s warrantless arrest and supported the admission of the seized evidence. *Murphy v. State*, 286 Ga. App. 447, 649 S.E.2d 565 (2007).

“Plain feel” exception. — Since the record was devoid of any testimony or evidence that the seizing officer articu-

lated a suspicion that would have reasonably led the officer to believe that the object seized from a coin pocket of defendant's jeans was contraband, never observed any portion of the plastic bag protruding from the pocket, and never testified that it was immediately apparent that the object was contraband, the plain feel exception did not apply and the trial court properly granted suppression of the item seized. *State v. Henderson*, 263 Ga. App. 880, 589 S.E.2d 647 (2003).

Pat down conducted as a matter of routine during a traffic stop did not provide a reasonable basis for concluding that defendant was a threat to the officer's safety, and because nothing indicated that defendant was involved in the drug trade or was otherwise threatening, the pat down was not justified and defendant's subsequent incriminating statement and drugs seized from defendant's vehicle should have been suppressed. *Wilson v. State*, 272 Ga. App. 291, 612 S.E.2d 311 (2005).

Trial court erred in granting the defendant's motion to suppress rings a police officer seized from the defendant's pocket during a pat-down search because the seizure was authorized under the plain feel doctrine; the officer's knowledge that a man matching the defendant's description was suspected of stealing numerous rings shortly beforehand and nearby gave the officer probable cause to believe that the items the officer felt in the defendant's pocket were the stolen rings, and had the rings been in the officer's plain view when the officer detained the defendant, the officer could have seized the rings under the plain view doctrine. *State v. Cosby*, 302 Ga. App. 204, 690 S.E.2d 519 (2010).

Seizure of contraband during justified safety frisk was proper. — A trial court properly denied the defendant's motion to suppress the contraband found on the defendant's person as a result of a traffic stop that came to fruition after an officer observed the defendant making a U-turn in front of a recently robbed bank because the defendant admitted to having a knife in the defendant's pocket but refused to remove the defendant's hand therefrom. As a result, the police were justified in frisking the defendant for safety reasons and the contraband was,

therefore, legally obtained from the defendant. *Johnson v. State*, 289 Ga. App. 27, 656 S.E.2d 161 (2007).

Statement overheard by officers not illegally procured evidence. — Evidence of statements made by the defendant in a conversation overheard by the arresting officers who had concealed themselves, as planned between them and the person with whom the defendant talked, does not amount to evidence given by the defendant involuntarily and without the advice of counsel, and is not coerced from the defendant in violation of the defendant's rights not to be compelled to be a witness against oneself. *Blackwell v. State*, 113 Ga. App. 536, 148 S.E.2d 912 (1966).

Evidence is lawfully obtained if observed by sheriff when the sheriff is lawfully on premises on another matter. *Hudson v. State*, 127 Ga. App. 452, 193 S.E.2d 919 (1972).

Plain view. — When the defendant was already stopped at the side of a road and a police chief, lawfully wanting to question the defendant about the incorrect vehicle tag number that the defendant had given earlier, walked passed an open car door and saw a gun in plain sight, there was no stop and the chief had a right to retrieve the gun; consequently, the trial court did not err by refusing to suppress the evidence of the gun. *Eldridge v. State*, 270 Ga. App. 84, 606 S.E.2d 95 (2004).

Evidence voluntarily given or seized while in plain view should not be suppressed. — When evidence establishes that a warrantless arrest and seizure were unrelated as when a sheriff who seized the items in question was permitted inside defendant's home by a person identified as defendant's spouse, and the items seized were either in plain view or voluntarily given to the sheriff, the evidence did not show a seizure pursuant to an illegal warrantless arrest that should be suppressed. *Dickerson v. State*, 151 Ga. App. 429, 260 S.E.2d 535 (1979).

Suppression not required when insufficient evidence of unreasonable search and seizure. — When a sheriff goes into the house of a relative and takes possession of a gun offered to the sheriff,

Evidence (Cont'd)

the evidence is insufficient to show an unreasonable search and seizure, and suppression of the gun was not required. *Marsh v. State*, 223 Ga. 590, 157 S.E.2d 273 (1967).

Untimely motion to suppress. — In a prosecution on four counts of child molestation, the defendant's failure to file a timely motion to suppress waived the right to claim that the seized items were inadmissible as fruits of the poisonous tree. *Walker v. State*, 277 Ga. App. 485, 627 S.E.2d 54 (2006).

Motion to suppress properly denied because approaching individual and asking questions not "seizure." — Trial court properly refused to suppress evidence based on the defendant's initial seizure as a deputy initiated a first-level police-citizen encounter when the deputy approached the defendant's stopped car and asked the defendant to get out; it was only after the deputy smelled alcohol on the defendant and noticed the defendant's bloodshot eyes that the defendant acted upon a reasonable suspicion that the defendant might be intoxicated. *Johnson v. State*, 268 Ga. App. 426, 602 S.E.2d 177 (2004).

Seizure from pretrial detainee's cell. — Because the state properly sought and obtained a search warrant before the state seized written materials from a pretrial detainee's cell, it was error to grant the detainee's motion to suppress. *State v. Henderson*, 271 Ga. 264, 517 S.E.2d 61 (1999), cert. denied, 528 U.S. 1083, 120 S.Ct. 807, 145 L. Ed. 2d 680 (2000).

Circumstances surrounding seeking of warrant. — When any conflict between testimony of magistrate and law enforcement officer seeking warrant as to circumstances surrounding seeking of warrant was resolved by the court and supported by the record, the motion to suppress evidence was properly denied. *Daitch v. State*, 168 Ga. App. 830, 310 S.E.2d 703 (1983).

There is no constitutional right to suppress evidence solely on ground that others have access to it. *Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981).

Seizure of marijuana when police officer investigates complaint is

proper. — Seizure of marijuana plant growing in yard of home where police officer was investigating complaint of illegal activity was proper. *State v. Brooks*, 160 Ga. App. 381, 287 S.E.2d 95 (1981).

Warrant as pathway to evidence. — Police did not exceed the scope of a search warrant when the warrant specified "receipts" and a furniture receipt was found in the defendant's car leading to the defendant's paramour's home and police, in a consented-to search, found incriminating evidence; the police were not required to overlook relevant evidence when the police knew the defendant's paramour's name and the receipt was a pathway to evidence. *Brown v. State*, 260 Ga. App. 627, 580 S.E.2d 348 (2003).

Use of similar transaction evidence. — Given the substantial evidence of defendant's guilt, a trial court did not abuse its discretion by permitting evidence showing the commission of similar transactions, in the nature of two out-of-state traffic stops which led to searches and discovery of drugs and drug paraphernalia on defendant, because there was no reasonable probability that the results of the trial would have been different had the evidence been excluded. *Goldsby v. State*, 273 Ga. App. 523, 615 S.E.2d 592 (2005).

Blood test results inadmissible. — Trial court erred in denying the defendant's motion to suppress the results of the defendant's intoximeter test after the arresting officer failed to provide an independent blood test under O.C.G.A. § 40-6-392(a)(3), failed to use reasonable efforts to ensure that the defendant's blood was both drawn and tested, and since the officer did not suggest any other testing alternatives, such as calling the defendant's personal physician or a lawyer, or submitting the sample to the state's crime lab; once the defendant invoked the right to an independent test, the officer had a duty to make reasonable efforts to accommodate the request. *Cole v. State*, 263 Ga. App. 222, 587 S.E.2d 314 (2003).

Blood and urine test results, obtained without sufficient voluntary consent, properly suppressed. — Because the evidence sufficiently showed

that the defendant's mental condition was clearly vulnerable, and that the defendant: (1) could not read; (2) had to be forcibly restrained while the consent form was initially being read; (3) was weeping while the remainder of the form was read; and (4) never actually signed the consent form, the trial court properly found that any consent to submit to blood and urine tests was not freely and voluntarily given. Moreover, the proper standard of review on appeal, based on the fact that credibility was an issue, was not a *de novo* standard, but a clearly erroneous standard. *State v. Stephens*, 289 Ga. App. 167, 657 S.E.2d 18 (2008).

Second blood sample was not fruit of poisonous tree. — Although a first search warrant for defendant's blood was defective, a second blood sample that was later drawn from defendant was not "fruit of the poisonous tree" because there was no evidence that the second search warrant for the blood was defective or that the second blood sample was obtained by exploitation of the original defective warrant; the second sample was separate and distinguishable from the first sample so as to be purged of the primary taint and, therefore, the trial court did not err in refusing to suppress the second sample. *McKinney v. State*, 261 Ga. App. 218, 582 S.E.2d 463 (2003).

Blood test results admissible. — Denial of a defendant's suppression motion was affirmed as a victim with a broken kneecap was seriously injured under O.C.G.A. § 40-5-55(c) and the officers had probable cause based on the defendant's statements, the defendant's glossy eyes, and the odor of alcohol on the defendant's person, to believe that the defendant was driving under the influence of alcohol; the officer was not required to arrest the defendant before the implied consent reading. *Jenkins v. State*, 282 Ga. App. 106, 637 S.E.2d 818 (2006).

Evidence of refusal to submit to breath test admissible. — Trial court erred in suppressing the defendant's refusal to submit to a state-administered chemical breath test, as the implied consent notice given by a sheriff's deputy was substantially accurate and timely given, and irrespective of whether the refusal

resulted from the defendant's confusion, it nevertheless remained a refusal. *State v. Brookbank*, 283 Ga. App. 814, 642 S.E.2d 885 (2007).

Trial court erred in granting the defendant's motion to suppress results from a blood test performed prior to any arrest, as: (1) the evidence showed that the defendant was involved in a car wreck resulting in serious injury before blood was drawn; and (2) a sheriff's deputy had probable cause to suspect that the defendant had been driving under the influence of alcohol; moreover, contrary to the defendant's assertion, the fact that a loss of consciousness was temporary did not cause the blood test to fall outside the ambit of O.C.G.A. § 40-5-55(c). *State v. Umbach*, 284 Ga. App. 240, 643 S.E.2d 758 (2007).

Tate standard justified suppression of breath tests. — Under the Tate standard, defendant's breath test results, obtained while defendant was in custody, were properly suppressed as the arresting officer lacked probable cause to arrest defendant for driving under the influence since: (1) defendant had a single-car accident; (2) defendant had two clues for intoxication in the HGN test, while the other four clues were inconclusive or indicated no intoxication; (3) defendant's alco-sensor test results were positive for alcohol; (4) the trial court found that all of the alleged indicia of impairment were caused by the accident or lacked credibility; and (5) defendant adequately explained the accident to the officer. *State v. Gray*, 267 Ga. App. 753, 600 S.E.2d 626 (2004), disapproved, *Hughes v. State*, 296 Ga. 744, 770 S.E.2d 636 (2015).

Photographic lineup was not impermissibly suggestive. — While a defendant pointed out differences in the various pictures, such as background, clothing, and facial hair, defendant failed to show how such differences made defendant stand out from the other lineup participants in an arbitrary or apparent way so as to "suggest" to the victim that defendant was the perpetrator; the lineup administrator's comment that the victim "did good" was not proof the administrator set up a suggestive lineup. *Weeks v. State*, 268 Ga. App. 886, 602 S.E.2d 882 (2004).

Statement by defendant during police investigation held admissible. —

Evidence (Cont'd)

Based on an officer's unequivocal testimony that the defendant was not under arrest when a challenged statement was made, but the officer was merely investigating the victim's stolen vehicle claim, and hence Miranda warnings were not required, suppression of the statement was not required. *Marshall v. State*, 286 Ga. App. 86, 648 S.E.2d 674 (2007).

With regard to defendant's felony murder conviction, the trial court properly determined that defendant was not in custody when defendant told a police officer that defendant was the shooter as, although defendant was transported to the police station in a car which had a security screen between the front and back passenger seats, and a pat-down

search for officer safety was performed before defendant entered the car, those actions did not mandate a finding that defendant was in custody. At no time was defendant handcuffed, defendant's relatives were present during the interview, and the door to the detectives' work area in the police station was not locked in any way that impeded exit. *Sewell v. State*, 283 Ga. 558, 662 S.E.2d 537 (2008).

Evidence taken after arrest based on probable cause. — Because the record showed that every police officer on duty the day of the defendant's arrest had actual knowledge of facts sufficient to support a finding of probable cause for the arrest, the seizure of the defendant's bloody clothes after the arrest was proper. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

OPINIONS OF THE ATTORNEY GENERAL

This section has long been construed to prohibit unreasonable searches without proper warrant. 1950-51 Op. Att'y Gen. p. 85.

Evidence obtained by illegal searches and seizures not inadmissible in courts of this state. 1962 Op. Att'y Gen. p. 244.

Department's search regulation is valid. — A regulation established by the Department of Human Resources which makes vehicles entering on the grounds of Central State Hospital subject to search is a valid exercise of the department's power, and does not violate U.S. Const., amend. 14. 1974 Op. Att'y Gen. No. 74-15.

Search warrant permits search and seizure by official. — Any law enforcement official who has obtained a search warrant may lawfully search and seize prescriptions retained for inspection by a pharmacy as required by Georgia law. 1970 Op. Att'y Gen. No. 70-112.

Inspector has authority to search and seize and make arrests. — Chief drug inspector of the Board of Pharmacy and the inspector's assistants have the authority to make arrests for certain violations and to search and seize evidence necessary for the presentation before courts of this state or before the Board of

Pharmacy; the chief drug inspector and the inspector's assistants do not have the authority to seize prescriptions from a pharmacy without properly acquiring a valid search warrant. 1970 Op. Att'y Gen. No. 70-112.

Authority of department's officers to board and search vessels. — Enforcement officers of the State Game and Fish Commission (now Department of Natural Resources) may board and search vessels: (a) when acting under a warrant; (b) when they have probable cause to believe a violation exists; or (c) in arresting an offender detected in the commission of a violation. 1945-47 Op. Att'y Gen. p. 342.

Prisoner's consent required for inspection of personal documents. — Board of Corrections may not authorize the inspection of personal documents and papers of a prisoner, in the custody of the warden, without the consent of the prisoner. 1945-47 Op. Att'y Gen. p. 437.

Unauthorized dormitory searches. — A college may not rely absolutely on a contractual provision in a dormitory contract to conduct a search of a student's dormitory room in the absence of a valid warrant or consent. 1994 Op. Att'y Gen. No. 94-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Searches and Seizures, § 1 et seq.

Am. Jur. Proof of Facts. — Police Officer's Use of Excessive Force in Making Arrest, 9 POF2d 363.

Lack of Probable Cause for Warrantless Arrest, 44 POF2d 229.

Excessive Force by Police Officer, 21 POF3d 685.

C.J.S. — 79 C.J.S., Searches and Seizures, § 1 et seq.

ALR. — Constitutional guaranties against unreasonable searches and seizures as applied to a search for or seizure of intoxicating liquor, 13 ALR 1316; 27 ALR 709; 39 ALR 811; 41 ALR 1539; 74 ALR 1418.

Right to arrest without a warrant for unlawful possession or transportation of intoxicating liquor, 44 ALR 132.

Admissibility of evidence obtained by government or other public officer by intercepting letter or telegraph or telephone message, 53 ALR 1485; 66 ALR 397; 134 ALR 614.

Search of automobile without a warrant by officers relying on description of persons suspected of a crime, 60 ALR 299.

Right of search and seizure incident to lawful arrest without a search warrant, 74 ALR 1387; 82 ALR 782.

Use as evidence against officers, employees, or stockholders of corporation of illegally seized documents or other articles belonging to corporation, 78 ALR 343.

Constitutionality of statutory provisions for examination of records, books, or documents for taxation purposes, 103 ALR 522.

Right of privacy, 138 ALR 22; 57 ALR2d 634; 57 ALR3d 16.

Order upon application for suppression in criminal case of evidence wrongly seized by government as appealable, 156 ALR 1207.

Requiring submission to physical examination or test as violation of constitutional rights, 164 ALR 967; 25 ALR2d 1407.

Search incident to one offense as justifying seizure of instruments of or articles connected with another offense, 169 ALR 1419.

Requiring submission to physical examination or test as violation of constitutional rights, 25 ALR2d 1407.

Opening, search, and seizure of mail, 61 ALR2d 1282.

Nature of interest in, or connection with, premises searched as affecting standing to attack legality of search, 78 ALR2d 246.

Transiently occupied room in hotel, motel, or roominghouse as within provision forbidding unreasonable searches and seizures, 86 ALR2d 984.

Lawfulness of nonconsensual search and seizure without warrant, prior to arrest, 89 ALR2d 715.

Admissibility, in civil case, of evidence obtained by unlawful search and seizure, 5 ALR3d 670.

Validity of procedures designed to protect the public against obscenity, 5 ALR3d 1214; 93 ALR3d 297.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.

Validity of consent to search given by one in custody of officers, 9 ALR3d 858.

Lawfulness of search of motor vehicle following arrest for traffic violation, 10 ALR3d 314.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 ALR3d 359.

Search warrant: sufficiency of description of apartment or room to be searched in multiple-occupancy structure, 11 ALR3d 1330.

Investigations and surveillance, shadowing and trailing, as violation of right of privacy, 13 ALR3d 1025.

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search, 19 ALR3d 727.

Plea of guilty as waiver of claim of unlawful search and seizure, 20 ALR3d 724.

Admissibility, in criminal case, of evidence obtained by search by private individual, 36 ALR3d 553.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 ALR3d 1373.

“Fruit of the poisonous tree” doctrine excluding evidence derived from information gained in illegal search, 43 ALR3d 385.

Right of exonerated arrestee to have fingerprints, photographs, or other criminal identification or arrest records expunged or restricted, 46 ALR3d 900; 58 ALR4th 902.

Censorship of convicted prisoners’ “legal” mail, 47 ALR3d 1150.

Lawfulness of “inventory search” of motor vehicle impounded by police, 48 ALR3d 537.

Observation through binoculars as constituting unreasonable search, 48 ALR3d 1178; 59 ALR5th 615.

Censorship and evidentiary use of unconvicted prisoners’ mail, 52 ALR3d 548.

Uninvited entry into another’s living quarters as invasion of privacy, 56 ALR3d 434.

Liability of creditor for excessive attachment or garnishment, 56 ALR3d 493.

Waiver or loss of right of privacy, 57 ALR3d 16.

Admissibility, in criminal prosecution, of evidence obtained by electronic surveillance of prisoner, 57 ALR3d 172.

Admissibility of videotape film in evidence in criminal trial, 60 ALR3d 333; 41 ALR4th 812; 41 ALR4th 877.

Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure, 77 ALR3d 636.

Validity of requirement that, as condition of probation, defendant submit to warrantless searches, 79 ALR3d 1083.

State or municipal liability for invasion of privacy, 87 ALR3d 145.

Admissibility of evidence discovered in search of defendant’s property or residence authorized by domestic employee or servant, 99 ALR3d 1232.

Admissibility of evidence discovered in search of defendant’s property or residence authorized by defendant’s spouse (resident or nonresident) — state cases, 1 ALR4th 673; 65 ALR5th 407.

Admissibility of evidence discovered in warrantless search of rental property authorized by lessor of such property — state cases, 2 ALR4th 1173; 61 ALR5th 1.

Adequacy of defense counsel’s representation of criminal client regarding search and seizure issues, 12 ALR4th 318.

Disputation of truth of matters stated in affidavit in support of search warrant — modern cases, 24 ALR4th 1266.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 ALR4th 1112.

Employment of photographic equipment to record presence and nature of items as constituting unreasonable search, 27 ALR4th 532.

Search and seizure: suppression of evidence found in automobile during routine check of vehicle identification number (VIN), 27 ALR4th 549.

Validity of, and admissibility of evidence discovered in, search authorized by judge over telephone, 38 ALR4th 1145.

Search and seizure: what constitutes abandonment of personal property within rule that search and seizure of abandoned property is not unreasonable — modern cases, 40 ALR4th 381.

Admissibility, in criminal case, of physical evidence obtained without consent by surgical removal from person’s body, 41 ALR4th 60.

Officer’s ruse to gain entry as affecting admissibility of plain-view evidence — modern cases, 47 ALR4th 425.

Search and seizure: necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person, 47 ALR4th 501.

Propriety of state or local government health officer’s warrantless search — post-Camara cases, 53 ALR4th 1168.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 ALR4th 391.

Search and seizure of telephone company records pertaining to subscriber as violation of subscriber’s constitutional rights, 76 ALR4th 536.

“Caller ID” system, allowing telephone call recipient to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protections, 9 ALR5th 553.

Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement, 11 ALR5th 52.

State constitutional requirements as to exclusion of evidence unlawfully seized — post-Leon cases, 19 ALR5th 470.

Search and seizure of bank records pertaining to customer as violation of customer's rights under state law, 33 ALR5th 453.

Propriety of execution of search warrant at nighttime, 41 ALR5th 171.

Sufficiency of description in warrant of person to be searched, 43 ALR5th 1.

Application of "plain-feel" exception to warrant requirements — state cases, 50 ALR5th 467.

Propriety of search of nonoccupant visitor's belongings pursuant to warrant issued for another's premises, 51 ALR5th 375.

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Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse — state cases, 55 ALR5th 125.

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Belief that burglary is in progress or has recently been committed as exigent circumstance justifying warrantless search of premises, 64 ALR5th 637.

Search and seizure: reasonable expectation of privacy in tent or campsite, 66 ALR5th 373.

Validity of anticipatory search warrants — state cases, 67 ALR5th 361.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant — state cases, 68 ALR5th 343.

Civilian participation in execution of search warrant as affecting legality of search, 68 ALR5th 549.

Effect of retroactive consent on legality of otherwise unlawful search and seizure, 76 ALR5th 563.

Permissibility and sufficiency of warrantless use of thermal imager or Forward Looking Infra-Red Radar (F.L.I.R.), 78 ALR5th 309.

Validity of search or seizure of computer, computer disk, or computer peripheral equipment, 84 ALR5th 1.

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Constitutionality of secret video surveillance, 91 ALR5th 585.

Expectation of privacy in internet communications, 92 ALR5th 15.

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Error, in either search warrant or application for warrant, as to address of place to be searched as rendering warrant invalid, 103 ALR5th 463.

Search warrant as authorizing search of structures on property other than main house or other building, or location other than designated portion of building, 104 ALR5th 165.

Admissibility, in civil proceeding, of evidence obtained through unlawful search and seizure, 105 ALR5th 1.

Odor detectable by unaided person as furnishing probable cause for search warrant, 106 ALR5th 397.

When are facts offered in support of search warrant for evidence of sale or possession of cocaine so untimely as to be stale — state cases, 109 ALR5th 99.

When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale — state cases, 111 ALR5th 239.

When are facts relating to marijuana, provided by one other than police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of a controlled substance — state cases, 112 ALR5th 429.

Validity of warrantless search of motor vehicle based on odor of marijuana — state cases, 114 ALR5th 173.

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provided by police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of controlled substance — state cases, 114 ALR5th 235.

Validity of warrantless search based in whole or in part on odor of narcotics other than marijuana, or chemical related to manufacture of such narcotics, 115 ALR5th 477.

Validity of routine roadblocks by state or local police for purpose of discovery of driver's license, registration, and safety violations, 116 ALR5th 479.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of state constitutions, 117 ALR5th 407.

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Validity of warrantless search of other than motor vehicle or occupant of vehicle based on odor of marijuana — state cases, 122 ALR5th 439.

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Validity of search conducted pursuant to parole warrant, 123 ALR5th 221.

Validity of warrantless search of motor vehicle passenger based on odor of marijuana, 1 ALR6th 371.

Application of Leon good faith exception to exclusionary rule where police fail to comply with knock and announce requirement during execution of search warrant, 2 ALR6th 169.

Application in state narcotics cases of collective knowledge doctrine or fellow officers' rule under Fourth Amendment — Cocaine cases, 4 ALR6th 599.

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When is warrantless entry of house or

other building justified under "hot pursuit" doctrine, 17 ALR6th 327.

Employee's expectation of privacy in workplace, 18 ALR6th 1.

Expectation of privacy in text transmissions to or from pager, cellular telephone, or other wireless personal communications device, 25 ALR6th 201.

Timeliness of execution of search warrant, 27 ALR6th 491.

Search and seizure: reasonable expectation of privacy in outbuildings, 67 ALR6th 531.

Search and seizure: reasonable expectation of privacy in side yards, 69 ALR6th 275.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where no warrant involved, 71 ALR6th 1.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where warrant was involved, 72 ALR6th 1.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — Underlying homicide and assault offenses, 72 ALR6th 437.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Motions other than for suppression, 73 ALR6th 1.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — Underlying drug offenses, 73 ALR6th 49.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — Underlying sexual offenses, 74 ALR6th 69.

Validity of warrantless search under extended border doctrine, 102 ALR Fed. 269.

When is consent voluntarily given so as to justify a search conducted on basis of that consent — Supreme Court cases, 148 ALR Fed. 271.

Use of trained dog to detect narcotics or drugs as unreasonable search in violation of Fourth Amendment, 150 ALR Fed. 399.

Admissibility of evidence discovered in search of adult defendant's property or residence authorized by defendant's minor relative, 152 ALR Fed. 475.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse, 154 ALR Fed. 579.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse, 160 ALR Fed. 165.

Validity of warrantless administrative inspection of business that is allegedly closely or pervasively regulated; cases decided since *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970), 182 ALR Fed. 467.

When are facts offered in support of search warrant for evidence of federal nondrug offense so untimely as to be stale, 187 ALR Fed. 415.

Validity of warrantless search of motor vehicle based on odor of marijuana — federal cases, 188 ALR Fed. 487.

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Validity of warrantless search of motor vehicle occupant based on odor of marijuana — federal cases, 192 ALR Fed. 391.

Sufficiency of information provided by confidential informant, whose identity is known to police, to provide probable cause for federal search warrant where there was indication that informant provided reliable information to police in past — Cases decided after *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), 196 ALR Fed. 1.

Sufficiency of information provided by confidential informant, whose identity is known to police, to provide probable cause for federal search warrant where there was no indication that informant provided reliable information to police in past — Cases decided after *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), 9 ALR Fed. 2d 1.

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Allowable use of federal pen register and trap and trace device to trace cell phones and internet use, 15 ALR Fed. 2d 537.

Validity and application of anticipatory search warrant — federal cases, 31 ALR Fed. 2d 123.

Unconstitutional search or seizure as warranting suppression of evidence in removal proceeding, 40 ALR Fed. 2d 489.

Border search or seizure of traveler's laptop computer, or other personal electronic or digital storage device, 45 ALR Fed. 2d 1.

Paragraph XIV. Benefit of counsel; accusation; list of witnesses; compulsory process.

Every person charged with an offense against the laws of this state shall have the privilege and benefit of counsel; shall be furnished with a copy of the accusation or indictment and, on demand, with a list of the witnesses on whose testimony such charge is founded; shall have compulsory process to obtain the testimony of that person's own witnesses; and shall be confronted with the witnesses testifying against such person.

1976 Constitution. — Art. I, Sec. I, Para. XI.

Cross references. — Jury trials generally, Ga. Const. 1983, Art. I, Sec. I, Para. XI. Juvenile delinquency proceedings,

§§ 15-11-30 and 15-11-31. Benefit of counsel, §§ 17-7-24, 17-12-31, and 38-2-395. Process to obtain witnesses, §§ 17-7-25, 17-7-191, and 38-2-440. Notice of state witnesses, §§ 17-7-31 and 17-7-110. De-

fendant to be furnished with copy of indictment and list of witnesses, § 17-7-110. Notice of the accusation, §§ 17-7-110 and 38-2-415. Exclusion of public from courtroom, § 17-8-53. Counsel for indigents, Ch. 12, T. 17. Competence of appointed counsel, § 17-12-8.

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For note, “The Monster in the Closet: Declawing the Inequitable Conduct Beast in the Attorney-Client Privilege Arena,” see 25 Ga. St. U.L. Rev. 735 (2009). For note, “Ineffective Assistance of Counsel Blues: Navigating the Muddy Waters of Georgia Law After 2010 State Supreme Court Decisions,” see 45 Ga. L. Rev. 1199 (2011). For note, “*Padilla v. Kentucky*: The Criminal Defense Attorney’s Obligation to Warn of Immigration Consequences of Criminal Conviction,” see 29 Ga. St. U.L. Rev. 891 (2012).

For comment on *Cannady v. State*, 190 Ga. 227, 9 S.E.2d 241 (1940), see 3 Ga. B.J. 55 (1940). For comment on *Loomis v. State*, 78 Ga. App. 153, 51 S.E.2d 13 (1948), see 11 Ga. B.J. 488 (1949). For comment on *Hill v. Balkcom*, 213 Ga. 58, 96 S.E.2d 589 (1957), holding that where court appointed counsel in a criminal case is a member of the bar in good standing, which is prima-facie evidence of his competency as an attorney, and serves his client in good faith and with loyalty, the requirements of due process are met, see 19 Ga. B.J. 519 (1957). For comment on *Roach v. State*, 111 Ga. App. 114, 140 S.E.2d 919 (1965), see 2 Ga. St. B.J. 494 (1966). For comment on *Weiner v. Fulton Co.*, 113 Ga. App. 343, 148 S.E.2d 143 (1966), see 18 Mercer L. Rev. 477 (1967). For comment on *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969) as to the constitutionality of the State Bar Act (Ch. 9-7), see 21 Mercer L. Rev. 355 (1969). For comment criticizing *Mercer v. Hopper*, 233 Ga. 620, 212 S.E.2d 799 (1975), see 27 Mercer L. Rev. 325 (1975). For comment, “The Right to a Speedy Trial,” see 13 Ga. St. B.J. 197 (1977). For comment on the right to counsel in post-conviction proceedings, see 47 Emory L.J. 1079 (1998).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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- 1. IN GENERAL
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General Consideration

Editor’s notes. — Prior to the 1983 Constitution, the provisions of this paragraph were combined with the provisions now appearing at Ga. Const. 1983, Art. I, Sec. I, Para. XI, and reference is made to opinions noted under that paragraph.

Waiver is based upon knowledge; it cannot be implied when the fact or the right which is claimed to have been waived by the party in whose favor the right existed is ignorant of the party’s right or of any fact which would substantially or materially affect the exercise of that right and tend to prevent a waiver. *Jones v. State*, 57 Ga. App. 344, 195 S.E. 316 (1938).

Provisions of this paragraph may be waived by defendant. *Fortson v. State*, 96 Ga. App. 350, 100 S.E.2d 129 (1957).

Appellate courts must accept factual and credibility determinations made by trial court. — Factual and credibility determinations of whether a justice of peace was prevented from being a neutral and detached magistrate by the justice’s work as a deputy sheriff six years before or by the justice’s association with individuals in the sheriff’s office made by a trial judge after a suppression hearing

must be accepted by appellate courts unless such determinations are clearly erroneous. *Sanders v. State*, 151 Ga. App. 590, 260 S.E.2d 504 (1979).

Writ of habeas corpus cannot be used merely as substitute for writ of error or other remedial procedure to correct errors of law, of which the defendant had opportunity to avail oneself, and no question as to guilt or innocence or as to any irregularity can be so raised, unless it was such as to render the judgment wholly void. *Sanders v. Aldredge*, 189 Ga. 69, 5 S.E.2d 371 (1939).

Defendant not deprived of right to fair trial. — Argument that defendant was deprived of the right to a fair trial under Ga. Const. 1983, Art. I, Sec. I, Para. XIV because the prosecutor injected an irrelevant matter into the trial when the prosecutor asked defendant on cross-examination whether defendant had filed an ante litem notice that defendant intended to sue the city because of the actions of its police officers in the case, failed; this subject of cross-examination was relevant to defendant’s financial interest in the outcome of the trial. *Golden v. State*, 276 Ga. App. 538, 623 S.E.2d 727 (2005).

Failure to object to appointment of magistrate. — Defendant failed to meet

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the burden of establishing that defendant was rendered ineffective assistance of counsel for trial counsel's failure to object to the alleged improper appointment of a chief magistrate who presided over the trial, sitting by designation following a request for judicial assistance by the superior court judge assigned to the case, since defendant failed to show that defendant was denied a fair trial by virtue of the appointment. Further, trial counsel testified at defendant's hearing on a motion for a new trial that trial counsel thought it would benefit defendant to have the particular magistrate preside over the trial rather than a superior court judge, which established that the failure to object to the appointment was a matter of trial strategy or tactics, which was not a basis for an ineffective assistance of counsel claim. *Mazza v. State*, 292 Ga. App. 168, 664 S.E.2d 548 (2008).

Failure to object to jury. — Because the defense counsel only sought to have a juror removed before the second day of a three-day jury trial based on that juror's acquaintance with three state witnesses, did not ask the jury pool questions related to such information during voir dire, and did not move for a mistrial when the issue arose during trial, the defendant waived any claim that a Sixth Amendment right to a jury trial was violated, and the trial court was not required to grant a mistrial, sua sponte; moreover, because the excused juror was not questioned about any familiarity with the witnesses during voir dire, that juror's selection to sit on the panel was not the result of any concealment or misleading statements. *Artega v. State*, 282 Ga. App. 751, 639 S.E.2d 634 (2006).

Claim that trial counsel rendered constitutionally ineffective assistance failed as the defendant could not show that any competent attorney would have decided not to object further to the composition of the jury pool. *Leslie v. State*, 292 Ga. 368, 738 S.E.2d 42 (2013).

Presumption that proceedings in trial court were rightly done. — In habeas corpus proceedings when the record is silent on the question of whether the defendant did or did not have counsel,

or was or was not furnished with a list of witnesses, or was or was not notified of the nature of the offense charged against the defendant, it will be presumed that whatever ought to have been done in the trial court was done and rightly done. *Plocar v. Foster*, 211 Ga. 153, 84 S.E.2d 360 (1954), cert. denied, 349 U.S. 962, 75 S. Ct. 893, 99 L. Ed. 1284 (1955).

Prosecutorial misconduct not found. — Defendant waived any error in a prosecutor's request during opening statements that the jury "hold (defendant) accountable and send a message that street justice—" as the defendant did not renew an objection after a curative instruction and never moved for a mistrial; further, it was not improper for a prosecutor to appeal to the jury to convict for the safety of the community, or to stress the need for enforcement of the laws and to impress on the jury its responsibility in that regard. *Haggins v. State*, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Discharge under habeas writ when judgment absolutely void. — A discharge under a writ of habeas corpus, after a conviction, cannot be granted unless the judgment is absolutely void; as when the convicting court was without jurisdiction, or when the defendant in the defendant's trial was denied due process of law. *Sanders v. Aldredge*, 189 Ga. 69, 5 S.E.2d 371 (1939); *Aldredge v. Williams*, 188 Ga. 607, 4 S.E.2d 469 (1939), cert. denied, 309 U.S. 661, 60 S. Ct. 512, 84 L. Ed. 1009 (1940).

Erroneous Harris charge did not result in unfair trial since evidence of malice was overwhelming in the malice murder case and, therefore, it was highly probable that the charge did not contribute to the verdict. A Harris charge involved an erroneous presumption that if a defendant used a deadly weapon, intent to kill could be inferred. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Freedom of press subordinate to proper administration of justice. — No freedoms, including the freedoms of speech and press, are absolute, and liberty of the press is subordinate to the independence of the judiciary and the proper ad-

ministration of justice. The latter is necessarily true, for only in the courts can freedom of the press and other constitutional rights be preserved. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. *Atlanta Newspapers, Inc. v. State*, 216 Ga. 399, 116 S.E.2d 580 (1960).

District attorney has wide latitude in management of state's case. — In the trial of an accusation, counsel for the state certainly has as wide a latitude in the management of the state's case as does the private practitioner in representing clients, and can call or refuse to call a particular witness as the state's counsel sees fit. *Bonds v. State*, 232 Ga. 694, 208 S.E.2d 561 (1974).

Provision for rights to information in possession of state. — This paragraph provides what information or rights the defendant in criminal case has when the defendant seeks access to certain documents, articles, and statements in the possession of the solicitor general (now district attorney). *Walker v. State*, 215 Ga. 128, 109 S.E.2d 748 (1959).

Defendant has no right to inspect file of district attorney before trial. — The defendant in a criminal case does not have the right to inspect the file of the district attorney before the defendant is put on trial. *White v. State*, 230 Ga. 327, 196 S.E.2d 849, appeal dismissed, 414 U.S. 886, 94 S. Ct. 222, 38 L. Ed. 2d 134 (1973).

State must disclose favorable evidence material to guilt or punishment upon request. — Constitution requires that, upon request by the defendant, the state disclose all favorable evidence which is material either to guilt or to punishment. “[I]mplicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.” *Wallin v. State*, 248 Ga. 29, 279 S.E.2d 687 (1981).

If defendant asks for “anything exculpatory,” such a request really gives the prosecutor no better notice than if no request is made. In such a case, the prosecutor will not have violated the prosecutor's constitutional duty of disclosure unless the prosecutor's omission is of

sufficient significance to result in the denial of the defendant's right to a fair trial; the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish “materiality” in the constitutional sense. *Wallin v. State*, 248 Ga. 29, 279 S.E.2d 687 (1981).

If omitted evidence creates reasonable doubt that did not otherwise exist, constitutional error has been committed. — This means the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial. *Wallin v. State*, 248 Ga. 29, 279 S.E.2d 687 (1981).

Preservation of evidence by police. — State of Georgia did not act in bad faith and commit a due process violation by failing to preserve material evidence when, following a single-car accident involving the defendant's car, the state removed samples of biological evidence from the interior of the defendant's car and sold the defendant's car to a salvage wholesaler who then sold the car to a mechanic, who cleaned, repaired, repainted, and resold the vehicle. The police followed the standard policy of releasing evidence in vehicular homicide cases that the police considered to be solved. *State v. Mussman*, 289 Ga. 586, 713 S.E.2d 822 (2011).

Constitution does not require police to provide defendant with all police investigatory work, and the mere possibility that an undisclosed item of information might have helped the defendant or might have affected the outcome of a trial, is not sufficient under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Whitaker v. State*, 246 Ga. 163, 269 S.E.2d 436 (1980).

Investigative detention does not amount to “custody.” — One who is under investigative detention or is the subject of a general on-the-scene investigation is not within “custody” within the meaning of *Miranda*. *Bailey v. State*, 153 Ga. App. 178, 264 S.E.2d 710 (1980).

Rights do not attach to investigation at crime scene. — *Miranda* warnings are not required when a person re-

General Consideration (Cont'd)

sponds to an officer's initial inquiry at an on-the-scene investigation which has not become accusatory. *Japhet v. State*, 176 Ga. App. 189, 335 S.E.2d 425 (1985).

Indictments in misdemeanor cases are not guaranteed. *Gordon v. State*, 102 Ga. 673, 29 S.E. 444 (1897).

There was no fatal variance or due process violation in juvenile petition as the petition contained sufficient information, including the date of the incident and the fact that it involved egg-throwing, to inform defendant of the charge, enable defendant to prepare a defense, and protect defendant from subsequent prosecutions for the same offense; the discrepancy between the delinquency allegations and the evidence regarding the number of windows damaged did not demand reversal as the petition fully informed defendant. In the Interest of M.M., 265 Ga. App. 381, 593 S.E.2d 919 (2004).

Lesser included offense instruction. — By charging a lesser offense in accordance with O.C.G.A. § 16-1-6, the trial court did not permit the jury to convict the defendant in a manner not alleged in the indictment in violation of the defendant's due process rights. *Rupnik v. State*, 273 Ga. App. 34, 614 S.E.2d 153 (2005).

Denial of out of time appeal. — Because the defendant's claims of ineffective assistance of counsel could not be resolved by examining facts appearing in the record, including the plea hearing transcript, and had to instead be developed in the context of a post-plea hearing, the trial court properly denied the defendant's motion for an out-of-time appeal. *Turner v. State*, 281 Ga. 435, 637 S.E.2d 384 (2006).

Because the record showed that the defendant entered into a plea freely and voluntarily, and because the evidence was sufficient to support the conviction, defendant's counsel could not have been ineffective in failing to pursue an appeal, and the trial court did not err in denying the defendant's out-of-time appeal. *McCoon v. State*, 294 Ga. App. 490, 669 S.E.2d 466 (2008).

Six year delay in appeal excused. — Trial court abused the court's discretion

by denying the defendant's amended motion for new trial because, contrary to the court's conclusion, the defendant demonstrated prejudice by arguing that the six-year delay in the appellate process caused by the loss of the case file, which frustrated the defendant's ability to present an ineffective assistance of counsel claim. *Jones v. State*, 322 Ga. App. 310, 744 S.E.2d 830 (2013).

Communications between parishioner and clergy admissible without assistance of counsel. — Because the defendant requested the future assistance of an attorney, not immediate assistance, and because the defendant knew that the defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in former O.C.G.A. §§ 24-3-51 and 24-9-22 (see now O.C.G.A. §§ 24-5-502 and 24-8-825) was inapplicable; therefore, the defendant's confession to the crimes was voluntary. *Willis v. State*, 287 Ga. 703, 699 S.E.2d 1 (2010).

Cited in *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932); *Cook v. State*, 48 Ga. App. 224, 172 S.E. 471 (1934); *Boatright v. State*, 51 Ga. App. 80, 179 S.E. 740 (1935); *Wright v. State*, 184 Ga. 62, 190 S.E. 663 (1937); *McKibben v. State*, 187 Ga. 651, 2 S.E.2d 101 (1939); *Claybourn v. State*, 190 Ga. 861, 11 S.E.2d 23 (1940); *Williams v. State*, 192 Ga. 247, 15 S.E.2d 219 (1941); *Morton v. Henderson*, 123 F.2d 48 (5th Cir. 1941); *White v. State*, 71 Ga. App. 512, 31 S.E.2d 78 (1944); *Williams v. State*, 199 Ga. 504, 34 S.E.2d 854 (1945); *Andrews v. Aderhold*, 201 Ga. 132, 39 S.E.2d 61 (1946); *Woodruff v. Balkcom*, 205 Ga. 445, 53 S.E.2d 680 (1949); *Boyett v. State*, 205 Ga. 370, 53 S.E.2d 919 (1949); *McLendon v. Balkcom*, 207 Ga. 100, 60 S.E.2d 753 (1950); *Cade v. State*, 207 Ga. 135, 60 S.E.2d 763 (1950); *Harris v. State*, 84 Ga. App. 1, 65 S.E.2d 267 (1951); *Bradford v. Mills*, 208 Ga. 198, 66 S.E.2d 58 (1951); *Porch v. Foster*, 209 Ga. 697, 75 S.E.2d 420 (1953); *Plymouth Record Corp. v. Books, Inc.*, 92 Ga. App. 753, 90 S.E.2d 336 (1955); *Giles v. State*, 212 Ga. 465, 93 S.E.2d 739 (1956); *Grammer v. Balkcom*, 214 Ga. 691, 107 S.E.2d 213 (1959); *Yancey v. State*, 98 Ga. App. 797, 107 S.E.2d 265 (1959); *Alley v. State*, 99 Ga.

App. 322, 108 S.E.2d 282 (1959); *Johnson v. State*, 214 Ga. 818, 108 S.E.2d 313 (1959); *Atlanta Newspapers, Inc. v. State*, 101 Ga. App. 105, 113 S.E.2d 148 (1960); *Cadle v. State*, 101 Ga. App. 175, 113 S.E.2d 180 (1960); *Ledford v. State*, 215 Ga. 799, 113 S.E.2d 628 (1960); *Josey v. State*, 102 Ga. App. 707, 117 S.E.2d 641 (1960); *Edwards v. State*, 217 Ga. 804, 125 S.E.2d 506 (1962); *Cobb v. State*, 218 Ga. 10, 126 S.E.2d 231 (1962); *Peppers v. Balkcom*, 218 Ga. 749, 130 S.E.2d 709 (1963); *Pistor v. State*, 219 Ga. 161, 132 S.E.2d 183 (1963); *Pugh v. State*, 219 Ga. 166, 132 S.E.2d 203 (1963); *Hunsucker v. Balkcom*, 220 Ga. 73, 137 S.E.2d 43 (1964); *Pippin v. Sheffield*, 220 Ga. 179, 137 S.E.2d 627 (1964); *Brandeis v. Broome*, 220 Ga. 190, 137 S.E.2d 628 (1964); *Shelton v. State*, 220 Ga. 610, 140 S.E.2d 839 (1965); *Blevins v. State*, 113 Ga. App. 413, 148 S.E.2d 192 (1966); *Lewis v. State*, 113 Ga. App. 714, 149 S.E.2d 596 (1966); *Evans v. State*, 222 Ga. 392, 150 S.E.2d 240 (1966); *Nichols v. Heffner*, 222 Ga. 706, 152 S.E.2d 393 (1966); *Mayes v. State Bd. of Cors.*, 224 Ga. 454, 162 S.E.2d 344 (1968); *Grice v. State*, 224 Ga. 376, 162 S.E.2d 432 (1968); *Studdard v. State*, 225 Ga. 410, 169 S.E.2d 327 (1969); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969), commented on in 21 *Mercer L. Rev.* 355 (1969); *Spell v. State*, 225 Ga. 705, 171 S.E.2d 285 (1969); *Butler v. State*, 226 Ga. 56, 172 S.E.2d 399 (1970); *Robinson v. State*, 226 Ga. 461, 175 S.E.2d 505 (1970); *Mitchell v. State*, 226 Ga. 450, 175 S.E.2d 545 (1970); *Lingo v. State*, 226 Ga. 496, 175 S.E.2d 657 (1970); *Robinson v. State*, 123 Ga. App. 243, 180 S.E.2d 258 (1971); *Nance v. State*, 123 Ga. App. 410, 181 S.E.2d 295 (1971); *Morris v. State*, 228 Ga. 39, 184 S.E.2d 82 (1971); *Goodwin v. Smith*, 439 F.2d 1180 (5th Cir. 1971); *Wallace v. Ault*, 229 Ga. 717, 194 S.E.2d 88 (1972); *Moye v. State*, 129 Ga. App. 52, 198 S.E.2d 514 (1973); *Elrod v. Caldwell*, 232 Ga. 876, 209 S.E.2d 207 (1974); *West v. Hopper*, 232 Ga. 830, 209 S.E.2d 310 (1974); *Alexander v. State*, 134 Ga. App. 201, 213 S.E.2d 560 (1975); *Brown v. State*, 235 Ga. 644, 220 S.E.2d 922 (1975); *Barrentine v. State*, 136 Ga. App. 802, 222 S.E.2d 103 (1975); *Mitchell v. State*, 136 Ga. App. 658, 222 S.E.2d 160

(1975); *State v. King*, 137 Ga. App. 26, 222 S.E.2d 859 (1975); *Dodd v. State*, 236 Ga. 572, 224 S.E.2d 408 (1976); *Fryer v. State*, 138 Ga. App. 124, 225 S.E.2d 437 (1976); *Crowder v. State*, 237 Ga. 141, 227 S.E.2d 230 (1976); *State v. Cox*, 140 Ga. App. 30, 230 S.E.2d 87 (1976); *Brown v. State*, 238 Ga. 98, 231 S.E.2d 65 (1976); *Meeks v. State*, 142 Ga. App. 452, 236 S.E.2d 119 (1977); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Williams v. State*, 144 Ga. App. 410, 241 S.E.2d 261 (1977); *Leonard v. State*, 146 Ga. App. 439, 246 S.E.2d 450 (1978); *Tanner v. State*, 242 Ga. 437, 249 S.E.2d 238 (1978); *Brown v. State*, 242 Ga. 536, 250 S.E.2d 438 (1978); *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981); *Ellis v. State*, 248 Ga. 414, 283 S.E.2d 870 (1981); *Hurst v. State*, 160 Ga. App. 830, 287 S.E.2d 677 (1982); *State v. Adamczyk*, 162 Ga. App. 288, 290 S.E.2d 149 (1982); *Kesler v. State*, 249 Ga. 462, 291 S.E.2d 497 (1982); *Berryhill v. State*, 249 Ga. 442, 291 S.E.2d 685 (1982); *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 292 S.E.2d 815 (1982); *Bryant v. State*, 163 Ga. App. 872, 296 S.E.2d 168 (1982); *Ellis v. State*, 164 Ga. App. 366, 296 S.E.2d 726 (1982), appeal dismissed, 462 U.S. 1113, 103 S. Ct. 3079, 77 L. Ed. 2d 1344, cert. denied, 462 U.S. 1119, 103 S. Ct. 3087, 77 L. Ed. 2d 1348 (1983); *Chancellor v. State*, 165 Ga. App. 365, 301 S.E.2d 294 (1983); *Kemp v. Spradlin*, 250 Ga. 829, 301 S.E.2d 874 (1983); *Hall v. State*, 255 Ga. 267, 336 S.E.2d 812 (1985); *LeGallienne v. State*, 180 Ga. App. 108, 348 S.E.2d 471 (1986); *Willis v. State*, 183 Ga. App. 408, 359 S.E.2d 194 (1987); *Beaman v. City of Peachtree City*, 256 Ga. App. 62, 567 S.E.2d 715 (2002); *Pearce v. State*, 256 Ga. App. 889, 570 S.E.2d 74 (2002); *Davenport v. State*, 289 Ga. 399, 711 S.E.2d 699 (2011); *Bunn v. State*, 291 Ga. 183, 728 S.E.2d 569 (2012).

Benefit of Counsel

1. In General

Right not extended to participants in civil disputes. — Constitution provides for effective assistance of counsel for one charged with a criminal offense, not participants in a civil dispute. *Calhoun v. Maynard*, 196 Ga. App. 219, 395 S.E.2d

Benefit of Counsel (Cont'd)**1. In General (Cont'd)**

645 (1990); *Finch v. Brown*, 216 Ga. App. 451, 454 S.E.2d 807 (1995); *Bergmann v. McCullough*, 218 Ga. App. 353, 461 S.E.2d 544 (1995), cert. denied, 517 U.S. 1141, 116 S. Ct. 1433, 134 L. Ed. 2d 555 (1996).

No misunderstanding upon part of judge shall forfeit this substantial right of the defendant when the defendant is being tried for a crime that might involve the defendant's liberty. *Jones v. State*, 57 Ga. App. 344, 195 S.E. 316 (1938).

Custodial interrogation. — Defendant's ambiguous statements and inquiries during an interview following the defendant's arrest were not an unambiguous request for counsel. *Gonzalez v. State*, 283 Ga. App. 843, 643 S.E.2d 8 (2007).

Inadequate invocation of right to counsel. — Because the defendant's statement that the defendant should not talk in the absence of "real talk" was insufficient to trigger the interrogating agent's duty to cease questioning, the trial court did not err in admitting the defendant's later statements to the police. *Barnes v. State*, 287 Ga. 423, 696 S.E.2d 629 (2010).

Failure to give sufficient Miranda warnings. — After a trial court did not give sufficient Miranda warnings as required by Ga. Const. 1983, Art. I, Sec. I, Para. XIV, the defendant did not knowingly waive the right to counsel during arraignment; thus, the defendant's motion to exclude statements made to a prosecutor during a pro se plea bargain were properly excluded. *State v. Pinkerton*, 262 Ga. App. 858, 586 S.E.2d 743 (2003).

Refusal to sign Miranda waiver form. — Defendant's refusal to sign a Miranda waiver form was not an invocation of the right to remain silent or to counsel. *Hunter v. State*, 273 Ga. App. 52, 614 S.E.2d 179 (2005).

Not yet under arrest at traffic stop. — Defendant was not under arrest for Miranda purposes at the time field and chemical sobriety tests were conducted, because when officers approached the defendant as the defendant exited the vehi-

cle, the officers had not made a decision to arrest the defendant for driving under the influence, but were pursuing an investigation of an allegation of domestic violence; although the defendant was detained, there was no evidence that the officers did or said anything to indicate that the defendant would be detained more than a short time. *Burnham v. State*, 277 Ga. App. 310, 626 S.E.2d 525 (2006).

Constitution does not require compensation for services of court-appointed counsel. — A request by a judge of a trial court that an attorney represent an indigent defendant in a criminal case is tantamount to a demand with which the attorney must necessarily comply, but the attorney's professional services, work product, and necessary out-of-pocket expenses in providing competent representation are not required by the Constitution to be compensated. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Defendant is not entitled to have counsel and also to self representation. A defendant is entitled to either, not both. *Simmons v. State*, 186 Ga. App. 886, 369 S.E.2d 36, cert. denied, 186 Ga. App. 919, 369 S.E.2d 36 (1988).

Defendant has no right to simultaneous representation by counsel and self-representation. *Coursey v. State*, 196 Ga. App. 135, 395 S.E.2d 574 (1990).

Defendant does not have a right to simultaneous representation by counsel and self-representation. *Snell v. State*, 203 Ga. App. 27, 416 S.E.2d 360 (1992).

Trial court did not abuse the court's discretion in denying the defendant's pro se request for a continuance because the defendant was represented by counsel when the defendant filed the pro se motion, thus, that motion was of no legal effect whatsoever; a criminal defendant does not have the right to self-representation and also be represented by an attorney. *Earley v. State*, 310 Ga. App. 110, 712 S.E.2d 565 (2011).

Translation of witness testimony. — Defendant was not denied defendant's due process rights because the trial court instructed an interpreter to translate only a witness's testimony for the benefit of the

jury, and not to otherwise interpret peripheral proceedings for the witness that were unrelated to the content of the witness's testimony; the defendant failed to show how the defendant was denied the right to participate in a meaningful way in the proceedings. *Puga-Cerantes v. State*, 281 Ga. 78, 635 S.E.2d 118 (2006).

No violation for failure to allow self-representation. — When defendant requested self-representation at trial but, upon hearing the trial court's warnings about self-representation admitted to being incapable of self-representation, the trial court did not err by proceeding with the trial with the existing appointed counsel representing the defendant. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Pro se demand invalid if defendant has counsel. — Because, at the time defendants filed their pro se demand for discharge pursuant to O.C.G.A. § 17-7-170, they were represented by counsel, the trial court was clearly authorized to find that the pro se demand was of no legal effect whatsoever. *Goodwin v. State*, 202 Ga. App. 655, 415 S.E.2d 472 (1992).

Refusal to delay resulted in denial of right to counsel. — When the attorney chosen and employed by the defendant in a criminal case is absent from trial to aid in the birth of the attorney's child, the trial court erred in refusing to delay the trial at least sufficiently to determine whether the trial could be held with representation by selected counsel and without undue delay and denied the defendant the right of counsel of defendant's own choice. *Long v. State*, 119 Ga. App. 82, 166 S.E.2d 365 (1969).

Failure to furnish counsel at hearing to revoke probation not unconstitutional. — A proceeding to revoke a probated sentence of one convicted of a criminal offense is not a criminal proceeding, and the failure of the court to supply that person with counsel is not a denial of the right to counsel unless a statute provides for benefit of counsel at such a hearing. *Dutton v. Willis*, 223 Ga. 209, 154 S.E.2d 221 (1967).

Failure to furnish counsel to one convicted of a criminal offense at the hearing

to revoke one's probation does not violate the right to counsel. *Reece v. Pettijohn*, 229 Ga. 619, 193 S.E.2d 841 (1972).

Fact that defendant was not represented by an attorney in a prior revocation proceeding did not affect the admissibility of the orders entered therein. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

Claim procedurally barred. — Defendant was procedurally barred from bringing an ineffective assistance of counsel claim as defendant proceeded directly with an appeal, without first filing a motion for new trial or otherwise demanding an evidentiary hearing on any claim of ineffective assistance of trial counsel; as there was no evidentiary hearing on the ineffective assistance of counsel claim, there was nothing to review on appeal. *Terrell v. State*, 268 Ga. App. 173, 601 S.E.2d 500 (2004).

Defendant's ineffective assistance of counsel claim was procedurally barred because the defendant's appellate counsel appeared in time to file a motion for new trial and an amended motion for new trial but failed to raise the issue of ineffective assistance of trial counsel. *Machado v. State*, 300 Ga. App. 459, 685 S.E.2d 428 (2009).

Because the defendant waived the defendant's ineffective assistance claim, the court of appeals did not address the claim; although the defendant raised an ineffective assistance of counsel claim in the defendant's new trial motion, the defendant did not allege that counsel was ineffective for failure to object to the admission of the pretrial identification evidence, but on appeal, that ground represented the sole basis for the defendant's ineffective assistance claim. *Bell v. State*, 306 Ga. App. 853, 703 S.E.2d 680 (2010).

Because the defendant's claims of ineffective assistance were not raised on a motion for new trial, the claims could not be raised for the first time on appeal. *Martinez v. State*, 289 Ga. 160, 709 S.E.2d 797 (2011).

Not error to deny continuance when co-counsel present and defendant uninjured. — When none of the statutory requirements necessary for the granting of a continuance were put forth by co-counsel when the case was called,

Benefit of Counsel (Cont'd)**1. In General** (Cont'd)

and there has been no showing that the defendant was injured by the absence of defendant's lead counsel, there was no merit in the complaint that the trial court erred in denying the defendant's motion for continuance because of the absence of counsel, and that the defendant had been denied defendant's Sixth Amendment right to counsel and defendant's Fifth Amendment right to due process as guaranteed by the state and federal constitutions. *Blair v. State*, 166 Ga. App. 434, 304 S.E.2d 535 (1983).

Denial of a requested continuance, after an attorney volunteered to assume the representation of an accused who had been told that the accused was not eligible for appointed counsel, was denial of counsel. *Butler v. State*, 198 Ga. App. 217, 401 S.E.2d 43 (1990), cert. denied, 198 Ga. App. 897, 401 S.E.2d 43 (1991).

Consideration of a person's prior uncounseled convictions for driving under the influence in determining an appropriate sentence for a subsequent conviction does not violate any constitutional right to counsel because the driving under the influence statute (O.C.G.A. § 40-6-391) is not an enhanced penalty statute since it neither increases the maximum confinement authorized nor converts a misdemeanor offense into a felony. *Moore v. State*, 181 Ga. App. 548, 352 S.E.2d 821, cert. denied, 484 U.S. 904, 108 S. Ct. 247, 98 L. Ed. 2d 204 (1987).

When denial of right, judgment making habeas corpus writ absolute was correct. — When the undisputed facts showed a denial of the accused's right to counsel, the trial court's judgment making the writ of habeas corpus absolute was correct. *Balkcom v. Turner*, 217 Ga. 610, 123 S.E.2d 918 (1962).

Judge is trier of fact in habeas corpus proceeding. — When a habeas corpus proceeding is instituted for the release of a prisoner upon the grounds that the prisoner was deprived of the prisoner's constitutional rights to the benefit of counsel and to trial by jury, and there is an issue of fact on the allegations made by the movant, the trial judge becomes the

trier; and when there is ample evidence to support the judge's judgment, it will not be set aside. *Mathis v. Scott*, 199 Ga. 743, 35 S.E.2d 285 (1945).

Court's failure to inform of danger of self representation. — Defendant was improperly held in contempt and sentenced to two days' imprisonment because a trial court failed to inform the defendant of the dangers of self-representation and did not obtain from the defendant a knowing waiver of the constitutional right to counsel when the only mention of counsel was a vague colloquy between the defendant and the trial court. *Merritt v. State*, 261 Ga. App. 597, 583 S.E.2d 283 (2003).

Defendant's required showing of deficient performance prejudicing defense. — To prove ineffective assistance of counsel, a defendant is required to show that counsel's performance was deficient and that this deficient performance prejudiced the defendant's defense. A trial court's determination with respect to counsel's effectiveness will be upheld on appeal unless clearly erroneous. *Davis v. State*, 264 Ga. App. 128, 589 S.E.2d 700 (2003).

Inmate seeking habeas corpus relief and alleging that the inmate received ineffective assistance of counsel when the inmate's trial attorney prevented the inmate from testifying needed to show that, had the inmate testified, it was reasonably probable that the outcome of the proceeding would have been different; the trial court, in granting habeas relief, relied on an erroneous legal standard by holding that the inmate was not required to show prejudice. *Turpin v. Curtis*, 278 Ga. 698, 606 S.E.2d 244 (2004).

No conflict of interest. — Upon a review of the specific statements identified by the defendant supporting a conflict of interest claim between the defendant and the codefendant, no evidence of antagonism was found as the specific statements identified merely amounted to mutual expressions of indifference over the outcome of the criminal charges and not "finger pointing" as alleged by the defendant's counsel; hence, counsel from the same public defender's office were not automatically disqualified from their respective representations. *Burns v. State*,

281 Ga. 338, 638 S.E.2d 299 (2006).

2. Procurement of Counsel

A. Appointment of Counsel

State may assign counsel for destitute party. *Delk v. State*, 99 Ga. 667, 26 S.E. 752 (1896); *Weatherby v. Pittman*, 24 Ga. App. 452, 101 S.E. 131 (1919).

Practice of courts to appoint counsel to represent indigents. — Georgia courts have uniformly adopted the practice of assigning counsel to represent indigent criminals in all cases when they were unable to employ counsel to represent them. *Summerour v. Fortson*, 174 Ga. 862, 164 S.E. 809 (1932).

An impoverished defendant who is unable to employ or arrange for counsel must be afforded an attorney when the defendant requests it in order to meet the constitutional guaranty and to afford due process. *Perry v. State*, 120 Ga. App. 304, 170 S.E.2d 350 (1969).

Failure to appoint counsel for indigent is violation of constitutional right. — While Georgia has no statute requiring the appointment of counsel for an accused unable to employ own counsel, the Supreme Court has construed this paragraph to mean that if the accused is not financially able to employ counsel and desires the court to appoint one to represent the accused, the court must do so, and failure to do so violates the accused's constitutional right to benefit of counsel. *Bibb County v. Hancock*, 211 Ga. 429, 86 S.E.2d 511 (1955); *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966), commented on in 18 *Mercer L. Rev.* 477 (1967); *McGlasker v. State*, 321 Ga. App. 614, 741 S.E.2d 303 (2013).

Lack of counsel for indigent persons being tried for crimes is a deprivation of their constitutional rights. *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964).

Court of appeals erred in deferring to the public defender's own policy not to appoint new counsel for purposes of appeal and denying the indigent defendant's request to raise an ineffectiveness claim as part of a new trial motion as the defen-

dant was constitutionally entitled to appointment of conflict-free counsel to represent the defendant on appeal. *Garland v. State*, 283 Ga. 201, 657 S.E.2d 842 (2008).

Defendant's petition for habeas corpus was improperly denied on the basis of procedural default as the trial court improperly failed to appoint counsel to represent the defendant on appeal after a motion for new trial was denied as the trial court was aware of the defendant's desire to appeal and the defendant's indigency; the defendant was prejudiced as the defendant's notice of appeal filed pro se was untimely. *Davis v. Frazier*, 285 Ga. 16, 673 S.E.2d 215 (2009).

Failure to rule on motion for appointment. — Failure to rule on a motion to appoint counsel, based on an affidavit of indigency, for an appeal was harmless error because the defendant's trial counsel handled the appeal. *Massey v. State*, 278 Ga. App. 303, 628 S.E.2d 706 (2006).

Defendant being provided pro bono representation. — An indigent defendant was constitutionally entitled to the appointment of counsel even though the defendant was being provided pro bono representation by an attorney who was receiving compensation from sources other than the defendant. *Roberts v. State*, 263 Ga. 764, 438 S.E.2d 905 (1994).

Defendant's case was remanded to the trial court with direction to appoint qualified appellate counsel as defendant's motion for appellate counsel had never been acted upon; defendant had been denied the right to appointed counsel on appeal, even though defendant was represented by pro bono counsel. *Speight v. State*, 279 Ga. 87, 610 S.E.2d 42 (2005).

Discretion of court. — When the trial court determined that a nonindigent defendant failed to use reasonable diligence to retain counsel and failed to present any evidence of special circumstances militating in favor of the court's exercising the court's discretion to appoint counsel, the court did not abuse the court's discretion in failing to appoint counsel. *McQueen v. State*, 240 Ga. App. 15, 522 S.E.2d 512 (1999).

Because the determination of whether a defendant was indigent, and thus entitled

Benefit of Counsel (Cont'd)**2. Procurement of Counsel** (Cont'd)**A. Appointment of Counsel** (Cont'd)

to have counsel appointed to pursue an appeal, was within the discretion of the trial court, and this determination was not subject to review, the Court of Appeals of Georgia declined to look behind the trial court's determination of indigence. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

Defendant must not be coerced into accepting counsel not of defendant's own choosing and defendant may proceed a defense without counsel. *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

State may not constitutionally hale a person into its criminal courts and there force a lawyer upon the person, when the person insists that the person wants to conduct the person's own defense. *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

A trial judge does not have a duty to attempt to force unwanted counsel upon a defendant who has resolutely declared the defendant's purpose to dismiss that counsel. *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

Counsel of choice. — Defendant was denied the right to counsel of defendant's own choosing and obtained a reversal of defendant's conviction for aggravated assault, aggravated battery, and possession of a firearm, as a result of the trial court judge's denial of a motion for a continuance, which was grounded on the fact that the defendant's retained counsel was hospitalized; the trial court failed to make an inquiry as to whether the absence of defense counsel was attributable to the defendant and merely stated that because appointed counsel was in the courtroom, the defendant was adequately represented. *Turman v. State*, 272 Ga. App. 570, 613 S.E.2d 126 (2005).

Defendant failed to show that the trial court's refusal to appoint the defendant's preferred counsel to represent the defendant was an abuse of discretion because nothing in the defendant's letters to the

trial court stating the defendant's dissatisfaction with the defendant's lawyer provided any objective considerations favoring the appointment of defendant's preferred counsel; the defendant's scant testimony at the hearing on the defendant's motion for new trial as to why the defendant preferred in particular the lawyer named in the defendant's letters fell short of providing objective considerations favoring the appointment of the defendant's preferred counsel. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Defendant was not denied the trial counsel of the defendant's choosing when the trial court declined to continue the trial proceedings after the defendant indicated that the defendant had retained new counsel because the record supported the trial court's conclusion that the defendant requested a continuance for purposes of delay; therefore, the trial court did not abuse the court's discretion in denying the defendant's request for a continuance and instead proceeding with the defendant's appointed counsel who was prepared for trial. *Calloway v. State*, 313 Ga. App. 708, 722 S.E.2d 422 (2012).

Trial court did not abuse the court's discretion when the court disqualified one of the defendant's two lawyers because the lawyer also represented a witness who ultimately testified against the defendant, and the prospects of the lawyer advising the witness about any deal that might be proposed by the state to secure the witness's testimony against the defendant or cross-examining the witness on behalf of the defendant were rife with serious ethical problems. *Heidt v. State*, 292 Ga. 343, 736 S.E.2d 384 (2013).

Defendant was not prejudiced by the appointment of counsel eight days prior to trial when on the day set for trial defense counsel requested a continuance, stating that defense counsel had not had an opportunity to talk with all the witnesses, but the trial court denied this motion, stating that counsel would be given an opportunity to interview witnesses prior to their testimony; defendant contended that these interviews were inadequate to prepare the defendant's attorney for trial, but the trial court did not abuse the court's discretion in denying the

motion for continuance since no showing was made that any prospective witness not interviewed by the defense would have been beneficial to the defendant. *Newberry v. State*, 250 Ga. 819, 301 S.E.2d 282 (1983).

Failing to interview witnesses whose testimony was not relevant. — Counsel was not ineffective for failing to identify a defendant's three "new eyewitnesses" who were to have provided "helpful information" for the defendant; the witnesses saw what occurred after the defendant's arrest, not the criminal events that led to the defendant's arrest. *McCarty v. State*, 269 Ga. App. 299, 603 S.E.2d 666 (2004).

Right to counsel triggered by probated or suspended sentence. — Appellate court erred in affirming the trial court's conviction of the defendant, on driving on a revoked license charge, on the ground that the defendant was not entitled to appointed counsel since defendant was not actually given a prison sentence but was instead given a probated sentence as the right to counsel was triggered when the defendant, who was indigent, was given a probated or suspended sentence. *Barnes v. State*, 275 Ga. 499, 570 S.E.2d 277 (2002).

Appointment of preferred counsel. — Although an indigent defendant has no right to compel the trial court to appoint an attorney of defendant's own choosing, when a defendant's choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight, it is an abuse of discretion to deny the defendant's request to appoint the counsel of defendant's preference. *Davis v. State*, 261 Ga. 221, 403 S.E.2d 800 (1991).

Counsel's motion to withdraw properly denied. — Given that a trial counsel represented that the trial counsel could be ready for trial and that the trial counsel's request to withdraw was filed four days before the trial was scheduled to commence, the trial court did not abuse its discretion in denying the trial counsel's motion to withdraw. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Reasons for failure to obtain counsel. — After defendant challenged the

trial court's failure to appoint a lawyer to represent defendant even though defendant was not indigent, the action was remanded for a determination of whether the trial court delayed the proceedings long enough to ascertain whether the defendant acted with reasonable diligence in attempting to obtain an attorney and whether the absence of an attorney was attributable to reasons beyond the defendant's control. *Nunnally v. State*, 261 Ga. App. 198, 582 S.E.2d 173 (2003).

Defendant failed to show good reason to discharge court-appointed counsel. — Defendant did not have a good reason for discharging a court-appointed attorney and substituting another one after the attorney had interviewed all of the defendant's witnesses, except for one witness who had not returned calls; the trial court properly advised the defendant that the trial would take place in four days, as scheduled, and that the defendant could either be represented by the court-appointed attorney, another attorney, or the defendant could be self represented. *Nicely v. State*, 277 Ga. App. 140, 625 S.E.2d 538 (2006).

Trial court did not abuse the court's discretion in giving the defendant the option of proceeding pro se and denying trial counsel's motion to withdraw from representation because the trial court conducted a thorough investigation of the allegations, and the defendant was unable to articulate any support for the claim of threats, beyond stating repeatedly the defendant's belief that counsel needed more time. *Billings v. State*, 308 Ga. App. 248, 707 S.E.2d 177 (2011).

Defendant not entitled to counsel in habeas proceeding. — Dismissal of an inmate's habeas petition without a hearing was proper as the petition failed to state any viable claim for pre-conviction habeas corpus relief since: (1) the inmate was not entitled to appointed counsel in the habeas corpus proceeding; (2) the habeas court was not required to make a determination of the inmate's mental state as it was an issue to be addressed in the context of the criminal prosecution; and (3) the inmate did not seek issuance of the writ on the ground that the inmate had tendered proper bail in connection

Benefit of Counsel (Cont'd)**2. Procurement of Counsel** (Cont'd)**A. Appointment of Counsel** (Cont'd)

with the inmate's then-pending prosecution on the criminal charge. *Britt v. Conway*, 281 Ga. 189, 637 S.E.2d 43 (2006).

Appointment of new counsel not warranted. — Because the defendant's sole claim of ineffectiveness of counsel on appeal lacked merit, the trial court did not err in denying a motion for the appointment of new counsel. *Dingler v. State*, 281 Ga. App. 721, 637 S.E.2d 120 (2006).

In the defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, trial court did not err by refusing to appoint new trial counsel after the defendant made it known that the defendant was dissatisfied with trial counsel and had filed a bar complaint against trial counsel; trial court gave the defendant choice between keeping current trial counsel or proceeding pro se, and the defendant chose to proceed with current counsel. *Holsey v. State*, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

B. Employment of Counsel

Right to employ counsel of own selection. — This constitutional right entitles everyone to exercise one's own free choice in the selection of the attorney one wishes to employ to represent one. *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955).

Representation by associate of the lead attorney did not violate defendants' constitutional right to counsel because, although defendant made a post-trial claim that defendant did not approve of the substitution, defendant did not object when the attorney informed the trial court that defendant had given permission for the associate to assume the role of defense counsel should that prove necessary; the trial court was authorized to find that defendant failed to rebut the presumption of effectiveness of the trial counsel by clear and convincing evidence. *Cox v.*

State, 279 Ga. 223, 610 S.E.2d 521 (2005).

Reasonable opportunity to procure counsel. — This provision guarantees a person who is unable to employ counsel the right to have counsel appointed for that person by the court; and such provision entitles an accused who is able to employ counsel a reasonable opportunity to procure counsel of the accused's own selection. *Fair v. Balkcom*, 216 Ga. 721, 119 S.E.2d 691 (1961).

This paragraph confers upon every person indicted for crime a most valuable and important constitutional right, and entitles the person to be defended by counsel of the person's own selection whenever the person is able and willing to employ an attorney and uses reasonable diligence to obtain those services. No person meeting these requirements should be deprived of the person's right to be represented by counsel chosen by that person, or forced to trial with the assistance only of counsel appointed for the person by the court. *Long v. State*, 119 Ga. App. 82, 166 S.E.2d 365 (1969); *Wallis v. State*, 137 Ga. App. 457, 224 S.E.2d 91 (1976).

Defendant must use reasonable diligence to obtain services of counsel. — This paragraph has been interpreted to confer upon every criminal defendant the right to be represented by counsel of the defendant's own selection whenever the defendant is able and willing to employ one, and uses reasonable diligence to obtain counsel's services. *Reid v. State*, 237 Ga. 106, 227 S.E.2d 24 (1976); *Lewis v. State*, 188 Ga. App. 205, 372 S.E.2d 482 (1988).

When a non-indigent defendant, an "almost" illiterate chicken coop builder, acted with reasonable diligence in the defendant's attempts to obtain an attorney, an attorney should have been appointed for the defendant. *Flanagan v. State*, 224 Ga. App. 272, 480 S.E.2d 299 (1997).

No right to representation by someone unauthorized to practice law. — While it is true that a defendant may proceed in a defense without counsel, a defendant may not expand the right to counsel to include representation by someone else unauthorized to practice law. *Pfeiffer v. State*, 173 Ga. App. 374, 326 S.E.2d 562 (1985).

Whether a particular defendant has exercised “reasonable diligence” in procuring counsel of choice is a factual question, and the grant or denial of a request for continuance on grounds of absence of retained counsel is a decision within the sound discretion of the trial judge, reversible only for an abuse of that discretion. *Shaw v. State*, 251 Ga. 109, 303 S.E.2d 448 (1983).

Inquiry as to defendant’s “reasonable diligence.” — Since the trial of the defendant had been continued in order to accommodate the defendant’s request to obtain different counsel and the defendant had been told when the case would be tried and warned of the dangers of proceeding without counsel and the defendant appeared without counsel on the date set, before proceeding to trial the court should have made an inquiry as to whether the defendant’s failure to obtain counsel was attributable to the defendant’s own lack of diligence. *Hasty v. State*, 210 Ga. App. 722, 437 S.E.2d 638 (1993).

Violation of rights when court denies postponement for procuring of counsel. — A judge’s refusal of the request of a defendant for postponement, which in effect deprives the defendant of an opportunity to use normal facilities and resources to procure counsel of defendant’s own choice, violates this paragraph. *Walker v. State*, 194 Ga. 727, 22 S.E.2d 462 (1942).

Trial court abused the court’s discretion when the court denied the defendant’s motion for a continuance and forced the defendant to proceed to trial without the assistance of counsel when, following the defendant’s discovery that the defendant’s retained attorney could not represent the defendant, the defendant makes a good faith, albeit unsuccessful, effort to obtain substitute counsel. *Shaw v. State*, 251 Ga. 109, 303 S.E.2d 448 (1983).

No error to refuse continuance when ample time for defendant to employ counsel. — It is not error for the trial court to refuse to grant a continuance in order to obtain the services of counsel when the defendant had ample time to employ counsel, had made no real attempt to employ counsel prior to trial, was rep-

resented by appointed counsel, and there was no evidence in the record that the defendant’s appointed counsel had inadequate time to prepare for trial. *Miller v. State*, 156 Ga. App. 469, 274 S.E.2d 818 (1980).

After continuance, defendant cannot reject appointed counsel. — After being afforded a continuance to obtain counsel, a defendant cannot reject appointed counsel and insist that the defendant’s preliminary hearing be further delayed while the defendant tries to obtain the services of one particular, prominent attorney who has not agreed to take the case. *Eiland v. State*, 246 Ga. 112, 268 S.E.2d 922 (1980).

Violation of rights to deny defendant counsel of defendant’s own selection. — Improper denial of the defendant’s right to be represented by counsel of the defendant’s own choosing is violative of this paragraph and former Code 1933, § 27-403 (see now O.C.G.A. § 17-7-24), and abrogates the right of procedural due process. *Johnson v. State*, 139 Ga. App. 829, 229 S.E.2d 772 (1976).

Disqualification of defense counsel in a criminal matter was an abuse of discretion, although a client of the defense attorney’s law firm was the employer of a witness for the state, because the relationship between the law firm and the firm’s client was not reasonably likely to impair a thorough and sifting cross-examination of the witness. *Lewis v. State*, 312 Ga. App. 275, 718 S.E.2d 112 (2011), cert. denied, 2012 Ga. LEXIS 238 (Ga. 2012).

Party may select chief counsel. — The spirit of this constitutional provision entitles a person charged with a crime to the privilege and benefit of counsel of the person’s own selection, and this right of selection must also extend to the right to select the counsel who shall lead in the conduct of the person’s case. *Chivers v. State*, 5 Ga. App. 654, 63 S.E. 703 (1909).

Indigent defendant has no absolute right to discharge counsel and have another substituted. — A criminal defendant has a constitutional right to be defended by counsel of defendant’s own selection whenever the defendant is willing and able to employ such counsel. However, an indigent criminal defendant does

Benefit of Counsel (Cont'd)**2. Procurement of Counsel (Cont'd)****B. Employment of Counsel (Cont'd)**

not have an absolute right to discharge one court-appointed counsel and have another substituted in that counsel's place. A request of this sort addresses itself to the sound discretion of the trial court. *Burney v. State*, 244 Ga. 33, 257 S.E.2d 543 (1979).

Court under no obligation to appoint counsel for accused who has means. — If the accused has means to employ counsel, and is out upon bond and has opportunity to secure counsel, and neglects or refuses to do so, the court is under no obligation or duty to appoint counsel to represent the accused. *Elam v. Rowland*, 194 Ga. 58, 20 S.E.2d 572 (1942).

When the accused has exercised the accused's own free choice of counsel and has engaged an attorney to represent the accused, the accused has no right under the Constitution to have the court appoint an attorney to represent the accused without charge. *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955).

When a defendant is financially able to employ counsel and is given the privilege to do so, it is not error for the court to fail to appoint counsel for the defendant. *McGhee v. State*, 71 Ga. App. 52, 30 S.E.2d 54 (1944).

When counsel whom the defendant believed the defendant had employed informed the court on the day of the defendant's hearing for probation violation that the defendant had not made the necessary arrangements with counsel and that counsel could not represent the defendant, but there was nothing in the record to show that the defendant was financially unable to employ counsel, it was not error for the court to fail to appoint counsel for the defendant. *McGhee v. State*, 71 Ga. App. 52, 30 S.E.2d 54 (1944).

Obtaining of counsel is matter of contract between party and attorney. *Walker v. State*, 17 Ga. App. 321, 86 S.E. 735 (1915).

No deprivation of rights when court honors request to conduct own defense. — Defendant is not deprived of the defendant's constitutional rights when a trial court honors defendant's request to conduct the defendant's own defense. *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

3. Time to Prepare

One accused of a crime is entitled as matter of right to reasonable time in which to prepare for trial. *Cartee v. State*, 85 Ga. App. 532, 69 S.E.2d 827 (1952).

Appointed counsel entitled to reasonable time for preparation. — Right to "benefit of counsel" includes a reasonable time for preparation of the case. *Blackman v. State*, 76 Ga. 288 (1886).

The constitutional guaranty of "benefit of counsel" means something more than the mere appointment by the court of counsel to represent the accused; the accused is entitled to a reasonable time for preparation by such counsel to properly represent the accused on the trial. *Sheppard v. State*, 165 Ga. 460, 141 S.E. 196 (1928); *Edwards v. State*, 204 Ga. 384, 50 S.E.2d 10 (1948); *Burkett v. State*, 131 Ga. App. 662, 206 S.E.2d 848 (1974).

Benefit of counsel guaranteed by this paragraph is not satisfied merely by the defendant being represented by counsel on defendant's trial, but defendant's counsel is entitled to a reasonable time after counsel's employment to prepare for defendant's defense in order that counsel may adequately and effectively represent the client. *Smith v. Greek*, 226 Ga. 312, 175 S.E.2d 1 (1970); *Tucker v. State*, 136 Ga. App. 456, 221 S.E.2d 664 (1975).

Constitutional privilege would amount to nothing if counsel for accused not allowed sufficient time to prepare defense. — The Constitution of this state provides that every person accused of a crime shall have the privilege and benefit of counsel, but it is useless to appoint counsel to represent one so accused unless the attorney so appointed is given at least a reasonable opportunity to prepare the case entrusted to the counsel.

Edwards v. State, 204 Ga. 384, 50 S.E.2d 10 (1948).

This constitutional guaranty amounts to nothing unless the counsel selected by the accused or appointed by the court are given a reasonable time to ascertain the character of the case that the accused is called upon to defend. *Fair v. Balkcom*, 216 Ga. 721, 119 S.E.2d 691 (1961).

Accused denied benefit of counsel when reasonable time to prepare not given. — When it appears that the defendant was put to trial upon an indictment for a capital felony, the defendant has not been apprised that an indictment had been found against the defendant, and that counsel appointed for the defendant were only permitted to confer with their client for two or three minutes before the court announced that “the case would go to trial,” the defendant was denied the constitutional benefit of counsel. *Jackson v. State*, 176 Ga. 148, 167 S.E. 109 (1932).

Constitutional requirement of benefit of counsel is, in effect, denied when counsel appointed to defend the accused is not given a reasonable time to prepare a defense before trial. *Edwards v. State*, 204 Ga. 384, 50 S.E.2d 10 (1948).

Constitutional requirement of counsel is denied in substance when court-appointed counsel is not given a reasonable time to prepare a defense before trial. If reasonable time is not given for such preparation, the accused is afforded only the privilege of counsel and not the benefit of counsel. *Edwards v. State*, 106 Ga. App. 535, 127 S.E.2d 475 (1962).

Facts and circumstances determine sufficiency of time allowed for preparation. — Whether or not a reversal is to be adjudged because counsel were not allowed sufficient time to prepare a case for trial is to be determined by the particular facts and circumstances of each case. *Cannady v. State*, 190 Ga. 227, 9 S.E.2d 241 (1940).

When counsel was appointed to represent a defendant charged with rape, assault, possession of a knife during the commission of a crime, and cruelty to children on the Friday before the week trial was scheduled to begin, and was given a one-week continuance, counsel

should have had more time to prepare, given the gravity of the charges, but defendant showed no prejudice from counsel’s short preparation time, as it was not shown that any of the things counsel would have done, given more time, would have resulted in evidence favorable to defendant or a different result of the trial in which defendant was found guilty. *Johnson v. State*, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Preparation of defendant for trial adequate. — Defendant failed to demonstrate that trial counsel was ineffective in insisting that the defendant testify without adequate preparation because the defendant’s contention that counsel forced the defendant to testify was refuted by trial counsel’s testimony to the contrary at the new trial hearing; trial counsel testified that trial counsel prepared the defendant to testify by telling the defendant to explain about the relationship with the victim, the defendant’s location at the time of the crime, why the defendant made a telephone call from a neighbor’s house, and various other matters. Although the defendant denied having this discussion, the trial court was authorized to disbelieve the defendant. *Ransom v. State*, 297 Ga. App. 902, 678 S.E.2d 574 (2009).

Instance when insufficient time allowed. — Peremptorily forcing one indicted for a criminal offense to trial immediately after the appointment of counsel not familiar with the case to defend that defendant, without giving counsel an opportunity to make an investigation of the case or prepare for the defense is, although no other ground for a postponement or continuance of the case be urged, cause for a new trial. *Long v. State*, 119 Ga. App. 82, 166 S.E.2d 365 (1969).

Continuance denied despite short period given appointed counsel to prepare. — When counsel were appointed to defend the accused on the charge of murder, slightly less than 24 hours before the case was called for trial, the court did not abuse the court’s discretion in overruling a motion then made for a continuance on the ground that the defendant’s counsel had not had sufficient time within which to prepare for trial.

Benefit of Counsel (Cont'd)**3. Time to Prepare (Cont'd)**

Cannady v. State, 190 Ga. 227, 9 S.E.2d 241 (1940), commented on in 3 Ga. B.J. 55 (1940).

Ten minute period is too short a time. *Reliford v. State*, 140 Ga. 777, 79 S.E. 1128 (1913).

Court abused discretion in denying continuance. — When facts show that court-appointed attorney was wholly unprepared for trial, after retained counsel withdrew on date of trial from case, and the court denied the motion for continuance or postponement, this was an unconstitutional abuse of discretion. *Smith v. State*, 215 Ga. 362, 110 S.E.2d 635 (1959).

Defendant's duty to employ or request attorney in advance. — Defendant must be afforded benefit of counsel, and this includes time sufficient for counsel to prepare for trial, but when the defendant was apprised of the charge against the defendant at a previous term of court and fails and neglects to procure counsel or ask the court to do so for the defendant there is no error in refusing a request for additional time on the ground that the counsel has had insufficient time to prepare the defense. It is the defendant's duty to employ an attorney to aid in the preparation of the defendant's defense sufficiently in advance of the trial of the case. *Duke v. State*, 104 Ga. App. 494, 122 S.E.2d 127 (1961); *Bradshaw v. State*, 132 Ga. App. 363, 208 S.E.2d 173 (1974).

Accused has right to private consultation with the accused's attorney. *Hill v. State*, 119 Ga. App. 612, 168 S.E.2d 327 (1969).

A prisoner should always be accorded the privilege of conferring freely with counsel at all reasonable times. *Morris v. Peacock*, 202 Ga. 524, 43 S.E.2d 531 (1947).

4. Right to Benefit of Counsel

Clear mandate of this paragraph requires that every person accused of crime shall have "benefit of counsel." *Edwards v. State*, 204 Ga. 384, 50 S.E.2d 10 (1948).

Denial of counsel within meaning of Constitution renders judgment of

conviction void. *Morris v. Peacock*, 202 Ga. 524, 43 S.E.2d 531 (1947).

Attorney hired by mother could not invalidate defendant's Miranda waiver. — Waiver of Miranda rights was not invalid due to police officers' failure to tell a defendant that an attorney hired by the defendant's mother had arrived at the station, because the attorney, without having consulted the defendant, was not empowered to invoke the defendant's personal rights. *Bell v. State*, 280 Ga. 562, 629 S.E.2d 213 (2006).

Accused entitled to new trial when right to counsel denied. — It is a constitutional right of a defendant in a criminal case to have the benefit of counsel but the defendant can waive this right. If the record shows that the accused did not have counsel, it is not cause for a new trial unless it further appears that the right to have counsel was denied the accused. *Bailey v. State*, 50 Ga. App. 92, 176 S.E. 909 (1934); *Fortson v. State*, 96 Ga. App. 350, 100 S.E.2d 129 (1957).

Right to counsel aids in protection of right to fair and impartial trial. — Right to counsel is guaranteed to the accused by the fundamental law of this state, in order that the accused and the accused's counsel may see to it that the accused has a fair and impartial trial and that nothing is done that would in any wise tend to the accused's prejudice. *Jones v. State*, 57 Ga. App. 344, 195 S.E. 316 (1938).

Trial court's actions did not deny defendant's right to counsel. — Because the trial court questioned both the defendant and trial counsel about their communications, made several suggestions about how to settle any differences, allowed the defendant and counsel a break during trial to attempt to settle any differences, and then continued the trial on the premise that it would be unfair to the defendant to bring in a new lawyer halfway through the trial to continue representing the defendant, the trial court did not abuse its discretion in requiring the defendant to proceed with trial counsel and did not deny the defendant a right to counsel; moreover, there was no indication in the record that trial counsel was unwilling or unable to effectively repre-

sent the defendant. *McCoy v. State*, 285 Ga. App. 246, 645 S.E.2d 728 (2007).

Subsequent custodial police interview violated right to counsel. — While non-custodial and custodial statements were properly admitted, as not violating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

Counsel protects accused from ignorance of the accused's constitutional and legal rights. — Purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from the accused's own ignorance of the accused's legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim the accused's rights removes the protection of the Constitution. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Constitutional provision restrains courts and legislature from denying right to counsel. — This provision absolutely guarantees one accused of a crime the right to have the assistance of counsel and be heard at one's trial, and was no doubt inserted in the Constitution to abrogate the common-law practice under which prisoners accused of a felony were denied such right, and to restrain the legislature from denying it by statute. *Harris v. Norris*, 188 Ga. 610, 4 S.E.2d 840 (1939).

The right of benefit and privilege of counsel should be strictly guarded and preserved. *Jones v. State*, 57 Ga. App. 344, 195 S.E. 316 (1938); *McGhee v. State*, 71 Ga. App. 52, 30 S.E.2d 54 (1944).

Privilege belongs to every citizen and cannot be denied. — This is a privilege which belongs to every citizen of this state without the slightest reference to the citizen's condition in life, and cannot be legally denied the citizen by the

courts. *Summerour v. Fortson*, 174 Ga. 862, 164 S.E. 809 (1932).

Threshold right to assistance of counsel is no less momentous to accused deciding whether to plead guilty than to an accused who stands trial. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Conflict of interest not proven. — Because, at the time of trial, the public defender's office was no longer representing the confidential informant involved in two sales of cocaine charged against defendant, and no evidence was presented that counsel was less vigorous in counsel's cross-examination, the trial court did not err in denying counsel's motion to withdraw. *Banks v. State*, 270 Ga. App. 221, 606 S.E.2d 34 (2004).

Average defendant does not have skill for self representation. — The right to counsel embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect oneself when brought before a tribunal with power to take the defendant's life or liberty. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Georgia Supreme Court's interpretation of right to counsel for misdemeanor prosecutions. — Although the right to counsel extends to misdemeanor prosecutions when imprisonment may result (*Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972)), the Georgia Supreme Court has interpreted *Argersinger* as requiring that a defendant in a misdemeanor criminal prosecution be entitled to counsel only when the defendant is sentenced to actual imprisonment. *Capelli v. State*, 203 Ga. App. 79, 416 S.E.2d 136 (1992).

Right extends to all prosecutions. — Right to private counsel attached in all criminal prosecutions not merely those resulting in imprisonment or fine; the defendant did not knowingly and intelligently waive the right to counsel since there was no evidence of relinquishment of the right. *Barnes v. State*, 261 Ga. App. 112, 581 S.E.2d 727 (2003).

Pro se defendant has no right to standby counsel, and therefore, since the defendant made a knowing and intel-

Benefit of Counsel (Cont'd)**4. Right to Benefit of Counsel** (Cont'd)

ligent waiver of defendant's right to counsel, including the presence of standby counsel, the defendant had no room to complain when the trial court did not provide defendant with standby counsel. *Bush v. State*, 268 Ga. App. 200, 601 S.E.2d 511 (2004).

Pro se defendant's failure to subpoena witnesses. — When the defendant was offered ample opportunity to subpoena witnesses, but did not comply with basic rules of criminal procedure, declining assistance, declining to make a proffer of their testimony, and failing to present the state with a list 10 days before trial, the defendant was not denied the Sixth Amendment right to represent oneself effectively, based on a failure to timely serve subpoenas on defense witnesses. *Clark v. State*, 278 Ga. App. 412, 629 S.E.2d 103 (2006).

Question was not a request for counsel. — Question by a defendant as to whether the defendant would have been arrested if the defendant asked for an attorney was not a clear request for counsel that required cessation of police questioning or clarification before continuing the interrogation and there was no evidence that the statement was given in fear of injury or for a hope of benefit; additionally, while the investigator lied to the defendant throughout the interview about the existence and amount of inculpatory evidence, nothing suggested that the investigator sought to procure a false statement. *Wright v. State*, 279 Ga. App. 155, 630 S.E.2d 656 (2006).

Trial court did not err in denying the defendant's motion to suppress because the defendant's question about counsel was equivocal. *Dunlap v. State*, 291 Ga. 51, 727 S.E.2d 468 (2012).

Right to choice of counsel. — Because the defendant was properly advised about retaining appointed counsel, but requested a change of counsel at trial, the trial court could have concluded that the request was a dilatory tactic; consequently, the trial court did not err in requiring the defendant to choose between

representation by appointed counsel and proceeding pro se. *Mondragon v. State*, 270 Ga. App. 780, 607 S.E.2d 914 (2004).

Right to self-representation. — Because the defendant failed to make an unequivocal assertion of a right to self-representation, and raised no objection after being informed that defense counsel and an associate would assist in the defense, the right was not violated. *Moore v. State*, 280 Ga. App. 894, 635 S.E.2d 253 (2006).

Defendant's pro se representation did not warrant reversal of convictions, despite the fact that the defendant's waiver of counsel was not knowingly and voluntarily made, as any error in the waiver was harmless, given that: (1) stand-by counsel assisted the defendant with procedural matters, jury instructions, and closing argument; (2) the state presented strong evidence of the defendant's guilt; (3) the defendant understood the nature of the charges filed; and (4) the defendant filed numerous pro se motions prior to trial, and successfully moved to exclude two potential jurors and to sequester witnesses; thus, as a result of the defendant's actions, the defendant was not mentally incompetent. *Granville v. State*, 281 Ga. App. 465, 636 S.E.2d 173 (2006).

Trial court did not err in refusing to appoint the defendant counsel at the motion to suppress hearing and allowing the defendant to represent oneself at trial as the trial court found that the defendant made an informed and voluntary choice to relinquish the right to counsel; the trial court repeatedly informed the defendant of the dangers of self-representation and the defendant was advised of the nature of the charges and the possible punishment. *Horne v. State*, 318 Ga. App. 484, 733 S.E.2d 487 (2012).

Right to counsel in one case did not extend to unrelated murder investigation. — Defendant was not deprived of counsel in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 when the defendant made statements to police in the murder case after the defendant had been assigned counsel on a theft charge that occurred in a different county hours after the murder; the appointment of counsel in the theft case

did not extend to the murder case, as they were not closely related, and the theft involved different victims from the murder, occurred well after the murder, and occurred at a different location than the murder. *Chenoweth v. State*, 281 Ga. 7, 635 S.E.2d 730 (2006).

Assistance of counsel denied. — Trial court erred in denying the defendant's motion for an out-of-time appeal of the denial of the defendant's motion to withdraw the defendant's guilty plea. It was obvious that the defendant had attempted to appeal the denial of the defendant's motion to withdraw and that the defendant's request for counsel to help the defendant pursue the defendant's appeal had never been ruled upon; prejudice was presumed and the harmless error analysis did not apply since there had been a total denial of the assistance of counsel. *Stockton v. State*, 298 Ga. App. 84, 679 S.E.2d 109 (2009).

5. Effective Assistance of Counsel

A. In General

Right to counsel is right to effective counsel. *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907, cert. denied, 444 U.S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979).

Elements of effective and competent counsel. — As to the requirement under the Fourteenth Amendment, the services of counsel meet the requirement of the due process clause when the counsel is a member in good standing at the bar, gives the client complete loyalty, serves the client in good faith to the best of counsel's ability, and counsel's service is of such character as to preserve the essential integrity of the proceedings at a trial in a court of justice. Counsel is not required to be infallible. Counsel may make some mistakes. A client is entitled to a fair trial, not a perfect one. *Jones v. Balkcom*, 210 Ga. 262, 79 S.E.2d 1 (1953), cert. denied, 347 U.S. 956, 74 S. Ct. 682, 98 L. Ed. 1101 (1954).

When inadequate representation of counsel is alleged, the reviewing court normally considers whether the defendant had a defense which was not presented; whether trial counsel consulted with the accused and adequately investi-

gated the facts and the law; and whether the omissions charged to trial counsel resulted from inadequate preparation, rather than from unwise trial tactics. *Ealy v. State*, 251 Ga. 426, 306 S.E.2d 275 (1983).

To show ineffective assistance of counsel, a defendant who pleads guilty must show that the defendant's counsel erred and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Johnson v. State*, 260 Ga. App. 897, 581 S.E.2d 407 (2003).

First defendant did not show that the first defendant received ineffective assistance of counsel; the first defendant could not show that the failure to challenge the joint trial of the first defendant and the second defendant was error and the first defendant's claim that the first defendant should have challenged the opening and closing statements of the second defendant's counsel that the first defendant was the gunman did not show ineffective assistance because an objection would have been futile given the fact that the statements of the second defendant's counsel were not evidence. *Bennett v. State*, 266 Ga. App. 502, 597 S.E.2d 565 (2004).

Defendant's ineffective assistance of counsel claims lacked merit because the defendant failed to: (1) show prejudice resulting from counsel's alleged ineffectiveness by failing to impeach two witnesses on cross-examination with prior statements they made; and (2) make and, in all likelihood, could not have made, a strong showing that the identification testimony would have been suppressed had trial counsel so moved. *Rivers v. State*, 283 Ga. 1, 655 S.E.2d 594 (2008).

In determining prejudice on an ineffective assistance of counsel claim under *Strickland*, a defendant has to show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; Georgia cases that deviated from that standard by eliminating the reasonable probability language, thereby putting a more stringent burden on the defendant, are thus disapproved. *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****A. In General (Cont'd)**

Case was remanded for a hearing on the issue of ineffective assistance of first appellate counsel because the supreme court could not determine from the record whether the defendant was unable to meet the standard for ineffective assistance of first appellate counsel since the trial court's order did not specifically address the issue. *Lewis v. State*, 291 Ga. 273, 731 S.E.2d 51 (2012).

Defendant not entitled to perfect counsel but reasonably competent counsel. — Constitutional right to assistance of counsel means not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. *Jones v. State*, 243 Ga. 820, 256 S.E.2d 907, cert. denied, 444 U.S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979); *Suits v. State*, 150 Ga. App. 285, 257 S.E.2d 306 (1979); *Zant v. Campbell*, 245 Ga. 368, 265 S.E.2d 22 (1980); *Birt v. Hopper*, 245 Ga. 221, 265 S.E.2d 276 (1980); *Rosser v. State*, 156 Ga. App. 463, 274 S.E.2d 812 (1980); *Galloway v. State*, 165 Ga. App. 536, 301 S.E.2d 894 (1983); *Johnson v. State*, 165 Ga. App. 773, 302 S.E.2d 626 (1983); *Jackson v. State*, 167 Ga. App. 509, 306 S.E.2d 757 (1983); *Veit v. State*, 182 Ga. App. 753, 357 S.E.2d 113 (1987).

United States Constitution does not guarantee every criminal defendant the assistance of perfect, errorless counsel, or counsel judged by hindsight nor will the court grant habeas relief upon a mere showing that the defense counsel's strategy foundered; even an erroneous sentence estimate by defense counsel does not vitiate the voluntariness of the defendant's plea. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Defendant is entitled to counsel likely to render and in fact rendering reasonably effective assistance; of course, this standard does not require errorless counsel, nor is it intended to require that an attorney's performance be ideal in every strategic or substantive particular. *Blake v.*

Zant, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), vacated on other grounds sub nom., *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

It is only necessary that counsel's performance fall within a sphere of reasonable legal skill and practice. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), vacated on other grounds sub nom., *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

Relief from conviction when trial was farce, or representation in bad faith. — It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel under this paragraph will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for a conference and preparation. Lawyers are not required to be infallible. The ability and faithfulness of an attorney is not to be judged by whether the lawyer won or lost the verdict. *Beavers v. State*, 132 Ga. App. 94, 207 S.E.2d 550 (1974).

Lack of skill and incompetency of attorney is imputed to defendant who employed the attorney, the acts of the attorney thus becoming those of the client and so recognized and accepted by the court, unless the defendant repudiates them by making known to the court at the time of the defendant's objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in the attorney's defense of the defendant or the defense's lack of it and, after the trial has resulted adversely to the defendant, obtain a new trial because of the incompetency, negligence, fraud, or unskillfulness of the defendant's attorney. *Jones v. Balkcom*, 210 Ga. 262, 79 S.E.2d 1 (1953), cert. denied, 347 U.S. 956, 74 S. Ct. 682, 98 L. Ed. 1101 (1954).

Requirements for showing ineffective counsel. — Defendant did not show that defendant received ineffective assistance of counsel, as defendant did not show either part of the two-part

Strickland test for establishing ineffective assistance of counsel, namely that counsel performed deficiently or that defendant was sufficiently prejudiced by counsel's deficient performance; accordingly, defendant's allegation that defendant received ineffective assistance of counsel was insufficient to overcome the strong presumption that counsel performed effectively. *Bishop v. State*, 266 Ga. App. 129, 596 S.E.2d 674 (2004).

In order to show counsel was ineffective, a defendant must show both that counsel's performance was deficient and that the deficient performance was prejudicial to the defense. Defendant did not show ineffective assistance of counsel: (1) since counsel was not obligated to raise a novel legal issue challenging the vagueness of the robbery by snatching statute; (2) since counsel was not obligated to raise a challenge under O.C.G.A. § 17-7-53.1 as there was no showing that two prior indictments were quashed, which was a prerequisite to application of the statute; and (3) since there was no prejudice to the defendant in counsel failing to request a verbal description from the victim of the victim's reenactment of the crime. *Hughes v. State*, 266 Ga. App. 652, 598 S.E.2d 43 (2004).

When issue must be raised. — Since appellate counsel did not raise the issue of ineffective assistance of trial counsel at the earliest possible moment, namely defendant's motion for a new trial, that claim was procedurally barred. *Harden v. State*, 278 Ga. 40, 597 S.E.2d 380 (2004).

When the defendant attempted to raise an ineffective assistance of counsel claim related to appointed counsel's pre-trial ineffectiveness, but was cut off from making this argument by the trial court, apparently because the trial court mistakenly believed that the claim related to the defendant's own ineffectiveness, the claim was raised at the earliest practicable moment. *Robinson v. State*, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Defendant's claim of ineffective assistance of counsel with respect to the defendant's guilty plea was waived because it was not raised below. *Blackmon v. State*, 297 Ga. App. 99, 676 S.E.2d 413 (2009).

Trial court did not err in denying the

defendant's motion for an out-of-time appeal to vacate a void sentence because the defendant's remedy had to be pursued in a habeas corpus action; the defendant's ineffective assistance of counsel claims could not be resolved by reference to facts contained in the record and had to be developed in a post-plea hearing. *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011).

Right does not attach before defendant charged. — Given the totality of the circumstances, and the defendant's age, education, and knowledge of both the substance of the charge and nature of the rights to an attorney and to remain silent, because the defendant voluntarily gave a statement to a police detective about an uncharged armed robbery, absent any threats, coercion, or promises in exchange for doing so, the statement was admissible. *Swain v. State*, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

Claim of ineffective assistance not preserved. — Because the defendant failed to provide any citations to either the law or the record, let alone an application of authority to that record amounting to legal argument, in support of an ineffective assistance of counsel assertion, this issue was deemed abandoned on appeal. *Gore v. State*, 272 Ga. App. 156, 611 S.E.2d 764 (2005).

Defendant's failure to file a motion for new trial asserting the ineffectiveness of trial counsel barred review of the claim on appeal. *Swan v. State*, No. A05A0891, 2005 Ga. App. LEXIS 906 (Aug. 15, 2005).

Defendant failed to preserve defendant's ineffective assistance of counsel claim as the defendant failed to raise it in defendant's motion for a new trial; additionally, defendant failed to request an evidentiary hearing on defendant's claim, which waived defendant's right to an evidentiary hearing. *Capps v. State*, 273 Ga. App. 696, 615 S.E.2d 821 (2005).

Because the defendant failed to raise an ineffective assistance of counsel claim at the first practicable opportunity, specifically when newly appointed counsel filed an amended motion for a new trial, the claim was waived. *Simmons v. State*, 281 Ga. 437, 637 S.E.2d 709 (2006).

Defendant waived the defendant's inef-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****A. In General (Cont'd)**

fective assistance of counsel claim as if a motion for new trial filed by a trial counsel was without effect because the defendant was not then represented by the trial counsel, and if the defendant filed a timely and effective pro-se notice of appeal, then the defendant was in the same position as a new counsel, and the defendant was required to raise the ineffectiveness of the trial counsel at the defendant's first opportunity and the failure to timely raise the ineffectiveness issue in the trial court barred consideration of the issue on appeal; alternatively, if the defendant was represented by the trial counsel when the latter filed a motion for new trial, then the pro-se notice of appeal was premature so long as the motion remained pending and the defendant then could have pursued an ineffective assistance claim through the defendant's post-trial counsel, but elected not to do so. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

Defendant abandoned claims of insufficient investigation and trial preparation when the claims were merely general and bald assertions, unsupported by argument or citation of authority. *Sampson v. State*, 282 Ga. 82, 646 S.E.2d 60 (2007).

In a battery prosecution, setting aside the defendant's failure to object to a second attorney's representation at trial, a denial from the defendant's first attorney of an alleged promise to represent the defendant after that counsel's suspension had expired gave the trial court sufficient grounds for finding that no such promise occurred, eliminating the defendant's denial of the right to counsel claim; moreover, inasmuch as the defendant failed to challenge the trial court's finding that the second attorney's representation was effective, the defendant was not entitled to a new trial. *Northington v. State*, 287 Ga. App. 96, 650 S.E.2d 760 (2007).

A defendant's claim that counsel was ineffective in failing to reserve objections to a "level of certainty" jury charge was waived because the defendant did not raise the issue in the defendant's written

motion for new trial or at the hearing on the motion. *Olivaria v. State*, 286 Ga. App. 856, 650 S.E.2d 422 (2007).

Because the defendant did not claim below that trial counsel was ineffective for opening the door to impeachment, the defendant failed to timely raise this argument, and thus the claim was waived for purposes of appeal; as a result, the trial court did not err in denying the defendant's motion for a new trial on ineffective assistance of counsel grounds. *Lipsey v. State*, 287 Ga. App. 835, 652 S.E.2d 870 (2007).

Because the record on appeal failed to show that the defendant moved to withdraw a guilty plea due to ineffective assistance of counsel, and the only evidence on this issue was the transcript of the guilty plea hearing, none of the defendant's complaints could be resolved by the transcript, and, thus, the defendant was not entitled to any further relief on the claim. *Duffey v. State*, 289 Ga. App. 141, 656 S.E.2d 167 (2007).

Because the defendant abandoned a claim that counsel was ineffective for failing to call a witness necessary to the defense, as the defendant completely failed to identify the witness, and presented no argument, reference to the record, nor citations of authority to support the claim, that claim presented no basis to support the defendant's amended motion for a new trial. Moreover, even if the claim had not been deemed abandoned, the appeals court found it lacked merit. *Bennett v. State*, 289 Ga. App. 110, 657 S.E.2d 6 (2008).

Because the defendant had not sought a new trial on the basis of ineffective assistance of counsel, defendant had not preserved the issue for appellate review; moreover, because defense counsel had not been called upon to explain counsel's actions, those actions were presumed strategic. *Banks v. State*, 290 Ga. App. 887, 660 S.E.2d 873 (2008).

Defendant's claim that counsel was ineffective for not raising the issue of the validity of the defendant's prior convictions was procedurally barred because the defendant had not raised the issue in the defendant's motion for new trial. The defendant could not resuscitate the issue by

raising the issue under the guise of an ineffective assistance of appellate counsel claim. *McGlocklin v. State*, 292 Ga. App. 162, 664 S.E.2d 552 (2008).

Because the defendant, through new counsel, could have, but did not, raise an ineffectiveness claim at the hearing on the defendant's motion to withdraw a guilty plea, the issue was waived. *Boykins v. State*, 298 Ga. App. 654, 680 S.E.2d 665 (2009).

Although the defendant claimed that trial counsel was ineffective for failing to file a special demurrer regarding the time frame for molestation claims, this issue was not raised in the motion for new trial or the amended motion for new trial filed by appellate counsel, and was never raised or argued in the hearing on the motion for new trial; this constituted a failure to assert the matter at the earliest practicable opportunity and, thus, was a waiver of the right to pursue the issue on appeal. *Sarratt v. State*, 299 Ga. App. 568, 683 S.E.2d 10 (2009).

Because the defendant's allegation of ineffective assistance based on unconstitutional vagueness was not raised on motion for new trial by appellate counsel, who had been appointed following the defendant's conviction, it was waived; the defendant did not raise the purported deficient performance at the hearing on the amended motion for new trial. *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

Defendant's contentions that defendant's trial counsel provided ineffective assistance by presenting inconsistent theories of defense, which did not directly rebut the state's case, and by failing to request a charge on theft by taking as a lesser included offense of armed robbery were not before the court of appeals to review and were deemed waived because the contentions were not presented to the trial court as bases for the claim of ineffective assistance of counsel, and the trial court did not rule on those claims. *Miller v. State*, 305 Ga. App. 620, 700 S.E.2d 617 (2010).

Because the defendant did not support the assertion that trial counsel was ineffective by citation to the record or argument or even a description of the manner in which the defendant alleged trial coun-

sel's performance was deficient, the enumeration of error was deemed abandoned. *Arroyo v. State*, 309 Ga. App. 494, 711 S.E.2d 60 (2011).

Defendant's enumerations asserting ineffective assistance were deemed abandoned because the enumerations were not supported by argument or by citations to the record or to relevant authority as required by Ga. Ct. App. R. 25(c)(2); to the extent the claims involve trial counsel's decisions as to whether to object to testimony, to introduce evidence, or to request a particular jury charge, the enumerations concerned matters of trial tactics and strategy. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012), cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Habeas court erred in granting the petitioner's application for habeas corpus relief because the court should not have reached the petitioner's claims of ineffective assistance since those claims had been waived; the petitioner never claimed that appellate counsel committed ineffective assistance by failing to timely raise claims that trial counsel was ineffective. *Tompkins v. Hall*, 291 Ga. 224, 728 S.E.2d 621 (2012).

Ineffective assistance of counsel not properly before appellate court. — Whether trial counsel provided ineffective assistance of counsel was not properly before the appellate court as the defendant was represented on appeal by trial counsel; the defendant was apprised of the need for new counsel to pursue the ineffectiveness issue and waived appellate review by electing to retain the defendant's trial counsel as the defendant's counsel on appeal. *Capps v. State*, 273 Ga. App. 696, 615 S.E.2d 821 (2005).

Claims of ineffective assistance were not properly before the court on appeal because they were not raised as ineffective assistance claims in the defendant's motion for new trial. *Bryant v. State*, 282 Ga. 631, 651 S.E.2d 718 (2007).

Remand warranted when ineffectiveness claim could not be resolved by the appellate record. — Because the defendant's claim as to the pre-trial ineffective assistance of appointed counsel could not be resolved by the record on

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****A. In General (Cont'd)**

appeal, the trial court's denial of a new trial as to that claim was reversed, and the case was remanded for a hearing on that claim only. *Robinson v. State*, 288 Ga. App. 219, 653 S.E.2d 810 (2007).

Case was remanded to the trial court for a hearing and determination on the defendant's ineffective assistance claim because the defendant's argument that the defendant was prejudiced by trial counsel's failure to call an expert could not be decided as a matter of law based on the existing record. *Elrod v. State*, 316 Ga. App. 491, 729 S.E.2d 593 (2012).

Defendant failed to proffer testimony of witness whom defendant argued counsel should have contacted.

— A defendant's ineffective assistance of counsel argument failed because the defendant had not proffered at the hearing on the defendant's motion for new trial the testimony of the witnesses whom the defendant argued that defense counsel should have contacted. *Williams v. State*, 287 Ga. App. 361, 651 S.E.2d 768 (2007).

Hearing required on pro se motion for substitute counsel. — When the issue of the effectiveness of appointed counsel is raised in motions for substitute counsel and for a new trial, the trial court, in order to insure that the defendant's right to counsel has been and will continue to be afforded, should conduct a hearing as to the basis of the defendant's motion for appointment of new counsel. *DeLoach v. State*, 198 Ga. App. 880, 403 S.E.2d 866 (1991).

Effective counsel regardless of whether attorney is retained or court-appointed. — Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish the system of justice, a serious risk of injustice infects the trial itself and, when a state obtains a criminal conviction through such a trial, it is the state that unconstitutionally deprives the defendant of liberty; thus, since the state's conduct of a criminal trial itself implicates the state

in the defendant's conviction, there is no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

A defendant is entitled to an attorney likely to render and, in fact, rendering reasonably effective assistance, whether that attorney be retained or court-appointed; this standard is to be applied with particular care in capital cases. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), vacated on other grounds, *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

General rule that incompetence of counsel does not constitute ground for new trial. — Incompetence, negligence, or unfaithfulness of the defendant's counsel who was selected by the defendant in the trial of a criminal case does not as a general rule constitute a ground for a new trial, nor call for application of constitutional guarantees of the defendant's full right to the benefit of counsel, nor for application of the Fourteenth Amendment. *Jones v. Balkcom*, 210 Ga. 262, 79 S.E.2d 1 (1953), cert. denied, 347 U.S. 956, 74 S. Ct. 682, 98 L. Ed. 1101 (1954).

Receipt of fee from family and indigent fund was not proven to have made counsel ineffective based upon a conflict of interest argument even though counsel was wrong to have accepted money from both sources. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Responsibility of appointed counsel to give full representation. — However low or poor the defendant may be, the defendant can rely upon this right, and the same due responsibility rests upon counsel appointed by the court to represent the defendant as if counsel received the fullest pecuniary compensation. *Jones v. State*, 57 Ga. App. 344, 195 S.E. 316 (1938).

Presumption that appointed counsel properly represented client. — When one accused of crime was upon one's

trial defended by an attorney at law appointed for this purpose by the presiding judge, it will, unless there be clear and convincing proof to the contrary, be presumed that this attorney did the attorney's duty in the premises and properly represented the client. *Brown v. State*, 76 Ga. App. 7, 45 S.E.2d 80 (1947).

In evaluating an attorney's performance for purposes of considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

With regard to the defendant's convictions for aggravated child molestation and two counts of child molestation after a bench trial, because the defendant failed to call trial counsel at the hearing on the defendant's motion for a new trial, the defendant was unable to establish that the defendant received ineffective assistance of counsel at trial based on trial counsel: (1) failing to adequately investigate the case; (2) failing to present an interview report as evidence; and (3) failing to object to hearsay testimony regarding the victims' abuse allegations; therefore, the presumption remained that trial counsel strategically elected not to offer the interview report as evidence. Further, even if the child victim's statements were not admissible under the child hearsay statute, there was no ineffective assistance since the defendant confirmed the statements through the defendant's own trial testimony. *Brumbelow v. State*, 289 Ga. App. 520, 657 S.E.2d 603 (2008).

Strong and convincing proof to contrary necessary to overcome presumption that counsel properly represented client. — Attorneys are officers of the court and are presumed to do as the law and their duty require them. When an attorney is appointed by the court to defend a person accused of crime who is unable to employ counsel, it is to be presumed that the attorney will discharge the attorney's full duty in the premises. It is also to be presumed that the court, in appointing counsel for this purpose, will appoint attorneys who have sufficient skill and learning to defend the accused

properly. Before a court should grant a new trial upon the ground that counsel failed to do their duty in this respect, there should be strong and convincing proof to overcome the presumption to the contrary. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

In the absence of satisfactory proof to the contrary, it will be presumed that counsel assigned to represent the interests of an accused are of sufficient experience and possess the requisite legal attainment to satisfy the constitutional requirement of the privilege and benefit of counsel. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

In a burglary case, the trial court did not err in denying the defendant's motion for new trial, which was based on a claim of ineffective assistance of counsel, because the defendant did not carry the burden of showing that the counsel's performance was deficient. *Burdette v. State*, 276 Ga. App. 695, 624 S.E.2d 253 (2005).

Acquittal on most serious charges supports effectiveness of counsel. — Defendant's acquittal on the three most serious charges strongly supported the conclusion that defense counsel was effective. *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

Acquittal on number of counts shows effectiveness. — Trial counsel successfully obtained directed verdicts of acquittal on a number of the charges against defendant, which strongly supported the conclusion that the assistance actually rendered fell within that broad range of reasonably effective assistance. *Sarratt v. State*, 299 Ga. App. 568, 683 S.E.2d 10 (2009).

Defense counsel's decision to have the defendant's entire interview with police played to the jury did not amount to ineffective assistance, but was one of informed trial strategy, as counsel was able to use the entire interview to show that it was improperly conducted; moreover, such was particularly true when the jury acquitted the defendant of several offenses charged in the indictment. *Jackson v. State*, 281 Ga. App. 506, 636 S.E.2d 694 (2006).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****A. In General (Cont'd)**

Differences in conduct of defense amongst varying lawyers does not amount to ineffective assistance of counsel. — While another lawyer or other lawyers, had they represented the petitioner upon petitioner's trial, might have conducted petitioner's defense in a different manner, and might have exercised different judgments with respect to the matters referred to in the petition, the fact that petitioner's attorneys chose to try the petitioner's case in the manner in which it was tried and made certain decisions as to the conduct of the defense with which the petitioner and the petitioner's presently employed attorneys now disagree, does not require a finding that their representation of the petitioner was so inadequate as to amount to a denial to petitioner of the effective assistance of counsel. *Johnson v. Caldwell*, 228 Ga. 776, 187 S.E.2d 844 (1972); *Williams v. State*, 153 Ga. App. 192, 264 S.E.2d 715 (1980); *Chapman v. State*, 154 Ga. App. 532, 268 S.E.2d 797 (1980).

Decisions as to what witnesses to call and what motions to file are the exclusive province of the lawyer after consultation with the client. *Jackson v. State*, 167 Ga. App. 509, 306 S.E.2d 757 (1983).

Simply because other lawyers might have exercised different judgments and conducted the defendant's defense in a different manner does not require a finding that defense counsel's representation of the defendant was so inadequate as to amount to a denial of effective assistance of counsel. *Mason v. State*, 180 Ga. App. 235, 348 S.E.2d 754 (1986).

Competence of counsel was issue of fact and properly decided by trial court. — When a ground of the motion for new trial was that the attorney who was employed by the defendant and who represented the defendant upon the trial was of unsound mind and incompetent to try the case, and was supported by the affidavits of two lawyers, and the state made a countershowing by introducing affidavits of four lawyers to the effect that the attor-

ney was of sound mind and was skilled and competent, an issue of fact for decision by the trial judge was presented, and the judge's decision thereon would not be disturbed by the Supreme Court. *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Frady v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955).

Defendant must make affirmative showing of counsel's incompetency.

— Because the defendant failed to support an ineffective assistance of counsel claim with affirmative evidence showing an infringement of rights or a procedural irregularity in the taking of a prior guilty plea, and the defendant failed to show that an objection by trial counsel to the introduction of the prior plea would have been successful, a claim that trial counsel was ineffective, thus warranting a new trial, lacked merit. *Lattimore v. State*, 282 Ga. App. 435, 638 S.E.2d 848 (2006).

Trial court properly denied the defendant's motion to withdraw the guilty plea to five counts of theft by taking as the defendant failed to show that counsel was ineffective by failing to show how counsel's alleged failure to review the evidence until shortly before trial either prejudiced the trial or influenced the defendant's decision to plead guilty. *Pruitt v. State*, 323 Ga. App. 689, 747 S.E.2d 694 (2013).

Ineffective counsel established as to one charge but not as to other.

— Because the defendant presented sufficient evidence to show that trial counsel was ineffective in failing to stipulate to the defendant's felon status or to obtain a jury charge limiting the jury's consideration of the defendant's criminal history, such failures prejudiced the defendant's defense sufficiently to require a new trial on a charge of aggravated assault; however, given the defendant's admission to possessing a gun at the time of the altercation, no prejudice resulted to warrant reversal and a new trial on the possession of a firearm by a convicted felon conviction. *Starling v. State*, 285 Ga. App. 474, 646 S.E.2d 695 (2007).

A new trial based on counsel's alleged ineffectiveness was properly denied because the defendant's numerous claims of

ineffective assistance of counsel lacked merit; the defendant failed to show that: (1) the number of different instructions sought; (2) any additional investigation or preparation; (3) an objection to evidence of the prior difficulties between the defendant and the victim, and request for a contemporaneous limiting instruction; and (4) a request for an instruction on a defense not alleged, would have changed the outcome of the trial, and the tactical decision as to which defense to pursue was part of a reasonable trial strategy. *Breazeale v. State*, 290 Ga. App. 632, 660 S.E.2d 376 (2008).

Because the defendant failed to show that trial counsel was ineffective in failing to request jury voir dire to determine whether jurors had seen the defendant wearing handcuffs, and because sufficient evidence supported the defendant's burglary conviction to make a directed verdict of acquittal unnecessary, a motion for a new trial was properly denied. *Brown v. State*, 289 Ga. App. 297, 656 S.E.2d 582 (2008).

Because the trial court was entitled to believe counsel's testimony at the hearing on the motion for new trial that counsel advised the defendant of the right to testify at trial and that counsel met numerous times with the defendant, with ample opportunity to discuss all aspects of the case with counsel, the defendant's ineffective assistance of counsel claim in support of a motion for a new trial had to be rejected. *Warren v. State*, 283 Ga. 42, 656 S.E.2d 803 (2008).

Court of appeals rejected the defendant's ineffective assistance of counsel claim, because, even if: (1) the arrest warrant had been excluded; (2) two witnesses had been cross-examined regarding their identification of the defendant as the shooter; and (3) the nontestifying eyewitnesses' statements had not been relayed to the jury by the police officer, there was no reasonable probability that the defendant would have been acquitted of both crimes. *Bradley v. State*, 283 Ga. 45, 656 S.E.2d 842 (2008).

Ineffective counsel not shown. — A new trial was unwarranted because: (1) the decision not to present the defendant's love interest as an alibi witness was

clearly strategic, and thus, could not serve as the basis for an ineffectiveness claim; and (2) counsel's alleged failure to specifically object to the victim's testimony on bolstering and not on leading and speculation grounds impermissibly expanded the enumerated error. *Scott v. State*, 288 Ga. App. 738, 655 S.E.2d 326 (2007).

Since defendant's trial counsel testified at the hearing on defendant's motion for a new trial as to the strategic reasons counsel had for taking certain actions that counsel did in the defense of defendant and counsel's explanations were supported by the record, defendant did not show that counsel rendered ineffective assistance of counsel in defending the defendant because no showing was made that counsel performed deficiently. *Glenn v. State*, 279 Ga. 277, 612 S.E.2d 478 (2005).

Defendant's motion for a new trial was properly denied because defendant did not establish that defendant received ineffective assistance of counsel. Defendant was aware of all of the charges against the defendant, defendant did not inform counsel that there were jurors that defendant wished to have stricken, it was sound trial strategy to not cross-examine the witness because the witness's testimony would have hurt defendant, counsel did not request a charge on the voluntariness of defendant's confession because it contradicted the defense of coercion, the evidence adequately demonstrated that defendant was intoxicated when defendant committed the assault and robbery, and the discrepancy in the victim's testimony regarding the car the perpetrator drove was not material since defendant confessed to the crime. *Blocker v. State*, 265 Ga. App. 846, 595 S.E.2d 654 (2004).

Because trial counsel's actions involved strategic decisions or failed to harm defendant and defendant could only pursue a claim against appellate counsel through a habeas corpus proceeding, defendant did not carry the burden of proving ineffective assistance. *Miller v. State*, 273 Ga. App. 171, 614 S.E.2d 796 (2005), cert. denied, 2007 Ga. LEXIS 90 (Ga. 2007).

Despite the fact that defendant failed to satisfy defendant's responsibility under the Rules of the Georgia Court of Appeals after a review of the record in the appel-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****A. In General (Cont'd)**

late court's discretion, defendant's claim of ineffective assistance of counsel failed as defendant's trial counsel's stipulation to a witness's prior testimony, made under oath, before the judge, and subject to trial counsel's searching cross-examination on defendant's behalf regarding this same case, did not constitute an unreasonable or incompetent strategy. *Stuart v. State*, 274 Ga. App. 120, 616 S.E.2d 855 (2005).

Because, *inter alia*, defendant's counsel requested a full and complete recollection of the trial, there was no evidence that a change of venue was warranted, counsel thoroughly investigated the case, and there was no evidence of prosecutorial misconduct, defendant failed to demonstrate any deficiency by trial counsel or that defendant was prejudiced thereby. *Hampton v. State*, 279 Ga. 625, 619 S.E.2d 616 (2005).

Despite defendant's numerous claims of ineffective assistance of counsel, none had merit as counsel was not ineffective in failing to: (1) raise a statute of limitations defense concerning the conviction for voluntary manslaughter; (2) challenge the constitutionality of O.C.G.A. § 17-2-2(h); (3) object to testimony by defendant's former spouse that defendant was a beneficiary of the victim's life insurance policy; (4) make a contemporaneous objection to the prosecutor's comment in opening argument that defendant failed to contact the police, as such would have been meritless; (5) object to inadmissible evidence of defendant's bad character; (6) request a limiting similar transaction instruction contemporaneously with the testimony of the similar acts; (7) object when the prosecutor gave a personal opinion as to defendant's guilt; (8) object to testimony and argument as to defendant's future dangerousness; (9) file a motion to suppress statements defendant made to law enforcement after the defendant retained counsel; (10) request a jury charge with respect to the potential motive, interest, or bias of the state's witnesses; (11) object when a state's witness testified to the

witness's belief of the veracity of another witness; (12) reserve objections to the final charge of the trial court; and (13) object to the prosecutor's argument of facts not in evidence. *Glidewell v. State*, 279 Ga. App. 114, 630 S.E.2d 621 (2006), overruled on other grounds, *Reynolds v. State*, 285 Ga. 70, 673 S.E.2d 854 (2009).

Defendant's ineffective assistance of counsel claim was rejected as the defendant's broad assertions that trial counsel was not adequately prepared, provided weak advocacy, engaged in superficial cross-examination, and failed to object to certain testimony regarding trial tactics. *Brown v. State*, 280 Ga. App. 884, 635 S.E.2d 240 (2006).

Trial court did not err in denying the defendant a new trial on grounds that trial counsel was ineffective as the defendant failed to show that the outcome of the trial would have been different if counsel would have: (1) filed a motion for funds to hire an expert on the reliability of cross-racial eyewitness identification and proffer what the testimony of this expert would have been; (2) verified that funds had been withdrawn from the respective ATM machines on the date of the crime or ascertain whether surveillance cameras might have refuted the state's evidence that the defendant was in the carjacked vehicle; and (3) proffered favorable testimony the defendant alleged could have been provided by the two victims suggesting complicity. *Pringle v. State*, 281 Ga. App. 230, 635 S.E.2d 843 (2006).

Because the defendant failed to show that trial counsel was ineffective in failing to remove biased jurors from the panel, object to the admission of a shotgun shell and jewelry that were the subject of the motion to suppress, and properly address material inconsistencies in one codefendant's testimony, the defendant's ineffective assistance of counsel claims lacked merit. *Vega v. State*, 285 Ga. App. 405, 646 S.E.2d 501 (2007).

Because trial counsel was not ineffective in: (1) failing to seek suppression of criminal acts which took place in other jurisdictions and to which the defendant was connected because they were part of the crime spree that began with the murder of the victim, as such was admissible;

(2) failing to seek a mistrial when an objection to the state's opening statement, although overruled, had some merit; (3) failing to object to jury instructions on mere presence and parties to a crime, as the charges were correct statements of the law and supported by the evidence; (4) making statements in closing argument that were actually in furtherance of the defense's theory of the case; (5) entering into a stipulation with the prosecutor; and (6) failing to move for a directed verdict of acquittal, as the evidence supported the defendant's convictions, the defendant's ineffective assistance of counsel claims lacked merit. *Pruitt v. State*, 282 Ga. 30, 644 S.E.2d 837 (2007).

Because the defendant failed to identify any defense strategy that trial counsel failed to pursue, the defendant failed to carry the burden of showing either deficient performance by counsel or any resulting prejudice that had to be established in order to succeed on a claim of ineffective assistance of counsel. *Zapien-Chavez v. State*, 285 Ga. App. 319, 646 S.E.2d 311 (2007).

Despite the defendant's contrary claims, trial counsel was not ineffective in failing to subpoena witnesses necessary to support a defense and failing to adequately raise all issues in the defendant's motion to suppress and motion for independent analysis of the suspected narcotics as: (1) the defendant failed to supply sufficient information about the whereabouts of the witnesses; (2) the defendant failed to produce those witnesses at the motion for a new trial hearing; (3) counsel's strategy in handling the suppression motion showed an appropriate exercise of discretion; and (4) under the theory of defense presented, counsel was not ineffective by failing to obtain an independent examination of the substance tested. *McTaggart v. State*, 285 Ga. App. 178, 645 S.E.2d 658 (2007).

The trial court properly denied the defendant a new trial based on numerous claims of ineffective assistance of trial counsel as counsel was not ineffective in failing to: (1) make meritless objections; (2) raise what was considered a novel legal argument; (3) file futile motions that would not have changed the outcome of

trial; (4) require corroboration of the defendant's confession; and (5) anticipate that the defendant's wife might mislead the defense; moreover, the defendant's claim that counsel was inadequately prepared for trial was belied by the record. *Daly v. State*, 285 Ga. App. 808, 648 S.E.2d 90 (2007), cert. denied, 2007 Ga. LEXIS 659 (Ga. 2007); 553 U.S. 1039, 128 S. Ct. 2441, 171 L. Ed. 2d 241 (2008).

Defendant was not entitled to a new trial based on claims of the ineffective assistance of trial counsel as the only evidence offered to support this claim was the defendant's own hearsay testimony as to what the desired witnesses were expected to testify to at trial, and such evidence was insufficient; further, defendant failed to show that counsel's decision to forgo calling such witnesses was unreasonable. *Brigman v. State*, 282 Ga. App. 481, 639 S.E.2d 359 (2006).

Defendant's ineffective assistance of counsel claims were without merit, because counsel: (1) adequately explained the decision not to call the defendant's spouse; (2) adequately met with the defendant to discuss the trial strategy and regarding the defendant's decision to waive the right to a jury trial; and (3) had reason to decline objection to the admission of an audio recording of the colloquy between the officers and the defendant at the scene, as that decision supported counsel's trial strategy. *Defrancisco v. State*, 289 Ga. App. 115, 656 S.E.2d 238 (2008).

Defendant's ineffective assistance of counsel claims lacked merit because: (1) the evidence supported the defendant's convictions, and thus a directed verdict was unwarranted; (2) Georgia law did not authorize a judgment notwithstanding the verdict in criminal cases; and (3) the defendant failed to show that counsel's representation and trial strategy was patently unreasonable. *Arellano v. State*, 289 Ga. App. 148, 656 S.E.2d 264 (2008).

Defendant did not prove that trial counsel was ineffective when the defendant did not cite to any facts in the record to support the claim, when the defendant failed to present any admissible evidence regarding what an alleged alibi witness would have said if counsel had called the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****A. In General (Cont'd)**

witness to testify at trial, and when contrary to the defendant's claim, counsel cross-examined the victim about past drug convictions. Moreover, even if counsel was ineffective, the evidence of the defendant's guilt was overwhelming, so the defendant did not show prejudice. *Rouse v. State*, 295 Ga. App. 61, 670 S.E.2d 869 (2008).

Defense counsel's failure to object or move for a mistrial based on the state's introduction of evidence relating to a witness's misconduct that fell short of a conviction was not ineffective assistance under circumstances in which counsel's decisions not to object to the state's pursuit of the topic of the witness's misdemeanor driving violations, and to attempt to rehabilitate the defendant by showing the minor nature of one of them, were objectively reasonable; when the state broached the subject of the witness's incarceration just before the night in question, it might have gone on to uncover proof of that fact, which would have been admissible as contradictory of the witness's testimony that the witness was in the car with the defendant on the night before the defendant's arrest. Defense counsel could not have been faulted for failing to complete the state's work for it, or for declining to highlight any of this testimony. *Noellien v. State*, 298 Ga. App. 47, 679 S.E.2d 75 (2009).

Although the defendant's prior convictions might or might not have been actually admissible against the defendant under former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609), trial counsel's belief in that regard was only one of several reasons for advising the defendant not to testify; thus, evidence supported the trial court's finding that such advice was not deficient performance. *Clements v. State*, 299 Ga. App. 561, 683 S.E.2d 127 (2009).

Denial of the defendant's motion to withdraw defendant's guilty plea to possession of cocaine with intent to distribute was appropriate because the defendant

did not prove that the defendant received ineffective assistance of counsel. The defendant never testified that, had the defendant proceeded to trial, the defendant wished to take the stand despite the defendant's extensive criminal history, nor did the defendant explain how the defendant or the defendant's lawyer could have made more effective use of a photograph had the defendant had more time to study the photograph prior to trial. *Sims v. State*, 299 Ga. App. 698, 683 S.E.2d 668 (2009).

Defendant failed to establish an ineffective assistance of counsel claim because, inter alia, with regard to counsel's failure to call various witnesses at trial, counsel testified at the motion for new trial hearing that counsel made a strategic decision not to call these witnesses as the witnesses' testimony would have undermined the defendant's justification defense at trial. *Rector v. State*, 285 Ga. 714, 681 S.E.2d 157, cert. denied, 558 U.S. 1081, 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009).

After defendant was convicted of aggravated child molestation, child molestation, three counts of aggravated sodomy, and two counts of contributing to the delinquency of a minor, the defendant was not entitled to a new trial based on counsel's performance; counsel's waiver of opening argument and decision to provide a brief closing statement were strategic determinations falling within the realm of trial tactics. Counsel discussed the discovery materials with defendant, prepared a trial notebook, and consulted with defendant while preparing to cross-examine the state's witnesses; counsel was not required to object to properly admitted evidence of similar transactions. *Bazin v. State*, 299 Ga. App. 875, 683 S.E.2d 917 (2009).

Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial on the ground of ineffective assistance of counsel because the defendant did not show that: (1) the defense counsel was ineffective in failing to file a motion for immunity from prosecution/plea in bar based upon the defendant's claim of self-defense as it was a matter of trial strategy and the defendant could not demonstrate how the failure to

pursue such a claim harmed the defendant; (2) the defense counsel was ineffective in failing to request a jury charge on the use of force in defense of habitation; (3) the defense counsel was ineffective in failing to test the thoroughness and good faith of the State of Georgia's investigation; (4) the defense counsel was ineffective in failing to adequately investigate the case or meet with the defendant prior to trial; and (5) the defense counsel was ineffective in failing to interview and cross-examine the prosecution's witnesses as the defendant did not establish a reasonable probability that further interviews and cross-examination would have resulted in a different outcome at trial. *Smith v. State*, 309 Ga. App. 241, 709 S.E.2d 823 (2011), cert. denied, No. S11C1266, 2011 Ga. LEXIS 954 (Ga. 2011).

During the defendant's trial for child molestation and sexual exploitation of children, defense counsel was not ineffective for failing to properly follow-up on other cases involving the child victims because there was only one other instance involving the children and the allegations were that their mother's new husband had touched the children improperly while bathing the children; there was no evidence in the record to show that the allegations were false, and it appeared that that was a separate case that was being investigated at the time of trial. *Vaughn v. State*, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

Defendant's trial counsel did not represent the defendant under an impermissible conflict of interest because the representation of a testifying witness in a prior case was by another attorney in the public defender's office, not the defendant's counsel, and the prior representation was concluded and was wholly unrelated to the defendant's case. Furthermore, the defendant's attorney did not impeach the witness because the testimony of the witness was not harmful to the defendant. Finally, the defendant also failed to establish deficient performance based upon any alleged failure of the defendant's attorney to object to the admission of a DVD containing a recording of a five-hour police interview with an accomplice as this decision

was part of the defense attorney's trial strategy and the trial court gave a curative instruction to the jury stating that the jury had to disregard any police statements in the recording opening on the character of the defendant. *Moon v. State*, 288 Ga. 508, 705 S.E.2d 649 (2011).

Defendant did not demonstrate either a Fifth Amendment or Sixth Amendment violation because the defendant made no showing of deficient performance by appointed defense counsel and pointed to no particular instance manifesting a conflict with counsel; because counsel did not entirely fail to subject the prosecution's case to meaningful adversarial testing, the defendant was not constructively denied counsel. *Smith v. State*, 312 Ga. App. 174, 718 S.E.2d 43 (2011).

In light of the defendant's statements to the police that placed the defendant at the scene of a crime and showed that the defendant carried a gun, the defendant was not prejudiced by trial counsel's explanation of the defendant's right to testify and explanation regarding the potential benefits of testifying. *Lytle v. State*, 290 Ga. 177, 718 S.E.2d 296 (2011).

Because a search warrant affidavit established probable cause even without the representation that the affiant saw the informant buy drugs from the defendant, and because the state introduced sufficient corroborating evidence of an accomplice's testimony that the drugs found in the basement of the house belonged to the defendant, the defendant failed to show that trial counsel was ineffective in failing to file a motion to suppress or request a jury charge on accomplice testimony. *Dickerson v. State*, 312 Ga. App. 320, 718 S.E.2d 564 (2011).

Because the testimony by defendant's accomplices, a confidential informant, and the officer who participated in the drug sale, in conjunction with the audio and video tapes of the transaction, overwhelmingly established the defendant's guilt, there was no reasonable probability that the outcome of the trial would have been any different; consequently, the defendant failed to show that trial counsel was ineffective. *Williams v. State*, 312 Ga. App. 693, 719 S.E.2d 501 (2011).

Defendant failed to prove ineffective as-

Benefit of Counsel (Cont'd)**5. Effective Assistance of Counsel (Cont'd)****A. In General (Cont'd)**

sistance of counsel because the defendant did not show that the result of the defendant's trial would have been different if the defense counsel had provided argument to support a motion for directed verdict, or if the counsel had been fully aware of the defendant's immigration status. *Medrano v. State*, 315 Ga. App. 880, 729 S.E.2d 37 (2012).

Although the defendant contended the defendant's trial counsel was ineffective because the defendant chose to pursue a theory of defense in which the defendant argued that the defendant was unaware that the defendant was being arrested and, thus, could not have knowingly resisted, instead of pursuing a defense in which the defendant argued that defendant legally resisted an unlawful arrest, counsel's decision as to which theory of defense to pursue is a matter of strategy and tactics; and, as a general rule, matters of tactics and strategy, whether wise or unwise, did not amount to ineffective assistance of counsel. Defendant had not shown that counsel's strategy was so patently unreasonable that no competent attorney would have chosen that strategy. *Zeger v. State*, 306 Ga. App. 474, 702 S.E.2d 474 (2010).

Defendant failed to show that trial counsel was ineffective because counsel made a strategic decision not to make a frivolous objection to identification testimony, failure to object to admissible evidence was not ineffective assistance, and a motion to sever the defendant's trial from that of a codefendant would not have been successful. *Jackson v. State*, 316 Ga. App. 80, 729 S.E.2d 404 (2012).

Because mere allegations, without evidence explaining how trial counsel's alleged failures affected the outcome of the trial, could not support the defendant's ineffective assistance of counsel claims, and counsel's reasons for not objecting to an officer's testimony amounted to trial strategy, the defendant's claims were rejected on appeal. *Slaughter v. State*, 282 Ga. App. 276, 638 S.E.2d 417 (2006).

B. Obligations of Counsel

Joint representation. — When three of four defendants each confirmed, on the record, that the defendants had discussed the case thoroughly with their counsel, and each stated that there were no conflicts of interest and each of them also stated that they were satisfied to proceed with one counsel representing all three of them, and since the trial court's decision to allow one counsel to represent the three was based on their statements to the court, if any error occurred, it was induced by these defendants' statements and induced error is impermissible. Accordingly, it was not error under the circumstances to allow one attorney to represent three of the four defendants, and the multiple representation did not result in ineffective assistance of counsel. *Shirley v. State*, 166 Ga. App. 456, 304 S.E.2d 468, cert. vacated, 251 Ga. 544, 307 S.E.2d 491 (1983).

Since counsel's testimony contradicted the defendant's regarding the nature and quantity of consultation and counsel's decision not to consider a co-indictee as a valuable witness was strategic or tactical, the defendant's guilty plea was not void due to ineffective assistance of counsel. *McCutchen v. State*, 276 Ga. 532, 579 S.E.2d 732 (2003).

Trial counsel did not provide ineffective assistance of counsel under the Sixth Amendment since: (1) trial counsel jointly represented defendants, a husband and a wife; (2) the trial court questioned the defendants about the joint representation and they testified that they understood the potential problems with joint representation; (3) any error was induced by the defendants; (4) there was no evidence that defendant husband would have been offered a better deal if he had testified against defendant wife; and (5) defendant wife's argument that trial counsel was unable to argue that the methamphetamine in the safe belonged to the defendant husband completely ignored the defendant wife's testimony that she put the methamphetamine in the safe and that her husband was lying to protect her, and the notes about the various drug sales. *Christopher v. State*, 262 Ga. App. 257, 585 S.E.2d 107 (2003).

Trial counsel was not ineffective be-

cause counsel initially represented second defendant as well as third defendant when counsel withdrew from representing both defendants after counsel sensed a potential conflict. *Baggs v. State*, 265 Ga. App. 282, 593 S.E.2d 734 (2004).

Trial counsel's failure to file a motion to sever a defendant's case from a codefendant's did not amount to ineffective assistance of counsel; since trial counsel testified that counsel made a tactical decision not to file a motion to sever after consultation with the defendant, and since the defendant had not shown that defendant would have benefited from a separate trial, there was evidence to support the trial court's conclusion that trial counsel rendered effective assistance. *Hubbard v. State*, 274 Ga. App. 184, 617 S.E.2d 167 (2005).

Codefendant was not denied effective assistance of counsel in a case in which the codefendant and defendant were represented by different attorneys from the same public defender's office as no actual conflict of interest developed and the codefendant did not show that the codefendant's attorney would have done anything differently to defend the codefendant had the same office not been representing both defendants or that any conflict of interest impaired the codefendant attorney's performance; the codefendant's claim that the codefendant did not knowingly waive on the record any conflicts of interest stemming from the joint representation was rejected as the codefendant failed to show that an actual conflict of interest resulted from the joint representation. *Burns v. State*, 274 Ga. App. 687, 618 S.E.2d 600 (2005), *aff'd*, 281 Ga. 338, 638 S.E.2d 299 (2006).

Since the defendant did not object at trial to defense counsel's joint representation of the defendant and a codefendant, the defendant was required to demonstrate that an actual conflict of interest adversely affected defense counsel's performance in order to establish a claim of ineffective assistance of counsel based on the joint representation; because there was no testimony to the contrary, an appellate court presumed that counsel's actions were strategic and fell within the wide range of reasonable professional as-

sistance. *Kendrick v. State*, 279 Ga. App. 263, 630 S.E.2d 863 (2006).

With regard to defendant's convictions for first degree arson, criminal damage to property in the second degree, threatening a witness in an official proceeding by unlawfully causing economic harm to a family member, and use of intimidation with the intent of influencing a witness to change the witness's testimony in an official proceeding, the defendant was not denied the right to legal representation free from conflicts of interest because the defendant's attorney also represented the codefendant as the defendant's alibi defense was not inconsistent with codefendant's, rather, the alibis were corroborative of each other and mutually supportive since the defendant and the codefendant both stated that each returned to the codefendant's house without incident and the defendant thereafter went to the defendant's parent's house. The defenses were synergistic rather than antagonistic, and the representation by the same attorney did not give rise to any conflict of interest, potential or actual. *Shelnutt v. State*, 289 Ga. App. 528, 657 S.E.2d 611 (2008), *cert. denied*, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

Habeas court did not err in granting the appellee's petition for writ of habeas corpus because there was no error in the habeas court's finding of an actual conflict of interest that adversely affected plea counsel's performance since the fact that the codefendant alone was paying counsel's fees created a strong incentive for counsel to prioritize the codefendant's interests in the matter over the appellee's interest, and counsel not only failed to pursue an alternative defense theory on behalf of the appellee, counsel failed even to recognize the possibility that one could exist; even though the appellee and the codefendant pursued a unified defense in that their accounts of the incident were consistent, the record reflected that the appellee was the less culpable of the two in the crime, as it appeared that the appellee's participation was limited to the role of a passive witness who happened to be driving when the codefendant initiated the brief, apparently unpremeditated interaction with the victim. *State v.*

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

Mamedov, 288 Ga. 858, 708 S.E.2d 279 (2011).

Advising on the right to testify. — Because defendant failed to show that counsel was ineffective for failing to advise on the right to testify and by failing to object to the admission of certain hearsay testimony by child witnesses, the trial court did not err in denying defendant's motion for new trial. *Brock v. State*, 270 Ga. App. 250, 605 S.E.2d 907 (2004).

No Georgia authority existed for expanding the constitutional obligation to advise the defendant of the right to testify to require counsel to "re-advise" the defendant of the right to testify after the state presented rebuttal evidence. *Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

Trial counsel was not ineffective for pressuring defendant into waiving defendant's right to testify as the trial court painstakingly informed defendant that defendant had a right to testify and that the decision was up to the defendant, not defendant's counsel; further, defendant was given the night to make a decision and affirmed defendant's intention not to testify the next day. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

Counsel did not provide ineffective assistance by not adequately advising the defendant of the right to testify, as the record showed that counsel discussed the issue both before and at trial and advised the defendant to avoid cross-examination, as the defendant had made a complete statement to the police which was played for the jury. *Giddens v. State*, 276 Ga. App. 353, 623 S.E.2d 204 (2005).

Advice of counsel as to whether or not to testify was trial strategy generally not subject to challenge for ineffectiveness, and since the defendant presented no evidence that defense counsel prevented the defendant from making the decision about testifying, the defendant failed to show ineffective assistance of counsel; additionally, the defendant failed to show how the defense case was prejudiced by having a codefendant's attorney at counsel table or

how the refusal of the trial court to allow defendant access to the victim's email prejudiced the defense. *King v. State*, 279 Ga. App. 302, 630 S.E.2d 905 (2006).

Defendant's claim that counsel provided ineffective assistance of counsel by failing to adequately advise the defendant of the defendant's right not to testify failed as the defendant did not rebut the presumption that counsel acted as an effective legal representative and properly advised the defendant of the defendant's rights since there was no testimony that counsel failed to inform the defendant of the defendant's constitutional rights or the risks of testifying. *Mayberry v. State*, 281 Ga. 144, 635 S.E.2d 736 (2006).

Defendant did not receive ineffective assistance of counsel as the defendant followed the trial counsel's advice not to testify; the trial counsel did not improperly prevent the defendant from doing so. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

Appeals court rejected the defendant's claims that trial counsel forced the defendant into testifying without adequately preparing the defendant to do so, as that claim was refuted by counsel's contrary testimony, which the trial court was authorized to believe. *Thomas v. State*, 285 Ga. App. 290, 645 S.E.2d 713 (2007), cert. denied, 2007 Ga. LEXIS 610 (Ga. 2007).

Defense counsel was not ineffective for advising a defendant not to testify on the defendant's own behalf because the defendant lied to counsel about two other men killing the victim and defense counsel found that the evidence did not support that claim. *Hamilton v. State*, 297 Ga. App. 47, 676 S.E.2d 773 (2009).

Defendant failed to make a case for the ineffective assistance of trial counsel because trial counsel could hardly be found to be deficient for not considering the defendant as a key witness in the defendant's own defense and for having to move forward with defendant's defense without the defendant's cooperation; trial counsel testified that counsel went to the jail to visit the defendant perhaps two or three times and then ceased to do so because the defendant refused to answer most of counsel's questions, would not give counsel defendant's version of events, would not

help with the defense, and told counsel that the defendant did not want to talk to counsel. *Sanford v. State*, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

Trial counsel was not ineffective for advising the defendant not to testify because the defendant acknowledged that counsel told the defendant that the defendant would cause more damage to the defendant's case if the defendant testified and acknowledged trusting counsel thereby choosing not to testify; even assuming that trial counsel did advise the defendant that the defendant could be impeached by certain evidence and that such advice was incorrect, the defendant did not show that the defendant was prejudiced thereby because the defendant never said what the defendant's testimony would have been had the defendant testified at trial. *Johnson v. State*, 290 Ga. 382, 721 S.E.2d 851 (2012).

Advising on the right to jury trial. — Defendant failed to show ineffective assistance for advising the defendant to waive a jury trial and not to testify because trial counsel discussed the advantages and disadvantages of waiving a jury, filed the waiver of jury trial form with defendant's understanding and consent, and the defendant made the decision not to testify at the close of the state's case. *Wroge v. State*, 278 Ga. App. 753, 629 S.E.2d 596 (2006).

On a claim that trial counsel was ineffective in advising a defendant to waive the right to a jury trial, the proper inquiry is whether the defendant has demonstrated a reasonable probability that the outcome of the proceeding would have been different had the defendant not waived the right to a jury trial on advice of counsel. Given the strength of the evidence against the defendant, the defendant failed to demonstrate a reasonable probability that the outcome of the trial would have been different if tried before a jury; accordingly, the defendant's claim that counsel was ineffective in advising the defendant to waive a jury trial failed. *Hendrix v. State*, 284 Ga. 420, 667 S.E.2d 597 (2008).

In a defendant's prosecution for criminal trespass, ineffective assistance of

counsel was not shown because trial counsel testified that counsel had discussed the issue of whether or not to waive a jury trial in counsel's initial consultation with the defendant and the defendant's parent and received no indication that the defendant did not understand the defendant's rights. *Thomas v. State*, 297 Ga. App. 416, 677 S.E.2d 433 (2009).

Advice to waive jury trial. — Counsel was not ineffective for advising a murder defendant to waive the right to a jury trial. This advice was based on reasonable trial strategy as the defendant testified that counsel believed that a judge, having been exposed to cases involving similar violence, would be more lenient than a jury; moreover, the defendant's acquittal of murder and conviction on the lesser offense of voluntary manslaughter strongly supported the conclusion that counsel was effective, and the defendant was advised by the trial court that the decision to waive a jury trial rested with the defendant. *Smith v. State*, 291 Ga. App. 725, 662 S.E.2d 817 (2008).

Failure to challenge arrest warrant. — Defendant's plea counsel did not render ineffective assistance of counsel by failing to challenge the legality of arrest warrants because all four of the supporting affidavits unquestionably satisfied the requirements of O.C.G.A. § 17-4-41(a), and based on the information provided in the supporting affidavits, the officer in the case supplied the issuing magistrate with sufficient information to support an independent finding that probable cause existed for the issuance of the warrants; the defendant failed to demonstrate that the defendant's plea counsel's failure to challenge the legality of the warrants prejudiced the defendant because even if counsel had challenged the warrants and was able to suppress any inculpatory statement the defendant made, there was nothing to suggest that the defendant's guilty plea resulted from such a statement. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Failure to file plea in abatement to dismiss arrest warrant and indictment. — Defendant failed to show that the defendant received ineffective assistance of counsel due to trial counsel's

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

failure to file a plea in abatement to dismiss an arrest warrant and an indictment because the allegedly inaccurate and incomplete information in the affidavit supporting the warrant did not suggest an intentional or reckless falsehood on the part of the affiant and was not necessary to a finding of probable cause. *Jones v. State*, 287 Ga. 770, 700 S.E.2d 350 (2010).

Failure to challenge indictment. — Defendant failed to prove that both defendant's appointed and retained counsel were ineffective since it was not error for the defendant's appointed counsel not to file a demurrer challenging certain counts of the indictment, and the defendant's retained lawyer consulted with the defendant on numerous occasions, thoroughly investigated the case, and was fully prepared for trial. *Silvers v. State*, 278 Ga. 45, 597 S.E.2d 373 (2004).

Trial counsel did not provide ineffective assistance of counsel by failing to move to quash the indictment as the failure to raise a meritless motion could not constitute ineffective assistance of counsel. *Hall v. State*, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

Because the indictment complied with O.C.G.A. § 16-8-41(a), counsel was not ineffective for not challenging it. *Smith v. State*, 274 Ga. App. 568, 618 S.E.2d 182 (2005).

Since the record showed that the victim could not recall the exact dates when the events alleged in the indictment occurred, the state was not able to identify a specific date for the offenses, and the defendant offered no other evidence that the indictment was imperfect in form or substance or that the defendant's ability to present a defense was impaired, the defendant failed to establish that a special demurrer would have been successful or that defense counsel's failure to file such pleading before trial affected the outcome of the proceedings. Therefore, the defendant's ineffective assistance claim lacked merit. *Berman v. State*, 279 Ga. App. 867, 632 S.E.2d 757 (2006).

Despite an inmate's claim to the contrary in a petition for habeas relief, trial counsel was not ineffective in not contesting the failure of the indictment to state venue, by inducing the inmate's guilty plea, in failing to advise the inmate of the inmate's Boykin rights, by failing to object to the prosecutor's conduct at the plea hearing, and by failing to advise the inmate about parole eligibility. *Wright v. Hall*, 281 Ga. 318, 638 S.E.2d 270 (2006).

Defense counsel's performance was deficient in failing to challenge the defendant's charge of possession of a firearm by a convicted felon on the basis that the indictment erroneously alleged that the crime was committed on a date after the indictment was issued; since this was the second time the defendant had been indicted for that offense, if trial counsel had timely challenged that count, any future prosecution for that crime would have been barred, and thus prejudice to the defendant was shown. *Langlands v. State*, 280 Ga. 799, 633 S.E.2d 537 (2006).

In a child molestation prosecution, since the defendant did not show that the state could have identified a specific date of the crimes in the indictment, or that the state's failure to do so prejudiced the defense, trial counsel's failure to pursue a special demurrer to the indictment did not effect the outcome of the trial and hence was not ineffective assistance. *Stillwell v. State*, 294 Ga. App. 805, 670 S.E.2d 452 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. 2009).

Trial counsel was not ineffective in failing to challenge the felony murder count of an indictment because the indictment contained sufficient facts to put the defendant on notice that the defendant was accused of the death of the victim as a result of an aggravated assault when the indictment alleged a specific, offensive use of the defendant's hands and feet and that when the defendant's hands and feet were used in a particular way they were objects which were likely to and actually did result in serious bodily injury; the absence of self-defense, like general intent, did not have to be expressly alleged in an indictment, and even if some such allegation were necessary, language in the indictment asserting that defendant acted un-

lawfully and contrary to the laws of the state, the good order, peace and dignity thereof was sufficient. *Lizana v. State*, 287 Ga. 184, 695 S.E.2d 208 (2010).

Defendant's ineffective assistance claims failed because the defendant could not show deficient performance on the ground that defense counsel erroneously advised the defendant to enter a plea of guilty upon a defective indictment since the indictment was valid and sufficient. *Belcher v. State*, 304 Ga. App. 645, 697 S.E.2d 300 (2010).

Defendant failed to show that the defendant received ineffective assistance of counsel due to trial counsel's failure to file a plea in abatement to dismiss an arrest warrant and an indictment because the allegedly inaccurate and incomplete information in the affidavit supporting the warrant did not suggest an intentional or reckless falsehood on the part of the affiant and was not necessary to a finding of probable cause. *Jones v. State*, 287 Ga. 770, 700 S.E.2d 350 (2010).

Trial counsel was not ineffective for failing to challenge the validity of an indictment because pursuant to O.C.G.A. § 17-7-54 the indictment showed that it was a "True Bill," was signed by the grand jury foreperson, and was filed with the clerk's office with the clerk of the court's name prior to the defendant's arraignment, since the defendant and counsel signed the indictment; even if the defendant was able to show that counsel was deficient for failing to challenge an imperfect indictment, the defendant was unable to establish prejudice because the filing of a demurrer would not have prevented the state from reindicting and trying the defendant. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Because the armed robbery count of the indictment sufficiently alleged the elements of armed robbery, trial counsel was not ineffective for failing to challenge the armed robbery charge, and the trial court did not err in denying the defendant's motion for new trial as to the ineffective assistance claim; that the property was taken from the person or immediate presence of another is necessarily inferred from the allegation of a use of an offensive weapon to accomplish the taking, and the

alleged offense of "armed robbery" can be accomplished only via a taking from the person or immediate presence of another. *Patterson v. State*, 312 Ga. App. 793, 720 S.E.2d 278 (2011), cert. denied, No. S12C0574, 2012 Ga. LEXIS 327 (Ga. 2012).

Defendant failed to show that trial counsel's performance was deficient for not filing a demurrer to the count of the indictment charging the defendant with enticing a child for indecent purposes in violation of O.C.G.A. § 16-6-5(a) because the indictment alleged that the defendant enticed the victim to a place and penetrated the victim's vagina with the defendant's penis. *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Any attempt by trial counsel to file a demurrer to the count of an indictment charging the defendant with child molestation, O.C.G.A. § 16-6-4(a)(1), would have been futile because nothing in the child molestation statute specifically prohibited the state from prosecuting the defendant on the ground that the defendant engaged in sexual intercourse with the victim; while sexual intercourse is not an element of child molestation, an adult's act of sexual intercourse with a child falls within the parameters of the child molestation statute. *Burke v. State*, 316 Ga. App. 386, 729 S.E.2d 531 (2012).

Trial counsel was not ineffective for failing to file a special demurrer to the indictment because the defendant did not show that the length of the period in which the indictment alleged the crimes were committed materially affected the ability to present a defense; the charges against the defendant were based on funds the defendant retained, which were disbursed to the defendant on different dates and which related to the representation of specific indigent defense clients. *Clarke v. State*, 317 Ga. App. 471, 731 S.E.2d 100 (2012).

Failure to request a change of venue. — Trial counsel's failure to seek a change of venue on the ground of pretrial publicity as ineffective assistance of counsel since the only pretrial publicity shown in the record was a single newspaper article published the week before trial, did not amount to ineffective assistance since

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

there was no evidence that the trial's setting was inherently prejudicial or that the jury selection process showed actual prejudice. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Defendant was not denied effective assistance of counsel due to counsel's failure to move for a change in venue as there was no evidence that the trial's setting was inherently prejudicial or that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. *Moore v. State*, 274 Ga. App. 432, 618 S.E.2d 122 (2005).

Alleged failure of a defendant's trial counsel to present evidence in support of a motion for a change of venue in defendant's prosecution for malice murder did not demonstrate that the defendant received ineffective assistance of counsel; the defendant presented no evidence post-trial to suggest that the trial's setting was inherently prejudicial or that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible, and since a complete failure to make a motion for change of venue would not have constituted ineffective assistance of counsel under those circumstances, the failure to support the motion adequately likewise did not show ineffectiveness under those circumstances. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Defendant's ineffective assistance of counsel claim based on counsel's failure to move for a directed verdict as to venue was rejected as: (1) there was sufficient evidence of venue as to the obstructing a police officer and battery charges as they occurred when defendant was arrested, and an officer testified that the officer apprehended the defendant in Floyd County; (2) there was ample evidence that the robbery took place in Rome, but there was no testimony that Rome was in Floyd County, and the trial court did not take judicial notice of the City's location; and (3) if counsel had moved for a directed verdict based on venue, the trial court would have allowed the state to reopen its

case and to present additional evidence of venue. *Hinkle v. State*, 282 Ga. App. 328, 638 S.E.2d 781 (2006).

Trial counsel's failure to seek a change of venue on the ground of pretrial publicity as ineffective assistance of counsel failed since the only pretrial publicity shown in the record was a single newspaper article published the week before trial since there was no evidence that the trial's setting was inherently prejudicial or that the jury selection process showed actual prejudice. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Trial counsel was not ineffective for failing to object to venue. *Flanders v. State*, 285 Ga. App. 805, 648 S.E.2d 97 (2007).

Failure to object to venue. — Trial counsel's failure to object to venue could not constitute grounds for ineffective assistance because the state established venue. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Pretermitted whether the decisions not to move for a directed verdict for lack of venue and to stipulate to venue fell below the objective standard of reasonableness, the defendant could not prove that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Indeed, if defense counsel either moved for a directed verdict as to the lack of venue or decided against ultimately stipulating to venue, the trial transcript clearly showed that the state was prepared to reopen the evidence to recall a witness to prove venue. *Muldrow v. State*, 322 Ga. App. 190, 744 S.E.2d 413 (2013).

Failure to file transfer motion under § 15-11-30.5. — Given the children services department's opposition to transferring a mother's reunification plan to the county where the mother was living, and given that transfer is not mandatory under O.C.G.A. § 15-11-30.5, the mother's attorney was not deficient in failing to file a transfer motion. Moreover, since there were significant grounds for finding parental misconduct or inability other than the mother's failure to comply with the case plan, there was no reasonable probability that the trial court would not have terminated the mother's parental

rights had counsel successfully moved to transfer the plan to another county. In the Interest of C.G., 279 Ga. App. 730, 632 S.E.2d 472 (2006).

Failure to file motion to transfer. — Trial counsel did not provide ineffective assistance of counsel by failing to petition to have defendant's case transferred to juvenile court as defendant was 16 when the crime was committed; as the case involved an armed robbery, it could not be transferred to juvenile court. *Hall v. State*, 274 Ga. App. 842, 619 S.E.2d 344 (2005).

Failure to move to sever. — In an armed robbery prosecution, counsel's failure to move to sever the trial of defendant from that of the codefendant was not shown to be ineffective assistance because the defendants did not present antagonistic defenses, and there was no likelihood of confusion because there were only two defendants who acted in concert. *Shannon v. State*, 275 Ga. App. 550, 621 S.E.2d 540 (2005).

Because a codefendant's statements were non-custodial and were made in furtherance of a conspiracy, the trial court did not abuse its discretion in finding that the statements were admissible under O.C.G.A. § 24-3-5 and did not violate *Bruton*; consequently, defendant failed to demonstrate that counsel's failure to request a severance constituted ineffective assistance. *Hankerson v. State*, 275 Ga. App. 545, 621 S.E.2d 772 (2005).

Defendant's claim that defense counsel was ineffective in failing to request that the defendant's trial be severed from the codefendant's trial because the admission into evidence of the codefendant's recorded statement, which implicated the defendant, violated the Sixth Amendment right to confront the codefendant, failed because first, the codefendant testified before the jury and was subject to cross-examination, so the admission of the codefendant's statement was not, in fact, a *Bruton* violation, and, second, the codefendant's incriminating statement was made shortly after the crimes occurred, was made prior to arrest, and was a non-custodial statement to an acquaintance rather than police officers, so the statement was more properly characterized as an admissible declaration of a

co-conspirator, rather than a confession; further, the defendant's trial counsel provided several strategic reasons for choosing not to request a motion to sever, which did not form the basis for an ineffectiveness claim. *Williams v. State*, 280 Ga. 539, 630 S.E.2d 410 (2006).

Trial counsel's defense strategy in failing to move for severance of defendant's armed robbery trial from that of a codefendant did not amount to ineffective assistance of counsel, as such was reasonable, even if it wasn't successful, given that: (1) the jury was unlikely to confuse the evidence applicable to either defendants; (2) the defenses were not mutually antagonistic; and (3) the defendant might have actually benefitted from being able to point to the codefendant as being the controlling figure in the robberies. *Lee v. State*, 281 Ga. App. 479, 636 S.E.2d 547 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failure to request a bifurcated trial on felony murder in violation of O.C.G.A. § 16-5-1 and on possession of a firearm by a convicted felon in violation of O.C.G.A. § 16-11-131; because the possession count was a predicate offense for the felony murder count, the prior conviction that was admitted into evidence was relevant to the felony murder count, and it was not necessary to sever the possession count. *Wells v. State*, 281 Ga. 253, 637 S.E.2d 8 (2006).

The defendant's trial counsel was not ineffective by failing to move to sever a possession of a firearm by a convicted felon charge and in failing to object to the admission of the defendant's prior felony convictions, as: (1) the prior drug convictions were not objected to because they helped in the presentation of counsel's defense strategy that the defendant had a long history of drug problems, and was a drug addict and not an armed robber; and (2) the prior felonies were never read to the jury, there was no evidence that the jury members actually read the indictment, the indictment did not go out with the jury, and the court instructed the jury that they had to decide the case based on the evidence given to them. *Einglett v.*

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

State, 283 Ga. App. 497, 642 S.E.2d 160 (2007).

Defendant did not show that defense counsel was ineffective and thus was not entitled to withdraw the defendant's guilty plea; defense counsel did not file a motion to sever because a codefendant's motion to sever had already been denied, and even if defense counsel's failure to interview certain witnesses was deficient, the defendant did not show that but for the allegedly deficient performance the defendant would have proceeded to trial. *Moon v. State*, 286 Ga. App. 360, 649 S.E.2d 355 (2007).

Counsel's failure to seek severance of the defendant's trial from that of the driver of a car in which drugs were found did not constitute ineffective assistance. Trial counsel testified that counsel wanted the driver in the case so that counsel could "blame the drugs on" the driver, and this strategic decision did not constitute deficient performance. *Gresham v. State*, 295 Ga. App. 449, 671 S.E.2d 917 (2009).

In a defendant's prosecution for malice murder and cruelty to children, trial counsel was not ineffective for failing to move to sever the defendant's trial from that of the codefendant, the parent of the five-year-old victim, as such a decision was a matter of trial strategy and trial counsel was able to cross-examine the parent as to any hearsay statements regarding the defendant's prior difficulties with the victim. *Wright v. State*, 285 Ga. 57, 673 S.E.2d 249 (2009).

In a defendant's prosecution for armed robbery, trial counsel was not ineffective due to the abandonment of a motion to sever the defendant's trial from that of a codefendant. Defendant argued that severance from the defendant's codefendant would have prevented the introduction of a phone call made from the codefendant's phone to a taxi service from which a taxi driver who was robbed was dispatched, however the evidence would have been admissible against the defendant regardless of severance because the phone call

had been made in furtherance of a conspiracy. *Troutman v. State*, 297 Ga. App. 196, 676 S.E.2d 836 (2009).

Even if defense counsel's withdrawal of a motion to sever could be considered deficient performance, the defendant failed to establish ineffective assistance of counsel because the defendant failed to show that the defendant was prejudiced as the count the defendant argued should have been severed was against the defendant's codefendant, and the defendant failed to point to any evidence in the record that could plausibly support the defendant's contention that the jury might not have believed that the defendant, who was charged with armed robbery along with the codefendant, was not involved in the burglary that the codefendant was charged with committing. *Killings v. State*, 296 Ga. App. 869, 676 S.E.2d 31 (2009).

Defendant failed to show that the defendant's trial counsel rendered ineffective assistance by failing to file a motion to sever the defendant's trial from that of the codefendants because a motion to sever would have been futile since one of the codefendants filed a motion to sever the trial, and the motion was denied. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Defendant was not denied effective assistance of counsel, even though defendant's trial counsel failed to object to the joining of the defendant and the codefendant for trial, because trial counsel testified that the counsel had found no legal basis upon which to object to the joinder of the defendant's case with that of the codefendant. Furthermore, the trial counsel testified that the counsel did not object to the joinder or move later for severance as a matter of trial strategy because counsel believed that having the defendant tried with the codefendant enhanced the counsel's strategy of placing the blame on the codefendant as the codefendant gave a statement to the police that all of the narcotics found by the police belonged to the codefendant. *Smith v. State*, 309 Ga. App. 889, 714 S.E.2d 593 (2011).

Trial counsel's failure to renew a motion to sever did not constitute deficient performance because the strategic decision fell

within the wide latitude of presumptively reasonable conduct engaged in by trial attorneys; counsel testified that counsel did not renew the motion to sever because counsel had impeached the codefendant on cross-examination and believed that the trial court would not grant severance at that stage of the proceedings. *Glass v. State*, 289 Ga. 706, 715 S.E.2d 85 (2011).

Trial counsel did not render ineffective assistance by failing to move to sever the defendant's case from that of the codefendant because counsel testified that counsel did not move to sever since counsel believed that if the two defendants were tried together, the chances of the codefendant implicating the defendant would diminish; trial counsel further testified that counsel thought the dangers of severance outweighed any benefits and that, even with the benefit of hindsight, counsel would have made the same decision. *Anderson v. State*, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Defendant failed to show either that trial counsel performed deficiently in failing to request a bifurcated trial on the charge alleging possession of a firearm by a convicted felon or that the defendant was prejudiced because trial counsel chose as part of the trial strategy not to seek bifurcation, and due to the lack of evidence, the trial court granted a directed verdict on the firearm possession count. *Newkirk v. State*, 290 Ga. 581, 722 S.E.2d 760 (2012).

Trial counsel's failure to move to have the charge of possession of a firearm during the commission of a felony tried separately did not amount to ineffective assistance as the possession charge was an underlying felony for the felony murder counts and, therefore, bifurcation was not authorized. *Leonard v. State*, 292 Ga. 214, 735 S.E.2d 767 (2012).

Failure to request a competency hearing. — Trial counsel was not ineffective for failing to request a competency hearing as the decision was reasonable since counsel observed nothing to suggest "low or even moderate intelligence" and concluded that defendant was quite intelligent and capable of assisting with defendant's own defense; counsel testified that if counsel believed a competency evalua-

tion was required, counsel would have ensured that one was conducted. *Lewis v. State*, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

Because: (1) the record did not demonstrate that the defendant's sanity or competency was or should have been a significant issue at trial; and (2) the defendant failed to support an assertion that competency should have been raised, the defendant failed to prove the prejudice prong of an ineffective assistance of counsel claim due to counsel's failure to request an independent psychiatric examination. Thus, a new trial on this ground was unwarranted. *Jennings v. State*, 282 Ga. 679, 653 S.E.2d 17 (2007).

In an armed robbery prosecution, defense counsel was not ineffective for not evaluating the defendant's competency as: (1) the defendant had been evaluated in connection with another case and found competent; (2) a forensic evaluator met with the defendant and told counsel the defendant would be found competent; and (3) counsel testified that although the defendant's behavior was odd, the defendant was able to communicate and discuss trial issues with counsel. *Shabazz v. State*, 293 Ga. App. 560, 667 S.E.2d 414 (2008).

Habeas court correctly concluded that ineffective assistance of trial counsel could not be used to excuse the procedural default of the petitioner's claim that the petitioner was mentally incompetent during trial because the information that trial counsel then had available to them, including the information that trial counsel unreasonably failed to obtain, would not have led constitutionally effective counsel to pursue a claim of incompetence to stand trial and would not be reasonably probable to have resulted in a finding that the petitioner was incompetent had such a plea been pursued; the petitioner failed to prove that trial counsel rendered ineffective assistance regarding the petitioner's competence to stand trial because trial counsel withdrew the petitioner's plea of incompetence only after satisfying themselves that counsel was able to communicate effectively with the petitioner, and the trial court had an extensive opportunity to observe the petitioner in pre-trial

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

and trial proceedings and to interact directly with the petitioner, and the court did not see sufficient indications of incompetence to pursue further evaluation. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Trial counsel was not ineffective for failing to assess the defendant's competency to stand trial as counsel observed nothing that caused counsel to believe that the defendant was not competent. *Brinkley v. State*, 320 Ga. App. 275, 739 S.E.2d 703 (2013).

Defendant failed to show that trial counsel's deficient performance in failing to investigate whether the defendant was suffering from delusional compulsion at the time of the offense had a reasonable probability of altering the outcome of the defendant's trial; the defendant presented no evidence that the defendant was legally insane or suffering from delusional compulsion at the time of the offense or at any other time. *Hatfield v. State*, 321 Ga. App. 904, 743 S.E.2d 560 (2013).

Ineffectiveness for failure to request psychological examination. — Although the defendant claimed that the defendant's trial counsel was ineffective in failing to request a psychological examination, which allegedly would have shown that the defendant was not competent to knowingly, intelligently, and voluntarily enter a guilty plea, the defendant failed to offer the results of any mental evaluation at either of the hearings on the motion to withdraw the plea; as a result, the defendant could only have speculated that a mental evaluation would have shown that the defendant was not competent to enter a valid plea. Such speculation was insufficient to establish a reasonable probability that any deficient representation resulted in the defendant entering a guilty plea instead of insisting on a trial and did not establish ineffective assistance of counsel. *Frye v. State*, 298 Ga. App. 415, 680 S.E.2d 431 (2009).

Failure to have defendant psychiatrically evaluated. — With regard to a

defendant's conviction for statutory rape and two counts of child molestation involving a stepchild, the defendant's ineffective assistance of counsel claim as a result of failure to have the defendant evaluated for mental illness and incompetence before trial or before sentencing was rejected because defense counsel testified at the defendant's motion for a new trial hearing that: (1) defense counsel did not know of the defendant's alleged prior history of psychiatric problems; (2) the defendant appeared to understand the communications that defense counsel had with the defendant; and (3) defense counsel did not explore the need for a psychological evaluation of the defendant because defense counsel did not see it as an issue. *Haygood v. State*, 289 Ga. App. 187, 656 S.E.2d 541 (2008).

No error in failing to conduct competency hearing. — Trial court did not err in failing sua sponte to conduct a competency hearing to determine whether the defendant knowingly and intelligently waived the defendant's right to counsel because the information available and evidence presented to the trial court prior to trial provided no real indication that the defendant was incompetent to waive the defendant's right to counsel. *Walker v. State*, 288 Ga. 174, 702 S.E.2d 415 (2010).

Failure to file an answer. — After an accused failed to appear or otherwise file an answer in a condemnation proceeding filed against the accused in connection with the accused's arrest for possession of methamphetamine, and the accused failed to show that counsel was ineffective in failing to file an answer, the state was properly granted judgment. *Walters v. State of Ga.*, 269 Ga. App. 883, 605 S.E.2d 458 (2004).

Failure to seek to redact portion of prior plea. — Trial counsel was ineffective in failing to seek to redact the portion of a defendant's first offender plea that related to carrying a concealed weapon. The plea to carrying a concealed weapon, a misdemeanor, was not an element of the current charge of the possession of a firearm by a first offender probationer under O.C.G.A. § 16-11-131(b). *Cobb v. State*, 283 Ga. 388, 658 S.E.2d 750 (2008).

Failure to file motion to suppress. — Defense counsel did not provide ineffec-

tive assistance of counsel by failing to file a motion to suppress because the fact that the defendants were in a police car during the show-ups did not taint the identifications obtained and there was no evidence that the victims knew that the defendants were in handcuffs; further, there was nothing unfair in the officer's statements to the victims. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Defendant's counsel did not provide ineffective assistance of counsel for failing to file a motion to suppress a BB gun and tennis shoes seized from defendant's house as the failure to file a suppression motion did not constitute per se ineffective assistance of counsel and the defendant did not make a strong showing that the evidence, which was seized pursuant to a search warrant, would have been suppressed had a motion been filed. *Oliver v. State*, 273 Ga. App. 754, 615 S.E.2d 846 (2005).

Failure to file motion to suppress confession. — Defense counsel did not provide ineffective assistance of counsel by not moving to suppress defendant's confession on the ground that it was obtained pursuant to an illegal arrest that was not supported by probable cause because the arrest was supported by probable cause as the arresting officer had information which allowed a prudent person to believe that the defendant had committed a crime, so such a motion would have been futile. *Robinson v. State*, 276 Ga. App. 502, 623 S.E.2d 711 (2005).

Defendant failed to show that counsel rendered ineffective assistance by failing to seek suppression when the defendant did not show that the damaging evidence would have been suppressed if the motion had been prosecuted; further, there was overwhelming, undisputed evidence of the defendant's identity as the perpetrator, such that the result of the trial would not have been different if the items seized from the car and residence were suppressed. *Leppla v. State*, 277 Ga. App. 804, 627 S.E.2d 794 (2006).

Trial counsel was not ineffective for failing to file a motion to suppress evidence of cash found in defendant's pocket, as the motion would have been denied due to the officer's reasonable suspicion to

justify stopping defendant for an investigation and a permissible pat down for weapons before placing the defendant in the back of the patrol car. *Fitzgerald v. State*, 279 Ga. App. 67, 630 S.E.2d 598 (2006).

Failure to file motion to suppress defendant's statements. — Malice murder and accompanying life sentence were upheld on appeal because counsel was not ineffective for failing to make a motion to suppress defendant's two statements; attempting to suppress the first statement would have been futile because the defendant was not under arrest and not subject to a custodial interrogation, and the second statement was made after a waiver of Miranda rights. *Wiggins v. State*, 280 Ga. 627, 632 S.E.2d 80 (2006).

Because the defendant did not assert a possessory interest in a car in which the defendant was a passenger or in items seized from the car, the defendant failed to show that the defendant had standing to contest the admissibility of those items, and since it was also unclear what was known to the officer at time of the defendant's arrest, the defendant failed to establish ineffective assistance based on counsel's failure to file a motion to suppress those items. *Callahan v. State*, 280 Ga. App. 323, 634 S.E.2d 102 (2006).

Defendant's ineffective assistance of counsel claim was properly rejected by the trial court given evidence that: (1) counsel did not stipulate as to the weight of the marijuana seized; (2) counsel's failure to file a suppression motion did not constitute per se ineffective assistance of counsel, and the defendant failed to show that the challenged evidence would have been suppressed had the motion been filed; (3) defendant's decision not to testify was the defendant's own; and (4) a continuing witness objection would not have changed the outcome of the trial. *Parnell v. State*, 280 Ga. App. 665, 634 S.E.2d 763 (2006).

Failure to file motion to suppress drug evidence. — Counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to file a motion to suppress marijuana and identification found in an idling car, as the search did not violate Ga. Const. 1983, Art. I, Sec. I, Para. XIII; it was proper for a drug sniff-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

ing dog to walk around the outside of the defendant's vehicle, a location in which police and the dog were permitted to be, and to alert to the presence of drugs. *Jackson v. State*, 281 Ga. App. 83, 635 S.E.2d 372 (2006).

Defendant's identification in a line-up was not unduly suggestive in violation of due process under Ga. Const. 1983, Art. I, Sec. I, Para. I, and defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to file a motion to suppress the line-up identification; the testimony regarding the line-up established that the defendant was not showing gold teeth, that all of the participants held their numbers in the same place while the victims separately identified the defendant, and that the officers used no suggestive techniques during the line-up. *Robinson v. State*, 281 Ga. App. 76, 635 S.E.2d 380 (2006).

Defendant's trial counsel did not provide ineffective assistance in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to file a motion to exclude the introduction of the defendant's videotaped statement admitting to having sex with the victim and for failing to move to exclude or object to evidence of a prior molestation; there was no basis for such a motion as the defendant's videotape showed the defendant being advised of and waiving the defendant's Miranda rights under Ga. Const. 1983, Art. I, Sec. I, Para. XIV, and the evidence of the prior molestation was admissible at trial and no compliance with Ga. Unif. Super. Ct. R. 31.3 governing similar transactions was required. *Hutchens v. State*, 281 Ga. App. 610, 636 S.E.2d 773 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Defendant's motion to withdraw the defendant's guilty plea based on the defendant's claim that the defense counsel failed to appeal the denial of a suppression motion was properly rejected because it was not ineffective assistance to fail to make a meritless appeal and the motion to

suppress was properly denied because the defendant voluntarily reinitiated discussions with law enforcement officers after the interview was terminated due to the defendant's request for counsel. *Rios v. State*, 281 Ga. 181, 637 S.E.2d 20 (2006).

Trial counsel, representing the first of two defendants, was not ineffective, despite claims that counsel allowed character evidence to be presented to the jury, failed to move to suppress the identification evidence against that defendant, and failed to object to the trial court's consideration at sentencing of a Georgia Criminal Information Center report pertaining to that defendant as: (1) the challenged portions of the defendant's statement were an integral part of a criminal confession, and such statements were not rendered inadmissible because the language used therein indicated that the accused committed another and separate offense; (2) the identification evidence was properly admitted as not unduly suggestive; and (3) nothing of record showed that the sentence the trial court ordered was based upon the defendant's criminal record report. *Taylor v. State*, 282 Ga. App. 469, 638 S.E.2d 869 (2006), cert. dismissed, 2007 Ga. LEXIS 135 (Ga. 2007).

Warrantless arrest of the defendant was authorized on the ground that a sale of cocaine was committed in the officers' presence, and after the defendant retreated into a motel room, the exigencies of the situation demanded and excused an immediate entry into the room for the officer to arrest the defendant without a warrant; hence, as suppression of the evidence seized thereafter would not have been granted, counsel was not ineffective in failing to file for the suppression of evidence. *Fortson v. State*, 283 Ga. App. 120, 640 S.E.2d 693 (2006).

Defendant's ineffective assistance of counsel claims lacked merit as: (1) trial counsel's decisions not to seek suppression of a bloody jacket seized from the defendant's home was strategic, and not to challenge, were strategic; and (2) the defendant failed to show a reasonable likelihood that the outcome of the trial would have been different had counsel objected to evidence of the victim's good character or evidence of the defendant's bad charac-

ter. *Parker v. State*, 281 Ga. 490, 640 S.E.2d 44 (2007).

Trial counsel was not ineffective by failing to seek suppression of the identification evidence or attack the reliability of identification evidence on grounds that such was impermissibly suggestive, as: (1) the showup was preceded by a photo array against which no attack was made; and (2) counsel's strategy in handling the state's failure to elicit in-court identification testimony from a particular witness was reasonable. *Brooks v. State*, 281 Ga. 514, 640 S.E.2d 280 (2007).

Counsel was not ineffective for failing to file a motion to suppress the identification of the defendant by the eyewitness, because, based on the witness's prior knowledge of the defendant, such was an independent basis for the challenged identification, making a motion to suppress futile. *Dumas v. State*, 283 Ga. App. 279, 641 S.E.2d 271 (2007).

Trial counsel was not ineffective in not filing a motion to suppress the defendant's videotaped statement on the ground that it had been induced by a promise of leniency; even if the statement could have been excluded, the statement, which allowed the jury to hear evidence that was unfavorable to the victim, was consistent with the defendant's theory of justification. *Carpenter v. State*, 285 Ga. App. 296, 645 S.E.2d 709 (2007).

Trial counsel was ineffective for not seeking to suppress evidence; before conducting a pat-down, officers had not obtained any information that would support a reasonable belief that the defendant was armed or dangerous, and there was prejudice in that the evidence supporting the convictions all resulted, directly or indirectly, from the search. *Perez v. State*, 284 Ga. App. 212, 643 S.E.2d 792 (2007).

Failure to request determination or suppression of videotape. — In a child molestation case involving the defendant's 13-year-old child, defense counsel was not ineffective for not requesting that the trial court determine the reliability of the victim's videotaped statement under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) or for not objecting to the statement's admission; the victim sponta-

neously told the victim's foster mother about the incidents when the victim was upset, and the victim repeatedly expressed love for the defendant and a desire not to get the defendant into trouble. *Foster v. State*, 286 Ga. App. 250, 649 S.E.2d 322 (2007), cert. dismissed, 2007 Ga. LEXIS 875 (Ga. 2007).

Because a motion to suppress the evidence seized from the vehicle that the defendant and the defendant's cohorts were riding in would have been futile, as the evidence showed they abandoned the vehicle on foot after being involved in a high-speed chase with police, the defendant's trial counsel could not have been ineffective in failing to file the motion. *Skaggs-Ferrell v. State*, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Defense counsel was not ineffective for not seeking to suppress the evidence seized in the search of the defendant's home based upon the alleged insufficiency of the search warrant affidavit; there was no showing that the information in support of the warrant was patently false or that there was any intent to mislead the judge in seeking the search warrant. *Bryant v. State*, 282 Ga. 631, 651 S.E.2d 718 (2007).

Despite ineffective assistance of counsel claim being raised for the first time on appeal, the appeals court found that the claim, which was based on counsel's failure to file a motion to suppress challenging the admission of a juvenile's purported confession to the police, required remand to the trial court for an evidentiary hearing to determine whether the result of the proceeding would have been different if a motion to suppress had been granted. In the Interest of J.T., 289 Ga. App. 248, 656 S.E.2d 580 (2008).

A defendant had not shown that counsel was ineffective for failing to attempt to suppress the defendant's videotaped statement: even if the defendant had sufficiently articulated a desire to have counsel present, the defendant had waived the right by initiating discussion with police without any further prompting or interrogation by them; furthermore, the videotape supported the conclusion that the defendant was not prevented by any intoxication from knowingly waiving the de-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

defendant's Miranda rights and giving a voluntary statement. *Stanley v. State*, 283 Ga. 36, 656 S.E.2d 806 (2008).

Counsel was not ineffective for failing to file a motion to suppress a holster when the admission of the holster did not violate the Fourth Amendment. The information in an affidavit contained sufficient information for the magistrate to come to the commonsense conclusion that evidence of contraband could be found at the defendant's apartment, and an officer saw the holster in plain view in an area in which the officer had a right to be while searching for contraband. *Cobb v. State*, 283 Ga. 388, 658 S.E.2d 750 (2008).

Failure to file motion to suppress blood and urine tests. — Defendant was rendered ineffective assistance of counsel with regard to defendant's trial and conviction for aggravated assault and drug possession as a result of trial counsel's failure to move to suppress the test results of defendant's urine and blood, and evidence of a tube of cocaine found in the vehicle which defendant was driving, as the bodily fluids were unlawfully obtained from defendant while unconscious and without a warrant, and there was evidence affirmatively showing that persons other than defendant had equal opportunity to possess the cocaine that was found on the floor of the vehicle. *Coney v. State*, 290 Ga. App. 364, 659 S.E.2d 768 (2008).

With regard to the defendant's conviction for trafficking in methamphetamine, the defendant failed to establish that defense counsel was ineffective for failing to pursue a motion to suppress the evidence found in the defendant's room as the evidence showed that a preliminary motion to suppress was filed and that trial counsel concluded that, based on the Fourth Amendment waivers of the defendant and others involved, pursuit of the motion would have been fruitless. *Corn v. State*, 290 Ga. App. 792, 660 S.E.2d 782 (2008).

Trial counsel was not ineffective by affirmatively stating that counsel had no objection to the admission of a handgun

and bullets seized from a pickup truck the defendant was driving because even if trial counsel waived counsel's motion to suppress the handgun and bullets, it did not prejudice the defendant since the defendant could not succeed on the merits of the motion to suppress; the trial court properly denied the motion to suppress the physical evidence seized from the pickup truck because the search was authorized under the automobile exception to the warrant requirement. *Martinez v. State*, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Defendant did not carry the defendant's burden of showing that trial counsel was deficient for failing to request a hearing on the defendant's motion to suppress the defendant's custodial statement because counsel participated in a hearing to determine the admissibility of the statement. *Hester v. State*, 304 Ga. App. 441, 696 S.E.2d 427 (2010).

Failure to file suppression motion for jailhouse phone call. — In an armed robbery prosecution, trial counsel was not ineffective for failing to file a motion to suppress cash recovered from a search of the appellant's clothing as the police had probable cause to arrest the appellant after finding the appellant in the area of the robberies and matching the appellant to the description of one of the suspects. Furthermore, trial counsel was not ineffective for failing to file a motion to suppress recordings of an appellant's telephone calls while the appellant was in jail because while O.C.G.A. § 16-11-62(4) prohibited any person from intentionally and secretly intercepting a telephone call by use of any device, instrument, or apparatus, O.C.G.A. § 16-11-66(a) provided an exception to this rule when one of the parties to the communication had given prior consent and that consent was implied based on the statements during the recording that all jail phone calls were recorded or monitored. *Boykins-White v. State*, 305 Ga. App. 827, 701 S.E.2d 221 (2010).

Trial counsel did not render ineffective assistance by failing to file a second motion to suppress until the morning of trial, and thus failing to secure a transcript of the hearing on the motion because trial

counsel thoroughly cross-examined the arresting detective, who admitted that the detective had previously testified to three different versions of the defendant's alleged statement; therefore, even assuming that trial counsel was deficient by failing to secure a transcript before trial to impeach the detective, the deficiency did not prejudice the defendant since the arresting detective admitted to the detective's contradictory statements and, thus, the inconsistencies were known to the jury even though the prior inconsistent testimony was not read verbatim into the record. *Cannon v. State*, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial counsel's failure to pursue a meritless motion to suppress body armor did not constitute ineffective assistance because the defendant did not make a strong showing that the body armor would have been suppressed had the defendant's counsel pursued a motion to suppress; a police officer had an arrest warrant for the defendant when the officer found the defendant in an apartment hiding in a shower, and even if the officer was not authorized to arrest the defendant outside the jurisdictional limits of the county, the defendant did not introduce evidence at the motion for new trial hearing that the officer lacked probable cause to arrest the defendant or that the defendant had standing to object to the search of the apartment. *Nyane v. State*, 306 Ga. App. 591, 703 S.E.2d 53 (2010), cert. denied, No. S11C0420, 2011 Ga. LEXIS 538 (Ga. 2011).

Trial counsel was not effective for failing to file a pre-trial motion to suppress evidence of the defendant's statement to the police based on a violation of Miranda because the defendant made no showing that such a motion would have been successful; the defendant spoke English, the interviewing officer informed the defendant of the defendant's Miranda rights, and the defendant acknowledged understanding those rights before giving the defendant's statement. *Cuvas v. State*, 306 Ga. App. 679, 703 S.E.2d 116 (2010).

Codefendant did not demonstrate that the codefendant's trial counsel was deficient for failing to seek suppression of the codefendant's custodial statement be-

cause the codefendant failed to provide a meritorious basis to contest its admission; the codefendant was not a suspect in the crimes at the time of the codefendant's arrest, the codefendant was informed of the codefendant's Miranda rights, the codefendant did not ask for an attorney, and the statement was made without threat of force or promise of reward. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Evidence supported the trial court's finding that the defendant failed to show that the defendant's plea counsel was ineffective for failing to suppress an inculpatory statement that the defendant allegedly made to the police after the defendant's arrest because, despite the defendant's claim that the defendant made an inculpatory statement that caused the defendant to plead guilty, the trial court had every right to disbelieve defendant's self-serving testimony in favor of counsel's testimony that counsel was not aware of the defendant making any inculpatory statement and that no record of such a statement existed in any of the files the state provided to the counsel; in addition, there was no mention of such a statement during the defendant's guilty-plea hearing. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Defendant's trial counsel was not deficient for failing to file a motion to suppress evidence because the defendant failed to show that police officers lied under oath during the trial; therefore, the defendant was unable to show that, if defense counsel had filed a motion to suppress on that basis, the trial court would have granted the motion. *Bass v. State*, 309 Ga. App. 601, 710 S.E.2d 818 (2011).

Defendant failed to establish that there was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because the defendant could not show prejudice due to trial counsel's failure to file a motion to suppress the approximately \$1,500 discovered when the defendant was searched; even if the evidence had been excluded, the remaining evidence adduced at trial was overwhelming. *Lowe v. State*, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

Trial counsel did not render ineffective assistance by failing to move to suppress evidence found on the defendant's person because any motion to suppress would have been without merit; when the officers lawfully approached and questioned the defendant, the smell of alcohol on the defendant's person and emanating from a cup, and the officers' earlier observations of the defendant staggering and stumbling in the middle of the roadway, gave the officers probable cause to arrest the defendant for unlawfully walking upon the roadway while under the influence of alcohol, O.C.G.A. § 40-6-95, and the cocaine and digital scales subsequently found in the defendant's pockets were discovered pursuant to a lawful search incident to an arrest. *White v. State*, 310 Ga. App. 386, 714 S.E.2d 31 (2011).

Defendant failed to establish that trial counsel's failure to timely file a motion to suppress evidence a police officer seized from the defendant's vehicle prejudiced the case because the warrantless search of the vehicle was lawful under the automobile exception to the warrant requirement; the objective facts known to the officer after the car was lawfully stopped gave the officer probable cause to believe that the car contained contraband, and those facts included the smell of marijuana in the car, flakes of what the officer suspected to be marijuana on the floorboards of the car, and the defendant's visible agitation during the traffic stop. *Brown v. State*, 311 Ga. App. 405, 715 S.E.2d 802 (2011).

Trial counsel was not deficient for failing to suppress the eyewitnesses identifications of the defendant because trial counsel could not have suppressed the evidence on the theory that various witnesses' accounts of the shooter were inconclusive or inconsistent since issues regarding the eyewitnesses' credibility were for the jury to resolve; the defendant made no argument on appeal that the pretrial identification procedures used by the police were unduly suggestive. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Trial counsel did not perform deficiently by failing to renew the motion to suppress after evidence was presented at trial because there was no evidence that a renewed motion would have been granted or that the defendant suffered prejudice as a result of counsel's performance. *Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

Defendant failed to show that trial counsel was ineffective by failing to move to suppress identification evidence and testimony because the admission of a deceased victim's identification statement was made the subject of a motion in limine filed by trial counsel and, thus, there could be no error as counsel did not fail to seek the exclusion of the admission of the victim's identification; the victims' identification of the defendant was merely one of the credibility of eyewitnesses to the incident, which had to be resolved by the trier of fact. *Gandy v. State*, 290 Ga. 166, 718 S.E.2d 287 (2011).

Failure to challenge search of computer. — Trial counsel was not deficient in failing to challenge the search of the defendant's computer because no basis existed under O.C.G.A. § 17-5-24 for suppressing the results of forensic computer analysis; the analysis required expert skill, and the computer examination was conducted at the direction of Georgia peace officers to enable the officers to complete the officers' own investigation. *Twiggs v. State*, 315 Ga. App. 191, 726 S.E.2d 680 (2012).

Trial counsel was not ineffective for failing to file a motion to suppress because probable cause to arrest the defendant and to search the defendant incident to that arrest had been shown on undisputed facts; therefore, the defendant could not make the requisite strong showing that a motion to suppress the evidence found during that search would have been meritorious. *Coney v. State*, 316 Ga. App. 303, 728 S.E.2d 899 (2012).

Trial counsel's failure to move for suppression of an in-court identification by the victims did not amount to ineffective assistance of counsel, because the identifications were appropriate given that the victims had ample opportunity to see the defendant at the scene of the crime and there were not impermissibly suggestive

pre-trial identification procedures involved in the case. *Taylor v. State*, 318 Ga. App. 115, 733 S.E.2d 415 (2012).

Trial counsel was not ineffective for failing to object to move to suppress evidence found during a search of the defendant's father's home because, even if the appellate court disregarded the allegedly incorrect statements about the defendant being positively identified as a perpetrator, the affidavit in support of the search warrant accurately stated that an eyewitness had positively identified the codefendant as a murder suspect and that the codefendant was apprehended in the residence the state desired to search. Therefore, the search was conducted pursuant to a valid warrant and the evidence was admissible. *Charleston v. State*, 292 Ga. 678, 743 S.E.2d 1 (2013).

Trial counsel was not ineffective for failing to file an out-of-time motion to suppress that lacked merit. *Bradley v. State*, 322 Ga. App. 541, 745 S.E.2d 763 (2013).

With regard to a defendant's convictions for child molestation, the trial court properly denied the defendant's motion for a new trial as the defendant failed to show that the defendant was rendered ineffective assistance of counsel as a result of trial counsel failing to move to suppress the photographic lineup evidence wherein the two victims identified the defendant as the perpetrator. The reviewing court agreed with the trial court that the photographic lineup was not impermissibly suggestive since the lineup depicted six black and white photographs of men of similar race, age, hairstyle, and complexion; thus, the defendant failed to prove that there would have been any merit to the motion to suppress. *Mohammed v. State*, 295 Ga. App. 514, 672 S.E.2d 483 (2009).

Because the jury was authorized to accept a cashier's identification testimony, because a photographic array was not impermissibly suggestive, and because nearly every weakness in the identification testimony was addressed in trial counsel's closing argument, the defendant failed to show that trial counsel was ineffective in failing to file a motion to suppress. *Clowers v. State*, 299 Ga. App. 576,

683 S.E.2d 46 (2009).

Suppression of identification and photographic lineup. — With regard to the defendant's convictions for aggravated assault and related crimes, the defendant failed to show that trial counsel was ineffective for failing to file a motion to suppress victim's pre-trial photographic lineup and subsequent in-court identifications of the defendant, as there was no basis upon which trial counsel could have successfully moved to have the identifications suppressed since the photographic lineup was not shown to have been unduly suggestive and in-court identification was unquestionably admissible; thus, there was no possibility that the suppression motion would have been successful. *Gibson v. State*, 291 Ga. App. 183, 661 S.E.2d 850 (2008).

With regard to the defendant's conviction for robbery by sudden snatching, the defendant failed to establish that the defendant was rendered ineffective assistance of counsel for failing to file a motion to suppress based on the patrol officer having no articulable suspicion to stop the defendant pursuant to the purported generic car description that was broadcast as the defendant failed to make a strong showing that the motion to suppress would have been granted on the asserted ground. *Cray v. State*, 291 Ga. App. 609, 662 S.E.2d 365 (2008).

With regard to the defendant's conviction for possession of marijuana with the intent to distribute, even if the defendant had not waived the issue of defense counsel being ineffective for failing to file a motion to suppress, the challenge was meritless since the search warrant properly named the package the police sought to seize, which the defendant picked up at a mailing store, and the warrant did not need to name the defendant's vehicle, which the defendant entered into with the package. *Ferguson v. State*, 292 Ga. App. 7, 663 S.E.2d 760 (2008).

With regard to the defendant's convictions for possessing cocaine with the intent to distribute, possessing a firearm during the commission of a crime, and numerous other crimes, the defendant failed to establish that defense counsel was ineffective for failing to file a motion

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

to suppress with regard to challenging the contraband evidence obtained after the police stopped the defendant's vehicle as an officer attempted to stop the defendant's vehicle for failing to maintain the traffic lane, which was a valid basis for making a traffic stop. As such, there was no basis to file a motion to suppress the contraband discovered in the defendant's vehicle after the stop. *Ray v. State*, 292 Ga. App. 575, 665 S.E.2d 345 (2008).

With regard to the defendant's conviction for distributing cocaine, the defendant failed to establish that the defendant was rendered ineffective assistance of counsel based on defense counsel failing to move to suppress the evidence obtained during a traffic stop as the motion to suppress would have been futile as the evidence showed that the officer had reasonable suspicion if not probable cause to stop the vehicle based on carefully constructing an orchestrated buy and using a confidential informant. *Beck v. State*, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, No. S08C1863, 2008 Ga. LEXIS 922 (Ga. 2008).

Trial counsel was not ineffective for not filing a motion to suppress. The seizure of one defendant did not violate the Fourth Amendment because the seizure was supported by exigent circumstances, and the other defendant lacked standing to contest an officer's search of a garage and had not asserted an ownership interest in a van located in the garage. *Dade v. State*, 292 Ga. App. 897, 666 S.E.2d 1 (2008).

As an officer's statement to the driver of a vehicle that it would be better for the driver if the driver cooperated because a female officer and a drug dog were on the way did not amount to improper coercion, the defendant could not show that it was likely that a renewed motion to suppress on this ground would have been successful, and the defendant thus failed to make the strong showing necessary to establish ineffective assistance. *Darden v. State*, 293 Ga. App. 127, 666 S.E.2d 559 (2008).

With regard to the defendant's convic-

tions for child molestation and aggravated sexual battery, the trial court properly rejected the defendant's contention that the defendant was rendered ineffective assistance of counsel for defense counsel's failure to object to the admission of an indictment evidencing the defendant's guilty plea to a prior conviction as such evidence was admissible, and the judgment entered thereon, as a complete record of a witness's criminal conviction for purposes of impeachment. Further, pretermittting whether defense counsel's failure to object to the additional document admitted constituted deficient performance, the defendant failed to show prejudice from the alleged deficiency as the defendant had already admitted to prior convictions during direct examination. *Daniel v. State*, 292 Ga. App. 560, 665 S.E.2d 696 (2008), cert. denied, 2008 Ga. LEXIS 891 (Ga. 2008).

In an armed robbery prosecution, a warrant issued by a judge in DeKalb County to search the defendant's home gave the correct DeKalb County address and directions to that address, but included a scrivener's error indicating the property was located in Gwinnett County. As that error was not so material as to destroy the validity of the search warrant, trial counsel was not ineffective in failing to move to suppress clothing found pursuant to the warrant. *Fuller v. State*, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

Because the defendant failed to demonstrate the existence of a meritorious Fourth Amendment argument, there was no merit to the argument that trial counsel was ineffective for failing to file a motion to suppress or motion in limine to exclude the evidence obtained from a search of the defendant's apartment. *Williams v. State*, 284 Ga. 849, 672 S.E.2d 619 (2009).

Defendant's armed robbery conviction was upheld on appeal as the defendant failed to show that the defendant was rendered ineffective assistance of counsel as a result of trial counsel failing to move to suppress items found in the defendant's vehicle shortly after the robbery linking the defendant to the crime as the defen-

dant failed to prove that the damaging evidence would have been suppressed if the motion had been made. *Williams v. State*, 295 Ga. App. 639, 673 S.E.2d 30 (2009).

Defense counsel was not ineffective in failing to file a motion to suppress a videotape of the defendant's encounter with police; since the videotape was properly authenticated, such a motion would have been denied. *Steillman v. State*, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

Because a police officer was authorized to stop the defendant's vehicle based on a suspicion that the defendant had illegally dumped trash, and because the defendant consented to a search of the vehicle, the items seized from the vehicle would not have been suppressed; accordingly, the defendant's ineffective assistance claim failed and the trial court properly denied the defendant's motion to withdraw the defendant's Alford plea. *Bishop v. State*, 299 Ga. App. 241, 682 S.E.2d 201 (2009).

Defendant failed to demonstrate that defendant's trial counsel provided ineffective assistance because the defendant could not make the requisite strong showing that had trial counsel filed a timely motion to suppress, a photographic array that was presented to a reserve deputy sheriff who witnessed the crimes would have been suppressed; the photo array did not present an all but inevitable identification of the defendant because an investigator assembled six pictures of men bearing similar characteristics, such as the same race and same general age range, similar facial features and hair styles, the photographs appeared to have been taken from the same distance, and the photographs displayed similar backgrounds. *Smith v. State*, 303 Ga. App. 831, 695 S.E.2d 86 (2010).

Trial counsel was not ineffective for failing to seek to suppress out-of-court eyewitness identifications as there was no evidence that the challenged pre-trial photographic identification was impermissibly suggestive. *Biggins v. State*, 322 Ga. App. 286, 744 S.E.2d 811 (2013).

Failure to submit any written motions to suppress certain lineup identification evidence does not support defendant's allegation of ineffective legal

representation at trial when the trial court entertained such motions made orally and conducted a hearing thereon outside the presence of the jury. *Aparicio v. State*, 166 Ga. App. 793, 305 S.E.2d 649 (1983).

Failure to file special demurrer. — Even if the defendant's first counsel was deficient in failing to file a special demurrer, the defendant did not show that such prejudiced the defense since the second trial counsel filed a special demurrer just before trial, which the trial court considered and denied; in any event, had the special demurrer been granted, the state could have re-indicted the defendant, and therefore, the trial court did not err in determining that the defendant's claim of ineffective assistance of counsel lacked merit. *Bowden v. State*, 279 Ga. App. 173, 630 S.E.2d 792 (2006).

Trial counsel was not ineffective for failing to file a special demurrer requiring the state to allege a specific date on which the alleged offenses occurred. Because defendant did not allege the defense of alibi, the specificity of dates would not have been helpful. *Stanford v. State*, 288 Ga. App. 463, 654 S.E.2d 173 (2007), cert. denied, 2008 Ga. LEXIS 461 (Ga. 2008).

Failure to raise a merger issue. — Defense counsel did not provide ineffective assistance of counsel in failing to raise a merger issue before the trial court as defendant was convicted of only one count of rape. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 in failing to argue at trial and on appeal that the inmate's statutory rape and incest convictions should have merged into the inmate's rape conviction as a matter of fact since all of the crimes arose out of the same incident, as the crimes of statutory rape and incest were not established by proof of the same or less than all the facts required to establish the crime of rape; the inmate's convictions of statutory rape under O.C.G.A. § 16-6-3 and incest under O.C.G.A. § 16-6-22 were not included pursuant to O.C.G.A. § 16-1-6(1) in the rape conviction under O.C.G.A. § 16-6-1, as statutory rape, which required evidence

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

as to the victim's age and that the victim was not the inmate's spouse, and incest, which required proof of the victim's relation to the inmate, had elements not required for rape. *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006).

Plea counsel performed deficiently in failing to argue for the merger of the defendant's convictions and sentences for armed robbery, O.C.G.A. § 16-8-41(a), and aggravated assault with a deadly weapon, O.C.G.A. § 16-5-21(a)(2), because the aggravated assault with a deadly weapon charges did not require proof of a fact that the armed robbery charges did not likewise require, and the defendant's aggravated assault convictions unquestionably merged into the defendant's armed-robbery convictions; the armed robbery counts in the indictment provided that the defendant unlawfully, with intent to commit theft, did take property from the person of the victim, by use of an offensive weapon, and the aggravated assault counts provided that the defendant did unlawfully make an assault upon the person of the victim with a steel rod, a deadly weapon, an object, which, when used offensively against a person, was likely to or actually did result in serious bodily injury, by beating the victim about the head and face with the steel rod. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Since merger of the defendant's convictions for aggravated assault and armed robbery was not authorized, counsel's failure to pursue a meritless motion could not constitute ineffective assistance. *McGlasker v. State*, 321 Ga. App. 614, 741 S.E.2d 303 (2013).

Failure to request continuance. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to request a continuance after an expert witness on eyewitness identification was obtained; there was no evidence that the defendant, who was indigent and had requested funds for the hiring of an expert witness, was preju-

diced as a result of the timing of the defendant's receipt of funds to hire an expert witness. *Robinson v. State*, 281 Ga. App. 76, 635 S.E.2d 380 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failure to request a continuance to locate potential exculpatory witnesses; the defendant failed to show prejudice, as the defendant did not show that the testimony of such witnesses would have been relevant and favorable. *Wells v. State*, 281 Ga. 253, 637 S.E.2d 8 (2006).

In a defendant's prosecution for child molestation, the defendant's counsel was not ineffective for failing to request a continuance when the defendant's roommate, whose whereabouts were unknown for 18 months, suddenly reappeared on the eve of trial because trial counsel had an adequate opportunity to interview the roommate before the trial began and the roommate answered questions as expected based on trial counsel's review of the roommate's pretrial statements. *Moe v. State*, 297 Ga. App. 270, 676 S.E.2d 887 (2009).

Defendant's convictions for two counts of aggravated child molestation and three counts of child molestation in violation of O.C.G.A. § 16-6-4 were appropriate because the defendant failed to prove that the defendant received ineffective assistance of counsel. The defendant admitted that the defendant did not inform counsel that the defendant wanted to call the defendant's aunt and mother until the day before jury selection and counsel told the defendant that it would probably not be possible to get another continuance; even assuming that counsel could have obtained another continuance, the defendant's counsel was not given an opportunity to testify about why counsel did not attempt to get a continuance or whether there were strategic reasons for not calling the defendant's aunt and mother as witnesses. *Watson v. State*, 299 Ga. App. 702, 683 S.E.2d 665 (2009).

Defendant could not show that defendant's trial counsel's performance fell outside the wide range of reasonable professional conduct when counsel failed to request a continuance or challenge the

admission of the defendant's videotaped police interview after the prosecutor did not produce the videotape to the defense until the day of trial because counsel requested and received a continuance, and thus secured an opportunity to review the videotape prior to trial. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Trial counsel was not ineffective for failing to request a continuance to review evidence and have the evidence tested by the defendant's own expert because the defendant presented no evidence at the motion for new trial hearing to support the defendant's bald assertion that there was a reasonable probability that the outcome of the proceeding would have been different had counsel sought a continuance or independent expert testing; even assuming that the defendant could properly raise a claim of ineffectiveness against counsel, the trial court did not err in denying the motion for new trial on that ground. *Walker v. State*, 288 Ga. 174, 702 S.E.2d 415 (2010).

Decision by trial counsel not to move for a continuance after an alibi witness did not appear and could not be located to testify on the defendant's behalf did not show the counsel's ineffectiveness because trial counsel testified that the alibi witness indicated by telephone that the witness did not want to testify and that defense counsel would not like what the witness had to say if counsel forced the witness to testify, and the trial court was authorized to credit counsel's testimony regarding the alibi witness; because trial counsel's investigation revealed that the supposed alibi witness was reluctant, unfavorable, and possibly prepared to commit perjury, the decision not to call such a witness was a reasonable exercise of professional judgment, and the tactical decision to proceed without the alibi witness's testimony was made after consultation with the defendant, who confirmed on the record that counsel agreed with the decision not to request a continuance. *Reeves v. State*, 288 Ga. 545, 705 S.E.2d 159 (2011).

Trial counsel was deficient on the ground that counsel's motion for continuance did not comply with O.C.G.A. § 17-8-25 because the witness in question

had not been subpoenaed, and, thus, counsel could not comply with the statute; the defendant did not show that the trial court's denial of the motion for continuance was reversible error and did not demonstrate ineffective assistance of counsel. *Presley v. State*, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Defendant's counsel was not ineffective for failing to request a continuance after a witness, who would have testified that another person confessed to killing the victim, failed to appear for trial because without some explanation as to why the witness did not appear at trial or some evidence that the witness had been located in the ensuing months, the defendant failed to demonstrate that the witness would testify at trial, and thus failed to carry the burden to show prejudice; the defendant failed to demonstrate that the outcome of the proceeding would have been different because the defendant did not establish that the witness's testimony would have been admissible at trial since there was no evidence that the confessor made the confession spontaneously or that the confessor and the witness were close friends. *Martinez v. State*, 289 Ga. 160, 709 S.E.2d 797 (2011).

Requesting continuance and sacrificing right to speedy trial. — Defendant had not shown deficient performance on the part of trial counsel in seeking a continuance; counsel replaced former counsel who was found to have a conflict of interest three days before the scheduled start of defendant's trial, and was immediately faced with a dilemma, to preserve defendant's demand for trial that had been mistakenly filed pursuant to O.C.G.A. § 17-7-170 and be unprepared for the upcoming trial, or waive defendant's demand for trial by seeking a continuance in order to prepare for trial. *Williams v. State*, 282 Ga. 561, 651 S.E.2d 674 (2007).

Failure to object when comments made about defendant's silence. — Failure to object to a police detective's comment that the defendant responded to some questions during a police interview after the defendant was Mirandized, but that the defendant refused to answer other questions, was deficient perfor-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

mance by the counsel, but the conviction did not require reversal because the defendant could not show prejudice as the state did not comment or capitalize on the defendant's exercise of the right to remain silent, it was merely a passing comment which was quickly moved away from during the trial, and there was other strong evidence of the defendant's guilt. *Hines v. State*, 277 Ga. App. 404, 626 S.E.2d 601 (2006).

With regard to convictions for aggravated assault and related crimes, the defendant failed to show that trial counsel was ineffective for failing to object or move for a mistrial when a security officer commented on the defendant's pre-arrest silence, namely that the defendant did not speak up as to owning the type of vehicle used to perpetrate the crimes; even if testimony on the defendant's pre-arrest silence had been objectionable, the defendant failed to show any prejudice since other evidence showed that the defendant drove to police station in the defendant's truck and consented to search of that vehicle. *Gibson v. State*, 291 Ga. App. 183, 661 S.E.2d 850 (2008).

Prosecutor's remark was unlikely to be interpreted as a comment on the defendant's failure to testify and was not intended to comment on the defendant's decision not to testify, but was instead intended to address, albeit inartfully, the defendant's closing argument challenging the veracity and motives of those witnesses who were involved in the subject crimes. Thus, the failure of trial counsel to object to the remarks did not constitute deficient performance. *Rosser v. State*, 284 Ga. 335, 667 S.E.2d 62 (2008).

In a prosecution for battery and aggravated assault, defense counsel's failure to object to a police officer's single gratuitous reference to the defendant's post-arrest silence was not reversible error because, in view of the strong evidence of the defendant's guilt, this error was unlikely to have affected the outcome of the trial. *Crawford v. State*, 294 Ga. App. 711, 670 S.E.2d 185 (2008).

In an armed robbery prosecution, defense counsel was not ineffective in failing to object to the state's questions regarding the defendant's prearrest silence. As the defendant first raised the issue of that silence while testifying, and the prosecutor's questions regarding the defendant's failure to report an alleged crime against the defendant or to seek police protection only incidentally involved a reference to the defendant's silence, any objection would have been meritless. *Dinkins v. State*, 295 Ga. App. 289, 671 S.E.2d 299 (2008).

Trial counsel was not ineffective for failing to object when the state asked the arresting officer if the defendant made a statement while in custody. The testimony was not given to prove the defendant's guilt or innocence, but could be characterized as a narrative recitation of the events surrounding the defendant's arrest by the authorities. *Hardy v. State*, 301 Ga. App. 115, 686 S.E.2d 789 (2009).

Defendant did not receive ineffective assistance of trial counsel when defendant's attorney failed to object to testimony from a detective regarding the defendant's post-arrest silence because although the testimony was improper, and trial counsel was deficient in failing to object, the defendant could not establish that counsel's deficient performance prejudiced the defendant's defense; trial counsel testified that counsel was unable to explain why counsel had not objected to the testimony but confirmed that counsel's failure to do so did not arise from a strategic decision, but the defendant, who aroused the suspicions of a security guard patrolling a high crime area during the late night hours, was caught in actual possession of nearly 240 grams of cocaine valued between \$8,000 and \$10,000, in addition to possessing a large amount of currency, and the state did not comment further regarding defendant's failure to give a statement, nor did the state make reference to it during closing argument. *Arellano v. State*, 304 Ga. App. 838, 698 S.E.2d 362 (2010).

Trial counsel's failure to object to the prosecutor's argument that the defendant's failure to come in and speak with police after an arrest warrant issued was

evidence of defendant's guilt constituted ineffective assistance because counsel's failure to object arose not from strategy but from counsel's mistaken belief that the argument was not objectionable, and the defendant suffered prejudice as a result of counsel's error; twice during closing the state deliberately and unequivocally argued that the jury could use the defendant's silence against the defendant and view the defendant's failure to come forward and speak with police as evidence of the defendant's guilt, despite the absence of any evidence showing that the defendant was aware that a warrant had issued for the defendant's arrest, and there was no physical evidence linking the defendant to the crimes. *Scott v. State*, 305 Ga. App. 710, 700 S.E.2d 694 (2010).

Trial court did not err in denying the defendant's motion for new trial on the basis of ineffective assistance of counsel because trial counsel's decision not to object to a police officer's passing reference to the defendant's post-arrest silence was a valid exercise of reasonable professional judgment; given the overwhelming evidence of the defendant's guilt, there was no reasonable probability that, but for counsel's failure to object, the outcome of the trial would have been different. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Counsel's failure to object to the prosecutor's comments on the ground that the prosecutor improperly commented on the defendant's exercise of the defendant's right to remain silent by remarking on the defendant's failure to testify at trial did not amount to deficient performance because the challenged remarks were not improper; the prosecutor made the comments while seeking to persuade the jury that the defendant's statements and behavior shortly after the crimes were inconsistent with the defendant's theory of self-defense, and the remarks were not intended to comment on the defendant's failure to testify or would have been received as such by the jury. *Lacey v. State*, 288 Ga. 341, 703 S.E.2d 617 (2010).

Trial court's finding that the defendant did not receive effective assistance of counsel due to trial counsel's failure to object to the prosecutor's comments dur-

ing closing arguments regarding the defendant's decision not to take the stand and testify at trial was not clearly erroneous because appellate counsel never asked trial counsel why trial counsel did not object to the statements; therefore, because trial counsel was never asked to explain the failure to object during the motion hearing, the defendant failed to meet the burden of making an affirmative showing that the purported deficiencies in trial counsel's representation were indicative of ineffectiveness and were not examples of a conscious and deliberate trial strategy. *Herndon v. State*, 309 Ga. App. 403, 710 S.E.2d 607 (2011).

Defendant's claim that trial counsel rendered ineffective assistance by not objecting to pervasive comments on the defendant's pre-arrest silence failed because the defendant made an insufficient showing of prejudice; there was strong evidence of the defendant's guilt of felony murder, including that it was undisputed that the defendant was the only adult caring for the victim when the victim received mortal injuries and that the defense that the victim fell from the bed was not supported by the medical evidence. *Whitaker v. State*, 291 Ga. 139, 728 S.E.2d 209 (2012).

Failure to object to closure of courtroom. — Defendant, who was charged with, inter alia, child molestation, did not show that defense counsel provided ineffective assistance by failing to object to closure of the courtroom during the victims' testimony, and because defendant did not object to improper questions posed to and responses given by the state's witnesses, as defendant did not show the courtroom's closure prejudiced defendant. Certain questions and responses were proper under the rule allowing expert opinion testimony about whether a victim's psychological evaluation was consistent with sexual abuse, and there was no reasonable probability that improper testimony about the likelihood that a victim would disclose this kind of sexual abuse to please the victim's mother contributed to the verdict. *Hunt v. State*, 268 Ga. App. 568, 602 S.E.2d 312 (2004).

Failure to object to clearing of courtroom for young victim's testimony. — With regard to the defendant's

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

convictions on two counts of cruelty to children in the first degree and one count of aggravated battery, the defendant failed to establish that defense counsel was ineffective for failing to object to the clearing of the courtroom when the child victim testified as defense counsel testified at the new trial hearing that defense counsel did not object to the closing of the courtroom because defense counsel recognized that the victim was very young and defense counsel believed it to be appropriate under the circumstances. As a result, defense counsel's decision not to object clearly constituted an exercise of reasonable professional judgment. *Glover v. State*, 292 Ga. App. 22, 663 S.E.2d 772 (2008).

Failure to object to sheriff testifying as witness also acting as bailiff during trial. — Defendant's trial counsel was ineffective for failing to object to a county sheriff serving as a bailiff during the defendant's trial on charges of, inter alia, arson because the sheriff was a key witness for the state. Even if the sheriff never directly discussed the case with the jurors, the defendant was prejudiced as the sheriff continually associated with the jurors during half the trial and thus denied the defendant the right to a fair trial by an impartial jury. *Bass v. State*, 285 Ga. 89, 674 S.E.2d 255 (2009).

Failure to object to comment on victim's credibility. — Defendant failed to establish ineffective assistance of counsel with regard to defendant's trial and conviction for child molestation based on trial counsel's failure to object to certain testimony by the investigating officer that commented upon the victim's credibility as, even though trial counsel did not object, the trial court gave a curative instruction that specifically informed the jury to disregard the officer's testimony commenting on the victim's credibility, which was adequate to correct any harm. *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

Defendant did not show that trial coun-

sel was ineffective by failing to object to the state's comment during closing argument regarding an experts' opinion regarding child molestation victims' credibility. Nor did the defendant show that there was a reasonable probability that the outcome of the case would have been different but for the purported deficient performance of trial counsel. *Cobb v. State*, 309 Ga. App. 70, 709 S.E.2d 9 (2011).

Failure to object to impermissible questions/comments on defendant's pre-arrest silence from prosecution.

— With regard to a defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony, although the defendant's trial counsel was deficient for failing to object to the prosecutor's impermissible questions and comments relating to the defendant's pre-arrest silence regarding the defendant's failure to contact the police to inform the police of the alleged accidental shooting, the defendant was not prejudiced by the deficiency based on the overwhelming evidence of guilt, including eyewitness accounts and evidence that the deceased victim was unarmed, which negated the defendant's accidental shooting and self-defense theories. *Thomas v. State*, 284 Ga. 647, 670 S.E.2d 421 (2008).

Failure to object to identification of defendant. — Defendant failed to show that the defendant received ineffective assistance of counsel by failing to object to an in-court identification of the defendant by the aggravated assault victim because the defendant neither asked trial counsel why no objection was made to the in-court identification nor made any showing that the identification would have been suppressed had an objection been made; the defendant made no affirmative showing that the purported deficiency in counsel's representation was indicative of ineffectiveness as opposed to being an example of a conscious, deliberate, and reasonable trial strategy. *Newsome v. State*, 288 Ga. 647, 706 S.E.2d 436 (2011).

Trial counsel did not perform deficiently by failing to object to a convenience-store clerk's allegedly tainted in-court identification of the defendant because the clerk's

identification of the defendant had an independent origin, and thus, any objection would have lacked merit; although the clerk did admit to seeing a photograph of the defendant prior to trial, the clerk testified that the in-court identification of the defendant was not based on a photograph but rather on the clerk's recognition of the defendant from the time of the robbery. *Anderson v. State*, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Defendant did not show ineffective assistance of counsel because the defendant failed to establish prejudice resulting from the defense counsel's failure to file pretrial motions regarding identification. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Trial counsel's failure to object when the prosecutor asked a police officer if the defendant was the person in the surveillance video and the officer said yes did not amount to ineffective assistance of counsel as counsel testified that it was a strategic decision made based on counsel's opinion that counsel would lose credibility by making such an objection. *Spinks v. State*, 322 Ga. App. 387, 745 S.E.2d 653 (2013).

Failure to raise inconsistent verdict issue. — Defense counsel did not provide ineffective assistance of counsel in failing to raise an inconsistent verdict issue before the trial court as Georgia did not recognize the inconsistent verdict rule. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Trial counsel did not render ineffective assistance by failing to object to the jury verdict after the jury found the defendant guilty of burglary and not guilty of the underlying charge of criminal damage to property; Georgia does not recognize an inconsistent verdict rule, which would permit a defendant to challenge the factual findings underlying a guilty verdict on one count as inconsistent with the findings underlying a not guilty verdict on a different count. *Ursulita v. State*, 307 Ga. App. 735, 706 S.E.2d 123 (2011).

Failure to comply with reciprocal discovery. — Because any error in the trial court's exclusion of the evidence of the male victim's prior convictions was harmless, the defendant's trial counsel

could not have been found ineffective due to an alleged failure to comply with reciprocal discovery. *Skaggs-Ferrell v. State*, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Defendant had not shown that counsel was ineffective for not engaging in reciprocal discovery under O.C.G.A. § 17-16-1. The defendant offered no evidence that counsel was unprepared or unaware of the salient evidence before trial and had not shown that the outcome would have been different had counsel opted into discovery. *Anuforo v. State*, 293 Ga. App. 1, 666 S.E.2d 50 (2008).

Premature filing of notice of alibi. — In an armed robbery prosecution, trial counsel was not ineffective for disclosing the defendant's alibi defense before the prosecution filed a demand for notice of alibi under O.C.G.A. § 17-16-5(a) because counsel knew that such a demand was going to be filed, and the defendant was not prejudiced by the premature disclosure. *Fuller v. State*, 295 Ga. App. 439, 672 S.E.2d 438 (2009), cert. denied, No. S09C0749, 2009 Ga. LEXIS 220 (Ga. 2009).

Failure to object to order appointing judge. — Defendant's claim that an order appointing a senior judge to preside over defendant's trial was insufficient under O.C.G.A. § 15-1-9.2(b) was not timely filed given it was filed after the motion for a new trial. Furthermore, counsel's failure to object to the appointment of the judge did not deny defendant effective assistance of counsel. *Strozier v. State*, 277 Ga. 78, 586 S.E.2d 309 (2003).

Defendant's counsel did not provide ineffective assistance of counsel for failing to object to an order appointing a judge because defendant failed to show that defendant was denied a fair trial by virtue of the appointment order; defendant did not satisfy the prejudice component of the test for ineffective assistance of counsel. *Oliver v. State*, 273 Ga. App. 754, 615 S.E.2d 846 (2005).

Trial counsel was not ineffective for failing to object that the order appointing a trial judge had expired by the time the defendant went to trial on a cocaine trafficking charge because the defendant failed to establish that the expiration of the order in any way denied the defendant

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

a fair trial. *Jones v. State*, 294 Ga. App. 854, 670 S.E.2d 506 (2008).

Failure to request bench trial. — Defendant was not deprived of the effective assistance of counsel because the defendant never stated that the defendant wanted a bench trial and the counsel's decision to try the child molestation case before a jury was plainly strategic. *Iles v. State*, 278 Ga. App. 895, 630 S.E.2d 148 (2006).

Failure to file motion to suppress evidence. — Because the information in an affidavit provided the magistrate a substantial basis for concluding that probable cause existed for issuing the search warrant, a motion to suppress the search warrant would have been futile; accordingly, defendant failed to show that counsel was ineffective. *Jarrett v. State*, 299 Ga. App. 525, 683 S.E.2d 116 (2009).

No obligation to file meritless motions. — When the defendant's trial counsel did not move for a mistrial after hearsay was admitted and the court on appeal determined such evidence was properly admitted under an exception to the hearsay rule, the failure to move for a mistrial did not constitute ineffective assistance of counsel because such a motion would have been meritless; furthermore, when defendant's counsel failed to object to the defendant's exclusion during jury selection and the court on appeal determined that the defendant had waived the right to be present during jury selection because of the defendant's disruptive behavior, the failure to object to the defendant's removal did not constitute ineffective assistance of counsel because such a motion would have been meritless. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Trial counsel was not ineffective for failing to present a meritless motion for a directed verdict because the evidence established that the defendant was guilty of both armed robbery and possession of a firearm in the commission of a felony, and failing to object to an officer's opinion

testimony identifying the defendant in a store security videotape, because the defendant's identification did not rest entirely on the videotape identification since a custodian identified the defendant in a pretrial photographic lineup. *Bryson v. State*, 316 Ga. App. 512, 729 S.E.2d 631 (2012).

Defendant was not rendered ineffective assistance of counsel by counsel's failure to file a motion to suppress a stop of defendant's car when that motion was meritless; the officer had a reasonable and articulable suspicion of defendant's criminal activity sufficient to justify an investigatory stop of defendant's car when the officer received information from a known, law-abiding, and concerned citizen, who testified at trial and who, on the day in question, had the opportunity to personally observe the defendant's suspicious activities. *Saxon v. State*, 266 Ga. App. 547, 597 S.E.2d 608 (2004).

Defendant was unable to show that the defendant's trial counsel was ineffective because: (1) the failure to pursue a futile objection with regards to the similar transaction evidence did not constitute ineffective assistance; and (2) two of the reasons that defendant's trial counsel did not object were either that counsel determined that the statement was not objectionable enough or counsel did not want to further highlight the remark. *McGuire v. State*, 266 Ga. App. 673, 598 S.E.2d 55 (2004).

Defense counsel did not provide ineffective assistance of counsel in failing to preserve an objection to the denial of a motion for a mistrial; the motion was based on a deadlocked jury and it was not error to fail to preserve a claim that the jury deliberated without one member present; further, defendant failed to show that the jury deliberated with only 11 members present, so the motion would not have been successful. *Brantley v. State*, 271 Ga. App. 733, 611 S.E.2d 71 (2005).

Defendant did not receive ineffective assistance of counsel as there was no evidence that the attorney-client relationship had deteriorated such that counsel was unable to be effective; defendant failed to show that counsel was deficient in failing to file a motion to withdraw or

that there was a reasonable probability that the result of the trial would have been different but for the alleged deficiency. *Williams v. State*, 273 Ga. App. 213, 614 S.E.2d 834 (2005).

Defendant did not receive ineffective assistance of counsel as counsel disregarded defendant's request that counsel file a motion to recuse the trial judge because there were no grounds for recusing the trial judge; defendant could not show either deficient performance or prejudice. *Williams v. State*, 273 Ga. App. 213, 614 S.E.2d 834 (2005).

Defendant did not show that defense counsel provided ineffective assistance by not filing discovery motions because the state had an open file policy and a hearing was held on counsel's objection to the admission of defendant's pre-Miranda statement to the police, so no prejudice was shown. *Brown v. State*, 273 Ga. App. 577, 615 S.E.2d 628 (2005).

Because the victim's passing reference to "all of the really bad things that have happened to me in my life" and the testimony of the victim's grandmother that the victim's mother had been unable to raise the victim because of the mother's drug problems, did not represent victim impact statements, as neither addressed the impact of the crime at issue, trial counsel could not be deemed ineffective for failing to object to the testimony, as any objection to the testimony would have been meritless. *Anthony v. State*, 282 Ga. App. 457, 638 S.E.2d 877 (2006).

Defendant's ineffective assistance of counsel claims lacked merit as: (1) the defendant failed to give any specific examples of prejudice; (2) the defendant, after consultation with counsel, testified freely and voluntarily; and (3) any objections counsel might have made to a videotaped statement would have lacked merit as those statements included evidence of prior difficulties, admissible without notice and without the need for a pretrial hearing; hence, the defendant was not entitled to a new trial on those grounds. *Campbell v. State*, 282 Ga. App. 854, 640 S.E.2d 358 (2006).

Trial court's denial of a defendant's motion for an out-of-time appeal was proper with respect to the defendant's claim that

counsel was ineffective in violation of U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to testimony by a probation officer, as the officer's statement that under former O.C.G.A. § 42-1-2(a)(3), the defendant did not have to register as a sex offender if the defendant was afforded treatment as a first offender was a correct statement of law at the time; accordingly, counsel's failure to object thereto was not ineffectiveness, as any such objection would have lacked merit. *Ethridge v. State*, 283 Ga. App. 289, 641 S.E.2d 282 (2007).

Trial court properly denied the defendant's motion for an out-of-time appeal as such failed to show any meritorious ground, and the defendant's failure to timely file an appeal did not result from the ineffective assistance of trial counsel, as it was apparent from the transcript of the plea hearing that the issues sought to be raised in the out-of-time appeal completely lacked merit. *Hicks v. State*, 281 Ga. 836, 642 S.E.2d 31 (2007).

Defendant's trial counsel was not ineffective for failing to raise the issue of entrapment in a motion for a directed verdict of acquittal because the defendant was not entrapped by law enforcement and the defendant did not admit to committing the charged crimes. Therefore, counsel was not required to make a motion that was without merit. *Logan v. State*, 309 Ga. App. 95, 709 S.E.2d 302, cert. denied, No. S11C1101, 2011 Ga. LEXIS 579; cert. denied, 132 S. Ct. 823, 181 L. Ed. 2d 533 (2011).

Trial counsel was not ineffective for failing to object to pre-autopsy photographs of murder victims; each of the photographs was relevant to some point of a forensic pathologist's testimony, and thus the photographs were admissible. *Conway v. State*, 281 Ga. 685, 642 S.E.2d 673 (2007).

Testimony by an officer about inconsistencies between the defendant's statements did not amount to improper bolstering or comment on the defendant's veracity; thus, trial counsel was not ineffective for failing to object to them. *Gonzalez v. State*, 283 Ga. App. 843, 643 S.E.2d 8 (2007).

A witness's testimony about statements

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

made by the defendant during the commission of the battery would have been admissible as *res gestae*, even if they related to previous crimes; thus, trial counsel was not ineffective for failing to object to it. *McClain v. State*, 284 Ga. App. 187, 643 S.E.2d 273 (2007).

Because a pre-trial motion to quash was not the proper method to attack an indictment for any defect not appearing on its face, and the defendant did not argue that there was a defect on the face of the indictment justifying a motion to quash, but instead counsel attacked the validity of the protective order supporting the indictment through both an original and renewed motion for directed verdict, trial counsel was not ineffective. *Shafer v. State*, 285 Ga. App. 748, 647 S.E.2d 274 (2007), cert. denied, No. S07C1498, 2007 Ga. LEXIS 642 (Ga. 2007).

Meritless objection to evidence not required. — In a case involving sexual offenses against a child, trial counsel was not ineffective for failing to make a meritless objection to evidence of the defendant's prior arrest for assault and battery against the victim's mother; the evidence was properly admitted to explain the victim's delay in reporting the crime. *Borders v. State*, 285 Ga. App. 337, 646 S.E.2d 319 (2007), cert. denied, No. S07C1374, 2007 Ga. LEXIS 640 (Ga. 2007).

Because trial counsel was not ineffective for failing to make a meritless objection to the introduction of evidence that was deemed relevant, and none of the prosecutor's closing remarks were objectionable in the manner alleged by the defendant on appeal, trial counsel was not found to be ineffective. *Williamson v. State*, 285 Ga. App. 779, 648 S.E.2d 118 (2007).

Defense counsel's failure to demur to the indictment and to request an additional limiting instruction concerning properly admitted similar transaction evidence did not amount to deficient performance, as those actions would have been

unavailing and the outcome of the trial would not have been different but for counsel's alleged omissions. *May v. State*, 287 Ga. App. 407, 651 S.E.2d 510 (2007).

Rape conviction was upheld on appeal as the defendant was not entitled to a new trial based on defense counsel's failure to object to certain testimony from the victim about the defendant's history of selling drugs and failure to subpoena certain medical records, as: (1) testimony from the victim that the defendant gave the victim drugs before some of the sexual encounters between them was admissible as part of the *res gestae*; and (2) the medical records were generally consistent with the victim's testimony, and therefore no prejudice resulted from failing to subpoena them. *Mitchell v. State*, 287 Ga. App. 517, 651 S.E.2d 821 (2007).

Defendant had not shown ineffective assistance of counsel since the stop and search of the defendant's vehicle were authorized by information that the car was stolen, and thus a motion contesting the stop would have been futile, and the defendant had not shown how additional time spent with counsel prior to trial would have benefitted the defendant's defense; also, the defendant in arguing that defense counsel had failed to interview potential witnesses had not identified any witness or proffered testimony that would have been favorable to the defense, and counsel's choice to argue that marijuana did not belong to the defendant instead of arguing that the substance was not marijuana was a strategic decision. *King v. State*, 287 Ga. App. 375, 651 S.E.2d 496 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

Because the defendant failed to show that defense counsel's performance fell below an objective standard of reasonableness, and the objections the defendant claimed should have been made were deemed meritless, counsel could not be found to be ineffective. *Boyd v. State*, 289 Ga. App. 342, 656 S.E.2d 864 (2008), cert. denied, 2008 Ga. LEXIS 498 (Ga. 2008).

With regard to a defendant's conviction for armed robbery and other crimes, the defendant failed to establish ineffective assistance of counsel from failure to: (1) adequately prepare the defendant for trial; (2) keep the defendant adequately updated with respect to issues relevant to the defense; and (3) discuss post-trial motions; the defendant failed to meet the burden of proving that any such alleged deficiency prejudiced the defendant in any manner. Defense counsel's failure to file a written motion to sever would have been pointless, as the trial court had considered the defense's oral motion; there was no evidence in the record that other witnesses existed that could have been called on the defendant's behalf; and trial counsel did not represent the defendant with regard to the defendant's motion for a new trial, therefore, the alleged failure of trial counsel to prepare the defendant for the motion for new trial hearing could not have constituted ineffective assistance of counsel. *Grant v. State*, 289 Ga. App. 230, 656 S.E.2d 873 (2008).

Trial counsel was not ineffective for not using the word "pretextual" in making Batson challenges. Although counsel did not use the word "pretextual," counsel sought to rebut the prosecutor's explanations by arguing either that the strike was not race-neutral or that, considering the totality of the jury's responses to questions on voir dire examination, there was no factual basis for the strike. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

A defendant had not shown that trial counsel was ineffective for failing to give certain pretrial notices. The trial court had not excluded the evidence based on counsel's failure to comply with court rules; moreover, there was no prejudice because a witness had testified at trial as to the evidence the defendant claimed

that counsel should have introduced. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

Defense counsel's failure to move for a directed verdict did not constitute ineffective assistance because the evidence presented was sufficient to sustain the defendant's conviction for armed robbery; therefore, defendant was not entitled to a directed verdict and counsel's failure to move for the directed verdict did not entitle the defendant to a new trial. The failure of counsel to pursue a meritless motion did not constitute ineffective assistance of trial counsel. *Range v. State*, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

Trial counsel's delay in pursuing a defendant's motion for new trial after the defendant was convicted of felony murder did not result in a denial of the defendant's due process rights and did not constitute ineffective assistance as the record showed that much of the ten-year delay between the filing of the motion for new trial and the motion's resolution was due to the defendant's own inaction after counsel advised the defendant that counsel did not intend to pursue the motion for new trial or any other appellate process because counsel was unable to discern any error or merit to an appeal. *Browning v. State*, 283 Ga. 528, 661 S.E.2d 552 (2008).

Because defendant neither asked for corrective action nor moved for a mistrial after the trial court's finding that a juror did not fall asleep, counsel was not ineffective because any objection or motion on the subject would have been unmeritorious. *Peterson v. State*, 294 Ga. App. 128, 668 S.E.2d 544 (2008).

While a juror initially stated during voir dire that the juror was unsure if the juror could be unbiased, but later stated the juror would try to be impartial and would follow the trial court's instructions, defense counsel was not ineffective for not moving to strike the juror for cause as such a motion would have been denied. *Brown v. State*, 293 Ga. App. 633, 667 S.E.2d 899 (2008).

Even assuming that defense counsel's failure to move for a mistrial following a comment by the State of Georgia was deficient, the defendant did not show ineffective assistance of counsel because the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel** (Cont'd)**B. Obligations of Counsel** (Cont'd)

defendant did not show that a mistrial would have been granted had counsel done so. *Baker v. State*, 307 Ga. App. 884, 706 S.E.2d 214 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. 2011).

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because the witness's improper remarks were fleeting, unsolicited, and nonresponsive to the prosecutor's examination questions, and since the defendant did not show that the defendant was otherwise entitled to a mistrial based upon the circumstances, trial counsel's failure to pursue a meritless motion does not constitute ineffective assistance of counsel; the trial court sustained the objections to the improper testimony and instructed the prosecutor and witness to restrict the examination and responses, the witness and prosecutor complied with the trial court's instructions, and there was no further mention of the bad character evidence. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Trial counsel's failure to renew a non-meritorious motion for directed verdict provided no ground for claiming ineffective assistance of counsel. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Defendant was not entitled to a new trial, based upon ineffective assistance of counsel, because, even assuming that two jurors saw the defendant in shackles and handcuffs as the jurors returned from lunch, it could not have been presumed that the jury was unfairly tainted by the defendant's appearance as the evidence against the defendant was overwhelming. Furthermore, the defendant was not entitled to a new trial, based upon ineffective assistance of counsel, because there was no fatal variance between the indictment that alleged that the defendant committed armed robbery by use of a pellet pistol and evidence that showed that the weapon used was a BB gun. Because no fatal variance existed, the defendant's asser-

tion that appellate counsel rendered ineffective assistance for failure to raise the issue on appeal also failed as the issue of variance was without merit. *Jones v. State*, 312 Ga. App. 15, 717 S.E.2d 526 (2011).

Trial counsel's failure to raise a novel legal argument. — that O.C.G.A. § 16-5-43 was unconstitutionally vague, did not amount to ineffective assistance of counsel. *Washington v. State*, 271 Ga. App. 764, 610 S.E.2d 692 (2005).

Missed deadlines. — Trial counsel did not provide ineffective assistance of counsel by missing the deadline for disclosing a witness's written statement as defendant personally chose to proceed with the trial without the witness and defendant could not argue that the state should have requested a continuance instead of defendant. *Clark v. State*, 271 Ga. App. 534, 610 S.E.2d 165 (2005).

Failure to show defendant discovery. — In denying the defendant a new trial, the trial court expressly found that trial counsel was not ineffective, specifically finding that: (1) counsel's decision not to provide the defendant with a copy of the discovery was based on the fact that the defendant could not read and was going to rely on someone else at the jail to read the documents, and that counsel was concerned that showing the discovery to another inmate might produce a "snitch;" and (2) prior to trial, counsel spent two and a half hours with the defendant going over the state's evidence. Hence, the trial court concluded that counsel had a good reason for not giving the defendant a copy of the discovery, and that counsel was exceptionally effective in representing the defendant's interests. *White v. State*, 281 Ga. 20, 635 S.E.2d 720 (2006).

Failure to disclose and use exculpatory evidence. — In a case in which defendant claimed mistaken identity and there was no question that defendant's dental records would have disproved the state's argument that defendant might have acquired the gold teeth after a robbery and would have corroborated the impeached and biased testimony of the defense witnesses, defendant's trial counsel was ineffective for failing to disclose the exculpatory evi-

dence after opting in to reciprocal discovery and failed to use the evidence; because there was a reasonable possibility that the outcome of defendant's trial would have been different, defendant was entitled to a new trial. *Gibbs v. State*, 270 Ga. App. 56, 606 S.E.2d 83 (2004).

Time with a client. — Counsel was not ineffective for insufficiently reviewing the state's discovery with the defendant, as there was no magic amount of time the counsel had to spend in actual conference with a client, nor did the defendant show how additional communications with counsel would have changed the trial's outcome. *Giddens v. State*, 276 Ga. App. 353, 623 S.E.2d 204 (2005).

Defendant was not afforded ineffective assistance of counsel because counsel met with the defendant 15 to 20 times prior to trial, investigated all leads provided by the defendant, spoke with numerous witnesses and potential witnesses, including the minor molestation victim's grandmother, brothers, great aunts, and mother, as well as all other witnesses the defendant mentioned, and reviewed the victim's videotaped interview with authorities. *Iles v. State*, 278 Ga. App. 895, 630 S.E.2d 148 (2006).

On remand, a Georgia trial court properly found that the defendant did not receive the ineffective assistance of trial counsel, as the record clearly showed that counsel: (1) met with the defendant to prepare for trial and go over discovery; (2) met with the prosecutor to discuss the case; (3) discussed legal issues and possible defenses with the defendant; and (4) properly decided to withhold copies of documents from the defendant, who was incarcerated, out of an abundance of caution that other inmates would steal them, learn the details of the case, and then offer to testify against the defendant in order to receive preferable treatment. *Williams v. State*, 281 Ga. 196, 637 S.E.2d 25 (2006).

Defendant did not show ineffective assistance of counsel during the defendant's trial for armed robbery and other crimes on the ground that the defense attorney only met with the defendant once before the trial; there existed no magical amount of time which counsel was required to spend in actual conference with a client,

and more importantly, the defendant did not describe how additional pre-trial communications would have changed the outcome of the trial and therefore failed to establish that the defense was prejudiced. *Metoyer v. State*, 282 Ga. App. 810, 640 S.E.2d 345 (2006).

Defendant failed to establish that trial counsel rendered ineffective assistance by failing to confer meaningfully with the defendant because the defendant did not specifically describe how additional communications with counsel could have changed the outcome of the trial; there exists no magic amount of time which counsel must spend in actual conference with a client. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Time to prepare for trial. — Because defendant's attorneys did not move for a continuance and obtain a longer time to prepare the case, because they allowed irrelevant or otherwise illegal evidence to be admitted without objection, because they relied solely on the statement of the defendant to the jury without introducing testimony, and because they themselves did not actively pursue the motion for new trial are not matters which would constitute a denial of the right to due process, but at most would amount to alleged negligence or errors of judgment. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

When counsel was appointed to the case approximately two weeks before the defendant's trial was scheduled to begin, the counsel had only a short period of time in which to prepare for this case, counsel had duties in other courts, and counsel's mother's illness occupied a great deal of counsel's out-of-court time, the defendant was not given effective assistance of counsel. *Cochran v. State*, 262 Ga. 106, 414 S.E.2d 211 (1992).

Defendant did not show defense counsel provided ineffective assistance because counsel was not prepared for trial since defendant did not point to any instances in the record that reflected counsel's lack of preparedness. *Berry v. State*, 262 Ga. App. 375, 585 S.E.2d 679 (2003).

When defense counsel admitted, at a hearing on defendant's motion for a new

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

trial, that counsel could have done more to prepare defendant's case, defendant was not entitled to a new trial due to ineffective assistance of counsel because defendant did not show that counsel's additional investigation would have caused a different verdict in defendant's trial. *Parker v. State*, 274 Ga. App. 347, 617 S.E.2d 625 (2005).

Defendant did not show the prejudice required for ineffective assistance of counsel and prejudice was not presumed as counsel did not entirely fail to subject the prosecution's case to meaningful adversarial testing; counsel presented a coherent theory of voluntary manslaughter and mutual combat, and testified to extensive preparation for trial, including several meetings with defendant totaling over 13 hours, as well as other meetings with defendant's family. *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

Defendant was not entitled to a new trial due to ineffective assistance of counsel as defendant did not specify how trial counsel failed to adequately prepare for trial or how defendant was prejudiced. *Mayfield v. State*, 276 Ga. App. 544, 623 S.E.2d 725 (2005).

Counsel, who spent one full work week and two weekends preparing for the trial, met with defendant three times to discuss trial strategy, talked to each witness, and read every police report and statement included in the state's file and outlined and compared them to prepare for trial, was not ineffective; even assuming, arguendo, that trial counsel was inadequately prepared, defendant failed to show prejudice. *Robertson v. State*, 277 Ga. App. 231, 626 S.E.2d 206 (2006).

Defendant also failed to establish the claim that the attorney was ineffective in asking for a continuance to prepare for trial since, even if defendant's attorney should have proceeded to trial unprepared, in order to try to force the state to comply with a deadline imposed by a habeas decision, defendant failed to show prejudice as there was no evidence that

the state would not have been able to satisfy the deadline. *Fortson v. State*, 280 Ga. 435, 629 S.E.2d 798 (2006).

Defendant failed to establish ineffective assistance of counsel in a rape charge after: trial counsel testified that trial counsel met with defendant many times; hired an investigator who interviewed every relevant witness, including one who, contrary to defendant's claim, did not corroborate defendant's claim of consensual sex with the victim; and that defense counsel went over everything with defendant; defendant pointed to nothing in the record indicating that trial counsel was not prepared for trial or did not understand the facts or law pertaining to the case; defense counsel's failure to file a motion in limine to prohibit the use of the term "rape" did not constitute ineffective assistance; and other claims of ineffective assistance of counsel were unpreserved since defendant failed to raise them in the motion for a new trial. *Nguyen v. State*, 279 Ga. App. 129, 630 S.E.2d 636 (2006).

Defendant's motion for a new trial was properly denied as trial counsel did not provide ineffective assistance in failing to prepare notes and questions for use during direct and cross-examination; the defendant did not show how any alleged deficiency prejudiced the defendant's case. *Lawson v. State*, 280 Ga. App. 870, 635 S.E.2d 259 (2006).

Although the defendant alleged on appeal that trial counsel should have interviewed additional witnesses, conducted a more thorough investigation, presented the defendant's medical record, and discussed further developments, defenses, and the defendant's right to appeal, the defendant failed to present any evidence to support those claims; further, the defendant's testimony at a hearing on the motion to withdraw a guilty plea simply presented a matter of witness credibility, which was for the trial court to decide. *Foster v. State*, 281 Ga. App. 584, 636 S.E.2d 759 (2006).

Trial counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to sufficiently investigate or attempt to understand the facts and law upon which the various charges were based; trial counsel had significant previ-

ous experience with child molestation cases such as the defendant's, and the defendant failed to point to any specific evidence in the record demonstrating that trial counsel was unprepared or did not understand the case. *Mikell v. State*, 281 Ga. App. 739, 637 S.E.2d 142 (2006).

Appellate court rejected the defendant's contention that trial counsel was ineffective: (1) in failing to investigate another molestation charge filed against the defendant; (2) by failing to interview the defendant's mother; (3) in not investigating the state's failure to obtain a warrant to determine whether the defendant's computer contained or could access pornographic material; (4) by referring to the defendant's prior criminal record on DUI charges; (5) in introducing several letters from the defendant's daughter into evidence; and (6) by characterizing the defendant in closing argument as guilty of drunken and boorish behavior, as the trial court was authorized to believe counsel's testimony regarding counsel's sufficient preparation for trial, and finding that without a proffer of evidence concerning the defendant's computer, the defendant could not show a reasonable probability that the results of the proceedings would have been different; hence, the trial court did not err in denying the defendant a new trial on grounds that trial counsel was ineffective. *Carey v. State*, 281 Ga. App. 816, 637 S.E.2d 757 (2006).

Although a defendant asserted that certain statements by the defendant's trial counsel about inadequate time to review discovery materials provided by the prosecution indicated that the trial counsel was insufficiently prepared for the defendant's malice murder trial, no ineffective assistance of counsel was shown; the trial court noted on the motion for a new trial that the record showed that trial counsel had reviewed the material provided by the prosecution, had investigated the case, had filed and argued pre-trial motions, and had adequate time to prepare for trial, and the defendant did not point out any occurrence at trial that demonstrated a lack of preparation. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Defendant's ineffective assistance of counsel claims based on counsel's failure

to call certain witnesses on the defendant's behalf and failure to adequately meet with the defendant to prepare for trial were rejected as the defendant presented nothing more than bare allegations that trial counsel should have acted differently; the defendant did not identify the potential witnesses, proffer their testimony, indicate what other steps counsel might have taken, or indicate how additional preparation would have altered the outcome of the trial. *Hinkle v. State*, 282 Ga. App. 328, 638 S.E.2d 781 (2006).

Defendant's defense attorney did not provide ineffective assistance in the defendant's child molestation trial by failing to prepare adequately; the record supported a finding that the attorney's preparation was not deficient because the attorney testified to spending 70 to 100 hours preparing for the trial, including filing pre-trial motions, reviewing the state's file on the case, interviewing witnesses, discussing defenses with the defendant, conveying a negotiated plea offer to the defendant, and pursuing a defense that a different perpetrator had committed the offenses against the victim. *Wheat v. State*, 282 Ga. App. 655, 639 S.E.2d 578 (2006).

Because the defendant was unable to establish prejudice resulting from trial counsel's alleged shortcomings, specifically that counsel was unprepared for trial, the defendant's ineffective assistance of counsel claim lacked merit. *Bradford v. State*, 287 Ga. App. 50, 651 S.E.2d 356 (2007).

Defendant did not meet the defendant's burden to demonstrate that counsel performed deficiently by failing to explain the risks of retaining new counsel on the eve of the defendant's trial as counsel testified that counsel interviewed all of the witnesses; met with the defendant the day before trial and for one or two hours on the morning of trial; and believed counsel had plenty of time to prepare for the misdemeanor trial. As the trial court was entitled to credit counsel's testimony and disbelieve the defendant's, it was authorized to find that counsel was adequately prepared. *Bagley v. State*, 298 Ga. App. 513, 680 S.E.2d 565 (2009).

Defendant failed to show that counsel

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

was ineffective due to counsel's alleged failure to adequately prepare the case and consult with the defendant prior to trial, although there were two public defenders that represented the defendant during the criminal proceedings, there was testimony from the second public defender that the case had been fully investigated and was ready to be tried, and that there was no reason to pursue further defenses. *Simmons v. State*, 309 Ga. App. 369, 710 S.E.2d 193 (2011).

Defendant did not show that trial counsel was unprepared for trial on the ground that counsel received thousands of pages of medical records shortly before trial because the defendant failed to establish that the receipt of the medical records shortly before trial was counsel's fault, and to the extent counsel's preparation was affected thereby, that preparation did not constitute deficient performance on counsel's part. *Eskew v. State*, 309 Ga. App. 44, 709 S.E.2d 893 (2011).

Total failure to prepare for trial required a disposition that there was evidence of ineffectiveness so pervasive that a particularized inquiry into prejudice would be unguided speculation. *Cochran v. State*, 262 Ga. 106, 414 S.E.2d 211 (1992).

Upon the state's appeal pursuant to O.C.G.A. § 5-7-1(a)(7), the appeals court found that the defendant was properly granted a new trial based on the ineffective assistance of trial counsel, given counsel's failure to interview any of the state's witnesses, present a viable defense to the charge of involuntary manslaughter, and adequately investigate whether the victim's death might have been an accident. *State v. McMillon*, 283 Ga. App. 671, 642 S.E.2d 343 (2007).

Defendant received ineffective assistance of counsel based on the defendant's attorney's lack of preparation for trial and failure to present a defense; at trial, the defense called no witnesses and presented no other evidence on the defendant's behalf, and trial counsel's belief as to what

testimony that witnesses proposed by the defendant might offer was formulated without the attorney ever having contacted those witnesses. *Johnson v. State*, 284 Ga. App. 147, 643 S.E.2d 556 (2007).

Failure to prepare defendant adequately for trial. — Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to adequately prepare the defendant for trial because trial counsel testified that counsel met with the defendant at least four times prior to trial to discuss the case, and the defendant failed to demonstrate how additional time with counsel would have changed the outcome of defendant's case; trial counsel testified that counsel believed that counsel and the Spanish interpreters counsel used were able to effectively communicate with the defendant and that the defendant never gave counsel any indication that defendant was unable to understand Spanish. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Defendant, in the absence of a proffer showing how further preparation would have changed the defendant's testimony such that it would have affected the outcome of the case, could not meet the defendant's burden of making an affirmative showing that specifically demonstrated how defense counsel's failure to have properly prepared the defendant for cross-examination would have affected the outcome of the defendant's case. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Duty of defense counsel to fully investigate case. — Counsel for a defendant not only has the right, but it is counsel's plain duty towards the client, to investigate the case fully and to interview any persons who might be able to assist counsel in ascertaining the truth concerning the event in controversy. *Wilson v. State*, 93 Ga. App. 229, 91 S.E.2d 201 (1956).

Trial court did not err in denying the defendant's motion for a new trial based on the defendant's claim that the defendant's trial counsel provided ineffective assistance as defendant did not show that counsel did not fulfill the duty to fully investigate the defendant's case; the trial court was entitled to believe the attorney's

testimony that the attorney went and spoke with neighbors defendant said could provide an alibi and that none of them could do so over defendant's testimony that counsel claimed a lack of time to interview them, and could believe that phone records defendant said would help defendant's case did not exist as the defendant did not provide those records personally or indicate what they contained that would have helped the defendant's case. *Roberts v. State*, 262 Ga. App. 629, 585 S.E.2d 920 (2003).

Because defendant's own friends and acquaintances could not verify that defendant was at a nightclub on the night of the murder, it was highly questionable that total strangers would be likely to provide any corroboration; thus, under the circumstances, the trial court did not err in concluding that the attorney performed effectively because the attorney did an investigation and there was no constitutional or statutory requirement that counsel actually visit the nightclub; therefore, the defendant's ineffective assistance of counsel claim failed. *Wicks v. State*, 278 Ga. 550, 604 S.E.2d 768 (2004).

Defense counsel did not provide ineffective assistance of counsel in failing to conduct a proper pretrial investigation as defendant failed to show that a grand juror was not qualified because the grand juror was a convicted felon; further, even if a grand juror was the father of a prosecution witness, defendant failed to show prejudice as the disqualification of a grand juror under O.C.G.A. § 15-12-70 was not a viable ground for quashing an indictment. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Trial counsel for an inmate provided ineffective assistance because the counsel did not adequately investigate a factual defense to the crimes or obtain available testimony confirming their client's own statements that other people committed the crimes and threatened to harm the inmate for speaking up, and witnesses discovered by habeas counsel showing that another person: (1) possessed the victims' van about the time of the murder; (2) was seen, along with another person, about that time, to be acting strangely; (3) had what appeared to be bloodstains on

that person's clothes; and (4) was distributing quarters after the victims, who ran a coin-operated laundry, had been abducted and killed. *Terry v. Jenkins*, 280 Ga. 341, 627 S.E.2d 7 (2006).

Because: (1) defendant failed to show that prejudice by the attorney's failure to view a surveillance tape or tender it into evidence; (2) defendant's contention that the counsel could have done more to prepare for trial and aid in the defense was mere speculation; (3) counsel advised defendant on the possible penalties; and (4) defendant failed to clarify what constitutional rights were involved and how counsel's failure to advise caused harm, counsel could not be deemed ineffective. *Navarro v. State*, 279 Ga. App. 311, 630 S.E.2d 893 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to obtain certain forensic evidence and for failing to investigate the case; trial counsel's conduct in failing to obtain the forensic evidence was reasonable in light of counsel's fear that it would link the defendant to the evidence, and, contrary to the defendant's claim, defense counsel investigated the case by interviewing witnesses, visiting the crime scene, and reviewing the hospital records and all of the police reports. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

Defendant's motion for a new trial was properly denied since defense counsel was not ineffective in: (1) failing to investigate the victim's reputation for violence and introduce evidence of that victim's prior violent acts; (2) failing to investigate the defendant's medical records; (3) failing to investigate a state witness's convictions for crimes of moral turpitude and request an impeachment charge concerning that witness; (4) advising defendant not to testify; and (5) failing to present evidence or argument at sentencing. *Cross v. State*, 285 Ga. App. 518, 646 S.E.2d 723 (2007), cert. denied, 2007 Ga. LEXIS 680 (Ga. 2007).

Defendant did not establish ineffective assistance of counsel based on failure to adequately investigate; although the defendant claimed that trial counsel failed to interview certain individuals, the de-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

defendant made no proffer of their expected testimony other than a general assertion that counsel would have discovered valuable information had counsel done so, and there was no showing that the evidence contained in certain records would have been relevant and favorable to the defendant. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

The trial court properly denied the defendant's motion for a new trial on appeal from the defendant's convictions of child molestation and aggravated child molestation because: (1) venue was adequately shown by the testimony of a single witness; (2) the defendant's trial counsel was not ineffective by failing to prepare for trial, investigate the case, subpoena important documents, interview key witnesses, and object to damaging testimony; and (3) the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged shortcomings. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

Trial court properly denied the defendant's motion for a new trial on appeal from the defendant's convictions of child molestation and aggravated child molestation because: (1) venue was adequately shown by the testimony of a single witness; (2) the defendant's trial counsel was not ineffective by failing to prepare for trial, investigate the case, subpoena important documents, interview key witnesses, and object to damaging testimony; and (3) the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged shortcomings. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

Defendant failed to establish that defendant received ineffective assistance of trial counsel with regard to defendant's drug-related convictions as, although defendant successfully met the burden of showing that defense counsel's representation fell below an objective standard of reasonableness due to defense counsel failing to advise defendant about all of the

evidence in the state's case against defendant due to defense counsel failing to examine the state's open file, defendant failed to establish but for defense counsel's unprofessional errors, the result of the proceeding would have been different, namely that defendant would not have accepted the state's plea offer. *Cleveland v. State*, 290 Ga. App. 835, 660 S.E.2d 777 (2008).

As the defendant did not point to any exculpatory evidence or alibi a friend might have provided, the defendant did not establish that defense counsel was ineffective in failing to investigate the friend. *Wallace v. State*, 295 Ga. App. 452, 671 S.E.2d 911 (2009).

Defendant's assertion that defense counsel was ineffective for failing to investigate the lighting at an apartment complex failed as the defendant did not demonstrate what an investigation would have shown with respect to the sufficiency of the lighting and how the lighting might have affected the victim's ability to identify the defendant as the person who robbed the victim at gunpoint. *Killings v. State*, 296 Ga. App. 869, 676 S.E.2d 31 (2009).

Failure to investigate impact of defendant's medical condition. — Defendant, who was convicted of violating Georgia's Peeping Tom Statute, O.C.G.A. § 16-11-61, was entitled to a new trial since defendant's counsel failed to investigate the impact of defendant's multiple sclerosis, which might have been sufficient to create a reasonable doubt as to whether defendant acted with the purpose of spying on the victim. *Fedak v. State*, 304 Ga. App. 580, 696 S.E.2d 421 (2010).

Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to hire an investigator and by failing to interview the victim, the police officers involved, and the fourth male at the scene because trial counsel testified that counsel spoke to several of the investigating officers about the case and to the victim's roommate, who initially contacted the police, and that counsel attempted to locate the fourth male at the scene but was told by the man's family members that the man had left the country; the defendant's argument concerning

the alleged failures was foreclosed by defendant's failure to make any proffer of what the allegedly necessary investigations would have uncovered. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Trial counsel was not ineffective for failing to obtain and review the tape, transcript, and forensic report for an interview of the defendant's son and the victim's school and medical records because the defendant failed to demonstrate a reasonable probability that the outcome of the trial would have been different if defendant's counsel had obtained and reviewed the information; the differences between the son's first and second interview after a prolonged period of counseling were brought out in the trial, and the school records were unlikely to have had an impact on the outcome of trial. *Wade v. State*, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, 131 S. Ct. 3066, 180 L. Ed. 2d 893 (2011).

Defendant failed to meet the defendant's burden of proving deficient performance on the ground that defendant's trial counsel failed to investigate an additional suspect because counsel testified that counsel investigated every person who could have been connected to the case and that counsel also investigated relevant phone records and police files that could have revealed other suspects in the victim's murder; despite counsel's efforts, counsel was unable to connect any additional suspect to the shooting. *Jennings v. State*, 288 Ga. 120, 702 S.E.2d 151 (2010).

Defendant could show no harm due to trial counsel's failure to thoroughly investigate the facts of the case and to interview all potential witnesses because trial counsel testified that the victim and the victim's mother refused to speak to defense counsel, and the defendant did not identify any other witnesses or their potential testimony that should have been presented. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Defendant failed to demonstrate that the defendant was deprived of effective assistance of counsel because the defendant could not show prejudice with regard to the defendant's assertions that counsel failed to fully investigate the case and call essential witnesses when the defendant

made no proffer as to what a thorough investigation would have uncovered or what the essential witnesses would have said. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Evidence supported a conclusion that the defendant failed to carry the burden of showing deficient performance or prejudice relating to counsel's preparation for trial because counsel testified that counsel and an investigator had interviewed numerous individuals in connection with the case; the defendant made no proffer as to what a more thorough investigation would have uncovered. *Jackson v. State*, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because counsel attempted to interview some of the state's witnesses, but some of the witnesses, including the state's main eyewitness, refused to speak to counsel. *Rafi v. State*, 289 Ga. 716, 715 S.E.2d 113 (2011).

Claim that counsel performed deficiently by failing to adequately prepare for trial and failing to investigate potential witnesses failed because two of the witnesses the defendant claimed should have been interviewed testified at trial and a third was interviewed but it was determined that the third witness's testimony would not have established an alibi defense. *Griffin v. State*, 292 Ga. 321, 737 S.E.2d 682 (2013).

Counsel did not render ineffective assistance by failing to obtain phone records or a surveillance video that the defendant alleged would have provided the defendant with an alibi because counsel testified that the defendant never told counsel about those items. *Riles v. State*, 321 Ga. App. 894, 743 S.E.2d 552 (2013).

Pretermitted whether counsel's investigation could be characterized as inadequate, the defendant's ineffective assistance of counsel claim still failed because the defendant failed to show that a more thorough investigation would have yielded any significant exculpatory evidence and, thus, the defendant failed to show prejudice. *Norton v. State*, 293 Ga. 332, 745 S.E.2d 630 (2013).

Failure to research eyewitness identification. — Defense counsel was

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

not ineffective for not adequately researching the issue of eyewitness identification, since the counsel questioned the witness at length about the witness's opportunity to observe the defendant and the identification, the counsel cross-examined an officer vigorously about the lineup procedure, and the counsel reasonably believed the various scientific theories on eyewitness identification would not help because the defendant had admitted to being at the crime scene. *Mobley v. State*, 277 Ga. App. 267, 626 S.E.2d 248 (2006).

Failure to admit witnesses pre-trial testimony. — Defendant did not receive ineffective assistance of trial counsel, despite any deficient performance in counsel's lack of diligence in obtaining witness three's (W3) testimony at trial as the outcome of the trial would not have been different if W3's pre-trial testimony had been admitted since it: (1) would have contradicted the defendant's testimony that witness one (W1) told the victim not to stab the defendant; (2) would have corroborated witnesses one's (W1) and two's (W2) testimony that they did not see the victim stab the defendant; and (3) would not have established that W1 and W2 saw the victim with a knife during the altercation. *Hill v. State*, 291 Ga. 160, 728 S.E.2d 225 (2012).

Failure to call witness. — Defendant was not denied effective assistance of counsel as the attorney concluded that, in its totality, a witness's testimony was more damaging than beneficial to the defense; the decision, after consultation with defendant, not to call the witness was a matter of trial strategy. *Nicely v. State*, 277 Ga. App. 140, 625 S.E.2d 538 (2006).

Trial counsel did not render ineffective assistance of counsel to defendant in a case in which defendant was found guilty in a jury trial of possession of methamphetamine with intent to distribute, but was acquitted of trafficking in methamphetamine as the trial counsel's decision not to call two witnesses who could not

have provided exculpatory evidence was a tactical decision and did not merit a finding that counsel provided ineffective assistance. *Chancellor v. State*, 270 Ga. App. 87, 606 S.E.2d 105 (2004).

Defense counsel did not give ineffective assistance of counsel in failing to call certain witnesses as which witnesses to call was in the exclusive province of the attorney, after consultation with the client; defense counsel conferred with defendant after counsel indicated that counsel wanted to call defendant's accomplices as witnesses and explained to defendant that defendant had the right to testify, defendant testified, and the only further mention of the witnesses was by the trial judge, who directed that the witnesses be brought to the courtroom, after which the defense rested, without calling the witnesses. *Reynolds v. State*, 267 Ga. App. 148, 598 S.E.2d 868 (2004).

Fact that trial counsel failed to subpoena one of the witnesses whose attendance defense counsel could not procure did not show that the trial counsel provided ineffective assistance of counsel, as trial counsel's decision may have been tactical and, in any event, defendant did not show that defendant was prejudiced because the evidence so overwhelmingly established defendant's guilt that the testimony of the missing witness would not have affected the outcome. *Cain v. State*, 277 Ga. 309, 588 S.E.2d 707 (2003), overruled in part by *Dickens v. State*, 280 Ga. 320, 627 S.E.2d 587 (2006).

Failure to investigate character witnesses. — Because the defendant failed to show that any prejudice resulted from trial counsel's failure to investigate potential character witnesses and failure to "re-advise" the defendant of the right to testify following the state's introduction of rebuttal evidence, the defendant was not entitled to a new trial on these grounds. *Thomas v. State*, 282 Ga. 894, 655 S.E.2d 599 (2008).

Failure to call witness on self-defense. — When a witness had originally given a statement that supported the defendant's self-defense claim, but later recanted this statement, defense counsel was not ineffective for calling the witness; the defendant had insisted that

the witness be called, and doing so at least allowed the jury to hear the witness's original statement. *Shelton v. State*, 281 Ga. 660, 641 S.E.2d 536 (2007).

Failure to call codefendant. — Trial counsel was not ineffective for failing to present a codefendant's testimony as an exculpatory witness who would have exonerated the defendant, as such amounted to a strategic decision; moreover, the failure to make a meritless objection to the court's failure to give the defendant's requested charge on accessory after the fact could not be deemed evidence of ineffectiveness. *Buruca v. State*, 278 Ga. App. 650, 629 S.E.2d 438 (2006).

Trial counsel was not ineffective for failing to call the codefendant as a witness because the codefendant was not a consistent witness. *Simmons v. State*, 289 Ga. 773, 716 S.E.2d 165 (2011).

Defendant's assertion that, under former O.C.G.A. § 17-8-71, defense counsel could have called a witness for impeachment and not lost the right to conclude final arguments, was erroneous; even if defense counsel provided deficient performance in failing to introduce evidence at trial, the defendant failed to show that there was a reasonable probability that the trial outcome would have been different but for the alleged deficient performance. *Rolland v. State*, 280 Ga. 517, 630 S.E.2d 386 (2006).

Because the defendant failed to show that: (1) trial counsel's performance was deficient in failing to call a forensic interviewer as a witness, and that failure prejudiced the defense and would have changed the outcome of the trial; (2) trial counsel's decision not to object to the properly admitted testimony from a forensic interviewer as to the opinion rendered on the victim's intelligence and reactions to certain questions which were consistent with abuse was not ineffective; and (3) the defendant could not show that the failure to call the trial attorney affected the outcome of a motion for a new trial, the defendant's ineffective assistance of counsel claims against both trial and appellate counsel lacked merit. *Freeman v. State*, 282 Ga. App. 185, 638 S.E.2d 358 (2006).

Defense counsel rendered ineffective assistance of counsel under Ga. Const. 1983,

Art. I, Sec. I, Para. XIV in the child molestation case because counsel failed to call witnesses to testify that the victim's mother, to whom the victim had first complained of the alleged molestation, had repeatedly made allegations of molestation that witnesses claimed were false; this was highly relevant, as it impacted upon the victim's credibility and upon the mother's credibility. *Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, No. S07C0623, 2007 Ga. LEXIS 338 (Ga. 2007).

Appeals court rejected the defendant's ineffective assistance of counsel claim as the defendant failed to show that trial counsel was ineffective in failing to call certain witnesses who were associated with the local government, contending that their testimony would have established that the prosecution was politically motivated, absent evidence regarding what their testimony would have been at trial and that such would have affected the outcome. *Brown v. State*, 285 Ga. App. 453, 646 S.E.2d 289 (2007), cert. denied, No. S07C1503, 2007 Ga. LEXIS 672 (Ga. 2007).

Failure to present alibi witness. — In a prosecution against the defendant under O.C.G.A. § 16-6-4, because the defendant failed to show that trial counsel was ineffective in failing to present an alibi witness, and because the defendant failed to offer evidence that a medical examiner or witnesses from the Department of Family and Child Services would have been favorable to a defense, the defendant's ineffective assistance of counsel claims lacked merit. *Herrington v. State*, 285 Ga. App. 4, 645 S.E.2d 29 (2007), cert. denied, 2007 Ga. LEXIS 548 (Ga. 2007).

Failure to call spouse. — On appeal from convictions on one count of aggravated sexual battery and two counts of sexual assault, the trial court did not err in denying the defendant's motion for a new trial as the defendant failed to show that any prejudice resulted from counsel's failure to call the defendant's wife to testify for the defense, and the appeals court refused to speculate that the wife's testimony would have led to an acquittal. *Lee v. State*, 286 Ga. App. 368, 650 S.E.2d 320 (2007).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

Failure to call future spouse. — Defendant did not show prejudice from trial counsel's failure to call the defendant's future spouse and the future spouse's sibling as character witnesses. Even if counsel's decision could be considered unreasonable, the evidence supported a finding that both persons were biased toward the defendant; given this finding, the trial court was authorized to conclude that introduction of the character evidence likely would not have made a difference at trial. *Gresham v. State*, 295 Ga. App. 449, 671 S.E.2d 917 (2009).

Defendant's ineffective assistance of counsel claim lacked merit because while the defendant claimed that the defendant's love interest should have been called as a witness, the defendant did not present the love interest's testimony at the hearing on the defendant's motion for new trial and, thus, the defendant could not demonstrate that any prejudice resulted from the love interest's absence at the trial. *Crawford v. State*, 297 Ga. App. 187, 676 S.E.2d 843 (2009).

Because the defendant was not denied effective assistance of trial counsel based on the counsel's failure to call certain witnesses as the testimony that these witnesses would have provided would not have affected the outcome of the trial, and counsel was not ineffective to the extent that the defendant was denied the right to testify at trial, the trial court properly denied the defendant a new trial. *Finch v. State*, 287 Ga. App. 319, 651 S.E.2d 478 (2007).

In a termination of parental rights matter, trial counsel was not ineffective, as the parent never informed counsel of any evidence or witnesses that would assist the parent's defense and never informed trial counsel or the parent's caseworker that the parent would not be attending the termination hearing. In the Interest of S.B., 287 Ga. App. 203, 651 S.E.2d 140 (2007).

Defendant's trial counsel was not ineffective in failing to call a witness who

would have testified that the victim fabricated claims of molestation as: (1) the witness did not inform counsel of the witness before trial; (2) counsel articulated valid reasons for not calling the witness; (3) counsel challenged the state's evidence, arguing that the claims were fabricated; and (4) the defendant failed to show that any prejudice resulted from counsel's actions. *Noe v. State*, 287 Ga. App. 728, 652 S.E.2d 620 (2007).

Defendant did not show ineffective assistance when trial counsel used a third party's confession to challenge the thoroughness of the police investigation, but instead focused on challenging the voluntariness of the defendant's taped statement. The defendant did not show that this strategic decision was an unreasonable one or that the defense was prejudiced by counsel's decision not to call the third party based on counsel's assessment that the party lacked credibility. *Boseman v. State*, 283 Ga. 355, 659 S.E.2d 364 (2008).

With regard to a defendant's conviction for malice murder, the defendant failed to establish that the defendant was rendered ineffective assistance of trial counsel as a result of trial counsel failing to call certain additional witnesses since at the hearing on the defendant's motion for a new trial, trial counsel testified that various tactical reasons existed for not calling the various additional witnesses. *Ventura v. State*, 284 Ga. 215, 663 S.E.2d 149 (2008).

In an armed robbery prosecution, defense counsel was not deficient for not calling alleged alibi witnesses because counsel interviewed the witnesses and deemed the witnesses unhelpful; and as the defendant failed to produce the witnesses at the motion for a new trial, the defendant could not show prejudice or ineffective assistance. *Shabazz v. State*, 293 Ga. App. 560, 667 S.E.2d 414 (2008).

Defendant, who claimed that counsel was ineffective, did not show that the outcome of the trial would have been different if a certain eyewitness testified. Because the eyewitness stated that the eyewitness did not see who fired the shots in question, because other witnesses testified consistently with the eyewitness's pretrial statement that the defendant had

been wrestled to the ground, and because those witnesses added that they saw the defendant fire a gun despite being wrestled to the ground, the defendant did not show that if the eyewitness had testified at trial, there was a reasonable probability that the result would have been different. *Savior v. State*, 284 Ga. 488, 668 S.E.2d 695 (2008).

If a witness claimed no knowledge of a statement and refused to testify about the statement at a motion for new trial hearing, it could not be assumed the witness would have testified differently or more fully at trial. Defendant failed to show that there was a reasonable probability that the result of defendant's trial would have been different, but for counsel's failure to produce the witness at trial. *Williams v. State*, 295 Ga. App. 249, 671 S.E.2d 268 (2008).

Defendant, who admitted firing a gun to frighten four victims, argued that defense counsel was ineffective for not calling a witness who would have testified that the defendant had not pointed the gun at the victims. As the state, to convict the defendant of aggravated assault, was not required to show that the defendant pointed the gun at the victims, but only that the defendant placed the victims in reasonable apprehension of immediately receiving violent injuries, there was not a reasonable probability that, had counsel called this witness, the outcome of the trial would have been different. *Hudson v. State*, 296 Ga. App. 692, 675 S.E.2d 578 (2009).

There was no ineffectiveness of trial counsel in the defendant's criminal matter as decisions regarding whether to cross-examine a witness or whether to call a witness were within counsel's trial strategy; further, since there was no showing that the outcome of the trial would have been different but for counsel's failure to object or to call a witness, there was no ineffectiveness shown. *Christian v. State*, 297 Ga. App. 596, 677 S.E.2d 767 (2009).

Failure to call parent. — Defendant claimed that trial counsel was ineffective in failing to secure the presence of the defendant's father to testify at trial; however, the defendant did not call the father as a witness at the motion for new trial

hearing, and without a proffer, was not able to show that trial counsel performed deficiently in not calling the father as a witness at trial. In any event, the evidence of the defendant's guilt was overwhelming, so no prejudice was shown. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

Because the defendant made no showing that trial counsel's failure to call the defendant or the defendant's mother as a witness was indicative of ineffectiveness as opposed to a deliberate and reasonable trial strategy, the trial court was authorized to conclude that the defendant had not carried the defendant's burden of proving ineffective assistance of counsel; the defendant failed to overcome the strong presumption that counsel's tactical decision not to call the defendant's mother fell within the broad range of professional conduct, and the defendant failed to show how the witness' testimony would have changed the outcome of the trial when the same evidence the defendant contended the mother would have testified to was admitted through other witnesses. *Gibson v. State*, 290 Ga. 6, 717 S.E.2d 447 (2011).

Trial counsel was not ineffective for failing to depose the defendant's father, a potential alibi-type witness who died prior to trial, as counsel's decision was a reasonable strategy since portions of the father's testimony would not have been beneficial to the defense. *Chalk v. State*, 318 Ga. App. 45, 733 S.E.2d 351 (2012).

Although the defendant argued that the defendant received ineffective assistance of counsel because, inter alia, counsel failed to locate and call witnesses, the testimony of one of the witnesses was contradictory to the defense theory that the defendant was not at the scene of the incident, and this strategy was reasonable; the defendant thus failed to establish the ineffective assistance of counsel claim. *Ransom v. State*, 298 Ga. App. 360, 680 S.E.2d 200 (2009).

Despite the absence of any physical evidence, the victims' testimonies were sufficient to find the defendant guilty of aggravated child molestation and child molestation under O.C.G.A. § 16-6-4; counsel's strategic decisions in failing to call impeachment witnesses did not

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

amount to deficient performance. *Barnes v. State*, 299 Ga. App. 253, 682 S.E.2d 359 (2009).

Trial counsel's performance was not constitutionally flawed because counsel could not be ineffective for failing to interview and call a potential alibi witness of whom counsel was not informed, and the trial court was authorized to credit counsel's testimony regarding the alibi witnesses whose names counsel was given; the defendant did not show that the testimony of the alibi witnesses would have been relevant and favorable because neither alleged alibi witness testified at the hearing on the motion for new trial. *McIlwain v. State*, 287 Ga. 115, 694 S.E.2d 657 (2010).

Defendant failed to demonstrate that defense counsel provided ineffective assistance because the defendant did not show that trial counsel's failure to further investigate and present testimony constituted deficient performance when the defendant neither identified any relevant witnesses nor put forward any evidence as to the testimony the witnesses would have given. *Smith v. State*, 303 Ga. App. 831, 695 S.E.2d 86 (2010).

Failure to call victim. — Trial counsel's tactical decision that the defense would be better served if the victim did not take the witness stand was not deficient because the prosecutor explained in the prosecutor's opening that the state would not call the victim as a witness since the victim's injuries caused short-term memory loss, leaving the victim unable to recall what happened before, during, and after the relevant events, and trial counsel testified that the victim refused to talk to counsel's investigator prior to trial and that the counsel was pleased that the victim would not be a witness since it was better to go to trial without a sympathetic victim; because the defendant did not call the victim as a witness at the motion for new trial hearing or present a legally acceptable substitute for the victim's testimony, it was

impossible for the defendant to show prejudice resulting from the victim's absence at trial. *Taylor v. State*, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Trial counsel was not ineffective in failing to confront the victim at trial when counsel testified that counsel did not call the victim to the stand because counsel thought that the victim's testimony would have done more damage than help; the mere existence of a defendant's right to confront a witness at trial cannot be taken to mean that it is always in the defendant's interest to do so. *Robinson v. State*, 308 Ga. App. 45, 706 S.E.2d 577 (2011).

Failure to call homeless victim. — Defendant argued that defense counsel performed ineffectively by failing to investigate and learn prior to trial that the homeless victim would not be called by the state to testify. Defendant, however, has failed to show how this alleged deficiency by trial counsel prejudiced the defendant in any way. Thus, the defendant cannot prove that the alleged failure to investigate so prejudiced the defendant that there is a reasonable likelihood that, but for that deficiency, the outcome of the trial would have been different. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Defendant did not receive ineffective assistance of counsel when defendant's trial counsel failed to call additional witnesses because the defendant did not identify in the defendant's brief, nor did the defendant call to testify at the motion for new trial hearing, any witnesses who could have allegedly added the "material evidence" that the defendant claimed was missing from the defendant's defense. *Jennings v. State*, 288 Ga. 120, 702 S.E.2d 151 (2010).

Defendant did not show that defendant's trial counsel failed to exercise reasonable professional judgment in failing to secure the attendance of a witness because counsel had already announced ready for trial based on the defendant's assurance that no witness would come forward for the state, and the defendant did not inform counsel of the witness's existence until the eve of trial; counsel immediately proceeded to interview the witness but did not have sufficient time to procure and serve a subpoena before trial

the next day, and the defendant could not demonstrate that the defendant's defense was prejudiced by counsel's failure to secure the witness's attendance at trial because the witness did not testify at the new trial hearing, and no substitute was offered for the witness's testimony. *Presley v. State*, 307 Ga. App. 528, 705 S.E.2d 870 (2011).

Defendant failed to show that the defendant received ineffective assistance of counsel because the defendant did not show that the defendant was prejudiced by counsel's performance in that counsel did not call an alibi witness to testify at the hearing on the defendant's motion for new trial or provide a legally recognized substitute for the witness's testimony; the defendant made no affirmative showing that the purported deficiency in counsel's representation was indicative of ineffectiveness, as opposed to being an example of a conscious, deliberate, and reasonable trial strategy. *Newsome v. State*, 288 Ga. 647, 706 S.E.2d 436 (2011).

Defendant failed to demonstrate that trial counsel rendered ineffective assistance by failing to call additional witnesses because the defendant failed to overcome the strong presumption that counsel's tactical decision to forego putting the subject witnesses on the stand was within the broad range of reasonable professional conduct; trial counsel testified that counsel decided not to present the other witnesses because counsel thought that the other witnesses would not "stand up well to cross-examination," that the jury would perceive variances in the testimony, that counsel was worried about credibility issues, and that counsel thought the defendant's "best chance" at establishing an alibi was with "one good clean witness." *Smiley v. State*, 288 Ga. 635, 706 S.E.2d 425 (2011).

Ineffective assistance of counsel was not shown because a juvenile failed to make an affirmative showing that specifically demonstrated how counsel's failure to investigate and present testimony from an investigator and the victim's friend would have affected the outcome of the juvenile's case. To the extent that the juvenile relied upon trial counsel's testimony to establish the investigator's and the friend's ex-

pected statements and to prove that the trial counsel's performance was deficient for failing to explore their testimony, such evidence was hearsay and had no probative value. *In the Interest of D.M.*, 308 Ga. App. 589, 708 S.E.2d 550 (2011).

Trial counsel was not ineffective for failing to locate and call witnesses who purportedly would have corroborated the defendant's claim that the defendant had a prior, consensual sexual relationship with the victim because the defendant failed to show that the purported deficiency of the defendant's trial counsel prejudiced the defendant's defense, given that the defendant failed to proffer the testimony of any of the alleged potential witnesses at the hearing on the motion for a new trial; because the defendant failed to make such a proffer, it was impossible for the defendant to show that there was a reasonable probability the results of the proceeding would have been different and thus impossible for the defendant to succeed on the ineffective assistance claim. *Alvarez v. State*, 309 Ga. App. 462, 710 S.E.2d 583 (2011).

Trial counsel was not ineffective for failing to call a witness to rebut similar transaction evidence at defendant's trial because the purported testimony of the witness was questionable, and trial counsel's tactical decision not to call the witness was not unreasonable. *Espinosa v. State*, 309 Ga. App. 877, 711 S.E.2d 425 (2011).

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because, although counsel did not present all three witnesses identified by the defendant as corroborating the defendant's claim of self-defense, counsel did present one witness who established the defendant's claim. *Rafi v. State*, 289 Ga. 716, 715 S.E.2d 113 (2011).

Failure to call police officer. — Trial counsel was not ineffective for failing to subpoena the police officer who took the fourth victim's statement after the robbery in order to show that the fourth victim's trial testimony was inconsistent with the statement provided to the officer as the inconsistency that was alleged, whether the victim was pushed against a fence or pulled to the ground by the rob-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

ber, was not material to the case. *Wickerson v. State*, 321 Ga. App. 844, 743 S.E.2d 509 (2013).

Failure to call character witnesses.

— Counsel's decision not to present character witnesses on the defendant's behalf because the defendant had a substantial history of prior burglaries did not amount to ineffective assistance. *Riles v. State*, 321 Ga. App. 894, 743 S.E.2d 552 (2013).

Defendant failed to show that trial counsel was ineffective for failing to subpoena and present evidence as counsel testified that the single witness presented at the motion for a new trial was not called as a witness because the witness was a negative. *Bradley v. State*, 322 Ga. App. 541, 745 S.E.2d 763 (2013).

Failure to challenge competency of witness. — Defense counsel was not ineffective for failing to challenge the competency of child witnesses because both victims were asked to demonstrate their understanding of the difference between the truth and a lie and both stated that they would tell the truth; the defendant gave no basis upon which, had defense counsel challenged their competency, the trial court would have ruled the children incompetent to testify, and defense counsel was not required to make a meritless objection. *Vaughn v. State*, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

Failure to object to cross-examination of defendant. — In a prosecution for the murder of the defendant's romantic companion, defense counsel was not ineffective for failing to object to cross-examination of the defendant about "the cycle of violence" that occurred in some domestic relationships. As there was evidence that the defendant assaulted the victim in the past, the question was proper and an objection would have been meritless. *Watkins v. State*, 285 Ga. 355, 676 S.E.2d 196 (2009).

Trial counsel was not ineffective for failing to object to the state's cross-examination of the defendant because the state's questioning was similar

to that which the trial court had already permitted, primarily eliciting specifics regarding the occasions when the defendant spoke to investigating officers, and counsel's strategic decision not to highlight such cumulative information was a legitimate trial strategy that fell within the range of reasonable professional conduct. *Kendrick v. State*, 287 Ga. 676, 699 S.E.2d 302 (2010).

Defense counsel was not ineffective for failing to make an objection regarding the prosecutor's questions on cross-examination because the prosecutor's questions exploring any inconsistencies or omissions concerning the statements that the defendant voluntarily made to the police were proper and the defense counsel was not required to make an objection that lacked merit. *Gilyard v. State*, 288 Ga. 800, 708 S.E.2d 329 (2011).

Because the prosecutor's question to the defendant on cross-examination was unlikely to be interpreted as a comment on the defendant's silence, the failure of the defendant's trial counsel to object to the question did not constitute deficient performance; the prosecutor's question did not imply that the defendant should have spoken to police officers or other government agents between the arrest and the trial, and, because the defendant did testify at trial, the question could not be construed as a comment on the defendant's failure to testify at trial. *Willis v. State*, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Defendant could not show that trial counsel performed deficiently by failing to object to the prosecutor's alleged "testimony" because the record did not support the defendant's assertion that the prosecutor, in posing leading questions to the defendant during cross-examination, "testified" against the defendant. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

Questioning of investigator. — Trial counsel's questioning of an investigator to show the investigator's bias against the defendant was not ineffective assistance even though it divulged defendant's previous arrest by inspector and the defendant's refusal to give a statement when arrested. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

Trial counsel was not ineffective for failing to object when the lead investigator was allowed to “interpret” the recordings of inmate phone calls by explaining the meaning of certain words and phrases because the investigator’s qualifications as a narcotics investigator were established by the investigator’s testimony at trial, and the investigator made it clear that the investigator was explaining the meaning of certain slang terms used during the conversations based on the investigator’s experience with drug investigations. *Lowe v. State*, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Defendant could not complain on appeal about defense counsel’s failure to object to an investigator’s bolstering of the victim’s credibility in a child molestation case, as defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object; defense counsel elicited the testimony from the witness while on cross-examination, and, as a result, there was no basis for counsel to object to the testimony. *Menard v. State*, 281 Ga. App. 698, 637 S.E.2d 105 (2006).

Use of alibi witnesses. — Defendant did not receive ineffective assistance of counsel when defendant’s trial counsel called alibi witnesses who in pretrial interviews told stories that were consistent with the defendant’s story that the defendant was not present at the time of the purse snatchings for which the defendant was on trial, but who on cross-examination told stories that were inconsistent, often conflicting, and harmful to the defendant’s alibi; the decision to call such witnesses involved a matter of trial strategy and did not amount to ineffective assistance of counsel. *Browne v. State*, 261 Ga. App. 648, 583 S.E.2d 496 (2003).

Cross-examination of rape victim. — Trial counsel was not ineffective in counsel’s cross-examination of a rape victim, after the victim changed her testimony since: (1) the trial counsel thoroughly cross-examined the victim regarding changed testimony; (2) the trial counsel pointed out that the victim had testified just minutes before that she had talked to husband about her testimony; and (3) the trial counsel argued to the jury

that the victim’s changed testimony was suspect. *Johnson v. State*, 263 Ga. App. 443, 587 S.E.2d 775 (2003).

Counsel opening door to admission of character evidence. — Trial counsel was not ineffective in opening the door to the admission of character evidence by cross-examining a detective who executed a search warrant as to whether the defendant lived in the room searched as the examination was a matter of sound trial strategy. Furthermore, trial counsel was not ineffective in failing to object to the prosecutor’s “Golden Rule” argument as the prosecutor did not improperly argue that the jurors should relive the rape, but properly argued that the jurors should consider how a person could appear calm or even relieved after such a heinous attack. *Johnson v. State*, 263 Ga. App. 443, 587 S.E.2d 775 (2003).

Examination of witnesses. — Defendant was not denied effective assistance of counsel at the defendant’s trial for malice murder and possession of a firearm in the commission of a felony since the defendant’s counsel conducted a thorough cross-examination of the state’s witnesses, including using prior inconsistent statements to impeach; defense counsel had no reasonable grounds for seeking a change of venue or sequestration of the jurors; and defense counsel had no reasonable basis for believing that a expert would be able to testify as defendant wished. *Wilson v. State*, 277 Ga. 485, 591 S.E.2d 812 (2004).

Habeas court was clearly erroneous in denying the defendant’s petition for a writ of habeas corpus and in finding that the defendant received effective assistance of counsel since: (1) trial counsel testified that counsel did not know of a potentially exculpatory witness disclosed by the state at the plea hearing; (2) as counsel was not aware of the witness, counsel’s failure to explore the possible defense could not have been a matter of trial strategy; (3) the plea transcript showed counsel’s apparent anger at the defendant for initially denying the defendant’s guilt and thwarting the plea proceedings, which raised questions about the voluntariness of the pleas; and (4) there was a reasonable probability that, had the defendant been

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel** (Cont'd)**B. Obligations of Counsel** (Cont'd)

advised of the serious problems with the state's case against the defendant, including the existence of the potentially exculpatory witness, the defendant would have insisted on going to trial. *Heyward v. Humphrey*, 277 Ga. 565, 592 S.E.2d 660 (2004).

Defendant did not receive ineffective assistance of counsel in the defendant's attorney's failure to call witnesses to testify to the nature of the defendant's acquaintance with the victim and to impeach the victim's testimony that the victim had never "partied" or smoked marijuana with the defendant as: (1) the proffered testimony went merely to the details of the admitted acquaintance between the defendant and the victim before the incident, not to the facts surrounding the incident itself or the charges against the defendant; (2) the only purpose of the evidence was to impeach the victim's testimony regarding how well the victim knew the defendant, an issue on which trial counsel cross-examined the victim; and (3) the defendant was not prejudiced by the absence of the evidence. *Joyner v. State*, 267 Ga. App. 309, 599 S.E.2d 286 (2004).

Defendant failed to establish that defendant was denied effective assistance of counsel because trial counsel was not deficient for failing to call a witness that defendant was not asked to call and there was no error in the trial court for giving more credence to trial counsel's testimony under the circumstances than it did to defendant's evidence of alibi. *Davis v. State*, 267 Ga. App. 668, 600 S.E.2d 742 (2004).

Trial counsel did not provide ineffective assistance of counsel in failing to object to the introduction of a police officer as a "gang task force" member given the minimal reference to the "gang task force" during voir dire as well as the fact that prosecutors never tried to link the defendant to gang activity; no reasonable probability existed that the jury would have reached a different verdict had counsel

objected. *Olarte v. State*, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Defendant did not receive ineffective assistance of counsel in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, during a trial for malice murder and other crimes; defense counsel interviewed the out-of-state witnesses the defendant believed should have testified and determined that their testimony would not have been helpful to the defendant and the counsel made "full discovery" in the case and provided all of it to the defendant. *Green v. State*, 279 Ga. 455, 614 S.E.2d 751 (2005).

Because the state's questions to a witness were not leading, had answers that were obvious, or were answered by the witness or other witnesses, trial counsel was not ineffective for failing to object. *Capers v. State*, 273 Ga. App. 427, 615 S.E.2d 126 (2005).

Counsel's failure to make hearsay objections to certain testimony was not ineffective assistance as the first witness's testimony was within the witness's personal knowledge and the other witness's testimony was cumulative of the first witness's testimony; the failure to make a best evidence objection to the admission of an Alabama "Case Action Summary" was not ineffective assistance as a Case Action Summary could be introduced as sufficient proof of a prior felony conviction. *Brooks v. State*, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Counsel did not provide ineffective assistance by not objecting to a witness's testimony because: (1) the testimony fit in with the counsel's reasonable trial strategy; and (2) the witness's comment that the witness went to interview the defendant, without stating whether such an interview was completed, was not an impermissible comment on the defendant's assertion of the right to remain silent. *Cornelius v. State*, 273 Ga. App. 806, 616 S.E.2d 148 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Trial counsel did not render ineffective assistance in failing to withdraw in order to testify as to counsel's conversation with

a victim; counsel was permitted to ask the victim about their conversation and the trial court's finding that counsel made a reasonable tactical decision to forego additional, cumulative impeachment of the victim by not withdrawing and remaining as the experienced advocate moving forward with defendant's pending demand for a speedy trial, was not clearly erroneous. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Defendant did not show that trial counsel performed deficiently in the defendant's trial on statutory rape and child molestation charges or that any alleged deficient performance prejudiced the defense, and, thus, did not establish ineffective assistance of counsel as: (1) the trial court's alleged failure to give a curative instruction regarding a remark a witness made that bolstered the victim's credibility was not error since defense counsel had asked the question to which the remark was made and did not object, which meant the defendant could not challenge the failure to give the instruction as error; and (2) the victim's comment to a witness shortly after the victim had sex with the defendant was admissible as *res gestae* evidence and, thus, defense counsel could not be ineffective for failing to object to it. *Drummond v. State*, 275 Ga. App. 86, 619 S.E.2d 784 (2005).

Because counsel's decision to use a witness's testimony to attack the witness's credibility rather than object to the testimony was not patently unreasonable, the trial court did not err in denying the defendant's claim of ineffective assistance of counsel; counsel attacked the testimony on cross-examination, pointing out the witness's failure to mention in previous testimony that a woman was at the defendant's house seeking to buy drugs, and indirectly challenging the witness's veracity. *Quimbley v. State*, 276 Ga. App. 174, 622 S.E.2d 879 (2005).

Counsel was not ineffective at trial as: (1) counsel's method of cross-examining the victim and another witness with a transcript from the preliminary hearing revealed several inconsistencies; (2) counsel did not fail to fully explore how the victim came to identify defendant as the attacker, in spite of the victim's steadfast

claims supporting the identification; and (3) counsel's decision to refrain from calling the defendant's doctor as a witness, which was made after consultation with the defendant, was a proper tactical decision. *Oliver v. State*, 278 Ga. App. 425, 629 S.E.2d 63 (2006).

Since neither trial counsel, defendant, nor any other witness testified at the motion for a new trial hearing, the appellate court had no way of knowing whether counsel interviewed defendant's friend, a potential alibi witness, before trial, and if counsel did, whether the friend confirmed the story that the defendant had concocted; the defendant thus failed to carry the burden of showing either deficient performance or prejudice relating to the allegation that counsel was ineffective for failing to interview the friend before trial. *Davis v. State*, 280 Ga. 442, 629 S.E.2d 238 (2006).

Defendant's ineffective assistance of counsel claim was rejected as the defendant's claim that trial counsel was not knowledgeable about the child hearsay statute and failed to highlight the unreliability of the child victim's statement to a nurse was based on mere speculation that a more thorough cross-examination would have altered the outcome at trial. *Brown v. State*, 280 Ga. App. 884, 635 S.E.2d 240 (2006).

Denial of a defendant's motion for a new trial was proper as the trial counsel did not provide ineffective assistance of counsel by abandoning the questioning of the defendant's housemate regarding the defendant's crying after the defendant's arrest as the decision was a tactical decision that the counsel had succeeded in placing the gist of the housemate's anticipated testimony before the jury, even though the counsel later critiqued the counsel's performance. *Temples v. State*, 280 Ga. App. 874, 635 S.E.2d 249 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to call any witnesses at the defendant's trial for aggravated assault; the record showed that the proposed witnesses' testimony at the ineffectiveness hearing was contradictory on the issues of where the gun was pointed, whether the defendant was upset, and whether the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

defendant spoke to the victim, and, although the defendant claimed that counsel did not consult with the defendant about trial strategy until the trial ended, the trial court was authorized to believe trial counsel's testimony. *Long v. State*, 281 Ga. App. 356, 636 S.E.2d 88 (2006).

In a prosecution for rape, kidnapping, and sodomy, the defendant did not receive ineffective assistance of trial counsel merely because counsel failed to impeach the victim's credibility with evidence concerning a 1996 drug arrest as: (1) that evidence was irrelevant to the circumstances surrounding the defendant's attack on the victim; and (2) the victim never opened the door to an issue of good character. *Pierce v. State*, 281 Ga. App. 821, 637 S.E.2d 467 (2006).

A defendant had not shown that counsel was ineffective for putting a witness's pre-trial statement into evidence: counsel testified that the statement was put into evidence so that the jury could see the inconsistencies between it and the witness's testimony in court, and the portion of the statement describing the defendant as the individual who stabbed the victim in the chest merely echoed the witness's trial testimony. *Stanley v. State*, 283 Ga. 36, 656 S.E.2d 806 (2008).

Because defense counsel obtained testimony from a codefendant that the codefendant had substantial motivation to testify against the defendant, counsel's failure to ask about specific effects of the codefendant's plea deal was not patently unreasonable. Moreover, given the overwhelming evidence of the defendant's guilt, it was unlikely that additional impeachment of the codefendant would have changed the outcome of the trial. *Daugherty v. State*, 291 Ga. App. 541, 662 S.E.2d 318 (2008), cert. denied, 2008 Ga. LEXIS 792 (Ga. 2008).

Trial court did not err in concluding that a defendant failed to show that the defendant had received ineffective assistance of counsel on the ground that counsel failed to obtain testimony from one of

the state's witnesses because although the defendant claimed on appeal that the witness's testimony would have supported the defendant's defense that the victims were coconspirators, the evidence showed that the defendant did not inform trial counsel that the witness had any information regarding the defendant's prior knowledge of the victims; even if the defendant had made trial counsel aware of such knowledge, the witness's vague recollection was unlikely to have changed the outcome of the case. *Brown v. State*, 299 Ga. App. 782, 683 S.E.2d 874 (2009).

Defense counsel was not ineffective in asking the codefendant's father if the father told the defendant to hide a gun because defense counsel testified that the testimony was used to shift responsibility to the codefendant; counsel's examination of the father was cumulative of prior testimony elicited by the prosecutor. *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012).

Trial counsel was not ineffective for failing to interview witnesses because the defendant did not proffer any specific evidence tending to show that the defendant suffered prejudice as a result of the omissions; the defendant failed to assert or show how any of the potential evidence would have affected the defendant's conviction. *Coney v. State*, 316 Ga. App. 303, 728 S.E.2d 899 (2012).

Trial counsel's failure to object to three instances of testimony indicating that the defendant was facing charges for "other robberies" at the time of the instant case did not amount to ineffective assistance of counsel because counsel testified that no objections were made because counsel did not want to bring the jury's attention to the testimony and the decisions were not so patently unreasonable that no competent attorney would have made those decisions. *Brown v. State*, 321 Ga. App. 765, 743 S.E.2d 452 (2013).

Defendant's claim of ineffective assistance of counsel failed because the defendant failed to show what evidence might have been revealed if counsel had cross-examined the defendant's cousin about an unrelated indictment to show any bias the cousin might have had to color the cousin's testimony in favor of the

state and how it would have produced a different result. *Mathis v. State*, 293 Ga. 35, 743 S.E.2d 393 (2013).

Trial counsel's decision not to cross-examine two witnesses about certain criminal charges did not amount to ineffective assistance because it could not be said that no reasonable attorney would have decided against attempting to ask about the charges given their limited probative value to show bias and the cross-examination that counsel did conduct. *Romer v. State*, 293 Ga. 339, 745 S.E.2d 637 (2013).

Obligations of counsel. — Trial counsel did not render ineffective assistance by failing to interview witnesses who could have corroborated the defendant's claim that the defendant's encounter with a victim was consensual because the defendant's claim that the two alleged witnesses could corroborate the defendant's defense was not supported by the record; counsel testified that counsel tracked down the female friend who the defendant claimed had given the defendant a ride to the victim's house on the night of the attack and that the friend denied doing so, and counsel testified that counsel attempted to locate the drug dealer who the defendant claimed could corroborate that the defendant and the victim knew each other but that counsel was unable to do so because the defendant only gave counsel the dealer's first name and the name of the apartment complex where the defendant believed the drug dealer lived. *Mattox v. State*, 305 Ga. App. 600, 699 S.E.2d 887 (2010).

Defendant did not show that defendant's trial counsel rendered ineffective assistance for failing to procure a witness in support of an alibi defense because trial counsel testified that counsel did not attempt to find the witness since, among other reasons, the defendant did not provide counsel with a last name for the witness; the defendant did not produce any evidence to show that a competent attorney exercising reasonable diligence under the same circumstances would have been able to locate the witness; and no evidence was presented as to what testimony the witness would have given at trial. *Miller v. State*, 305 Ga. App. 620, 700 S.E.2d 617 (2010).

Defendant juvenile did not receive ineffective assistance of trial counsel because the defendant did not demonstrate a reasonable probability that the outcome of the defendant's case would have been different if defendant's trial counsel had cross-examined the victim about whether the defendant's use of alcohol affected the defendant's memory of the events; during the defendant's testimony, the defendant admitted that the defendant followed the victim off a train and struck the victim. In *the Interest of J. W.*, 306 Ga. App. 339, 702 S.E.2d 649 (2010).

Failure to obtain additional witness. — When the defendant alleged the defendant's trial counsel was ineffective for not obtaining an additional witness, but trial counsel testified that the decision to proceed without obtaining the additional witness was made in consultation with the defendant, the trial court properly found that counsel's decision to proceed without the additional witness was not ineffective assistance. *Forehand v. State*, 270 Ga. App. 365, 606 S.E.2d 589 (2004).

Decision to go to trial without certain witness. — Trial counsel did not provide ineffective assistance of counsel by failing to adequately advise the defendant of the defendant's options to go to trial without a certain witness or to go to trial later with the witness as the parties and the trial court discussed the subject for more than 60 transcript pages and the trial court clearly outlined the defendant's options more than once; furthermore, trial counsel did not provide ineffective assistance of counsel by failing to present medical evidence of the defendant's injuries from a gunfight and defendant's hospital stay as the defendant and the defendant's mother testified about the defendant's injuries and the defendant could not show that defendant was prejudiced by the omission. *Clark v. State*, 271 Ga. App. 534, 610 S.E.2d 165 (2005).

Testimony from mentally retarded victim. — Trial counsel was not ineffective for failing to object to a victim's testimony because the 31-year-old mentally retarded victim was non-responsive on the witness stand as the mother testified that the victim functioned "like a two year old

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

or less”; defendant failed to show prejudice as the mother’s testimony established that the victim had no powers of reason, so the additional evidence could not be harmful. *Page v. State*, 271 Ga. App. 541, 610 S.E.2d 171 (2005).

Alleged failure to understand defendant incompetent. — Defendant’s ineffective assistance of counsel claim failed as the defendant failed to proffer the necessary evidence to support the defendant’s claims that counsel failed to interview witnesses, failed to obtain a 9-1-1 tape, failed to attack the credibility of the arresting officer, and failed to understand that the defendant was incompetent. *Spear v. State*, 271 Ga. App. 845, 610 S.E.2d 642 (2005).

Testimony not hearsay. — Counsel was not ineffective for failing to object to testimony that defendant was told that the declarant “didn’t want any guy to take off with [the declarant’s] 16-year-old daughter”; the testimony was not hearsay as the statement was admitted to show that the defendant was told that the girls were only 16. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Counsel’s failure to object to testimony of officer. — Defense counsel’s failure to object to an officer’s testimony that the defendant said nothing after the defendant was arrested and that sometimes when the officer arrests people they protest, particularly when the officer has arrested the wrong person, was not ineffective assistance of counsel because it was harmless, given the other evidence of the defendant’s guilt. *Patterson v. State*, 274 Ga. App. 341, 618 S.E.2d 81 (2005).

Failure to object to hearsay statement of detective. — In a prosecution for kidnapping with bodily injury and aggravated assault, it was not ineffective assistance of counsel for the defense counsel not to object to the hearsay testimony given by a detective about responses to questions asked of the victim’s neighbors about the victim and the victim’s husband because the counsel’s decision to forego

any objection was a matter of trial strategy. *Nelson v. State*, 278 Ga. App. 548, 629 S.E.2d 410 (2006).

Failure to call witnesses. — Defendant failed to establish that defense counsel’s failure to call two witnesses was ineffective assistance, since, even if one witness had testified as defendant claimed, the defendant did not establish prejudice, as the testimony did not exonerate the defendant, and since counsel’s failure to call the second witness was based on a belief that the witness was not credible. *Fortson v. State*, 280 Ga. 435, 629 S.E.2d 798 (2006).

Questioning on polygraph examination. — Denial of a defendant’s motion for a new trial was affirmed as counsel did not provide ineffective assistance of counsel when counsel elicited testimony that the defendant initially agreed to take a polygraph test and then refused to do so because a state’s witness had referred to inadmissible evidence supporting the charges other than the victim’s statements and counsel proceeded to ask the witness about these conversations as a conscious decision to take the “lesser of the evils” and “deal with it,” rather than “make it appear that (counsel was) hiding something”; eliciting inadmissible testimony to address or explain a matter raised by the evidence was a reasonable trial strategy. *Ellis v. State*, 280 Ga. App. 660, 634 S.E.2d 833 (2006).

Failure to introduce written statements made by victim. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to introduce into evidence certain written statements made by the victim to law enforcement officers and a hospital nurse and statements made by the victim’s friend to police that allegedly conflicted with the witnesses’ trial testimony; each statement, in addition to contradicting the witnesses’ testimony, also contained inculpatory information that stood to further strengthen the state’s case, and the defendant called a sheriff’s deputy to elicit direct testimony regarding the victim’s post-incident statements. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

Failure to adequately cross-examine forensic pediatrician. — In a shaken

baby case in which the injuries allegedly occurred during a time when the defendant was responsible for the victim, defense counsel was not ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV for allegedly failing to adequately cross-examine a forensic pediatrician about the time frame during which the victim's injuries occurred; although the pediatrician stated in testimony in a hearing on a motion for a new trial that the pediatrician could not pinpoint when the injury occurred, the defendant failed to show prejudice, as the substance of the pediatrician's testimony was essentially the same in the new trial hearing and before the jury. *Mahan v. State*, 282 Ga. App. 201, 638 S.E.2d 366 (2006).

Questioning on deal with accomplice witness. — Given the lack of evidence of a deal between an accomplice witness and the state, trial counsel was not deficient in failing to cross-examine the witness about whether a deal existed; furthermore, counsel's representation did not fall outside of the broad range of reasonable professional conduct because counsel did not ask the witness whether the witness had a hope of benefitting from the witness's testimony. Even assuming *arguendo* that trial counsel was deficient in failing to cross-examine the witness about whether the witness held any hope of benefit, the defendant did not show prejudice; the statement the witness initially gave to the police was consistent in material respects with the witness's trial testimony, and both statements were also corroborative of the victim's trial testimony. *Varner v. State*, 297 Ga. App. 799, 678 S.E.2d 515 (2009).

Trial counsel was not ineffective for failing to ask about specific effects of a plea deal when counsel obtained testimony that an accomplice had motivation to testify against the defendant. *Holder v. State*, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

Trial counsel's failure to cross-examine the codefendant about a plea deal was not patently unreasonable because trial counsel's decision not to question the codefendant due to the potential harm to the defendant was a tactical and strategic decision; even if trial counsel performed

deficiently, the defendant could not show prejudice in light of the overwhelming evidence against the defendant, and even in the absence of the defendant's testimony placing the defendant at the scene and acknowledging that the defendant hit the victim, under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), the victim's testimony alone was sufficient to establish the facts necessary to support the defendant's convictions. *Bonner v. State*, 308 Ga. App. 827, 709 S.E.2d 358 (2011).

Questioning on accomplice's drug involvement. — Defendant's trial counsel was not ineffective for failing to object when the trial court stopped defense counsel's cross-examination regarding an accomplice's drug involvement because even if trial counsel could have properly objected to the trial court's action, the defendant failed to show any harm by defendant's trial counsel's failure to do so, and trial counsel effectively impeached the accomplice by getting the accomplice to admit to another crime, and any further questioning regarding drug involvement would merely have been cumulative; the defendant did not call the accomplice to testify at the hearing on defendant's motion for new trial, and speculation as to what the accomplice's testimony would have been did not satisfy the defendant's burden to show that the result of defendant's trial would have been different if trial counsel had objected to the trial court's action and had trial counsel continued to cross-examine the accomplice regarding the drug issue. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Questioning on defendant's prior bad acts. — Trial court did not err in finding that trial counsel was not ineffective for failing to object to a witness's unsolicited mention of the defendant's prior bad acts because any objection would have been fruitless; the defendant could not show that the defendant was harmed by the witness's answer because trial counsel followed up with a question regarding the defendant's criminal history, and the police chief acknowledged that the defendant had never been convicted of a felony. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

Questioning on defendant's drug usage. — Codefendant's trial counsel was not ineffective in failing to object to testimony from one of the victims and a police officer regarding the codefendant's prior purchase of marijuana from one of the victims because drug use showed the codefendant's motive to rob a home where the codefendant believed illegal drugs and money would be found; an accomplice testified that the motive for the robbery was that the victims kept drugs and cash in the apartment and that the codefendant planned the robbery and knew that drugs and money were kept in the house. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Defendant's trial counsel was not ineffective in failing to object to a question directed to an accomplice because counsel personally opened the line of questioning on cross-examination, and in the absence of counsel's testimony, it was presumed to be a strategic decision; having made that decision, trial counsel could not object, and because trial counsel succeeded in obtaining acquittal on the three most serious charges against the defendant that strongly supported the conclusion that the assistance actually rendered by trial counsel fell within that broad range of reasonably effective assistance that members of the bar in good standing were presumed to render. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Questioning of phlebotomist. — Defendant failed to show that the outcome of the trial would have been different had counsel questioned the phlebotomist who drew the defendant's blood about the fact that the phlebotomist did not invert the blood tubes and introduced evidence regarding the impact of that omission on the blood test results because there was no evidence that the phlebotomist failed to invert the tubes; the phlebotomist did not testify that the phlebotomist failed to invert the tubes. *Fletcher v. State*, 307 Ga. App. 131, 704 S.E.2d 222 (2010).

Impact of misstatement by defense counsel. — Defendant failed to demon-

strate that trial counsel rendered ineffective assistance by mistakenly referring to the night of the murder as August 30 rather than September 1, 2006, during the direct examination of the host of a barbecue because the transcript of defense counsel's complete questioning of the host and the host's responsive testimony made clear that both were operating under the premise that the event of the barbecue took place on the day of the murder, which was unquestionably September 1, 2006, and thus, the jury was aware that the host was testifying in an attempt to establish an alibi for the defendant; there was not a reasonable probability that, but for counsel's mistake, the outcome of the defendant's trial would have been different because it was plain that the host was testifying about the night of the murder, and the host's testimony fell well short of establishing an alibi for the defendant for other reasons. *Smiley v. State*, 288 Ga. 635, 706 S.E.2d 425 (2011).

Questioning of police detective. — Trial counsel's performance was not deficient when counsel elicited testimony from a detective that another witness, besides the victim, had identified the defendant as being at the scene of the crimes because the discussion between the trial court and defense counsel indicated that defense counsel had done extensive discovery in the case and was surprised by the detective's answer; even if counsel was ineffective, the error did not so undermine the proper functioning of the adversarial process that the trial court could not have reliably produced a just result. *Delgiudice v. State*, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

Failure to object to drug agent's testimony. — Defendant failed to establish a claim of ineffective assistance of counsel based on counsel's failure to object to an agent's testimony regarding what the agent believed to be a marijuana stalk in a burn pile because expert testimony based on scientific tests was not necessarily required to establish that a substance was marijuana as the identifying witness had the requisite training in the narcotics field; additionally, defense counsel testified that counsel did not think it was all that helpful to focus on the stalk because

it may have emphasized that the substance was marijuana before it got burned. *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

Failure to impeach witness. — Defendant failed to demonstrate a claim of ineffective assistance of counsel based on counsel's failure to impeach an eyewitness with prior inconsistent statements since counsel testified that the witness was very argumentative and that the counsel questioned the witness as well as possible, and since counsel did impeach the witness with the prior statement in several respects; that counsel may not have impeached the witness in every respect did not show that counsel's performance fell outside the broad range of reasonable professional conduct. In any event, the exploration of additional inconsistencies in the witness's testimony would not have changed the outcome of the trial. *Sims v. State*, 280 Ga. 606, 631 S.E.2d 656 (2006).

Trial counsel's decision not to impeach a witness with a prior criminal history was not patently unreasonable in light of counsel's testimony that counsel impeached the witness by showing inconsistencies between the witness's testimony and a prior statement to police. *Romer v. State*, 293 Ga. 339, 745 S.E.2d 637 (2013).

Because: (1) the defendant failed to show that counsel was deficient in failing to impeach a cohort in the crimes charged with a prior felony conviction; (2) counsel made the strategic decision to restrict the scope of the cohort's cross-examination; and (3) the defendant could not show any prejudice resulting from counsel's actions, the defendant's ineffective assistance of counsel claim lacked merit. *Jones v. State*, 289 Ga. App. 219, 656 S.E.2d 556 (2008), cert. denied, 2008 Ga. LEXIS 381 (Ga. 2008).

Defense counsel was not ineffective for failing to object to the trial court's exclusion of a state witness's conviction without conducting the balancing test required by former O.C.G.A. § 24-9-84.1(a)(1) (see now O.C.G.A. § 24-6-609) because the defendant made no showing that the prior conviction would have been admitted notwithstanding the stringent limitations in former § 24-9-84.1(b) on the use of a conviction more than ten years old. *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012).

Because the defendant failed to show that any prejudice resulted from trial counsel's alleged ineffectiveness in failing to discover and introduce the criminal record of one of the witnesses for the prosecution for impeachment purposes, the defendant's convictions were upheld on appeal. *Rivers v. State*, 283 Ga. 108, 657 S.E.2d 210 (2008).

With regard to defendant's conviction for arson and other related crimes, defendant failed to establish that defense counsel rendered ineffective assistance by failing to impeach a witness with evidence that the witness previously had committed arson as instances of specific misconduct cannot be used to impeach a witness's character or veracity unless the misconduct resulted in the conviction of a crime involving moral turpitude, and the proper method of proving such a conviction was by the introduction of a certified copy of the conviction. Since no conviction existed, defense counsel could not be charged with deficient performance in failing to attempt to introduce inadmissible evidence. *Shelnutt v. State*, 289 Ga. App. 528, 657 S.E.2d 611 (2008), cert. denied, No. S08C0977, 2008 Ga. LEXIS 518 (Ga. 2008).

Because: (1) trial counsel could not be deemed ineffective in failing to move to strike two jurors who were allegedly convicted felons, as their felon status had not been proven; (2) defendant failed to show that counsel was ineffective in failing to adequately impeach a detective concerning a previous suspension; and (3) order denying suppression was supported by probable cause, defendant's ineffective assistance of counsel claims lacked merit. *Jones v. State*, 289 Ga. App. 767, 658 S.E.2d 386 (2008).

With regard to defendant's convictions for malice murder and other crimes, defendant failed to show that defense counsel was ineffective for failing to impeach four witnesses' testimony by the witnesses' convictions as such impeachment would have caused defense counsel to lose the right to make the final closing argument under O.C.G.A. § 17-8-71. *Adams v. State*, 283 Ga. 298, 658 S.E.2d 627 (2008).

Defendant's passenger testified that the defendant stole a purse from a vehicle in a

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

parking lot; defense counsel was not deficient for not introducing evidence of the passenger's criminal conviction. Counsel questioned the passenger as to the fact that the passenger was arrested along with the defendant for a probation violation, and that the passenger was found in possession of other persons' credit cards; as the jury was made aware that the passenger had a criminal record, the defendant did not show that but for counsel's failure to formally introduce the passenger's conviction, the outcome of the trial would likely have been different. *Dennis v. State*, 294 Ga. App. 171, 669 S.E.2d 187 (2008).

There was no ineffectiveness by the defendant's counsel in failing to obtain a continuance in the defendant's criminal trial in order to more effectively impeach a witness for the state with certified copies of all of the witness's prior convictions, as counsel had impeached the witness with a number of convictions and there was no reasonable probability that the additional ones would have changed the outcome of the trial; further, the failure to cross-examine that witness regarding the initial denial of a criminal history was not ineffectiveness, as it would not have changed the outcome and it was not necessarily even admissible impeachment evidence. *Johnson v. State*, 297 Ga. App. 823, 678 S.E.2d 531 (2009).

Trial court did not err in finding that ineffective assistance of counsel had not been proven when trial counsel failed to impeach a witness with evidence of charges pending against the witness because the defendant failed to establish that the outcome of the defendant's trial would have been different had the witness been impeached; there were eyewitness identifications of defendant as the shooter, evidence that the defendant had been looking for the victim and believed the victim had robbed the defendant, and evidence that the defendant had been shot. *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

Trial counsel was not ineffective for failing to focus the jury's attention on the fact that a passenger was not being prosecuted for any involvement in the theft of the defendant's automobile or for originally telling the investigating officers that the passenger did not know that a driver would steal the automobile because the jury had already been informed that the passenger had multiple felony convictions and was a close friend of the driver; the defendant failed to establish that had counsel additionally impeached the passenger, there was a reasonable probability that the result of the trial would have been different. *Kendrick v. State*, 287 Ga. 676, 699 S.E.2d 302 (2010).

Defendant failed to establish that the defendant received ineffective assistance of trial counsel due to counsel's failure to provide the state with written notice of the defendant's intent to use evidence of a witness's prior conviction for impeachment purposes pursuant to former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609) because even if the conviction had been admitted and the jury had disregarded the witness's testimony, there remained evidence sufficient to convict the defendant; the witness's trial testimony conflicted with the witness's prior statements, and the witness admitted on the stand being a crack dealer. *Lanier v. State*, 288 Ga. 109, 702 S.E.2d 141 (2010).

Defendant did not show a reasonable probability that the trial would have ended differently if trial counsel had uncovered all the details about the victim's first offender plea and cross-examined the victim about the victim's possible bias toward the state because five witnesses separately testified that the defendant assaulted the victims with a gun; thus, even if the jury decided to completely disregard the victim's testimony based on successful cross-examination, the testimony of four other eyewitnesses remained. *Strong v. State*, 308 Ga. App. 558, 707 S.E.2d 914 (2011).

Trial court's conclusion that trial counsel's failure to obtain certified copies of the victim's prior felony convictions and first offender plea, which the defendant asserted would have been admissible to impeach the victim and show bias under

former O.C.G.A. § 24-9-84.1 (see now O.C.G.A. § 24-6-609), did not constitute ineffective assistance and was not clearly erroneous because counsel made a strategic decision not to expend the limited resources of the office to obtain the certified copies, choosing instead to focus on other avenues of defense. *Strong v. State*, 308 Ga. App. 558, 707 S.E.2d 914 (2011).

Trial counsel was not ineffective for failing to highlight the inconsistencies between a prior victim's trial testimony and the victim's account of a shooting as reported to police immediately after the victim was shot because although trial counsel testified that counsel recalled that the account in the police report was inconsistent with the victim's trial testimony, appellate counsel never inquired as to why trial counsel chose not to use the police report to impeach the state's pre-trial proffer or the victim's trial testimony; in the absence of any evidence on the issue, it was presumed that trial counsel made a reasonable strategic decision not to pursue that mode of impeachment. *Johnson v. State*, 289 Ga. 22, 709 S.E.2d 217 (2011).

Defendant's trial counsel was not ineffective for failing to discredit the veracity of an inmate witness who testified to the defendant's jailhouse confession because at trial the inmate witness appeared in prison clothes, and the state elicited testimony from the inmate that the inmate was a convicted felon; since the evidence was properly before the jury, it could not be shown that the omission was an unreasonable tactical move that no competent attorney in the same situation would have made. *Brown v. State*, 289 Ga. 259, 710 S.E.2d 751 (2011), cert. denied, 132 S. Ct. 524, 181 L. Ed. 2d 368 (2011).

Defendant failed to establish that trial counsel rendered ineffective assistance because although the defendant contended that trial counsel should have impeached a witness with testimony from a pre-trial hearing, and the defendant failed to establish that there was any reasonable probability that had counsel pursued the line of questioning, the outcome of the trial would have been different; at the pre-trial hearing, the witness was testifying regarding the behavior of prostitutes,

not about what another person recounted to the witness. *White v. State*, 289 Ga. 511, 712 S.E.2d 834 (2011).

Trial counsel was not ineffective for failing to impeach a witness through the use of prior inconsistent statements because, on cross-examination, counsel did attempt to impeach the witness with comments in the witness's statement to the police, the video recording of the witness's statement was admitted at trial, and the defendant did not establish that trial counsel's tactics for laying a foundation for impeaching the witness in regard to the statement was unreasonable. *Nations v. State*, 290 Ga. 39, 717 S.E.2d 634 (2011).

Although trial counsel's performance was defective for failing to urge that counsel was entitled to cross-examine the defendant's cell mate about probation revocation charges that were pending at the time the cell mate went to the police with the defendant's jailhouse confession, the defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different if counsel's performance had not been deficient because the victim testified about the struggle with the defendant, DNA evidence placed the defendant in the apartment, and the defendant was hospitalized for a gunshot wound consistent with the victim's testimony. *Davis v. State*, 312 Ga. App. 328, 718 S.E.2d 559 (2011).

Trial counsel did not fail to adequately question and impeach the state's witness because counsel did not question the witness about potential deals, favorable treatment, or why the witness was handcuffed since the witness was arrested on a material witness warrant and had no pending cases about which to make a deal; the defendant could not show prejudice because the state had already elicited from the witness information about prior drug convictions and that the witness was jailed the preceding day for failing to appear to testify in the defendant's case. *Johnson v. State*, 290 Ga. 382, 721 S.E.2d 851 (2012).

Trial counsel was not ineffective for failing to discover that a witness had four prior felony convictions that could have been used to impeach the witness because

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

counsel discovered one conviction and used that conviction to impeach the witness and, thus, there was no reasonable probability that the outcome of the trial would have been different. *Boothe v. State*, 293 Ga. 285, 745 S.E.2d 594 (2013).

Failure to object to hearsay testimony of witness. — As a parent's testimony about a child's claim of being molested by the defendant was not admissible under the former Georgia Child Hearsay Statute, O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820), because the child was 15 when the accusation was made, defense counsel was ineffective in failing to object at trial. *Cash v. State*, 294 Ga. App. 741, 669 S.E.2d 731 (2008).

Because defendant's counsel had no reasonable strategic reason for not objecting to a detective's hearsay testimony regarding an accomplice's custodial statement identifying the defendant as a purse snatcher, the outcome of the trial might have been different; therefore, the trial court erred in denying the defendant's motion for new trial. *Grindle v. State*, 299 Ga. App. 412, 683 S.E.2d 72 (2009).

Trial counsel was ineffective because counsel did not properly object to evidence that the defendant was a drug trafficker who always carried a gun, that the defendant was a dangerous man, that the defendant was the shooter in a similar transaction, and that the defendant's other girlfriend knew where the gun was located after the second crime; the statements, especially that the defendant's other girlfriend knew where the gun was located, were clearly objectionable hearsay, and failing to object to that statement alone was deficient because the statement linked the defendant to the principal crime. *Ward v. State*, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Trial counsel was not ineffective for failing to object to the responding officer's testimony about what the victim said at the time of the incident because the testimony at issue was admissible as part of

the *res gestae* of the crime. *Mubarak v. State*, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

Trial counsel did not provide ineffective assistance by failing to object to the arresting detective's testimony about what a witness told the defendant just prior to a shooting because although the testimony was inadmissible hearsay since the state failed to lay a proper foundation for the admission of a prior inconsistent statement by not asking the witness about the witness's statement, the defendant failed to show a reasonable probability that the outcome of the trial would have been different if counsel had objected to the testimony; four eyewitnesses other than the witness testified that those witnesses saw the defendant shoot the victim, and the witnesses independently picked the defendant out of a photographic lineup. *Cannon v. State*, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial counsel was not ineffective for failing to object to a lead investigator's references to a tip the investigator received from an unnamed source implicating the defendant in a shooting because counsel did object to at least one of the investigator's references to the tip and to two questions bearing the potential to elicit responses regarding the substance of the tip; because none of the investigator's references to the tip constituted reversible error, any failure of counsel to object in certain of those instances could not give rise to an ineffectiveness claim. *Johnson v. State*, 289 Ga. 22, 709 S.E.2d 217 (2011).

Defendant did not receive ineffective assistance of counsel due to trial counsel's failure to object when a witness testified as to statements a man made because the testimony was hearsay but nevertheless admissible as part of the *res gestae* of the crime and, thus, trial counsel was not deficient for failing to object to admissible evidence; the defendant's right to confrontation was not compromised because the statements to the witness was not testimonial. *Kitchens v. State*, 289 Ga. 242, 710 S.E.2d 551 (2011).

Defendant could not establish that the trial court's admission of a witness's testimony would have constituted an abuse of discretion had trial counsel voiced an ob-

jection because the evidence was admissible under the necessity exception to the hearsay rule, subject to the trial court's discretion. *White v. State*, 289 Ga. 511, 712 S.E.2d 834 (2011).

Trial counsel was not ineffective for failing to raise a hearsay objection to testimony about surveillance videotape because such an objection would have been unavailing; the surveillance footage and the testimony about what the witnesses personally observed on the videotape was not hearsay. *Hammock v. State*, 311 Ga. App. 344, 715 S.E.2d 709 (2011).

Defendants' trial counsel was not ineffective for having failed to object on hearsay grounds to an investigator's testimony regarding the reasons why the victim's sibling and the sibling's spouse could not come to court to testify because the defendant suffered no harm from the admission of the testimony as the testimony had nothing to do with either the charged offenses or with the defendant as the alleged perpetrator of the alleged crimes. *Adel v. State*, 290 Ga. 690, 723 S.E.2d 666 (2012).

Trial counsel was not ineffective for failing to object on hearsay grounds to portions of a Secret Service agent's testimony about what the agent learned during the investigation since the agent did not repeat the testimony of an out-of-court declarant and was not hearsay. *Bearden v. State*, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Trial counsel's decision not to object to an officer's testimony, which was hearsay because the testimony was based on someone else's research about vehicle tag numbers, in an attempt to confuse the jury over the different vehicles used in the similar transaction was a legitimate strategic decision. *Spinks v. State*, 322 Ga. App. 387, 745 S.E.2d 653 (2013).

Failure to move for mistrial on basis of witness's testimony. — Defendant failed to establish a claim of ineffective assistance of counsel due to counsel's failure to seek a mistrial after successfully objecting to a witness's testimony that the defendant told the witness that "he would have a shoot-out with police before he ever went back to jail" on the ground that the witness's response placed the defendant's

character in evidence because even if counsel's failure to request a mistrial were deemed deficient, no mistrial would have been granted as a nonresponsive answer that impacted negatively on a defendant's character did not improperly place the defendant's character in issue. *Billings v. State*, 308 Ga. App. 248, 707 S.E.2d 177 (2011).

Failure to obtain investigator's written reports. — A defendant's motion for a new trial was properly denied as trial counsel did not provide ineffective assistance in failing to obtain written reports from the court-appointed investigator since, while the trial counsel did not obtain any reports of witness interviews, the trial counsel discussed extensively the content of those interviews with the court-appointed investigator; assuming that the trial counsel's failure to obtain the content in written form constituted deficient conduct, the defendant failed to show how the defendant was prejudiced by the alleged deficiency. *Lawson v. State*, 280 Ga. App. 870, 635 S.E.2d 259 (2006).

Failure to object to statement given to investigator. — Trial court properly denied defendant's motion for a new trial as defense counsel did not give ineffective assistance of counsel by failing to request a Jackson-Denno hearing as there was no basis to object to the introduction of defendant's statement to an investigator as: (1) defendant was not under arrest at the time of the statement, nor would a reasonable person have understood that the person was under arrest; (2) there was no evidence that the officer sent to insure that defendant did not leave the hospital before the investigator arrived had any contact with defendant; (3) that defendant was in pain or taking pain medication did not render defendant's statement involuntary; and (4) defendant failed to show that defendant was prejudiced by the failure to request the hearing. *Alwin v. State*, 267 Ga. App. 236, 599 S.E.2d 216 (2004).

Failure to obtain medical evidence. — In a prosecution for felony obstruction of an officer, the defendant's claim that counsel was ineffective for failing to subpoena the defendant's medical records to show injuries received in the struggle with police failed as the defendant did not

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

state what these medical records would have shown or how this would have changed the outcome of the trial. *Steillman v. State*, 295 Ga. App. 778, 673 S.E.2d 286 (2009).

Defendant did not carry the defendant's burden of showing that trial counsel was deficient for failing to preserve a sample of the defendant's blood for later testing to determine whether the defendant's mind was impaired during the interrogation session because the defendant did not cite to anything in the record that showed that the state obtained a blood sample from the defendant; counsel testified that counsel investigated whether such a blood sample existed but found no evidence of the sample, and one could not fault counsel for failing to secure and to maintain a blood sample for testing if the sample did not exist. *Hester v. State*, 304 Ga. App. 441, 696 S.E.2d 427 (2010).

Failure to object to testimony by undisclosed witness. — Trial counsel was not ineffective for failing to object to the victim's brother's testimony on the ground that the state failed to put the brother on the witness list as required by O.C.G.A. § 17-16-3 because the defendant failed to show that if counsel had objected the outcome of the trial would have been different; the defendant offered no evidence at the motion for new trial hearing to show how the defendant could have benefitted from a continuance before the brother was permitted to testify or that the state acted in bad faith in leaving the brother off the witness list. *Charleston v. State*, 292 Ga. 678, 743 S.E.2d 1 (2013).

Failure to object to testimony of GBI agent. — Trial counsel was not ineffective for failing to object to the testimony of a GBI Agent because counsel made a strategic decision not to object to the testimony, and that strategy was reasonable. *Wheeler v. State*, 290 Ga. 817, 725 S.E.2d 580 (2012).

Use of polygraphs. — Mere fact that a jury was apprised that a lie detector test may have been taken was not prejudicial

if no inference as to the result was raised, so even if testimony received from a police polygraph examiner implied that a polygraph exam was taken, it was not admitted in error, and defense counsel was not deficient in failing to object to it; further, in a molestation case, an expert was allowed to testify regarding the proper techniques for interviewing an alleged victim and whether the techniques actually used were proper, so admission of expert testimony regarding the tactile recollections of victims of child sexual abuse did not constitute reversible error since the witness was never asked whether the victim was telling the truth, and defense counsel was not ineffective for failing to object to this testimony, either. *Norman v. State*, 278 Ga. App. 497, 629 S.E.2d 489 (2006).

Defendant failed to establish a claim that defense counsel was ineffective based on the fact that defense counsel did not hire a defense polygraph examiner to rebut the state's examiner because, at the motion for new trial hearing, the defendant's trial defense counsel testified that this was a matter of trial strategy to preserve the right to closing argument; defense counsel was prepared to and did cross-examine the state's expert to bring out the points defense counsel wanted to raise and felt the value of putting on a defense expert was not outweighed by retaining the right to close. *Johnson v. State*, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

A defendant did not receive ineffective assistance of counsel due to an attorney's failure to obtain a stipulation from the state permitting the admission of the results of a polygraph test, when the attorney had not entered the attorney's appearance in the case, because the defendant did not show that the state was willing to enter into a stipulation to authorize the admission of the polygraph results and the defendant did not show that the attorney's performance was deficient or that the defendant suffered any prejudice from the inaction. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

When the evidence shows that the defendant knew and understood the defendant's rights before waiving counsel and stipulated to the admissibility of poly-

graph results, the trial court's determination that the stipulation was valid was not clearly erroneous and was affirmed. *Beaudoin v. State*, 311 Ga. App. 91, 714 S.E.2d 624 (2011).

Use of photographs. — Defendant was not denied effective assistance of counsel after counsel failed to photograph the crime scene as the counsel went to the crime scene several times, photographs of the scene already had been taken by the police, and counsel was unaware of any photos or any angles that would have been beneficial to defendant. *Haggins v. State*, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Because the second of two pre-autopsy photos of the clothed body of the victim was properly admitted as relevant in order to show the nature and extent of the victim's wounds, as well as to show that the body had been examined in preparation for autopsy, the defendant failed to show that counsel's performance as it related to the admission of the photo was deficient or that the result of the trial would have been different if counsel objected to the admission of the photograph. *Green v. State*, 282 Ga. 672, 653 S.E.2d 23 (2007).

Defendant could not establish that the defendant was prejudiced by defendant's trial counsel's failure to take and introduce into evidence photographs of the home where the defendant and the defendant's girlfriend resided in order to show the distance from the rear window, out of which the defendant's girlfriend escaped, to the ground below because the state introduced photographs of the back of the home, which included the rear windows; there is no ineffective assistance when trial counsel simply failed to introduce evidence cumulative of other evidence admitted at trial. *Carmichael v. State*, 305 Ga. App. 651, 700 S.E.2d 650 (2010).

Trial counsel was not ineffective in failing to move for a mistrial or request a curative instruction when the State of Georgia showed the jury two photographs of the murder victim's body at the crime scene, which the trial court had previously ordered the state not to show on the ground that the photographs were duplicative of other photographs. Given that the two photographs did not show the jury

more than other crime scene photographs, and given the strength of the evidence against the defendant, the defendant failed to show that, even if trial counsel had moved for a mistrial or requested a curative instruction, there was a reasonable probability that the trial court would have granted a mistrial or that the outcome of the trial otherwise would have been different. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Medical evidence. — Defendant did not receive effective assistance of counsel when defendant provided counsel medical records showing that defendant suffered from "confusional migraines," which could render defendant unable to form requisite criminal intent, but counsel did not investigate the condition, nor was evidence of it, which was defendant's only defense, offered, and defendant was prejudiced because other evidence showed defendant was suffering from this condition at the time of defendant's alleged crime. *Guzman v. State*, 260 Ga. App. 689, 580 S.E.2d 654 (2003).

Defendant did not receive ineffective assistance of counsel as the failure to introduce medical evidence to show that defendant's foot injury was consistent with defendant's claim that defendant was shot while running away from a robbery attempt was due to counsel's inability to locate the emergency room doctor; further, there was no evidence at the motion for a new trial hearing that the testimony would have been relevant or favorable. *Sampson v. State*, 279 Ga. 8, 608 S.E.2d 621 (2005).

Defense counsel was not ineffective as defense counsel tried without success to obtain medical evidence showing that defendant was impotent at the time defendant allegedly molested the victim, defendant did not investigate similar transaction witnesses' criminal backgrounds because defendant did not think that their juvenile records would yield any useful impeachment evidence, and ample evidence concerning the victim's behavioral problems was admitted at trial. *Hogan v. State*, 272 Ga. App. 19, 611 S.E.2d 689 (2005).

Ineffective assistance of counsel claim, based on the failure of counsel to present

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel** (Cont'd)**B. Obligations of Counsel** (Cont'd)

evidence of the defendant's medical condition, was rejected because the claim that the condition detrimentally affected the defendant's ability to understand the Miranda rights was pure speculation; further, counsel researched the condition and found that it was not legally recognized. *Ward v. State*, 274 Ga. App. 511, 618 S.E.2d 154 (2005).

Because evidence of the victim's disease was inadmissible under former O.C.G.A. § 24-2-3(a) (see now O.C.G.A. § 24-4-412), trial counsel's performance could not be considered deficient based on a failure to contest the receipt of the medical information; thus, an order granting defendant's petition for a writ of habeas corpus was reversed because even if counsel had requested a continuance for the purpose of testing the defendant, no reasonable likelihood existed that the outcome of the trial would have been different, and in fact, a negative result for defendant at the time of trial would not have established the medical condition at the time of the crimes, or rule out the possibility that the defendant had molested the victim. *Murrell v. Ricks*, 280 Ga. 427, 627 S.E.2d 546 (2006).

On retrial on one count of child molestation and two counts of aggravated child molestation, the defendant was not entitled to a new trial on grounds that trial counsel was ineffective in admitting notes generated by a forensic evaluator who interviewed the child victim, as the defendant had previously been found guilty in the first trial in which the notes were not introduced. *Mewborn v. State*, 285 Ga. App. 187, 645 S.E.2d 669 (2007).

Trial counsel was not ineffective for failing to present the victim's medical records because even assuming that trial counsel was remiss for failure to use the medical records in the attempt to block admission of the victim's statements as dying declarations, the defendant could not show any prejudice thereby; there was ample evidence to support the finding that the victim believed that the victim was in

the article of death, and the statements were also admissible under the res gestae exception to the hearsay rule. *Sanford v. State*, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

Trial court properly rejected the defendant's claim that trial counsel was ineffective for failing to introduce into evidence two medical evaluation documents, which the defendant alleged would have contradicted statements witnesses gave to the police, because it was mere speculation that the witnesses' statements were inconsistent with the medical reports; it was impossible for the defendant to show there was a reasonable probability the results of the proceedings would have been different but for counsel's alleged error. *McClarín v. State*, 289 Ga. 180, 710 S.E.2d 120 (2011), cert. denied, 132 S. Ct. 1004, 181 L. Ed. 2d 745 (2012).

Failure to object to DNA evidence.

— With regard to a defendant's conviction for statutory rape and two counts of child molestation involving a stepchild, the defendant's ineffective assistance of counsel claim as a result of failure to object to the state's DNA evidence was rejected because the defendant failed to show prejudice in that the outcome of the trial would have been no different had the DNA evidence not been admitted. The defendant's conclusory assertion that the conviction was largely based upon the DNA evidence was contradicted by the totality of the evidence in the record in that: (1) the jury heard direct evidence from the victim that the defendant forced the victim to engage in sex with the defendant over a period of years; (2) the victim testified that the defendant fathered the victim's twins; and (3) the victim's mother testified as to the victim's prior consistent outcry statements, which the mother initially did not believe. *Haygood v. State*, 289 Ga. App. 187, 656 S.E.2d 541 (2008).

Trial counsel was not ineffective for failing to obtain an independent DNA analysis to challenge the state's findings because counsel's strategy in challenging the state's version of events was reasonable; the strategy was not rendered unreasonable just because another attorney could have approached the case under a

different theory that would have required an independent DNA analysis. *Wheeler v. State*, 290 Ga. 817, 725 S.E.2d 580 (2012).

Failure to seek DNA evidence. — Trial court did not abuse the court's discretion in denying a defendant's motion to withdraw the defendant's guilty plea because the defendant failed to prove the prejudice prong of the defendant's ineffectiveness claim since, at the hearing on the motion to withdraw the plea, the defendant proffered no evidence that a deoxyribonucleic acid (DNA) test pursuant to O.C.G.A. § 5-5-41 would have rebutted the state's evidence, regarding defendant's incest conviction pursuant to O.C.G.A. § 16-6-22, that the defendant and the victim were half-siblings; in addition, counsel's strategy to forego a DNA test was one of trial tactics and did not provide a basis on which to find that counsel's representation was deficient. *Hunter v. State*, 294 Ga. App. 583, 669 S.E.2d 533 (2008).

Trial counsel was not ineffective because while the results of DNA testing of certain items recovered from the scene of armed robberies were favorable to the appellant, trial counsel used reasonable trial strategy in not requesting additional DNA testing based on a concern that such testing might implicate the appellant. *Boykins-White v. State*, 305 Ga. App. 827, 701 S.E.2d 221 (2010).

Trial counsel was not ineffective for failing to obtain either an independent test of the blood on the defendant's shoes or an independent review of the lab's practices and procedures because defense counsel did not produce a DNA expert who would testify that the state's DNA evidence was defective, and the defendant's unfounded speculation as to the potential for a test result different from that introduced at trial did not constitute a showing of professionally deficient performance by counsel. *Lanier v. State*, 288 Ga. 109, 702 S.E.2d 141 (2010).

Failure to object to search warrant affidavit from which DNA obtained. — With regard to defendant's convictions for rape and other crimes, the trial court did not err by concluding that defendant's trial counsel was not ineffective for failing to object to a search warrant affidavit that

led to the police obtaining a DNA swab from defendant, despite defendant's voluntary statement to the detectives being elicited in violation of Miranda and case law, as the search warrant could be predicated on defendant's voluntary but unlawfully obtained statements. *Brown v. State*, 292 Ga. App. 269, 663 S.E.2d 749 (2008).

Mental health history as evidence. — Trial counsel's failure to introduce evidence of defendant's mental health history was not ineffective assistance of counsel as a prior incident, in which defendant was shot, could not support a justification defense. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

Failure to investigate mental state. — Since the defendant did not prove that trial counsel failed to investigate the defendant's mental state or move for a directed verdict, the defendant did not prove that the defendant was prejudiced by counsel's actions. *Hightower v. State*, 278 Ga. 39, 597 S.E.2d 362 (2004).

Trial counsel did not provide ineffective assistance of counsel due to a failure to investigate defendant's mental health history as: (1) defendant did not claim that defendant was insane at the time of the crimes, was incompetent to stand trial, or was otherwise suffering from delusional compulsion; (2) there was no evidence that defendant was guilty, but mentally ill; and (3) felony murder carried a mandatory life sentence, firearm possession required a consecutive five-year sentence, and the trial court was lenient in sentencing defendant to half of the time allowed by law for an aggravated assault, so there was no harm in the failure to introduce more detail about defendant's mental health history at sentencing. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

Because defendant's trial and appellate counsel did not investigate after being notified of the defendant's history of mental problems, the habeas court properly concluded that they were ineffective and that the defendant was prejudiced thereby. *Martin v. Barrett*, 279 Ga. 593, 619 S.E.2d 656 (2005).

Trial court erred by refusing to conduct a hearing or to rule on defendant's motion for a new trial based upon its finding that

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

defendant was, at that time, mentally incompetent and unable to assist the counsel in challenging a conviction, as defendant's current mental incompetence provided no logical basis to delay a post-conviction proceeding to address whether defendant was incompetent at trial, whether the trial court should have been on notice of the incompetency and conducted a hearing during trial, or whether the trial counsel was ineffective for failing to timely raise the competency issue. *Florescu v. State*, 276 Ga. App. 264, 623 S.E.2d 147 (2005).

Defendant's trial counsel was not ineffective in failing to obtain a mental evaluation of the defendant prior to trial to determine criminal responsibility, absent record evidence that counsel had advance notice of any mental health problems, and further discussions with the defendant's family would not have revealed a history of significant mental illness. *Breland v. State*, 285 Ga. App. 251, 648 S.E.2d 389 (2007).

Habeas court erred by reversing a defendant's death sentence imposed for a murder based on the defendant's claim of ineffective assistance of counsel for trial counsel's failure to present evidence of the defendant's mental health status and for failing to present other mitigation evidence as, considering the combined effect of trial counsel's various professional deficiencies, as a matter of law, there was no possibility that absent trial counsel's professional deficiencies a reasonable probability existed that a different outcome would have occurred. *Schofield v. Cook*, 284 Ga. 240, 663 S.E.2d 221 (2008).

Failure to have drugs retested. — Defendant's argument, that counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to request independent analysis of cocaine allegedly found on the defendant's person, failed; trial counsel's decision not to retest the contraband, under the belief that the original test had been properly conducted and that an additional test might identify the

presence of more cocaine, was strategic, thereby foreclosing an ineffective assistance claim. *Copeland v. State*, 281 Ga. App. 11, 635 S.E.2d 283 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to object when the state placed the defendant's character at issue by introducing evidence of the defendant's use of crack cocaine after the crime; the state had presented evidence that the defendant acted erratically after the crime, suggesting nervousness about the defendant's involvement in the crime, and the defendant and defense counsel strategically chose not to object to the crack cocaine evidence because the defense provided an alternative reason for the defendant's nervous behavior. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Failure to object to bolstering. — A defendant did not receive ineffective assistance of counsel due to counsel's failure to object to testimony concerning the defendant's initial statement denying knowledge of a murder as counsel testified that counsel did not object because the testimony bolstered the defense theory that the initial statement was true and that the defendant had given a subsequent inculpatory statement only after being threatened by a co-indictee; the decision was a reasonable strategic decision and did not constitute deficient performance. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Defendant failed to establish that defense counsel was unconstitutionally ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object when the child victim's relative in a sexual abuse case impermissibly bolstered the victim's credibility; although the relative stated that the relative believed the victim's testimony, the defendant failed to establish prejudice, as the relative's response was only one answer in a day-long trial, the victim's description of the abuse remained consistent throughout the case and was corroborated, and the defendant had a full opportunity to test the victim's credibility during cross-examination. *Anderson v.*

State, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, Schofield v. Holsey, 281 Ga. 809, 642 S.E.2d 56 (2007).

A defendant's conviction for child molestation and related charges was upheld on appeal, and the trial court properly denied the defendant's motion for remand, as the defendant failed to show ineffective assistance of counsel as a result of defense counsel failing to object to the bolstering testimony of a child psychologist. The defendant failed to show how defense counsel's strategy, which resulted in leading the expert to qualify the prior bolstering testimony on cross-examination, was unreasonable, as well as failed to show a likelihood that an objection would have led to a different trial outcome necessitating remand. *Al-Attawy v. State*, 289 Ga. App. 570, 657 S.E.2d 552 (2008), cert. denied, No. S08C1039, 2008 Ga. LEXIS 503 (Ga. 2008).

As a child's alleged motive to fabricate arose after the child told the child's parent of being molested by the defendant, and after the child made a videotaped statement to an investigator, the parent's testimony about the child's accusation and the videotape were not admissible as prior consistent statements, but constituted impermissible bolstering. Defense counsel was ineffective in failing to object at trial; this failure harmed the defendant, thereby satisfying the prejudice prong of *Strickland*. *Cash v. State*, 294 Ga. App. 741, 669 S.E.2d 731 (2008).

Defense counsel was not deficient for failing to object to expert witnesses' testimony as to the truthfulness of the child victims because the testimony was not objectionable; testimony by a witness that the witness did not see any evidence that the child victim had been coached does not constitute bolstering of the child's credibility and does not impermissibly address the ultimate issue. *Vaughn v. State*, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

Trial counsel's failure to object to a detective's testimony did not amount to deficient performance because the testimony was not a statement of the victim's credibility or an invasion of the province of the jury since the testimony concerned the detective's reason for ending the inter-

view with the victim and referring the victim to the Georgia Center of Child Advocacy; even if the detective's testimony that "a molestation incident occurred" did constitute improper bolstering, the defendant failed to show a reasonable probability that the testimony so prejudiced the defense as to affect the outcome of the trial because the victim's account of the incident remained consistent throughout. *Strickland v. State*, 311 Ga. App. 400, 715 S.E.2d 798 (2011).

Trial counsel did not provide ineffective assistance by failing to timely object when a testifying police officer provided an opinion as to what was depicted in a convenience store's video surveillance footage while the video was being played for the jury because the officer's testimony was not improper bolstering; the officer was testifying as to the officer's own observations regarding the video. *Anderson v. State*, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Trial counsel was not ineffective for failing to object to a police detective's testimony regarding a victim's truthfulness because the defendant could not demonstrate either that trial counsel's performance was deficient or that the deficient performance prejudiced the defense since, in an initial statement, the victim identified three perpetrators by name and omitted the defendant entirely; therefore, the testimony exculpated the defendant, and it was highly unlikely that the testimony changed the outcome of the trial. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

Trial counsel did not err in failing to raise an objection to a detective's testimony regarding a forensic interview with the victim as improperly bolstering because the prosecutor's question appeared to have been directed at determining whether the victim provided information that led to further investigation, not at determining whether the detective believed the victim was telling the truth. *Twiggs v. State*, 315 Ga. App. 191, 726 S.E.2d 680 (2012).

Failure to present evidence suggested by defendant. — Defendant

Benefit of Counsel (Cont'd)**5. Effective Assistance of Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

failed to establish a claim of ineffective assistance of counsel based on the counsel's decision to not put up evidence because trial counsel testified that, as agreed to by the defendant, it was defense counsel's strategy to not put up evidence in order to preserve the right to closing argument; with regards to the defendant's accusations that a county solicitor general had some motive to commit the murders at issue, defense counsel also testified that defense counsel believed that it would not be productive to attempt to blame an elected official on the basis of weak evidence and supposition. *Griffin v. State*, 280 Ga. 683, 631 S.E.2d 671 (2006).

Failure to object to admission of driving record. — Counsel was ineffective for failing to object to the admission of the defendant's driving record, which was not admissible at trial, that consisted of six pages, showing 22 separate traffic offenses. *Kalb v. State*, 276 Ga. App. 394, 623 S.E.2d 230 (2005).

Failure to object to admission of cocaine field test. — With regard to defendant's appeal of a conviction for possessing cocaine, defendant's argument that defense counsel was ineffective in failing to object to the admission of a cocaine field test was meritless since significant evidence other than the field test supported the jury's verdict based on the officers finding a residue-laden scale commonly used to measure cocaine on defendant's person; following arrest, defendant displayed the same physical symptoms seen in persons who had swallowed cocaine when confronted by police; defendant had admitted to two people — an officer and a nurse — to swallowing the cocaine; and on two prior occasions leading to drug convictions, defendant attempted to discard cocaine to avoid detection by authorities. Moreover, defense counsel successfully undermined the field test, establishing through the state's own expert that the test was merely presumptive and lacked scientific certainty. *Hinton v. State*, 292 Ga. App. 40, 663 S.E.2d 401 (2008).

Trial court erred in granting the defendant a new trial as defense counsel's decision to present evidence of the defendant's two prior convictions for intent to distribute cocaine was in furtherance of defense counsel's reasonable trial strategy to portray the defendant as a drug dealer and to support the defense's theory that the defendant's fingerprint was found on the stolen car because the defendant sold drugs to someone driving the same car, not because the defendant was involved in the armed robbery of the two victims. *State v. Reynolds*, 332 Ga. App. 818, 775 S.E.2d 187 (2015).

Failure to introduce county records. — Defendant received ineffective assistance of counsel relating to charges arising from a fatal accident which occurred at an intersection controlled by a traffic light, based on the defense counsel's failure to introduce county department of transportation reports which showed, inter alia, that four days before the collision there had been a report that the traffic signals at this intersection were showing "green all 4 ways;" while witnesses testified that the victims had a green light when they entered the intersection, the defendant claimed the defendant, also, had a green light; the fact that there had been equipment malfunctions at this intersection, and reports of the signals holding green all four ways less than a week before this accident, was certainly relevant to the defense. *Gibson v. State*, 280 Ga. App. 435, 634 S.E.2d 204 (2006).

Failure to introduce evidence. — A defendant had not shown ineffective assistance of counsel, as counsel's failure to attempt to introduce into evidence additional photographs was not deficient performance when counsel testified that the state's photographs fairly illustrated the area in question and the defendant did not show anything to the contrary; counsel explained that a certain witness had not been called because the witness was clearly hostile toward the defendant, the defendant's claim that counsel should have introduced certain evidence rested on mere speculation, and the evidence showing the child victim walking through a store would have belied the defendant's assertion that the child had already been

significantly injured before being left in the defendant's care. *Banta v. State*, 282 Ga. 392, 651 S.E.2d 21 (2007).

With respect to presenting chemical testing evidence and pursuing the state's undisclosed chemical test results, counsel's failure to present or pursue such evidence did not affect the outcome at trial, and counsel's performance was not ineffective. The chemical test was consistent with evidence that the state had already presented to the jury; accordingly, the undisclosed evidence was not outcome determinative. *Morris v. State*, 284 Ga. 1, 662 S.E.2d 110, cert. denied, 555 U.S. 1074, 129 S. Ct. 731, 172 L.Ed.2d 734 (2008).

In a prosecution for first degree forgery, the defendant claimed defense counsel was ineffective in not introducing certain exculpatory e-mails. As the trial court found that everything contained in the e-mails was covered by the defendant's testimony, the defendant was unable to show any prejudice. *Taylor v. State*, 293 Ga. App. 551, 667 S.E.2d 405 (2008).

Defense counsel's decision not to play child victims' videotaped interviews for the jury was not ineffective assistance as counsel chose to highlight the victims' alleged inconsistencies by way of cross-examination. This reasonable and calculated tactical decision presented no grounds for reversal, and the defendant failed to show prejudice. *Scruggs v. State*, 294 Ga. App. 501, 669 S.E.2d 485 (2008), cert. denied, No. S09C0450, 2009 Ga. LEXIS 191 (Ga. 2009).

Trial court did not err in denying the defendant's motion for a new trial on the ground that defendant's trial counsel rendered ineffective assistance by failing to obtain an electronic enhancement of a videotape depicting a drug sale, which allegedly would have shown that defendant was not the perpetrator of the offense, because the defendant failed to show that the defendant was prejudiced as a result of trial counsel's failure to obtain an electronic enhancement of the videotape prior to trial since the enhanced images failed to create a reasonable probability that the defendant was not the perpetrator depicted in the images; an undercover officer unequivocally identi-

fied the defendant as the perpetrator based upon the officer's personal observations and independent memory of the defendant at the time of the drug sale, and although the defendant attempted to prove that another individual was the perpetrator depicted in the videotape's images, the defendant failed to proffer sufficient evidence in support of the defendant's claim. *Faulkner v. State*, 304 Ga. App. 791, 697 S.E.2d 914 (2010).

Although the defendant claimed that the defense attorney failed to introduce evidence that would have allowed the jury to understand the reasonable nature of defendant's allegedly fearful state of mind with regard to the shooting victim, the defendant's attorney was able to elicit testimony from the defendant about the defendant's belief that the victim was dangerous. Therefore, the defendant did not prevail on the defendant's ineffective assistance of counsel claim because the defendant could not show that a reasonable probability existed that, but for counsel's errors in allegedly failing to introduce the evidence, the outcome at trial would have been more favorable. *Render v. State*, 288 Ga. 420, 704 S.E.2d 767 (2011).

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because counsel testified that counsel attempted to produce evidence of specific acts of violence by the victim against third persons but because of lack of time was not able to do so; counsel further testified that counsel did not strenuously pursue a continuance for more time to gather such evidence because of the age of the case and because counsel believed such motion for continuance would be unsuccessful. *Rafi v. State*, 289 Ga. 716, 715 S.E.2d 113 (2011).

Trial counsel was not ineffective for failing to introduce photographs because counsel testified that counsel decided not to introduce the photographs since the photographs would have shown that there were numerous surveillance cameras at the scene; a decision not to introduce certain evidence is a strategic and tactical matter that cannot be judged by hindsight to support a claim of ineffective assistance of counsel. *Hammock v. State*, 311 Ga. App. 344, 715 S.E.2d 709 (2011).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

Court of appeals could not review the defendant's claim that trial counsel erred by failing to follow proper procedures to introduce a psychologist's notes, which stated that the defendant suffered from post-traumatic stress disorder because the defendant did not attach a copy of the psychologist's notes, proffer any testimony, or otherwise provide any information to support the claim that the defendant suffered from post-traumatic stress disorder. *White v. State*, 312 Ga. App. 421, 718 S.E.2d 335 (2011).

Defendant did not receive ineffective assistance of counsel due to counsel's failure to subpoena an insurance company because the defendant did not show that such evidence was available, that the evidence was relevant to the charges, or that the evidence would have aided the defense. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012), cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Alleged failure of counsel to find all evidence. — Counsel was not shown to be ineffective for mitigating evidence development and presentation in a malice murder trial because a defendant did not show (by actually presenting that evidence to the appellate court) how the defendant was prejudiced by evidence that the defendant alleged counsel should have, but did not, find and present on the defendant's behalf. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Failure to admit booking sheet. — Defendant's ineffective assistance of counsel claim failed as the defendant failed to show that the defendant was prejudiced by counsel's failure to admit a copy of the book-in sheet, which showed that the defendant was not wearing a white cap when the defendant was booked; although the victim testified that the victim's assailant was wearing a white cap at the time of the crime, the fact that the defendant was not wearing a white cap when

the defendant was booked did not indicate that the defendant was not wearing a white cap at the time of the crime. *Lawrence v. State*, 267 Ga. App. 515, 600 S.E.2d 444 (2004).

Failure to secure second drug test.

— Defendant's trial counsel was not ineffective in failing to lay a proper foundation for the admission of a second drug test on the defendant's urine sample by a private lab, because without a positive assertion that the independent drug test would have shown that controlled substances were not present in the defendant's system, the defendant could not meet the defendant's burden of affirmatively showing how counsel's failure affected the outcome of the defendant's case; further, a proper foundation was nearly impossible, as the defendant was unable to secure the presence of someone who saw the specimen given and could establish a chain of custody. *Poston v. State*, 274 Ga. App. 117, 617 S.E.2d 150 (2005).

Failure to question legality of traffic stop. — Defendant was not entitled to a new trial due to ineffective assistance of counsel as there was no basis to argue that a traffic stop of defendant was illegal. *Mayfield v. State*, 276 Ga. App. 544, 623 S.E.2d 725 (2005).

Failure to show mental retardation. — An inmate seeking habeas corpus had not shown prejudice by the alleged deficiencies of trial counsel, and even if trial counsel had failed to provide certain records to a psychologist, the psychologist, upon seeing the records, had reaffirmed the psychologist's original opinion that the inmate was not mentally retarded; the additional mitigation evidence cited by the inmate would not have made a significant contribution in light of the evidence trial counsel actually presented. *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56, cert. denied, 552 U.S. 1070, 128 S. Ct. 728, 169 L. Ed. 2d 569 (2007).

Failure of counsel to listen to 9-1-1 call. — Even if trial counsel was ineffective for failing to listen to a 9-1-1 tape prior to trial, given the overwhelming evidence supporting the defendant's convictions, particularly the eyewitness testimony, the defendant failed to show that there was a reasonable probability that

the outcome of the trial would have been different but for counsel's error. Thus, this ineffectiveness claim failed. *Taylor v. State*, 295 Ga. App. 689, 673 S.E.2d 7 (2009), *aff'd*, 286 Ga. 328, 687 S.E.2d 409 (2009).

Conceding to reliability of a child victim's hearsay testimony. — Defendant failed to establish ineffective assistance of counsel with regard to the defendant's trial and conviction for child molestation based on trial counsel's failure to object and conceding to the issue of reliability for the admission of the child victim's hearsay testimony as: (1) the defendant failed to point to any evidence indicating that the victim's statements were unreliable since the statements were videotaped at a neutral location in a room alone with a professional forensic interviewer; (2) the forensic interviewer testified that the victim was very bright and articulate and did not appear to be coached; (3) the victim's videotaped statements were spontaneous, voluntary, and not coerced; (4) the victim's videotaped statements were consistent with other out-of-court statements; and (5) significantly, the victim's statements were consistent with the defendant's statements to police. *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

New trial unwarranted when counsel's failure to object to evidence of prior DUI conviction did not result in prejudice. — Defendant's ineffective assistance of counsel claim did not warrant a new trial because sufficient evidence of the defendant's intoxication was presented in the record, and the defendant failed to show prejudice resulting from trial counsel's failure to object to the defendant's admission to having a prior DUI conviction, even though it was error for trial counsel not to object. *Thomas v. State*, 288 Ga. App. 827, 655 S.E.2d 701 (2007).

Alibi defense. — Defendant could not show a reasonable probability that the outcome of the trial would have been different had counsel met the notice requirements in O.C.G.A. § 17-16-5(a) and presented defendant's alibi defense because of the overwhelming evidence against the defendant. Thus, defendant did not re-

ceive ineffective assistance of counsel when defense counsel failed to properly notify the prosecution of defendant's alibi defense, which resulted in the exclusion of alibi testimony at trial pursuant to O.C.G.A. § 17-16-6. *Jones v. State*, 266 Ga. App. 679, 598 S.E.2d 65 (2004).

Defendant did not show defendant received ineffective assistance of counsel when defendant's trial counsel did not subpoena two alibi witnesses, because the testimony of these witnesses would have been cumulative of witnesses who testified, so defendant did not show that defendant was prejudiced by counsel's actions. *Jefferies v. State*, 267 Ga. App. 694, 600 S.E.2d 753 (2004).

Defendant did not show counsel provided ineffective assistance of counsel because counsel elicited testimony from the defendant showing the defendant had an alibi without presenting alibi witnesses as this was presumed strategic, absent testimony to the contrary, which was not presented. *Jackson v. State*, 271 Ga. App. 317, 609 S.E.2d 643 (2004).

Defendant failed to prove the prejudice prong of the defendant's ineffectiveness of counsel claim because the defendant did not show that any alibi witnesses existed or what their testimony would have been; moreover, the defendant did not show whether a DNA expert would have provided testimony at trial that would have rebutted the state's DNA evidence. *Denny v. State*, 280 Ga. 81, 623 S.E.2d 483 (2005).

In a prosecution for murder and related crimes, defendant's counsel was not ineffective for not interviewing or calling two alleged alibi witnesses because one of these witnesses intentionally did not return counsel's messages, neither witness could provide an alibi consistent with defendant's statements about where defendant was on the night of the crimes, and, at a hearing on defendant's motion for new trial, the witnesses gave inconsistent testimony about defendant's whereabouts on the night of the crimes and admitted they visited defendant in jail before trial but did not credibly explain their failure to come forward as alibi witnesses, so counsel's failure to call them was reasonable trial strategy. *Styles v. State*, 279 Ga. 134, 610 S.E.2d 23 (2005).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

Defendant did not show counsel provided ineffective assistance for not contacting possible alibi witnesses as defendant instructed counsel not to contact these witnesses; it was not unreasonable for counsel to follow this instruction, and it was not shown that these witnesses would have testified or provided an alibi defense. *Brown v. State*, 273 Ga. App. 577, 615 S.E.2d 628 (2005).

Trial counsel did not provide ineffective assistance of counsel as counsel spoke with an alibi witness who refused to testify on the defendant's behalf; in addition, counsel found that the alibi strained credulity and might harm the defendant's case. *Johnson v. State*, 274 Ga. App. 641, 618 S.E.2d 716 (2005).

Defendant did not meet the defendant's burden of showing prejudice to support the defendant's ineffective assistance of counsel claim as the defendant did not proffer an alleged alibi witness's testimony at the hearing on the defendant's new trial motion. *Boatwright v. State*, 281 Ga. App. 560, 636 S.E.2d 719 (2006).

Because the defendant failed to show that trial counsel was ineffective for failing to withdraw an alibi notice and failed to show prejudice by the introduction of the notice, the defendant's ineffective assistance of counsel claim lacked merit. *Hester v. State*, 287 Ga. App. 434, 651 S.E.2d 538 (2007).

In a malice murder prosecution, as the defendant did not give defense counsel the correct phone number for an alleged alibi witness until trial was underway, and the witness was out of state and counsel was unable to convince the witness to appear voluntarily, counsel did not provide ineffective assistance. *Marshall v. State*, 285 Ga. 351, 676 S.E.2d 201 (2009).

Attorneys did not provide the defendant ineffective assistance when the attorneys failed to timely serve notice of the defendant's alibi evidence because the attorneys testified that the attorneys discovered a theoretical alibi defense when searching through phone records pro-

duced by the state in late November 2006, and the attorneys talked with potential alibi witnesses and then gave notice of the alibi on December 1, 2006; prior to that time, the attorneys had no independent evidence of an alibi. *Huckabee v. State*, 287 Ga. 728, 699 S.E.2d 531 (2010).

Trial counsel was not ineffective for failing to present an alibi defense because an appellant admitted that the appellant committed the armed robberies, and Ga. St. Bar R. 4-102(d):3.3(a)(4) prohibited trial counsel from knowingly offering false evidence. *Boykins-White v. State*, 305 Ga. App. 827, 701 S.E.2d 221 (2010).

Trial counsel's decision not to request the production of the duct tape that was used to bind the defendant when the defendant was allegedly kidnapped was not patently unreasonable because the duct tape itself was cumulative of evidence that was introduced through the defendant's recorded police interview and trial counsel's cross-examination of a detective; even if it was assumed that trial counsel performed deficiently, the defendant proffered no evidence at the hearing on the defendant's motion for new trial that an analysis of the duct tape would have bolstered the defendant's alibi defense, and because the defendant did not proffer an analysis of the duct tape, the defendant failed to prove the prejudice prong of the ineffectiveness claim. *Buis v. State*, 309 Ga. App. 644, 710 S.E.2d 850 (2011).

Defendant failed to show a reasonable probability that the results of the proceeding would have been different had trial counsel presented an alibi defense through evidence that the victim was in another state during some of the dates alleged in the indictment because the defendant offered nothing more than mere speculation that the victim was not in the state during the dates listed in the indictment. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Trial counsel was not ineffective for failing to present an alibi defense showing that the defendant was incarcerated during some of the time listed in the indictment because there was no evidence supporting an alibi defense; thus, the defendant did not meet the burden of showing a reasonable probability that the

evidence would have affected the outcome of the trial. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Coercion defense. — Defendant was not denied effective assistance of counsel by the counsel's failure to reserve an objection to the failure to charge on coercion regarding the armed robbery, kidnapping, and aggravated assault charges against defendant because the failure to make a meritless objection was not ineffective assistance of counsel; there was no evidence that the codefendant threatened defendant during the commission of the offenses or forced defendant to drive the getaway car. *Maxey v. State*, 272 Ga. App. 800, 613 S.E.2d 236 (2005).

Because the defendant was identified by the victim as the robber and none of the proffered testimony related to an immediate threat, it was highly unlikely that the defendant was misidentified; consequently, because the trial court properly excluded the defendant's coercion defense, counsel was not ineffective for failing to raise it. *Treadwell v. State*, 272 Ga. App. 508, 613 S.E.2d 3 (2005).

Trial counsel did not provide ineffective assistance of counsel in failing to object to a jury charge on coercion as the defendant was not entitled to a charge on coercion since the defendant did not admit to participating in the crimes; any error in the charge was harmless error and the defendant was not prejudiced by any error. *Olarte v. State*, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Misidentification defense. — Pretermittting whether the identification procedure used, in which the defendant was identified as the perpetrator of an armed robbery by the victims at a one-on-one showup identification, was impermissibly suggestive, the evidence showed no likelihood of irreparable misidentification, so trial counsel was not ineffective in failing to object to the identification evidence. *Sorrells v. State*, 279 Ga. App. 18, 630 S.E.2d 171 (2006).

Failure to pursue certain forensic evidence or to challenge the state's failure to disclose certain forensic evidence was not ineffective assistance because the defendant failed to show that such evidence either existed or would have tended to

exculpate the defendant; the misidentification defense was unrelated to a food stamp card found on the victim, and the defendant failed to show that the misidentification defense was outside the ambit of reasonable trial strategy. *Butts v. State*, 279 Ga. App. 28, 630 S.E.2d 182 (2006).

Failure to present sleepwalking defense. — Trial counsel was not ineffective for failing to assert a sleepwalking defense since the decision was based on counsel's belief that the jury was more likely to believe a defense based on the accidental discharge of a defective weapon. *Smith v. State*, 292 Ga. 620, 740 S.E.2d 158 (2013).

Justification defense. — In circumstances in which a trial court found that defense counsel was ineffective for failing to present evidence which supported the defendant's justification defense, it was illogical to grant a new trial for charges of murder and aggravated assault, but not for possession of a firearm in the commission of a crime; the jury could have acquitted the defendant of the possession charge on the basis of justification. *Langlands v. State*, 280 Ga. 799, 633 S.E.2d 537 (2006).

In a malice murder trial, trial counsel, who relied on a defense of lack of malicious intent, was not ineffective for withdrawing a request to charge on justification. Self-defense was supported by only slight evidence at best, and such a defense might have risked alienating the jury; moreover, defense counsel reasonably concluded that if the defendant sought a charge on self-defense, the state would request a charge on voluntary manslaughter. *Muller v. State*, 284 Ga. 70, 663 S.E.2d 206 (2008).

Because there was no evidence to support a justification defense pursuant to O.C.G.A. § 16-3-21(a), including defense of habitation under O.C.G.A. § 16-3-23, trial counsel's performance could not be considered deficient for failure to pursue those defenses. *Reese v. State*, 289 Ga. 446, 711 S.E.2d 717 (2011).

Failure to present evidence of victim's violent act. — When the defendant presented a prima facie case of justification, counsel was ineffective in not introducing evidence of a prior act of violence by the victim based on counsel's mistaken

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

belief that such an act had to have occurred prior to the act being tried in order to be admissible. The error was not harmless, as the assault, which like the charged crime involved an assault with a gun upon a man leaving the residence of the victim's ex-spouse, was highly relevant to the sole defense of justification. *Bennett v. State*, 298 Ga. App. 464, 680 S.E.2d 538 (2009).

Investigation of victim's prior bad acts impacting effectiveness. — Defendant was not entitled to a new trial based on counsel's ineffectiveness because defendant gave counsel no information (in support of defendant's self-defense claim) to conduct an investigation of the victims' alleged prior violent acts. *Moreno-Rivera v. State*, 291 Ga. 336, 729 S.E.2d 366 (2012).

Affirmative misrepresentations about effects of plea. — Evidence showing that a doctor asked counsel about the effect of a nolo plea to sexual battery on the doctor's future participation in federal health care programs, and that counsel responded with affirmative misrepresentations, which were caused by the counsel's failure to perform basic research, required the habeas court to allow the doctor to withdraw the plea. *State v. Patel*, 280 Ga. 181, 626 S.E.2d 121 (2006).

No affirmative misrepresentations about effects of plea. — Defendant's claim of ineffectiveness of first appointed counsel lacked merit as the defendant did not contend that counsel affirmatively misrepresented the defendant's eligibility or ineligibility for parole, but merely asserted that counsel failed to sufficiently explain Georgia's parole system to the defendant. *Toro v. State*, 319 Ga. App. 39, 735 S.E.2d 80 (2012).

Plea deals. — When the defendant was convicted of selling cocaine and obstruction of an officer, the defendant failed to establish that counsel was ineffective because trial counsel insisted that counsel communicated a plea to the defendant and that the defendant was "adamant" on not

accepting the plea, and the record revealed that trial counsel had several meetings with the defendant, conducted discovery, filed pretrial motions, and spoke with most of the state's witnesses. *Trammell v. State*, 262 Ga. App. 786, 586 S.E.2d 693 (2003).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea on grounds that the defendant's attorney failed to inform the defendant that the defendant's plea was open-ended as opposed to negotiated when the plea transcript showed that the defendant was well aware that the plea was open-ended; that the defendant understood the consequences of the plea; and that the defendant entered the plea freely, knowingly, and voluntarily, with a full understanding that the defendant was subject to the maximum sentence. *Dudley v. State*, 266 Ga. App. 336, 596 S.E.2d 772 (2004).

Defendant's ineffective assistance of counsel claim arising from the failure of trial counsel to communicate a plea offer to the defendant was rejected as the trial court's decision not to credit the defendant's testimony, that a plea offer was only communicated to the defendant's mother and that the defendant would have accepted the plea, was not clearly erroneous. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

Defendant did not show deficient performance for purposes of an ineffective assistance of counsel claim on the basis that counsel failed to adequately advise the defendant regarding a possible plea to the fleeing and attempting to elude and obstruction charges, and that the defendant's failure to plead guilty to these charges would result in the trial court's admission of similar transaction evidence; nor did the defendant show that counsel's failure to advise the defendant as to the consequences of counsel's concession of guilt in opening statement and closing argument constituted deficient performance. *Mills v. State*, 273 Ga. App. 699, 615 S.E.2d 824 (2005).

Defendant did not show that defendant received ineffective assistance of counsel, despite the defendant's claims that the defendant's attorney did not accurately

convey a plea offer to the defendant and that the defendant's attorney waived objections to the allegedly illegal search of the defendant's vehicle following an investigatory stop of the vehicle, as the evidence showed that the attorney adequately explained the plea agreement to the defendant and the defendant nevertheless chose to reject the agreement, and the search of the vehicle was not illegal; accordingly, the defendant could not show that the defendant's attorney performed in an unreasonable manner and that the defendant was prejudiced by the attorney's conduct. *Fernandez v. State*, 275 Ga. App. 151, 619 S.E.2d 821 (2005).

Claim that counsel provided ineffective assistance in failing to communicate a plea bargain offer made by the state lacked merit, as the record did not support a finding that such a plea bargain had even been made by the state; there was no notation of such an offer in the prosecution's file, and the prosecutor did not recall such an offer and would not have re-indicted the matter in order to seek an increase in time that defendant would serve in prison if there had been such an offer. *Lindo v. State*, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Because the defendant failed to show that trial counsel was ineffective for failing to properly advise the defendant regarding a plea offer, and counsel was not required to make meritless objections to the admission of testimony and evidence, the defendant's ineffective assistance of counsel claim failed. *Hunter v. State*, 281 Ga. 526, 640 S.E.2d 271 (2007).

Because the defendant failed to present the testimony of either trial counsel to support a claim of ineffective assistance of counsel, and thus, the record of the new trial hearing was silent as to what actions were taken by counsel to prepare for the plea or to investigate the ramifications of the previous plea, the trial court did not err in denying the defendant's withdrawal of the plea. *Jackson v. State*, 288 Ga. App. 742, 655 S.E.2d 323 (2007).

An ineffective assistance claim based on a guilty plea failed. The defendant did not assert that the defendant would have rejected the plea deal if counsel had told the defendant that the defendant was ineligi-

ble for parole or corrected the trial court's alleged misstatement about sentence review. *Leary v. State*, 291 Ga. App. 754, 662 S.E.2d 733 (2008).

It was error to deny an inmate's habeas petition when the only evidence of record, the inmate's affidavit, indicated that counsel gave erroneous advice that adversely affected the decision of the inmate, who entered into a negotiated plea, not to go to trial. Without a finding that counsel gave proper advice or that the inmate lacked credibility, the evidence did not support the conclusion that counsel was not deficient. *Garrett v. State*, 284 Ga. 31, 663 S.E.2d 153 (2008).

Evidence authorized the trial court to find that trial counsel's representation of the defendant in connection with an offered plea bargain was not deficient because the evidence showed that the defendant met with counsel several times prior to trial, the defendant discussed the facts of defendant's case with counsel, counsel explained to the defendant the problems defendant's custodial statement posed for the defense, and counsel set forth the potential sentence the defendant could expect if found guilty; after receiving advice from counsel, the defendant told counsel that the defendant still wanted to proceed to trial, and nothing in the record showed that the defendant was amenable to the state's plea bargain offer, as required for the defendant to demonstrate that the defendant was prejudiced by counsel's representation. *Miller v. State*, 305 Ga. App. 620, 700 S.E.2d 617 (2010).

Trial counsel was not ineffective for failing to adequately explain to the defendant the possibility that the defendant faced a mandatory life sentence or a sentence of life because the defendant did not carry the defendant's burden of proving that there was a reasonable probability that but for counsel's deficient performance, the defendant would have accepted the state's plea offer; counsel testified that counsel discussed the plea offer with the defendant, told the defendant that the defendant was facing a possible life sentence or life without parole, and tried to explain the recidivist statute, but the defendant did not want to talk about it, and the defendant further testified that

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

when the counsel attempted to discuss the details of the plea, defendant repeatedly said that it was not good enough and that counsel needed to do better. *Chatman v. State*, 306 Ga. App. 218, 702 S.E.2d 51 (2010).

Plea counsel did not perform deficiently for failing to investigate a robbery charge in another county because the defendant's only available means to withdraw the defendant's guilty plea to the robbery charge was through habeas-corpus proceedings; the defendant's first mention of any challenge to the defendant's plea of guilty to the robbery charge was well beyond the term of court in which the defendant was sentenced. *Murray v. State*, 307 Ga. App. 621, 705 S.E.2d 726 (2011).

Habeas corpus petitioner failed to prove that trial counsel's performance was professionally deficient because trial counsel did not fail in the duty to offer the petitioner informed advice regarding the state's plea agreement offer; the petitioner admitted that the petitioner never told trial counsel that the petitioner wished to plead guilty, and trial counsel did not act in an unreasonable or professionally deficient manner in concluding that the petitioner had decided to let the petitioner's father speak for the petitioner and wished to reject the state's offer. *Cammer v. Walker*, 290 Ga. 251, 719 S.E.2d 437 (2011).

Defendant's allegations of ineffective assistance of counsel failed because the court credited trial counsel's testimony that trial counsel fully explained the evidence and the strength of the state's case to the defendant, conveyed all plea bargain offers from the state to the defendant, and the defendant rejected those offers. *Butler v. State*, 319 Ga. App. 350, 734 S.E.2d 567 (2012).

Trial counsel was not ineffective for failing to advise the defendant that, as a recidivist, the defendant faced a mandatory life sentence because even after being informed that the defendant could face a

life sentence, the defendant continued to assert the defendant's innocence and request a jury trial. *Biggins v. State*, 322 Ga. App. 286, 744 S.E.2d 811 (2013).

Failure to obtain a plea agreement.

— Failure to obtain plea agreement for a malice murder, death sentenced defendant was not ineffective assistance of counsel because the state did not want to agree to a reduced sentence—primarily because there was no evidence the state needed from the defendant to prosecute other persons for two other (or the instant) murders. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Defendant's motion for a new trial was properly denied as the trial counsel did not provide ineffective assistance in failing to engage in plea negotiations since there was no evidence that the state made a plea offer to the defendant and a failure to initiate plea bargaining did not constitute deficient professional conduct; further the defendant failed to show that the defendant would have accepted any plea offer and thus did not show that the defendant was prejudiced. *Lawson v. State*, 280 Ga. App. 870, 635 S.E.2d 259 (2006).

Defendant failed to show that counsel was ineffective due to counsel's alleged failure to engage in plea negotiations with respect to the defendant's multiple pending armed robbery charges as the failure to initiate plea negotiations by counsel did not, without more, constitute deficient performance. *Simmons v. State*, 309 Ga. App. 369, 710 S.E.2d 193 (2011).

Miscommunication on plea deal.

— Although the defendant claimed that the defendant's trial counsel was ineffective in forwarding to the defendant a plea offer that was meant for another client and in failing to ensure that the defendant understood the statutory range of the defendant's sentence, the record showed that trial counsel informed the defendant later that month that counsel had sent the letter in error and that the plea offer the letter contained was not available to the defendant; the defendant presented no evidence that trial counsel's mistake led the defendant to plead guilty some five months later. Even assuming that trial

counsel failed to properly ensure that the defendant understood the statutory range, the defendant's alleged confusion was corrected by the trial court before the defendant entered the plea, and the defendant presented no evidence that the defendant otherwise would have insisted on proceeding to trial. *Frye v. State*, 298 Ga. App. 415, 680 S.E.2d 431 (2009).

Guilty pleas. — Reasonably effective assistance is an easier standard to meet in the context of a guilty plea than in a trial, but counsel still must render competent service: it is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly; the lawyer must actually and substantially assist the client in deciding whether to plead guilty; it is the lawyer's job to provide the accused an understanding of the law in relation to the facts; the advice the lawyer gives need not be perfect, but it must be reasonably competent; the lawyer's advice should permit the accused to make an informed and conscious choice; in other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

In a case in which the defendant sought to withdraw the defendant's guilty plea after sentencing based on, *inter alia*, defense counsel's ineffectiveness in allegedly giving the defendant confusing advice about the sentence and in allegedly failing to inform the defendant that the defendant had the opportunity to withdraw the defendant's guilty plea prior to sentencing, the trial court did not clearly err in finding that the evidence of ineffective assistance of counsel was insufficient to justify allowing the defendant to withdraw the defendant's guilty plea as the record clearly showed that the defendant was well aware of the trial court's intention to sentence the defendant to 20 years in prison and that defense counsel had informed the defendant that the defendant could withdraw the defendant's guilty plea prior to sentencing if the defendant did not want to accept the intended sentence. *Johnson v. State*, 260 Ga. App. 897, 581 S.E.2d 407 (2003).

Trial court did not commit clear error in denying the defendant's motion to withdraw the defendant's guilty plea as the defendant did not show that defense counsel rendered ineffective assistance of counsel and caused the defendant's plea of guilty to first-degree homicide by vehicle to be entered unknowingly and involuntarily; indeed, the record showed that defense counsel properly prepared the defendant's case and advised the defendant even though the trial court entered a slightly longer sentence than the defendant had expected and, as a result, the defendant entered the defendant's plea knowing the nature of the charges and consequences of the plea. *David v. State*, 261 Ga. App. 468, 583 S.E.2d 135 (2003).

A defendant, who was sentenced as a recidivist to life imprisonment without the possibility of parole, failed to show that defense counsel was ineffective for failing to inform defendant that defendant would likely receive a mandatory sentence of life without parole if defendant rejected a plea offer because defendant failed to show that, when defendant rejected the plea, defendant was amenable to the offer made by the state. *Carson v. State*, 264 Ga. App. 763, 592 S.E.2d 161 (2003).

Trial court did not err in denying the defendant's motion to withdraw the defendant's guilty plea as the plea was entered knowingly, intelligently, and voluntarily; the defendant did not show that the plea was the result of ineffective assistance of counsel since the record showed that defense counsel fully advised the defendant in all aspects of the plea and no evidence existed to show that defense counsel was unprepared, unresponsive, or otherwise incompetent to represent the defendant. *Payne v. State*, 271 Ga. App. 619, 610 S.E.2d 572 (2005).

Because a trial judge informed the defendant of the charges as well as the possible penalties for conviction on those charges, the defendant's guilty plea was freely and voluntarily entered; the defendant failed to show that counsel's trial strategies were ineffective, and consequently, the trial court properly denied the defendant's motion to withdraw the guilty pleas. *Hart v. State*, 272 Ga. App. 754, 613 S.E.2d 107 (2005).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

When the defendant's motion to withdraw defendant's guilty plea was denied, the defendant did not show the defendant's trial counsel ineffectively advised the defendant about entering the plea because: (1) the defendant did not show what advice counsel should have given the defendant in addition to the advice given; (2) the defendant had ample time to consider the plea and several chances to withdraw the plea, so the defendant was not prejudiced by being given a last minute opportunity to plead; (3) trial counsel was not unprepared for trial; and (4) it was not shown that counsel was ineffective for not requesting a presentence investigation. *Zellmer v. State*, 273 Ga. App. 609, 615 S.E.2d 654 (2005).

Counsel did not provide ineffective assistance by not advising the defendant of the option of an Alford plea because the defendant had no constitutional right to plead guilty, there was no indication that the trial court would have been willing to accept such a plea, and the defendant and the family had rejected any possibility of entering a plea from the counsel's first involvement in the case. *Cornelius v. State*, 273 Ga. App. 806, 616 S.E.2d 148 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Defendant was not entitled to relief from a guilty plea because the defendant did not show that the trial counsel breached the duty to ensure that the defendant knowingly and voluntarily pled guilty nor did the defendant show that there was prejudice as a result of the trial counsel's failure to file a meritless motion to recuse. *Trimble v. State*, 274 Ga. App. 536, 618 S.E.2d 163 (2005), overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

Record did not support a claim that the defendant rejected the state's plea offer due to the ineffectiveness of defense counsel as the defendant was aware of the state's final plea offer and was aware of the potential of being sentenced as a re-

cidivist; the defendant's claims regarding missing discovery documents were not credible. *Himes v. State*, 274 Ga. App. 541, 618 S.E.2d 174 (2005).

Denial of a motion to withdraw a guilty plea was proper because: (1) the record showed that the defendant knowingly and voluntarily withdrew the pre-sentencing motion to change the plea to not guilty; (2) the trial counsel did not render ineffective assistance in failing to obtain a psychiatric evaluation, as there was no showing that the evaluation would have shown the existence of a psychiatric defense; and (3) speculation was insufficient to satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984). *Terrell v. State*, 274 Ga. App. 539, 618 S.E.2d 175 (2005).

When the defendant did not even allege, let alone establish, a reasonable probability that, but for counsel's purported error in failing to advise the defendant of a possible appeal right, the defendant would not have pled guilty and would have insisted on going to trial, and when the defendant cited no evidence that the defendant would have proceeded to trial but for counsel's alleged error, the defendant failed to make the required showing and the claim of ineffective assistance of counsel provided no basis for setting aside the guilty plea. *Lee v. State*, 277 Ga. App. 887, 627 S.E.2d 901 (2006).

Defendant failed to establish that the defendant received ineffective assistance in defense counsel's advice to plead guilty because the defendant's trial counsel testified that after the conviction in a first trial, it was counsel's best professional recommendation that the defendant plead guilty in the second case, as the second case was a lot worse than the first and that, if the defendant went to trial in the second case, the defendant was potentially facing a much longer sentence, but as a consequence of the plea, the defendant's maximum aggregate sentence in both cases was 15 years, with 13 to serve; moreover, the defendant's testimony demonstrated that the defendant understood that by pleading guilty, the defendant would not have to serve a longer sentence. *Hollman v. State*, 280 Ga. App. 53, 633 S.E.2d 395 (2006).

Defendant's motion to withdraw a

guilty plea was properly denied as the defendant failed to show that defense counsel's performance was deficient in advising the defendant to enter a non-negotiated plea without a recommendation from the state; the defendant also did not overcome the presumption that defense counsel's conduct was reasonable as the defendant's testimony that the defense counsel led the defendant to believe that the defendant's sentence would be no more than 10 years' was contradicted by the defendant's testimony that the defendant understood that the defendant could be sentenced to life imprisonment, entreaties from the defendant's mother and the defense counsel for the imposition of concurrent sentences, and the defendant's decision to throw the defendant upon the mercy of the sentencing court. *Brown v. State*, 280 Ga. App. 767, 634 S.E.2d 875 (2006).

Trial court did not err by denying a defendant's motion to withdraw the defendant's guilty plea due to ineffective assistance of the counsel representing the defendant at the plea hearing as: (1) the counsel met with the defendant several times prior to the plea hearing, reviewed the district attorney's file, and discussed with the defendant the evidence the state intended to present against the defendant; (2) the counsel moved to suppress the defendant's statements to the police and discussed the options available with the defendant after the motion was denied, including the state's offer of a plea recommendation; and (3) the defendant failed to show how additional communication with the counsel would have changed the defendant's decision to enter a guilty plea. *Rios v. State*, 281 Ga. 181, 637 S.E.2d 20 (2006).

Trial court did not abuse the court's discretion in denying the defendant's post-sentence motion to withdraw a guilty plea because the defendant failed to show ineffective assistance of trial counsel in incorrectly assessing the strength of the state's case, and recognizing the existence of exculpatory evidence; moreover, the appeals court rejected the defendant's coercion claim, as any coercion the defendant experienced did not manifest itself from counsel's actions, but arose from the cir-

cumstances the defendant felt during the entire hearing process. *Collier v. State*, 281 Ga. App. 646, 637 S.E.2d 72 (2006).

Because the defendant's current counsel filed the motion to suppress the defendant claimed initial counsel failed to do, and because the defendant chose to enter a guilty plea while that motion was pending, withdrawal of that plea based on an ineffective assistance of counsel claim due to the initial counsel's failure to file the motion to suppress was not allowed as the evidence did not show that there was a reasonable probability that the defendant would have insisted on going to trial but for counsel's failure to file a motion to suppress. *Lamb v. State*, 282 Ga. App. 756, 639 S.E.2d 641 (2006).

Because a defendant failed to argue or show actual prejudice by the trial court's requirement that the defendant's previously appointed attorney remain present at the defense table after retaining new counsel only one week prior to trial, the trial court did not err in denying the defendant's motion to withdraw the guilty plea entered to possessing cocaine and speeding. *Cole v. State*, 284 Ga. App. 246, 643 S.E.2d 733 (2007), cert. denied, 2007 Ga. LEXIS 514 (Ga. 2007).

Because the defendant failed to show sufficient evidence of a psychological impairment, due in part by ceasing to take needed medication, sleep deprivation, racing thoughts or other psychological turmoil, or that trial counsel was ineffective as to counsel's advice regarding sentencing as a recidivist under O.C.G.A. § 17-10-7, the appeals court agreed that a guilty plea was intelligently and voluntarily entered; thus, the trial court properly denied a motion to withdraw it. *Frost v. State*, 286 Ga. App. 694, 649 S.E.2d 878 (2007).

The trial court properly denied the defendant's motion to withdraw a guilty plea to a charge of malice murder, because sufficient evidence was presented to support a finding that: (1) counsel did not render ineffective assistance in advising the defendant as to the guilty plea; (2) counsel attempted, albeit unsuccessfully, to pursue a voluntary manslaughter defense and plea deal with the state; (3) the defendant was generally competent at the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

time of the murder; (4) a statement by a proposed expert witness in support of the defense would have been inadmissible as an opinion on the ultimate issue and could not, in any event, have helped the defendant's case; and (5) the viability of any type of voluntary manslaughter defense was highly unlikely. *Trauth v. State*, 283 Ga. 141, 657 S.E.2d 225 (2008).

Trial court properly denied the defendant's motion to withdraw the defendant's guilty plea to possession of cocaine and possession of tools for the commission of a crime charges as the defendant failed to show that the plea was not knowingly, intelligently, and voluntarily entered as the colloquy of the trial court indicated that the defendant was properly questioned and that the defendant's responses established that the plea and circumstances were understood and that the defendant was satisfied with trial counsel. Further, the defendant failed to establish that the defendant was rendered ineffective assistance of counsel based on trial counsel purportedly not explaining that the state was incapable of meeting the state's burden on a trafficking charge, causing the defendant to believe that the reduced charges were a part of a negotiated plea agreement, as the defendant testified that the defendant informed trial counsel that the defendant would take a plea if the trafficking offense was reduced. *Franklin v. State*, 291 Ga. App. 267, 661 S.E.2d 870 (2008).

With regard to the defendant's conviction for pimping, the defendant failed to establish that the defendant was rendered ineffective assistance of counsel as a result of defense counsel allegedly failing to advise the defendant as to the consequences of a guilty plea as the defendant failed to show how further consultation with defense counsel would have impacted the decision to enter a guilty plea and the defendant failed to show how, but for counsel's performance, the defendant would not have pled guilty and proceeded to trial. *Burroughs v. State*, 292 Ga. App.

580, 665 S.E.2d 4 (2008), cert. denied, No. S08C1930, 2008 Ga. LEXIS 930 (Ga. 2008).

Pursuant to the record of the defendant inmate's plea hearing, the trial court properly provided advice regarding the rights being waived by the inmate's entry of a plea as well as the maximum sentences that could be imposed; there was no ineffectiveness in counsel's failure to inform the inmate of the right to appeal, and the trial court had no duty to inform the inmate that there was possibly a right to appeal from convictions that resulted from the guilty plea. *Powell v. State*, 297 Ga. App. 833, 678 S.E.2d 524 (2009).

Defendant, who sought to withdraw an Alford plea, did not show that the defendant misunderstood the state's recommendation concerning credit for time served or that counsel failed to listen to the defendant, much less that the defendant would have insisted on going to trial had the defendant been counseled properly. Thus, the defendant failed to prove that plea counsel was ineffective on this ground. *Skinner v. State*, 297 Ga. App. 828, 678 S.E.2d 526 (2009).

Trial court properly denied a defendant's motion to withdraw a guilty plea to voluntary manslaughter. Pretermittting whether counsel's performance was deficient, the defendant failed to establish a reasonable probability that the defendant would have insisted on a trial if the defendant had always known the defendant could be sentenced to serve 15 years instead of 10; furthermore, the defendant would have been tried for felony murder had the defendant gone to trial. *Johnson v. State*, 298 Ga. App. 197, 679 S.E.2d 763 (2009).

Defendant, who pled guilty to theft by shoplifting, did not establish that the defendant received ineffective assistance of counsel due to trial counsel's failure to interview and subpoena witnesses because the defendant did not demonstrate that there was a reasonable probability that the defendant would have insisted on going to trial but for trial counsel's failure to interview any potential witness, and the defendant failed to produce any such witness at the hearing on the motion to withdraw the defendant's plea; evidence

supported the trial court's finding that the defendant was motivated to plead guilty after viewing a video of the defendant committing the crime and not as a result of any purportedly deficient performance by counsel. *Trapp v. State*, 309 Ga. App. 436, 710 S.E.2d 637 (2011).

Trial court was authorized to find that trial counsel's alleged deficiency of misinforming the defendant about the eligibility for parole was not prejudicial and did not present a manifest injustice requiring withdrawal of the defendant's guilty plea because at the hearing conducted on the defendant's motion to withdraw the guilty plea, trial counsel testified that counsel had explained to the defendant that it was within the parole board's discretion to decide the parole issue and that no promises or guarantees could be made as to the length of the defendant's incarceration; the trial court was authorized to find that the defendant was not primarily concerned about parole eligibility but rather was concerned about proceeding to trial on the more serious charges before a jury that the defendant did not deem as being favorable because the defendant testified that the defendant did not like the composition of the potential jurors and wanted to put off the trial, and when trial counsel expressed uncertainty regarding how the defendant's probation revocations would affect parole eligibility, the defendant did not inquire further. *James v. State*, 309 Ga. App. 721, 710 S.E.2d 905 (2011).

Trial counsel's advice to the defendant regarding the effect of a guilty plea did not constitute ineffective assistance of counsel because trial counsel correctly advised the defendant that once the defendant entered the guilty plea, the defendant was subject to being deported to Mexico as did the state and the trial court during the plea hearing; the defendant admitted being in the United States illegally, United States Immigration and Customs Enforcement already had a hold on the defendant, and in addition to the felony child endangerment plea, the defendant was entering a third DUI plea within the past year. *Lopez v. State*, 309 Ga. App. 756, 711 S.E.2d 345 (2011).

Trial court did not abuse the court's discretion when the court denied the de-

fendant's motion to withdraw a guilty plea on the defendant's claim that plea counsel failed to explain the consequences of the non-negotiated guilty plea because the record supported the trial court's conclusion that the defendant knowingly and intelligently entered the guilty plea; during the plea hearing, the defendant confirmed that counsel discussed the plea petition and waiver-of-rights form with the defendant and that the defendant understood the form; the defendant then responded affirmatively when the state's prosecutor asked if the defendant understood the rights the defendant was waiving by pleading guilty, and the defendant affirmatively stated that the defendant understood when the trial court reiterated the rights the defendant was waiving by pleading guilty. *Earley v. State*, 310 Ga. App. 110, 712 S.E.2d 565 (2011).

Because the defendant declined the opportunity at a plea hearing to discuss any concerns with counsel's representation, the defendant failed to demonstrate that counsel was ineffective; therefore, the trial court did not abuse the court's discretion in denying the defendant's motion to withdraw the defendant's plea on that basis. *Norwood v. State*, 311 Ga. App. 815, 717 S.E.2d 316 (2011).

Trial court did not abuse the court's discretion in denying the defendant's motion to withdraw a guilty plea on the grounds of ineffective assistance of counsel because counsel informed the defendant of the state's extended plea offer and fully advised the defendant about the process; counsel informed the defendant that the defendant faced a possible recidivist punishment, that the state would withdraw the state's plea offer if it revealed the identity of the confidential informant, and that if the defendant rejected the offer, the only options were to enter a blind plea or proceed to trial. *Arnold v. State*, 315 Ga. App. 831, 728 S.E.2d 342 (2012).

Trial court did not err in finding that the defendant failed to establish an ineffectiveness claim because the defendant was adequately advised regarding the plea offer, the options, and the risks, but the defendant rejected the state's plea offer; having received the full and careful

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

advice of counsel, the ultimate decision of whether to plead guilty belonged to the defendant. *Cruz v. State*, 315 Ga. App. 843, 729 S.E.2d 9 (2012).

Trial court did not err in denying the defendant's motion to withdraw a guilty plea based upon ineffective assistance of counsel because the record authorized the trial court to reject the defendant's claim that counsel's performance was deficient and that there was a reasonable probability that, absent the deficiency, the defendant would not have pled guilty; counsel testified that prior to the plea hearing, counsel reviewed with the defendant all of the evidence obtained through discovery and that counsel and the defendant had agreed on the strategy. *Davis v. State*, No. A12A0674, 2012 Ga. App. LEXIS 583 (June 27, 2012).

Failure to object to reference to codefendant's guilty plea. — Because the defendant did not show that there was a reasonable probability that the outcome would have been different if counsel had objected to a reference to a codefendant's guilty plea during the state's opening, the court did not have to determine whether counsel was deficient; furthermore, the jury was charged that opening statements were not evidence. *Wilcox v. State*, 297 Ga. App. 201, 677 S.E.2d 142 (2009), cert. denied, No. S09C1285, 2009 Ga. LEXIS 342 (Ga. 2009).

Advice not to testify. — In a malice murder trial, trial counsel was not ineffective in advising the defendant not to testify even though only the defendant could have supplied the details surrounding the shooting, given the weakness of the state's case, the trial court's permission to argue justification without using the word, the defendant's reluctance to testify, the belief that the state's rebuttal witnesses would be very hostile, and the desire to eliminate the possibility of a voluntary manslaughter instruction. *Muller v. State*, 284 Ga. 70, 663 S.E.2d 206 (2008).

Defense counsel was not ineffective for interfering with the defendant's right to

testify at trial as: (1) counsel informed the defendant that, although the defendant had an absolute right to testify, counsel believed that it was in the defendant's interest not to testify for strategic reasons; and (2) based on the reasonable advice of counsel, the defendant voluntarily chose not to testify. *Dixon v. State*, 285 Ga. 312, 677 S.E.2d 76 (2009), overruled on other grounds, 287 Ga. 242, 695 S.E.2d 255 (2010).

No misstatement on sentence. — Defendant's ineffective assistance claims failed because the defendant could not show deficient performance on the ground that defendant's defense counsel failed to correct the trial court and prosecutor's misstatement regarding the defendant's eligibility to seek review of the defendant's sentence; neither the trial court nor the prosecutor informed the defendant that the defendant was entitled to seek sentence review. *Belcher v. State*, 304 Ga. App. 645, 697 S.E.2d 300 (2010).

Advising on sentencing. — When the defendant alleged that the defendant's counsel inadequately advised the defendant as to the defendant's guilty plea, the defendant had to move to withdraw the defendant's guilty plea, develop the record on the defendant's ineffectiveness claim, and appeal the denial of the defendant's motion, and, because the defendant did not move to withdraw the defendant's guilty plea, and the only evidence of record was a transcript of the guilty plea hearing, the defendant could not challenge counsel's effectiveness in a direct appeal, and the defendant's motion to file an out-of-time appeal was properly denied. *Coleman v. State*, 278 Ga. 493, 604 S.E.2d 157 (2004).

Even if counsel gave incorrect advice as to sentencing, a defendant did not establish that this caused the defendant to plead guilty, and a claim of ineffective assistance failed because the defendant was warned by the trial court at the plea hearing that the sentence imposed could be up to 15 years without parole; even if counsel was deficient in filing the notice of appeal prematurely, thereby divesting the trial court of jurisdiction to rule on a motion to withdraw the guilty plea, defendant did not suggest what evidence might

have been presented at a plea withdrawal hearing, and thus failed to show that the lack of a ruling on the motions changed the outcome of the case. *Thomas v. State*, 278 Ga. App. 661, 629 S.E.2d 553 (2006).

Defendant's ineffective assistance of counsel claim was rejected as trial counsel testified that counsel advised defendant that defendant could receive a sentence of 85 years without parole. *Porter v. State*, 275 Ga. App. 513, 621 S.E.2d 523 (2005).

Despite the defendant's claims that trial counsel failed to: (1) discuss the possibility of a plea or engage in plea negotiations with the state; (2) advise defendant of the consequences of being sentenced as a recidivist; and (3) advise defendant of the consequences of a speedy trial demand, the defendant's ineffective assistance of counsel claims failed because the record showed that the state never made a plea offer and the defendant failed to show that the outcome of the trial would have been different but for trial counsel's alleged remaining errors. *Cater v. State*, 280 Ga. App. 891, 635 S.E.2d 246 (2006).

Defendant, who sought to withdraw a guilty plea on the ground that defense counsel was ineffective, did not show that defense counsel was deficient; the trial court found that defense counsel was more credible than the defendant on the question of whether counsel had advised the defendant that the defendant, who had pled guilty to armed robbery, would not be eligible for parole or sentence review. *Carson v. State*, 286 Ga. App. 167, 648 S.E.2d 493 (2007).

Defendant failed to show that the defendant received ineffective assistance of counsel with regard to being coerced or deceived by counsel as to the length of sentence that could be imposed, and the trial court did not err by denying the defendant's motion to withdraw the guilty plea entered into, because the record did not support the defendant's claim that counsel deceived the defendant about the length of the sentence as the defendant was advised of the maximum possible sentence and was told that there was no guarantee as to the length of sentence that would be imposed. *Brantley v. State*, 290 Ga. App. 764, 660 S.E.2d 846 (2008).

In a prosecution for possession of meth-

amphetamine, the defendant claimed defense counsel was ineffective for failing to advise the defendant of the possibility of receiving a prison sentence without the possibility of parole. This claim failed as the trial court was entitled to believe trial counsel's testimony that counsel advised the defendant of this possible sentence before the defendant elected to go to trial. *Matthews v. State*, 294 Ga. App. 836, 670 S.E.2d 520 (2008).

It was proper to deny a defendant's motion for new trial based on ineffective assistance. There were opposing arguments, each supported by the record, as to whether the defendant would have pled guilty had counsel correctly informed the defendant of the mandatory minimum sentence, which presented factual matters primarily for resolution by the trial court. *Childrey v. State*, 294 Ga. App. 896, 670 S.E.2d 536 (2008).

Defendant could not establish that defendant's trial counsel provided ineffective assistance by failing to advise the defendant that entering a guilty plea to two counts of molestation would subject the defendant to the state probation office's sex offender treatment program because the transcript of the plea hearing plainly reflected that both the prosecutor and the trial court expressly advised the defendant that the defendant would be required to comply with any and all screening and treatment recommendations of the state probation office as a special condition of defendant's probation; therefore, even if trial counsel failed to advise the defendant on those matters, the defendant was made cognizant of them prior to entry of defendant's plea but nevertheless chose to plead guilty, and the defendant could not demonstrate that the defendant was prejudiced by any failure of defendant's trial counsel to advise the defendant that the defendant would have to comply with all treatment recommendations of the probation office. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Trial counsel's failure to advise a client that pleading guilty will require the client to register as a sex offender is constitutionally deficient performance; even if registration as a sex offender is a collateral consequence of a guilty plea, the failure to

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

advise a client that the client's guilty plea will require registration is constitutionally deficient performance because prevailing professional norms support the view that defense counsel should advise their clients concerning registration as a sex offender prior to entry of a guilty plea. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Trial court erred in denying the defendant's motion to withdraw defendant's guilty plea to two counts of child molestation because defendant's trial counsel failed to advise the defendant that entering a plea of guilty to child molestation would necessitate that the defendant comply with the requirements of the state's sex offender registry statute, O.C.G.A. § 42-1-12; the defendant was subject to the sex offender registration requirements at the time that the defendant entered into defendant's plea, the terms of the sex offender registry statute were succinct, clear, and explicit in setting forth the consequences of defendant's guilty plea, and defendant's trial counsel could have readily determined that the defendant was required to register and conveyed that information to the defendant. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Defendant juvenile did not receive ineffective assistance of counsel because trial counsel testified that counsel met with the defendant several times and conveyed the sentencing offer to the defendant; although the defendant testified that counsel visited the defendant only twice and never communicated any information about the evidence that would be presented at trial or that the state had presented any plea offers, the juvenile court was authorized to believe counsel's testimony over the defendant's testimony. In the Interest of K.F., 316 Ga. App. 437, 729 S.E.2d 575 (2012).

Defendant failed to demonstrate ineffective assistance of counsel during the plea process based on counsel's alleged promise regarding the sentence to be im-

posed because the trial court expressly found that the defendant's testimony regarding what counsel told the defendant about the sentence that would be imposed lacked credibility and was contradicted by the testimony of counsel and the evidence of record. *Davis v. State*, No. A12A0674, 2012 Ga. App. LEXIS 583 (June 27, 2012).

Performance of counsel during sentencing. — Trial counsel was not ineffective for remaining silent during sentencing when the prosecutor erroneously stated that the defendant did not have a right to file a petition for a writ of habeas corpus because the record reflected that the defendant's trial counsel responded that the defendant had a right to file a habeas petition. Additionally, after announcing the court's sentence, the trial court advised the defendant that the defendant had the right to challenge the convictions in habeas proceedings. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Failure to advise defendant of prosecution as recidivist. — A trial court did not err in denying the defendant's motion for new trial on the grounds of ineffective assistance of counsel with regard to the defendant's drug-related convictions based on defense counsel failing to advise the defendant that the state intended to prosecute the defendant as a recidivist since the defendant did not testify that the defendant would have accepted a plea offer if the defendant had known that the defendant was facing the prospect of being sentenced as a recidivist, thus, the defendant failed to show that counsel's alleged deficiency affected the end result of the case. Furthermore, the defendant did not show in the record that the state made or was amenable to any plea negotiations. *Heard v. State*, 291 Ga. App. 550, 662 S.E.2d 310 (2008).

Use of word "victim" in trial. — Trial court's ruling that it was highly unlikely that a reasonable probability existed that the outcome of the defendant's case would have been different but for defense counsel's failure to object to the use of the word "victim" when referring to the victim was not clearly erroneous; moreover, defense counsel testified that the defense theory was to show that the prosecution was on a

witch hunt against the defendant and not objecting to the state's use of the word "victim" reinforced that strategy of showing that the state was "paranoid." This was a matter of tactics and strategy, and whether wise or unwise did not constitute ineffective assistance of counsel. *Johnson v. State*, 280 Ga. App. 341, 634 S.E.2d 134 (2006).

Failure to request redaction of drug reference in 9-1-1 tape. — Trial counsel was not ineffective for failing to request redaction of drug references in a 9-1-1 tape as the defendant could not demonstrate the prejudice necessary to establish ineffective assistance of counsel since the defendant subsequently injected the issue of drugs into the case by testifying that the victim's home was a crack house and that the victim set the defendant up in order to protect the victim's grandchild, an alleged drug dealer. *Atwell v. State*, 293 Ga. App. 586, 667 S.E.2d 442 (2008).

Reference to the 9-11 tragedy. — Defendant's counsel was not ineffective for failing to object to the prosecutor's reference to the September 11, 2001, terrorist attacks; there was no evidence in the record as to trial counsel's perspective because trial counsel did not testify at the hearing on the motion for new trial, and while the appellate court did not condone the analogy's use so soon after the 9-11 tragedy, it could not conclude that but for trial counsel's failure to object to its use, the jury would have acquitted defendant. *Chalvatzis v. State*, 265 Ga. App. 699, 595 S.E.2d 558 (2004).

Prosecutor's use of word "rape." — In a rape prosecution, defendant did not show that defendant's counsel provided ineffective assistance by not objecting to the prosecutor's repeated use of the word "rape" in examining witnesses because, if counsel erred, defendant did not show that the outcome of defendant's trial would have been different had counsel raised this objection, as the trial court's instructions explained to the jury the difference between consensual sexual relations and rape and the state's burden of proving that the victim did not consent to sexual relations with defendant. *Machuca v. State*, 279 Ga. App. 231, 630 S.E.2d 828 (2006).

Reference to defendant as 'monster' without objections. — Defense counsel was not ineffective for failing to make a motion for a mistrial after the prosecutor referred to the defendant as "a monster" in the prosecutor's opening statement; defense counsel explained that the trial court had ruled against the state's request to admit similar transaction evidence, to the prosecutor's surprise, and that defense counsel wanted the trial to go forward without giving the state time to "regroup." *Phillips v. State*, 284 Ga. App. 683, 644 S.E.2d 535 (2007).

Objections to prosecutor's argument. — Evidence supported the trial court's conclusion that defendant's trial counsel rendered effective assistance because: (1) counsel did not err in not moving for a directed verdict because the evidence sufficed to sustain defendant's conviction for possession of a firearm by a convicted felon charge; (2) counsel's failure to object to the trial court's failure to recharge the jury in the second phase of the bifurcated trial was harmless error; (3) counsel's failure to object to detective's testimony regarding citizens' complaints about a drug dealer was appropriate trial strategy because counsel did not want to call more attention to the statement; and (4) counsel's failure to object to the prosecutor's closing argument statements was not deficient performance as each of the prosecutor's statements was a reasonable inference drawn from the evidence. *Ballard v. State*, 268 Ga. App. 55, 601 S.E.2d 434 (2004).

Defendant did not show counsel provided ineffective assistance of counsel because counsel did not object when the prosecutor made comments concerning facts that were not in evidence, as this was presumed strategic, absent testimony to the contrary, which was not presented. *Jackson v. State*, 271 Ga. App. 317, 609 S.E.2d 643 (2004).

Because the trial result would not have been different if counsel had objected to the prosecutor's argument, the defendant failed to show that counsel was ineffective. *Hunter v. State*, 273 Ga. App. 52, 614 S.E.2d 179 (2005).

Defendant did not receive ineffective assistance of counsel by the failure to

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

object to a passing reference to defendant's incarceration as the reason for defendant not being arrested sooner and to the initial arrest as being part of a "roundup"; all of the circumstances connected with a defendant's arrest were admissible, even those that established the commission of another criminal offense, if they were relevant and the testimony was relevant to counter any accusation that defendant's arrest was delayed due to lack of identification. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Defendant failed to establish that defense counsel's failure to object to a prosecutor's questions about specific instances of misconduct was ineffective assistance since trial counsel testified that, knowing that the state had no evidence of prior crimes to introduce, defense counsel's trial strategy was to show that the type of acts for which the defendant stood accused were "totally out of character," and since counsel further testified that counsel did not object to the two questions at issue because defense counsel believed that the door to that line of questioning had been opened and because the state possessed no evidence that could be introduced to harm the defendant. *Harris v. State*, 279 Ga. App. 570, 631 S.E.2d 772 (2006).

Trial counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to join the objection tendered by the codefendant's counsel to the prosecutor's closing argument that allegedly improperly shifted the burden of proof to the three defendants; trial counsel's decision not to add an objection on top of the codefendant's objection was neither deficient performance nor prejudicial, as the trial counsel had already objected once, the codefendant's objection to the statement had already been overruled, and the trial counsel testified that the trial counsel was prepared to argue extensively about the burden of proof and the judge's instructions on the burden of proof during the trial counsel's closing argument. *Brooks v.*

State, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Defendant's trial counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to move for a mistrial after the prosecutor, in violation of O.C.G.A. § 17-16-4(a)(1), failed to notify the trial counsel of the defendant's oral admission made in custody and then elicited testimony from the officer to whom the admission was made indicating that the officer had testified about the admission at a pretrial hearing when the officer, in fact, had not so testified; the state acted in bad faith as the prosecutor intentionally elicited testimony about the admission and knew about the admission long before trial, the defense counsel was prejudiced by the misconduct as, had the misconduct not occurred, the defense counsel would have understood the importance of obtaining the officer's pretrial testimony, and the defendant was prejudiced by counsel's failure, as the admission was central to the state's case and was not cumulative of other evidence. *Johnson v. State*, 281 Ga. App. 455, 636 S.E.2d 178 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to object to a portion of the state's closing argument that the defendant characterized as an impermissible golden rule reference; there was a presumption that defense counsel's actions were strategic, as appellate counsel did not call defense counsel at the hearing on the defendant's motion for a new trial to examine defense counsel on the conduct of the trial, and the appellate court found that the state's closing argument did not refer to the golden rule. *Parks v. State*, 281 Ga. App. 679, 637 S.E.2d 46 (2006).

Defense counsel was not ineffective for failing to argue that the state was relying on the same facts to support burglary and theft by taking charges; the two charges were not based on the same facts, and even if one was included in the other as a matter of fact, the defendant was not entitled to dismissal of either charge or to a limiting instruction. *Martin v. State*, 285 Ga. App. 375, 646 S.E.2d 339 (2007).

Defendant's ineffective assistance of

counsel arguments failed when, because the prosecutor's suggestion in closing argument that the victim was bending when the victim was shot was authorized by the physical evidence, trial counsel was not ineffective for failing to object to the prosecutor's argument; although the defendant alleged that trial counsel failed to subpoena trial witnesses, the defendant admitted that there was no failure to introduce critical testimony at trial. *Winfrey v. State*, 286 Ga. App. 718, 650 S.E.2d 262 (2007).

Because the defendant's trial counsel was not ineffective in presenting a defense and requesting jury instructions on the defendant's claim of innocence, and was authorized to forego objection to a challenged portion of the state's closing argument, the defendant's ineffective assistance of counsel claims lacked merit and did not warrant a new trial. *King v. State*, 282 Ga. 505, 651 S.E.2d 711 (2007).

While the defendant's trial counsel was ineffective in failing to object to that portion of the state's closing argument in which the prosecutor referenced a slain officer's funeral a week prior, as that fact had no relevance to the charges the defendant was facing, based on the overwhelming evidence of guilt, including the defendant's admission, the defendant's convictions for trafficking in cocaine and possession of cocaine with intent to distribute were upheld on appeal; thus, a new trial was properly denied. *Cantrell v. State*, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

At a trial for trafficking in cocaine and for possession of cocaine with intent to distribute, trial counsel was ineffective for not objecting when the prosecutor, in closing, described attending the funeral of a police officer killed in the line of duty, as this tragic and emotionally charged event had no relation to the evidence admitted or the case at hand. The defendant, however, had not shown prejudice from counsel's deficient performance, as the defendant admitted having cocaine before being chased by police officers, an officer saw the defendant throw down a large bag while the defendant was being chased, and a large amount of cocaine was recovered in this same location, less than 40 yards

from where the defendant surrendered. *Cantrell v. State*, 290 Ga. App. 651, 660 S.E.2d 468 (2008).

In a rape case, as the prosecutor did not offer a personal belief about the veracity of an eyewitness and victim during closing argument, but instead argued that based on the facts and reasonable inferences drawn therefrom, the jury should conclude that those witnesses were telling the truth, defense counsel was not ineffective in failing to object to the argument. *Brown v. State*, 293 Ga. App. 633, 667 S.E.2d 899 (2008).

Trial counsel was not ineffective for failing to object to statements made by the prosecutor in opening and closing arguments because the statements were but a small part of a summary of the evidence best understood as conceding the ambiguities therein and were unlikely to be interpreted as comments on the defendant's failure to testify. *Odom v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Trial court did not err in denying the defendant's claim of ineffectiveness of counsel on the ground that trial counsel should have objected to the prosecutor's closing argument that the incident took place in a residential area and that the incident could have endangered innocent women and children because the defendant did not show how the outcome of the trial would have been different had counsel objected to the second reference made by the prosecutor, and the trial court instructed the jury that the evidence did not include opening and closing statements of the attorneys. *Odom v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Defendant did not receive ineffective assistance of counsel when the defendant's trial counsel failed to object to the state's opening argument because no reversible error occurred with respect to the prosecutor's opening statement; the prosecutor had a good faith belief at the time that the prosecutor made the prosecutor's opening statement that a witness would testify that the witness saw the defendant with a gun, and the jury was instructed

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

that the prosecutor's opening statement was not evidence. *Jennings v. State*, 288 Ga. 120, 702 S.E.2d 151 (2010).

Defendant's trial counsel was not ineffective in failing to object to statements the prosecutor made during closing argument because counsel did object, and counsel's objection was successful; while the defendant asserted that counsel should have further moved for a mistrial, such decisions generally fell within the ambit of strategy and tactics. *Wilson v. State*, 306 Ga. App. 827, 703 S.E.2d 400 (2010).

Counsel was not deficient in failing to object to the prosecutor's victim impact argument during opening statement because negative characterizations of the victim were proper since the characterizations were relevant to evidence later offered to explain the context in which the drug-related crimes occurred, and the prosecutor's allusion to the fact that the victim was no longer alive was relevant to the murder charge; a witness's testimony and photographs of the witness's injuries were directly relevant and admissible to prove the charge against the defendant of committing aggravated assault on the witness. *Lacey v. State*, 288 Ga. 341, 703 S.E.2d 617 (2010).

Defendant's trial counsel was not ineffective for failing to object to arguments made by the prosecutor during closing arguments because the defendant failed to show either that trial counsel performed deficiently in failing to object or that the outcome of the trial would have been different had counsel objected under the standard of *Strickland*. *Fletcher v. State*, 307 Ga. App. 131, 704 S.E.2d 222 (2010).

Trial court did not err in denying the defendant a new trial on the ground that the defendant's trial counsel's failure to object to the prosecutor's statement during closing argument amounted to ineffective assistance because the defendant could not demonstrate that the deficiency in trial court's performance prejudiced the

defendant; the evidence of the defendant's guilt was overwhelming, and there was no reasonable probability that the outcome of the defendant's trial would have been more favorable had trial counsel objected, even successfully, to the prosecutor's statement in argument. *Jones v. State*, 288 Ga. 431, 704 S.E.2d 776 (2011).

Defendant did not show that trial counsel was ineffective by failing to object to the prosecutor's improper argument because the prosecutor's comments, when read as a whole, did not constitute a warning to the jury regarding the defendant's future actions if the defendant remained free, but instead constituted a comment on the evidence, including the defendant's molestation of the similar-transaction victim. Even if the argument did violate the prohibition against future-dangerousness arguments by the state of Georgia, it was highly unlikely that this single portion of the prosecutor's closing argument contributed to the guilty verdict, given the evidence presented against the defendant. *Cobb v. State*, 309 Ga. App. 70, 709 S.E.2d 9 (2011).

Counsel's failure to object to a municipal court judge's improper testimony about the defendant's future dangerousness was not ineffective assistance as a matter of law. *Bass v. State*, 288 Ga. App. 690, 655 S.E.2d 303 (2007), rev'd on other grounds, 2009 Ga. LEXIS 31 (Ga. 2009).

A defendant did not show that trial counsel was ineffective by moving for a directed verdict at the close of the state's evidence, thereby allowing the state to introduce additional evidence when the motion was denied. Trial counsel testified at the motion-for-new-trial hearing that moving for a directed verdict was trial strategy and that counsel hoped the motion would be granted by the trial court. *Zapata v. State*, 291 Ga. App. 485, 662 S.E.2d 271 (2008).

Failure to object to comments from court. — Because O.C.G.A. § 17-8-57 was not violated by the trial court's remarks when giving reasons for a ruling, any objection to that comment by defendant's trial counsel would have been without merit. *Artis v. State*, 299 Ga. App. 287, 682 S.E.2d 375 (2009).

Trial counsel rendered ineffective assistance when counsel failed to object after the state elicited improper testimony and improperly commented on defendant's pre-arrest silence; defendant was entitled to a new trial because the evidence was not overwhelming and the error occurred in direct examination, cross-examination of defendant, and the state's closing argument. *State v. Moore*, 318 Ga. App. 118, 733 S.E.2d 418 (2012).

Erroneous legal argument. — Counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for allegedly failing to know or research the elements of rape, as counsel erroneously argued that there had to be actual physical force without considering that force could be by intimidation; while trial counsel's argument as to the element of intimidation may have been legally inaccurate, no prejudice was shown, as the trial court's charge did not contradict the argument advanced by trial counsel. *Hutchens v. State*, 281 Ga. App. 610, 636 S.E.2d 773 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Futile objections. — Trial counsel was not ineffective in failing to raise a constitutional challenge to O.C.G.A. § 16-13-31(e) based on the statute's allowance of a conviction for trafficking in methamphetamine if a defendant possessed 28 grams or more, regardless of the purity of the methamphetamine mixture, while O.C.G.A. § 16-13-31(a) only allowed a conviction for trafficking in cocaine if the mixture of cocaine had a purity of at least 10 percent; the proposed challenge was not supported by the evidence as the state's expert testified that 56.2 grams of the 79.0 grams of the substance tested was positive for methamphetamine, and there was no proffer or evidence as to the purity of the mixture or any allegation by defendants that the substance was not methamphetamine. *Christopher v. State*, 262 Ga. App. 257, 585 S.E.2d 107 (2003).

Defendant was not denied effective assistance of counsel at a trial for aggravated child molestation because it would have been futile to object to the 10-year old victim's videotaped statement, which was admissible under the exception in

O.C.G.A. § 24-3-16 for a child's statement of sexual abuse since there was sufficient indicia of reliability and the child was available to testify at trial. *Campos v. State*, 263 Ga. App. 119, 587 S.E.2d 264 (2003).

When defendant's counsel did not object to a nurse's testimony summarizing what the victim had told the nurse about her rape by defendant, this was not ineffective assistance of counsel because the victim's veracity was at issue, she was present at trial, under oath, and subject to cross-examination, and the nurse's testimony amounted to a prior consistent out-of-court statement, which was admissible. *Johnson v. State*, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Defendant did not receive ineffective assistance of counsel as counsel did not object to the admission of statements defendant made to two police officers during defendant's custodial interrogation because the claim had been resolved adversely to defendant during a pretrial hearing; a different result was not required because defendant's statements involved a denial of culpability for the crimes, not a confession induced by trickery and deceit. *Sampson v. State*, 279 Ga. 8, 608 S.E.2d 621 (2005).

Defendant failed to show that trial counsel was ineffective for failing to object to similar transaction evidence as trial counsel did not testify at the ineffective assistance hearing and the decision was presumed to be strategic; further, any objection would have been futile as the transactions were sufficiently similar in that: (1) defendant lived with the victims' mothers; (2) the victims were left in defendant's care; (3) defendant pushed aside the victims' clothing to assault them; (4) defendant was discovered when family members walked in on defendant during the assaults; and (5) one victim was a child, while the other had the mental capacity of a child. *Page v. State*, 271 Ga. App. 541, 610 S.E.2d 171 (2005).

Trial counsel was not ineffective in failing to object when the state asked defendant why the defendant did not stay at the victim's home following the robbery, report the incident to authorities, or tell anyone defendant's version of events prior

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

to the trial; the state's cross-examination did not infringe upon defendant's right to remain silent and since defendant's direct examination brought out virtually the same testimony as the allegedly improper cross-examination, defendant was not prejudiced by the state's inquiry. *Olarte v. State*, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Trial counsel did not provide ineffective assistance of counsel by failing to object to the trial court's communication with the jury as the failure to raise a meritless objection could not constitute ineffective assistance of counsel. *Hall v. State*, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

Defendant failed to show that the trial counsel was ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, as statements made by a co-conspirator were admissible under O.C.G.A. § 24-3-5, and the failure of counsel to raise a non-meritorious hearsay objection did not constitute ineffective legal representation. *Jones v. State*, 279 Ga. 854, 622 S.E.2d 1 (2005).

Defendant did not receive ineffective assistance of counsel by the failure to object to the trial court complying with a juror's request that defendant briefly stand before the jury before they watched a video of a drug transaction a second time; the objection would have been meritless. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

It was not ineffective assistance to fail to seek a mistrial after the prosecutor made certain statements during closing arguments regarding the horribleness of child molestation, for which the defendant was on trial, as the statements were a fair inference drawn from the evidence and within the latitude given to counsel during closing. *Steverson v. State*, 276 Ga. App. 876, 625 S.E.2d 476 (2005).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to object to the police detective's testimony that the victim exhibited symptoms that, in the detective's training

and experience, were displayed by victims of sexual or physical abuse; although the state did not ask the trial court to qualify the detective as an expert in forensic interviewing, the detective's testimony established the detective's qualifications as such, and the detective's testimony, therefore, was within permissible bounds. *Malone v. State*, 277 Ga. App. 694, 627 S.E.2d 378 (2006).

Defendant did not receive ineffective assistance of counsel as: (1) a hearsay objection to statements the defendant made during an argument and to testimony that the defendant stated that the defendant should have killed the other witnesses would have been futile as the statements were not offered for the truth of the matter asserted; (2) a hearsay objection to a witness's testimony as to the defendant's statements during a van ride would also have been futile as the statements were admissible under O.C.G.A. § 24-3-3; and (3) counsel's strategic decision to attack certain testimony through cross-examination was not ineffective assistance of counsel. *Johnson v. State*, 281 Ga. 229, 637 S.E.2d 393 (2006).

In a shaken baby case, defense counsel was not ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to testimony about two earlier incidents, one in which the defendant left the victim alone after agreeing to baby sit, and another in which the defendant cut up the victim's shoes with a knife after arguing with the victim's mother; any objection would have been futile, as the two incidents were admissible to show the defendant's motive, intent, and bent of mind in shaking the victim. *Mahan v. State*, 282 Ga. App. 201, 638 S.E.2d 366 (2006).

No ineffectiveness of counsel was shown in a defendant's malice murder trial by the failure of the defendant's trial counsel to object to the introduction of a prior consistent statement of a witness whose motivation for testifying against the defendant had been vigorously examined in cross-examination; such an objection would have been futile because the veracity of the witness was placed in issue by the cross-examination, rendering the prior consistent statement admissible,

and therefore no ineffectiveness of counsel was shown. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

A prosecutor's closing argument did not ask the jurors to put themselves in the victim's place or imply that the defendant was a future danger to society, but instead the prosecutor argued that it would be nonsensical to find that a mean look could justify a shooting; such an argument was not improper in light of the defendant's justification defense, and counsel thus was not ineffective for failing to object to it. *Carpenter v. State*, 285 Ga. App. 296, 645 S.E.2d 709 (2007).

Counsel was not ineffective because the record established that the defendant's statement that a multipurpose tool belonged to the defendant was voluntary, and as such the statement was admissible; a motion to suppress by counsel would have been futile under the circumstances. *Donnell v. State*, 285 Ga. App. 135, 645 S.E.2d 614 (2007).

Because the defendant's counsel was not ineffective in failing to make a meritless objection and could not be held to a duty to anticipate changes in the law regarding the use of a nolo plea to impeach a witness, allegations of ineffective assistance of counsel lacked merit. *Martin v. State*, 281 Ga. 778, 642 S.E.2d 837 (2007).

Because the trial judge did not err in admonishing the victim to tell the truth, outside the presence of the jury, or by propounding a single question to the victim in the presence of the jury in order to develop the truth of the case, trial counsel was not ineffective in failing to object to either action, as the objection would have lacked merit. *Morales v. State*, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

In a child molestation case, trial counsel was not ineffective for not objecting when a child advocate and a grandmother of the victim testified that they had told the victim to tell the truth; the statements were not improper bolstering because they did not constitute an opinion as to whether the victim was in fact telling the truth. *Slade v. State*, 287 Ga. App. 34, 651 S.E.2d 352 (2007), cert. denied, 129 S. Ct. 56, 172 L.Ed.2d 24 (2008).

Defendant's trial counsel could not be

found to have rendered ineffective assistance in not objecting to the court's admonishment of the victim to tell the truth or the court's subsequent questioning of the victim, as the appeals court found that both actions by the trial court were proper; hence, any objection would have lacked merit. *Morales v. State*, 286 Ga. App. 698, 649 S.E.2d 873 (2007).

Counsel was not ineffective for not objecting to evidence that a bloodhound had tracked a human scent, as the evidence was admissible without a showing that such tracking had reached a scientific stage of verifiable certainty, or for not objecting to expert testimony, as the expert had not made an impermissible comment on the ultimate issue in the case but merely posited a connection between two crimes. *Bass v. State*, 288 Ga. App. 690, 655 S.E.2d 303 (2007), rev'd on other grounds, 2009 Ga. LEXIS 31 (Ga. 2009).

Defendant did not carry the burden of demonstrating ineffective assistance of counsel because trial counsel did not perform deficiently by failing to make a meritless objection to the trial court's allegedly erroneous decisions regarding merger of offenses and prosecutorial misconduct; neither of those decisions were in error. *Chandler v. State*, 309 Ga. App. 611, 710 S.E.2d 826 (2011).

Defendant failed to show ineffective assistance of counsel from the defendant's trial counsel having failed to object to the absence of a charge instructing jurors that to convict the defendant of felony murder the jurors were to specifically find the underlying felony had some connection with the homicide. Inasmuch as the jury found the defendant guilty of malice murder and no conviction was entered on the felony murder charge, this enumeration of error was moot. *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

Failure to object to closing argument. — Defense counsel was not ineffective for failing to object to the state's closing argument that a club was not lenient about letting people in who were under 21 years of age because that was a reasonable inference from defendant's testimony that one had to be 21 years old to get into the club. *Young v. State*, 272 Ga. App. 304, 612 S.E.2d 118 (2005).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

When, in a prosecutor's closing argument in defendant's murder trial, the prosecutor said the state did not have to prove the exact time of the murder, unless defendant claimed an alibi, which the defendant did not, the prosecutor did not improperly comment on defendant's failure to testify, so defense counsel did not provide ineffective assistance by failing to object to the prosecutor's closing argument. *Washington v. State*, 279 Ga. 722, 620 S.E.2d 809 (2005).

In a case in which a jury convicted the defendant for trafficking in cocaine, trial counsel was not deficient for failing to object to that portion of the prosecutor's closing argument concerning the sufficiency of the evidence to convict the defendant as a party to the crime as the prosecutor's statement was correct; even if counsel's failure to object could be considered deficient, it did not prejudice the jury. *Moss v. State*, 278 Ga. App. 362, 629 S.E.2d 5 (2006).

In a prosecution for kidnapping with bodily injury and aggravated assault, it was not ineffective assistance of counsel for the defense counsel not to object to part of the prosecutor's closing argument, claiming that the prosecutor was trying to bait the jury into believing that its only opportunity to prevent crime in general was to convict the defendant, because exhorting jurors to have an impact on crime in general was not impermissible. *Nelson v. State*, 278 Ga. App. 548, 629 S.E.2d 410 (2006).

Defendant failed to establish a claim of ineffective assistance of counsel based on counsel's failure to object to the state's closing argument, in which the prosecutor incorrectly stated that the burden of proof was on the defendant because defense counsel testified that counsel did not object because counsel knew that the trial court would instruct the jury that the attorney's argument was not evidence, and then would tell the jury that the state had the burden of proof; additionally, the trial judge instructed the jury that the

state had the burden of proof and that the burden never shifted to the defendant. *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

Because an objection to the prosecutor's closing argument would have been meritless, as the prosecutor's description of aggravated assault was in accordance with the statute, consistent with the trial court's instruction to the jury, and, given the evidence, could not have misled the jury into convicting the defendant on an alternate basis of aggravated assault not specified by the indictment, trial counsel could not be deemed ineffective. *Dudley v. State*, 283 Ga. App. 86, 640 S.E.2d 677 (2006).

Trial counsel's decision not to object to a witness's statement about the defendant's silence was strategic and thus did not constitute ineffective assistance; moreover, the evidence of the defendant's guilt was overwhelming. *McClain v. State*, 284 Ga. App. 187, 643 S.E.2d 273 (2007).

In a prosecution for child molestation involving a 12-year-old victim, evidence was properly admitted that the defendant also had sexual intercourse with a 15-year-old child. Defense counsel was not ineffective for failing to object to the prosecutor's comment during closing argument that the defendant liked to perform sex acts on children as this was a fair comment on the evidence, and any objection would have been overruled. *Martin v. State*, 294 Ga. App. 117, 668 S.E.2d 549 (2008).

As the interpretation of former O.C.G.A. § 24-3-36 (see now O.C.G.A. § 24-8-801) in *Mallory v. State*, 409 S.E.2d 839 (1991), had only prospective application, it did not apply to the defendant's case, which was tried before *Mallory* was decided. Therefore, defense counsel's strategic decision not to object to the prosecutor's comment on the defendant's request for counsel was not prejudicial as a matter of law; in view of the overwhelming evidence of the defendant's guilt, the defendant did not establish a violation of the right to the effective assistance of counsel. *Patterson v. State*, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

Even assuming that the prosecutor's request that the jury not turn the defendant loose on the streets was an improper comment on the defendant's future dangerousness, and that defense counsel's failure to object constituted deficient performance, in light of evidence that the defendant confessed to a murder to an accomplice, a cellmate, and an officer, the assumed deficient performance created little, if any, actual prejudice. *Patterson v. State*, 285 Ga. 597, 679 S.E.2d 716 (2009), cert. denied, 558 U.S. 1117, 130 S. Ct. 1051, 175 L. Ed. 2d 892 (2010).

In a prosecution for possession of controlled substances, defense counsel did not object to statements by the codefendant's counsel in closing argument regarding the multiple drug-related investigations of the defendant. As the argument was based on evidence produced at trial, an objection would not have been meritorious; therefore, the defendant's trial counsel was not ineffective. *Kessinger v. State*, 298 Ga. App. 479, 680 S.E.2d 546 (2009).

Trial counsel did not render ineffective assistance by failing to object to comments made during the state's closing argument in which the prosecutor conveyed the prosecutor's personal assessment of the evidence because the evidence against the defendant was overwhelming, and in light of the evidence, the defendant did not show that had trial counsel objected to the state's closing argument, there was a reasonable probability that the outcome of defendant's trial would be different. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial counsel was not ineffective for failing to object and/or to move for a mistrial due to a statement the assistant district attorney made during closing argument because the defendant did not demonstrate that any statement by the prosecution was not a reasonable inference from the evidence; the defendant did not show that but for a lack of objection or moving for a mistrial, there was the reasonable probability that the outcome of the defendant's trial would have been different. *Sanford v. State*, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

Trial counsel was ineffective for failing to object to the prosecutor's characterization of the defendant as a "thug" during closing argument because the prosecution was afforded wide latitude in closing argument, and the characterization was based on reasonable inferences drawn from the evidence. *Dockery v. State*, 287 Ga. 275, 695 S.E.2d 599 (2010).

Defendant did not receive ineffective assistance of trial counsel because even assuming that counsel performed deficiently in failing to object to the prosecutor's argument, despite counsel's explanation of the strategy, the defendant failed to carry the defendant's burden to show prejudice since the trial court instructed the jury that closing arguments were not evidence and that it was the jury's responsibility to decide the case based on the evidence introduced in court, which would exclude what the jury could have heard on television. Because the evidence against the defendant was strong, even if counsel had objected to the argument and the trial court had sustained the objection and instructed the jurors specifically not to rely on what the jurors had heard on television, there was no reasonable probability that the result of the trial would have been different. *Long v. State*, 287 Ga. 886, 700 S.E.2d 399 (2010).

Trial counsel did not provide deficient performance in failing to object to the prosecutor's remarks during closing argument because the remarks did not constitute an improper comment on the defendant's failure to testify since the state's manifest intention was not to comment on the defendant's silence to the police or failure to testify at trial but to comment on the defendant's failure to assert the defendant's innocence in response to a request by an acquaintance for the defendant to go to the police; taken in context, the prosecutor's closing argument did not directly or naturally implicate the defendant's decision not to testify, but the prosecutor was simply making a reasonable inference based on previous testimony. *Cannon v. State*, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial court's finding that the defendant did not receive effective assistance of counsel was not clearly erroneous because

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

trial counsel's failure to object to the prosecutor's permissible closing argument could not serve as the basis for an ineffective assistance claim; the prosecutor was not offering the prosecutor's personal belief about the veracity of a state witness, but instead was arguing that, based on the evidence presented and the reasonable inferences drawn therefrom, the jury could conclude that the witness was telling the truth, and when read in context, the prosecutor's statements to the jury that the witness was telling you the truth were suggestions to the jury of inferences the jury could draw from the evidence presented and were made in response to trial counsel's attack on the witness's credibility during cross-examination. *Herndon v. State*, 309 Ga. App. 403, 710 S.E.2d 607 (2011).

Defendant's counsel did not render ineffective assistance by failing to object to certain remarks made by the prosecutor during closing argument because the prosecutor's argument that the victim could not have been lying due to the level of detail in the victim's testimony merely urged the jury to make a deduction about the victim's veracity based upon the evidence adduced at trial; the remarks did not constitute a statement of the prosecutor's personal belief as to the victim's veracity, and any objection thereto would have been meritless. *Jackson v. State*, 309 Ga. App. 450, 710 S.E.2d 649 (2011).

Trial counsel's failure to object to the prosecutor's comments during closing argument did not constitute deficient performance because the comments of which defendant complained were permissible; the comments were the conclusion the prosecutor wished the jury to draw from the evidence and not a statement of the prosecutor's personal belief as to the veracity of a witness. *Strickland v. State*, 311 Ga. App. 400, 715 S.E.2d 798 (2011).

Defendant failed to show that trial counsel was ineffective for failing to object to the prosecutor's improper argument because even assuming that an objection

to the offending argument would have had merit, the defendant did not show a reasonable probability that the outcome of the trial would have been different had counsel made the objection. *Jeffers v. State*, 290 Ga. 311, 721 S.E.2d 86 (2012).

Trial counsel was not ineffective for failing to object during closing arguments when the state commented on the defendant's right to remain silent and failure to come forward because the prosecutor did not act inappropriately; the defendant initially placed the evidence before the jury that the defendant fled and did not go to police after the shooting. *Kendrick v. State*, 290 Ga. 873, 725 S.E.2d 296 (2012).

Trial counsel was not ineffective for failing to object to the state's argument that no person in the circuit had ever been convicted and later proven innocent because the trial court would not have abused the court's discretion in denying the defendant's motion for mistrial had one been made and did not err when the court credited trial counsel's defense of counsel's decision not to object to the prosecutor's closing argument as strategic; even assuming that the prosecutor should not have compared the defendant to others, the subject of wrongful convictions in other cases was brought up by the defendant, and the jury was not impressed either way by the colloquy. *Stubbs v. State*, 315 Ga. App. 482, 727 S.E.2d 229 (2012).

Trial counsel was not ineffective for failing to object to the prosecutor's closing arguments because evidence supported the trial court's determination that no improper comments were made during the state's closing argument. *Davenport v. State*, 316 Ga. App. 234, 729 S.E.2d 442 (2012).

Trial counsel was not ineffective for failing to object to the prosecutor's closing argument which the defendant alleged shifted the burden of proof to the defense because trial counsel made the strategic decision not to object so as not to draw the jury's attention to the statements. *Maurer v. State*, 320 Ga. App. 585, 740 S.E.2d 318 (2013).

When it would have been meritless for defense counsel to object to portions of the state's closing argument and to reserve

objections to the jury charge, the failure to make the objections did not support a claim of ineffective assistance of counsel. *Sampson v. State*, 282 Ga. 82, 646 S.E.2d 60 (2007).

Time for closing argument. — While the defendant met the burden of showing trial counsel's deficient performance based on a misimpression that counsel was entitled to only one hour to make a closing argument, instead of two as permitted by O.C.G.A. § 17-8-73, the defendant failed to show that but for that error, trial counsel could have convinced the jury that the defendant was innocent of the crimes charged. *Hardeman v. State*, 281 Ga. 220, 635 S.E.2d 698 (2006).

Although defense counsel did not object when counsel's closing argument was limited to one hour, even though the kidnapping charge permitted two hours, the defendant failed to show prejudice necessary for an ineffective assistance of counsel claim because there was no reasonable possibility of an acquittal even if counsel had demanded two hours of closing argument due to the lack of complex issues, the fact that the defendant admitted to most of the charges, and counsel addressed all pertinent issues in counsel's closing argument. *Hammond v. State*, 303 Ga. App. 176, 692 S.E.2d 760 (2010), *aff'd*, 289 Ga. 142, 710 S.E.2d 124 (2011).

Timing of jury instructions. — Trial counsel's failure to object when the court gave jury instructions before closing arguments did not amount to ineffective assistance of counsel since the trial counsel explained the process to the defendant and the defendant agreed to the reversal of the usual process. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Questioning of jurors. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to object to a prosecutor's questions to a jury panel relating to aiding and abetting in which the prosecutor used an armed robbery involving a getaway car as an example; because there was nothing in the circumstances of the defendant's case, which involved the defendant riding in a stolen vehicle and eluding police officers, that would have caused the prosecutor's reference to the extrinsic offense of armed

robbery to have improperly influenced the jurors. *Cooper v. State*, 281 Ga. App. 882, 637 S.E.2d 480 (2006).

Assuming defense counsel's performance was deficient during the defendant's trial for aggravated assault and criminal trespass for failing to object to the trial court's failure to ask the qualifying voir dire questions that are required by O.C.G.A. § 15-12-164(a), the defendant failed to show that the outcome of the trial would have been different had the trial court asked the statutory questions as the prosecutor asked the potential jurors whether the jurors were acquainted with the defendant or the victim, and if so, whether they could remain impartial. Since the potential jurors indicated no bias and the defendant did not contend that any juror was, in fact, biased or prejudiced, the defendant failed to show ineffective assistance of trial counsel. *Burnette v. State*, 291 Ga. App. 504, 662 S.E.2d 272 (2008).

Defendant failed to demonstrate that the defendant was deprived of effective assistance of counsel because although the defendant argued that the defendant's trial counsel failed to ask prospective jurors certain questions during voir dire, the defendant made no assertion as to what answers any prospective juror would have given had the juror been asked any of those questions or as to what significance any such answer would have had; because the record also did not show that any other prospective jurors were erroneously qualified or disqualified due to any actions that the trial counsel took or failed to take, no prejudice could be assigned to the alleged error by trial counsel. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Defendant's claim that the defendant's trial counsel rendered ineffective assistance by failing to request that the trial court examine the remaining jurors whether the jurors had been affected by a juror after the juror had been removed was unsupported, and the defendant could not show prejudice or harm because there was no error on which to premise the claim of ineffective assistance; the defendant did not request that the trial court question the remaining jurors, and

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

the juror's responses clearly indicated that the juror's statement to the other jurors about the juror's conflict was exceedingly minimal and that the others had no reaction to the statement. *Sharpe v. State*, 288 Ga. 565, 707 S.E.2d 338 (2011).

When the defendant was on trial for murdering a girlfriend, as defense counsel decided not to further question a prospective juror, who had strong feelings about domestic violence, in order to avoid tainting the remaining jurors, this was a reasonable strategic decision that did not constitute ineffective assistance. *Cade v. State*, 289 Ga. 805, 716 S.E.2d 196 (2011).

Failure to challenge jury array. — Counsel was not ineffective for failing to challenge or object to the racial composition of the jury panel because the panel appeared to mirror the demographics of the county as a whole. *Goodall v. State*, 277 Ga. App. 600, 627 S.E.2d 183 (2006).

As defense counsel testified that counsel believed the state's race-neutral reasons for striking African-Americans during voir dire, and as the jury panel comprised 10 white members and two African-American members, counsel was not ineffective for not raising a Batson challenge. *Crawford v. State*, 294 Ga. App. 711, 670 S.E.2d 185 (2008).

Because the defendant waived any objection regarding an unsummoned juror, and because evidence supported the trial court's finding that the state's reasons for striking the challenged jurors were race-neutral, the defendant did not show that counsel's failure to object constituted ineffective assistance. *Allen v. State*, 299 Ga. App. 201, 683 S.E.2d 343 (2009).

Trial counsel did not render ineffective assistance by failing to raise a Batson challenge because the defendant failed to show that a Batson challenge would have been successful since the defendant neither called the state's prosecutors to testify at the motion for new trial hearing nor sought out or attempted to introduce their notes regarding the striking of jurors prior

to trial; only the state attempted to elicit that information during the state's cross-examination of trial counsel, and the resulting testimony indicated that the state did have race-neutral reasons for using the state's peremptory strikes. *Stokes v. State*, 289 Ga. 702, 715 S.E.2d 81 (2011).

Failure to object to juror. — Trial court determined under O.C.G.A. § 15-12-163(c) that a juror who had recently moved from the county was competent to serve, and the defendant presented no evidence to contradict this finding; even if the counsel's failure to object to the juror could be deemed ineffective representation, the defendant did not show that the deficiency prejudiced the defense. *Lawson v. State*, 278 Ga. App. 852, 630 S.E.2d 131 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIII for failing to properly pursue an equal protection objection under Ga. Const. 1983, Art. I, Sec. I, Para. II based on the exclusion of African-Americans from the jury and from the pool of available jurors; the only evidence showed that the population of available African-American jurors in the trial court's county was very small, and the defendant did not show that the jury list failed to contain a fair cross section of the community or that there was purposeful discrimination in the selection of the panel. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

Appeals court rejected the defendant's ineffective assistance of counsel claim, based on trial counsel's failure to move for mistrial or seek the removal of a juror who became nauseated during the state's cross-examination of the defendant and left the courtroom with the bailiff, but who thereafter indicated a willingness to continue and was allowed to remain on the jury, as: (1) nothing showed either that the juror was rendered unable by illness to continue or that anything improper occurred while the juror was separated from the others during the juror's temporary illness; (2) the defendant failed to show any prejudice by the lack of an inquiry; and (3) the defendant was not entitled to a presumption of prejudice due to an irreg-

ularity in the conduct of a juror. *Jones v. State*, 282 Ga. 47, 644 S.E.2d 853 (2007).

Defendant did not overcome the strong presumption that trial counsel's failure to seek a juror's removal for cause constituted reasonable professional assistance because the defendant did not question trial counsel at the motion for new trial hearing about counsel's decision-making with regard to this issue, and the trial transcript showed that the juror did not meet the qualification for dismissal for cause. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial counsel was not ineffective in failing to move to strike three prospective jurors for cause, all of whom said the jurors had strong feelings about individuals involved in the sale of illegal drugs, because the jurors all indicated the jurors could try to judge the case based upon the court's instructions and the evidence. *Ellis v. State*, 292 Ga. 276, 736 S.E.2d 412 (2013).

Failure to object to limitation on voir dire. — Trial counsel was not ineffective for failing to object to limitations on voir dire because the defendant was nevertheless able to adequately explore any inclination or bias that might have derived from strong feelings that prospective jurors had about individuals involved in the sale of illegal drugs. *Ellis v. State*, 292 Ga. 276, 736 S.E.2d 412 (2013).

Failure to ensure defendant's presence at in-chamber hearing on juror removal. — With regard to a defendant's conviction for malice murder, the trial court properly denied the defendant's motion for a new trial based on a claim that trial counsel was ineffective for failing to object to a juror remaining on the panel after a brief encounter with one of the state's witnesses and the failure to insist that defendant be allowed to personally participate in the in-chambers hearing on the issue. The decision to allow the juror to remain on the panel was a reasonable tactical decision made after a hearing was held on the issue and no harm was established by the defendant not being present during the in-chambers hearing on the issue as a result of the overwhelming evidence of the defendant's guilt. *Peterson v. State*, 284 Ga. 275, 663 S.E.2d 164 (2008).

Failure to allow defendant's "participation" in voir dire. — Defendant had not shown ineffective assistance of counsel based on the defendant's claim that the defendant was not allowed to participate in jury selection. Trial counsel testified that the defendant was present during voir dire and that counsel and the defendant did have some discussion about prospective jurors; moreover, the defendant did not suggest how jury selection would have been different if the defendant had participated. *Daugherty v. State*, 291 Ga. App. 541, 662 S.E.2d 318 (2008), cert. denied, 2008 Ga. LEXIS 792 (Ga. 2008).

Failure to poll jury. — Because the failure to timely request a jury poll did not amount to deficient performance and trial counsel's preparation was not deficient or prejudicial, the appeals court rejected the defendant's ineffective assistance of counsel claims. *Hodge v. State*, 287 Ga. App. 750, 652 S.E.2d 634 (2007).

A jury sent a question to the trial court, but before it could respond, the jury reached a verdict. The defendant's trial counsel was not ineffective for not demanding that the jury be polled; moreover, the defendant failed to show it was reasonably probable that had the jury been polled, a problem with the verdict would have become apparent. *Soloman v. State*, 294 Ga. App. 520, 669 S.E.2d 430 (2008).

Trial counsel was not ineffective for failing to conduct a poll of the jury because the defendant cited no authority to support the position that a poll of the jury was required under the circumstances to provide effective representation. *Bonner v. State*, 308 Ga. App. 827, 709 S.E.2d 358 (2011).

Counsel's use of peremptory strike after juror removed for cause. — Defendant did not receive effective assistance of counsel after defendant's attorney used a peremptory strike to strike a juror who had already been stricken for cause; defendant was prejudiced by the unnecessary waste of a peremptory strike, and the denial of defendant's motion for a new trial was improper. *Fortson v. State*, 277 Ga. 164, 587 S.E.2d 39 (2003).

Failure to request voir dire transcription. — Defense counsel was not

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failure to request that voir dire be transcribed; the defendant argued that a juror made a misrepresentation during voir dire that the juror did not know the defendant even though the defendant had served prison time with the juror's son, the trial court did not abuse the court's discretion in accepting the juror's testimony that the juror did not know the defendant or have any bias against the defendant. *Robinson v. State*, 281 Ga. App. 76, 635 S.E.2d 380 (2006).

Because convictions did not merge, trial counsel was not ineffective for not objecting to the trial court's failure to merge them. *Smashum v. State*, 293 Ga. App. 41, 666 S.E.2d 549 (2008), cert. denied, 2008 Ga. LEXIS 952 (Ga. 2008).

Trial counsel was not ineffective for failing to have voir dire taken down by a court reporter because the defendant did not show prejudice since the defendant failed to establish that a Batson violation, or any other irregularity, occurred and the record revealed no dispute at trial about the questioning and responses with respect to a juror; trial counsel testified that even though voir dire was not officially recorded, the co-counsel's primary duty was to take notes throughout trial, including voir dire, and that all the notes and other legal work by defense counsel on the case were turned over to the appellate counsel. *Hunt v. State*, 288 Ga. 794, 708 S.E.2d 357 (2011).

Failure to provide voir dire transcript. — Trial counsel was not ineffective in failing to object to the state's explanations for striking jurors, to move to suppress evidence obtained from a search after the armed robbery of a theater, to move to strike certain testimony, and by waiving the defendant's right to a unanimous verdict because the defendant failed to provide a transcript of the voir dire conference. *Johnson v. State*, 277 Ga. App. 41, 625 S.E.2d 411 (2005).

Failure to ask that closing argument be recorded. — Because the jury

was informed of a stipulation and were read the contents of the victim's post-mortem toxicology reports, the trial court properly limited defense counsel's closing arguments; defense counsel was not ineffective for failing to ask that closing argument be reported or for failing to request a jury charge on manslaughter, since defendant claimed that the shooting was accidental. *Williams v. State*, 279 Ga. 600, 619 S.E.2d 649 (2005).

In view of the trial court's curative instruction and the evidence against the defendant, no reasonable probability existed that the outcome of the defendant's case would have been different had trial counsel requested that the jury be excused before counsel moved for a mistrial. *Dixon v. State*, 285 Ga. App. 211, 645 S.E.2d 692 (2007).

Failure to challenge admission of testimony. — Trial counsel was not ineffective for failing to challenge the admission of testimony regarding the victim's dying declaration because the statement satisfied the requirements for admission of a dying declaration under former O.C.G.A. § 24-3-6 (see now O.C.G.A. § 24-8-804); the defendant identified no valid basis for objection. *Mathis v. State*, 291 Ga. 268, 728 S.E.2d 661 (2012).

Failure to object to further jury deliberations. — Defense counsel did not provide ineffective assistance in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to object to the trial court's ordering the jury back into deliberations when the jury could not come to a verdict on the charged offense or the lesser-included offense; an objection would have been meritless, as the jury had not yet come to a decision on the count at issue, thus there had been no acquittal. *Giacini v. State*, 281 Ga. App. 426, 636 S.E.2d 145 (2006).

Failure to object to communication with jury on unanimous decision issue. — When a trial judge, upon learning of a jury's question during deliberations as to whether its verdict had to be unanimous, allowed the bailiff to communicate an answer to the question directly to the jury outside the presence of defendant, counsel, the prosecutor, the judge, or a court reporter, before telling the prosecu-

tor or defense counsel of the court's intentions, and defense counsel did not raise an objection or request that the matter be placed on the record, it could not be found that defendant was not prejudiced. *Lindsey v. State*, 277 Ga. App. 18, 625 S.E.2d 431 (2005).

Jury instructions impacting ineffectiveness argument. — Despite the various ineffective assistance of counsel claims involving a number of evidentiary issues and the jury instructions issued by the trial court, because the defendant failed to show that the objections made or not made by trial counsel prejudiced the defense, or that the instructions given were not in and of themselves deficient or correct statements of the law, the claims lacked merit. *Goldey v. State*, 289 Ga. App. 198, 656 S.E.2d 549 (2008).

In a prosecution against the defendant on two counts of child molestation, because trial counsel was not ineffective in failing to request specific jury charge addressing alleged improper bolstering testimony, present any expert testimony which was not helpful to the defense, and elicit available favorable evidence and impeach the victim's testimony, the defendant's convictions of related offenses were upheld on appeal; thus, the defendant was not entitled to a new trial on grounds that trial counsel was ineffective. *Rouse v. State*, 290 Ga. App. 740, 660 S.E.2d 476 (2008).

Defendant was not entitled to a new trial based on a claim that trial counsel was ineffective for failing to request an adverse inference instruction when the defendant failed to return to the courtroom after the first day of trial; appellate counsel declined to have trial counsel testify at the hearing on the motion for a new trial and without any other evidence to the contrary, trial counsel's decision regarding the instruction was presumed to be strategic. *Spragg v. State*, 292 Ga. App. 37, 663 S.E.2d 389 (2008).

Failure to obtain recusal of trial judge. — Because the absence of a Ga. Unif. Super. Ct. R. 25.1 affidavit in support of defendant's motion to recuse the trial judge did not affect the court's consideration of the motion, and although defense counsel was unable to cite any law

indicating that the judge should be disqualified after presiding over defendant's prior probation revocation proceedings, defendant did not demonstrate either deficient performance by counsel or prejudice in failing to secure the trial judge's recusal. *Paul v. State*, 296 Ga. App. 6, 673 S.E.2d 551 (2009).

Failure to request mistrial based on presence of SWAT team members. — Trial counsel was not ineffective for failing to request a mistrial or curative instructions because the defendant did not show with reasonable probability that the presence of SWAT team members in the courtroom affected the outcome of the trial. *Davis v. State*, 309 Ga. App. 831, 711 S.E.2d 324 (2011).

Failure to request mistrial. — Transcript revealed that the state's inquiry into defendant's silence was neither manifestly intended to comment on defendant's failure to testify nor was it of such character that it would have prejudiced the jury, and because the trial court sustained the defense's objection to the questioning and gave a curative instruction to the jury, defendant could not show either that counsel's tactical decision not to move for a mistrial fell outside the wide range of reasonably effective assistance, or that defendant would have been granted a mistrial but for counsel's decision not to move for one. *Allen v. State*, 277 Ga. 502, 591 S.E.2d 784 (2004).

Defendant's motion for a new trial was properly denied as the trial counsel did not provide ineffective assistance in failing to move for a mistrial when the trial counsel learned of an improper jury-bailiff communication since the improper communication was placed on the record and remedial instructions were given before the jury's deliberations. *Lawson v. State*, 280 Ga. App. 870, 635 S.E.2d 259 (2006).

Defendant failed to establish ineffective assistance of counsel under Ga. Const. 1983, Art. I, Sec. I, Para. XIV due to defense counsel's failure to request a mistrial when a police officer testified that the officer believed that the victim in the child molestation case was telling the truth; while the witness was prohibited under O.C.G.A. § 24-9-80 from bolstering the victim's testimony, it was not clear that

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

the trial court would have granted a mistrial had the defendant requested one, as the defense counsel had objected to the statement and the trial court had issued a curative instruction. *Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, No. S07C0623, 2007 Ga. LEXIS 338 (Ga. 2007).

Because trial counsel's failure to move for a mistrial could have been a strategic decision, and because the defendant did not question trial counsel concerning this decision, the defendant failed to show that this failure amounted to deficient performance. *Vonhagel v. State*, 287 Ga. App. 507, 651 S.E.2d 793 (2007).

As there was no showing that a juror heard anything improper during a bench conference, the trial court did not err in not sua sponte declaring a mistrial. Defense counsel was not ineffective for not moving for a mistrial or removal of the juror as such motion would have been denied. *Smith v. State*, 284 Ga. 304, 667 S.E.2d 65 (2008).

Trial court did not err in finding that the defendant's trial counsel was not ineffective for failing to move for a mistrial or object to the state proceeding against the defendant on a different indictment in the midst of trial because any error in failing to try the defendant upon a "perfect" indictment was manifestly harmless when after the trial court severed an armed robbery charge from one of the indictments, the charges were identical in the two indictments, and the defendant did not show that the defendant suffered any prejudice from the state's mistake or by proceeding under the older indictment; the trial court's instruction to the jury regarding the mistake dealt with trial counsel's concern that the jury would think the defendant had two pending indictments, and the instruction was sufficient to cure any error. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Because defendant's failure to renew motions for a mistrial after declining a curative instruction waived the issue on

appeal, and because the outcome of the trial would not have been different if trial counsel had renewed the motions, defendant was not prejudiced by counsel's failure to do so. *Johnson v. State*, 305 Ga. App. 853, 700 S.E.2d 735 (2010).

Defendant failed to demonstrate that the defendant was deprived of effective assistance of counsel due to counsel's failure to seek a mistrial when the prosecutor elicited certain testimony from the police detective who investigated the case and procured the photographic lineup because the defendant failed to show a reasonable probability that an objection or motion for mistrial related to the detective's testimony would have changed the outcome of the defendant's trial; the robbed teller made an in-court identification of the defendant as the perpetrator, and the jurors were shown video footage of the robber committing the crime as well as still photographs of the robber's face. *Ware v. State*, 307 Ga. App. 782, 706 S.E.2d 143 (2011).

Defendant was not denied effective assistance of counsel due to trial counsel's failure to renew a motion for mistrial after the trial court gave a curative instruction because the defendant failed to demonstrate prejudice; trial counsel had twice moved for a mistrial, which the trial court denied, and the trial court did not abuse the court's discretion in giving the curative instruction, which preserved the defendant's right to a fair trial. *Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

Trial counsel was not ineffective for failing to request a mistrial after learning of improper conduct between two jurors and a spectator at the trial because the communication at issue did not involve extrajudicial information, a discussion of the facts or legal issues in the case, or improper conduct by the jurors themselves and, thus, the defendant suffered no prejudice. *Causey v. State*, 319 Ga. App. 841, 738 S.E.2d 672 (2013).

Trial counsel's decision not to move for a mistrial when the trial court mentioned the redacted count of possession of a firearm by a convicted felon did not amount to ineffective assistance because the decision was based on counsel's belief that the single mention would not have any influ-

ence on the jury and the fact that the trial court gave an adequate curative instruction. *Vanstavern v. State*, 293 Ga. 123, 744 S.E.2d 42 (2013).

Failure to file motion for directed verdict. — Defendant's contention that the defendant did not receive effective assistance of counsel because counsel made no motion for a directed verdict of acquittal based on insufficiency of the evidence is without merit. *Galloway v. State*, 165 Ga. App. 536, 301 S.E.2d 894 (1983).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to file a motion for directed verdict based upon the alleged fatal variance between the indictment and the proof at trial; such a motion would have been meritless, as the variance was found to be immaterial because the indictment still gave the defendant adequate notice of the charge alleged. *Fields v. State*, 281 Ga. App. 733, 637 S.E.2d 136 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Trial counsel was not ineffective for failing to move for a directed verdict on malice and felony murder charges because the evidence was sufficient to authorize a conviction on malice murder, and a motion for directed verdict would have been fruitless. *Kendrick v. State*, 287 Ga. 676, 699 S.E.2d 302 (2010).

Trial court erred by denying the defendant's motion for new trial on the ground that trial counsel was ineffective by failing to move for a directed verdict as to a count of the indictment alleging that the defendant operated a motor vehicle as a habitual violator without a valid driver's license because the state failed to prove the charge alleged in that count; because the trial court would have been required to grant a motion for directed verdict, trial counsel was ineffective by failing to make such a motion. *Murray v. State*, 315 Ga. App. 653, 727 S.E.2d 267 (2012).

Because the evidence was sufficient to sustain the defendant's convictions and to establish venue, there was no merit to the defendant's claim that trial counsel was ineffective for failing to move for a directed verdict of acquittal on those issues. *Bearden v. State*, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Failure of counsel to testify at motion for new trial. — Trial court did not err in denying the defendant's motion for a new trial on the ground that the defendant received ineffective assistance of counsel as defendant did not show that the defendant received ineffective assistance of counsel, especially since the defendant's trial counsel did not testify at the defendant's motion for a new trial and, thus, the defendant did not overcome the presumption that the defendant's trial counsel's conduct fell within the wide range of reasonable professional assistance. *Gardner v. State*, 261 Ga. App. 188, 582 S.E.2d 167 (2003).

Since defendant's trial attorneys did not testify at the new trial hearing, and it was impossible for the trial court to determine their reasons for the objections made at trial, defendant failed to carry defendant's burden that defense counsel were ineffective in failing to object to rap lyrics admitted at trial as improper character evidence, but objected instead on the basis of relevancy. *Holmes v. State*, 271 Ga. App. 122, 608 S.E.2d 726 (2004).

In a trial for kidnapping and false imprisonment, although the defendant claimed defense counsel was ineffective for failing to move for a mistrial, counsel did not testify at the hearing on the motion for new trial; thus, the defendant failed to make an affirmative showing that counsel's alleged deficiencies were not trial strategy. *Watson v. State*, 275 Ga. App. 174, 620 S.E.2d 176 (2005).

Failure to explain recidivist statute. — Defendant's argument, that defense counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV, for failure to explain the recidivist statute to defendant, failed; although the defendant and defense counsel gave conflicting testimony on this issue, the trial court was permitted to accept the testimony of counsel, who testified that counsel had discussed recidivist punishment with the defendant and relayed the prosecution's plea offers to the defendant. *Copeland v. State*, 281 Ga. App. 11, 635 S.E.2d 283 (2006).

Failure to seek first offender treatment. — Defendant's motion for a new trial was properly denied as trial counsel did not provide ineffective assistance in

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

failing to seek first offender treatment since defendant's sweeping allegations of ineffective assistance with only the barest of reference to the record were insufficient to establish an ineffectiveness claim; further, the trial counsel did not believe that the defendant would be eligible for such treatment given the defendant's prior misdemeanor offenses and the defendant pointed to no evidence suggesting that the defendant would have received first offender status had it been requested. *Lawson v. State*, 280 Ga. App. 870, 635 S.E.2d 259 (2006).

Failure to pursue insanity defense.

— Defendant was not erroneously denied a new trial on grounds that trial counsel was ineffective, as the evidence, via trial counsel's testimony, showed that: (1) counsel, after gathering the defendant's medical history and interviewing the defendant's medical provider, did not believe the defendant was insane; and (2) counsel, after consulting with the defendant and gaining an approval, made a strategic decision not to pursue a mental health defense, opting instead to pursue a claim of self-defense. *Radford v. State*, 281 Ga. 303, 637 S.E.2d 712 (2006).

Failure to request specific instruction on insanity. — Defendant's claim of ineffective assistance of counsel failed because there was no error in counsel's failure to request a more specific instruction on insanity as the instruction given specially explained that the defendant had the burden of proving insanity by a preponderance of the evidence and properly defined that burden of proof. *Simon v. State*, 321 Ga. App. 1, 740 S.E.2d 819 (2013).

Inadequate presentation of mitigation case during sentencing. — Vacation of a death sentence was warranted since the defendant's trial counsel was deficient in the conduct of the sentencing phase due to inadequate investigation and presentation of possible mitigation evidence. *Turpin v. Christenson*, 269 Ga. 226, 497 S.E.2d 216 (1998), cert. denied, 525

U.S. 869, 119 S. Ct. 163, 142 L. Ed 2d 133 (1998).

Habeas court's order denying the petitioner's claim that the petitioner was entitled to a new sentencing trial was reversed and the petitioner's death sentence was vacated because trial counsel performed deficiently by failing to sufficiently develop mitigating evidence from non-experts, and there was a reasonable probability that the jury would have reached a different outcome in the sentencing phase of the petitioner's trial if the additional evidence habeas counsel obtained had been presented at trial; trial counsel failed to fully investigate whether the petitioner had suffered one or more brain injuries prior to the petitioner's crimes, and unduly limiting counsel's interviews of the petitioner's family and friends to an unreasonably narrow range of persons, and there was additional evidence from non-experts concerning the petitioner's traumatic childhood and the petitioner's change in behavior and apparent mental distress following two head injuries. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Standard for effective counsel on appeal. — To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. The trial judge, who oversaw the trial and heard the evidence presented at the hearing on the motion for new trial, makes the findings on whether the performance was deficient and whether it prejudiced the defendant, and an appellate court does not disturb such findings unless they are clearly erroneous. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Failure to file an appeal. — Defendant could not obtain a reversal of a rape conviction due to trial counsel's ineffective assistance in failing to file an appeal as defendant was granted the right to file an out-of-time appeal. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Trial counsel was not ineffective for not timely pursuing a new trial motion or an appeal, as the trial counsel advised the defendant to raise ineffective assistance on appeal and to obtain new counsel to

pursue that claim, and the trial court appointed new counsel for the defendant for the sole purpose of airing the issue both in the trial court and on appeal. *Moore v. State*, 279 Ga. App. 105, 630 S.E.2d 557 (2006).

Given that the defendant had no right to file a direct appeal from a guilty plea that was evident from the record, a motion for an out-of-time appeal, which alleged ineffective assistance of counsel, was properly denied, and counsel could not be deemed ineffective for failing to inform the defendant of the right to appeal; thus, the defendant's only remedy was by habeas corpus. *Barlow v. State*, 282 Ga. 232, 647 S.E.2d 46 (2007).

A trial court abused the court's discretion in ruling the court lacked jurisdiction to consider an inmate's motion for an out-of-time appeal because the motion was based on a claim that the inmate's right to a direct appeal was denied due to ineffective assistance of counsel, and on that claim, the trial court was required to inquire into the facts to determine responsibility for the failure to pursue a timely appeal. *Duncan v. State*, 291 Ga. App. 580, 662 S.E.2d 337 (2008).

Meritless enumerations of error. — Because defendant's enumerations of error were meritless, they provided no basis for reversal of defendant's convictions under the guise of ineffective assistance of counsel. *Nelson v. State*, 277 Ga. App. 92, 625 S.E.2d 465 (2005).

Because the defendant failed to cite any legal authority requiring trial counsel, in order to be effective, to poll the jury, this claim of ineffective assistance of counsel lacked merit. *Vonhagel v. State*, 287 Ga. App. 507, 651 S.E.2d 793 (2007).

Refusal to withdraw as trial counsel after defendant filed bar complaint. — In the defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, the defendant failed to show trial counsel performed deficiently by failing to withdraw as counsel despite existence of conflict of interest created by the defendant having filed a bar complaint against trial counsel; evidence supported the trial court's determination that the defendant failed to carry

the burden of proving that trial counsel's refusal to withdraw constituted ineffective assistance. *Holsey v. State*, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

Ineffectiveness of post conviction counsel. — Trial court erred in denying the petitioner's application for habeas corpus relief as the petitioner's appellate counsel was ineffective for failing to contend on appeal that the state failed to establish the chain of custody of the substance identified at trial as cocaine as any competent attorney would have raised that issue on appeal, the appellate attorney provided deficient representation in failing to do so, and the error was prejudicial to the petitioner because the error, if raised, would have led to a different outcome on appeal. *Phillips v. Williams*, 276 Ga. 691, 583 S.E.2d 4 (2003).

Defendant's ineffective assistance of counsel claim was waived as defendant's original post-conviction counsel moved for a new trial, but did not raise an ineffective assistance of trial counsel claim; defendant's claim that the original post-conviction counsel was deficient in failing to raise an ineffective assistance claim below had to be addressed in a habeas corpus proceeding. *Mullins v. State*, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

Defendant's ineffective assistance of counsel claim failed as any shortcoming of counsel appointed to represent defendant at defendant's ineffective assistance of trial counsel hearing was due to defendant's failure to cooperate with appointed counsel. *Spear v. State*, 271 Ga. App. 845, 610 S.E.2d 642 (2005).

Defendant did not receive ineffective assistance of counsel due to trial counsel's failure to raise the issue of ineffective assistance of counsel as the first appellate counsel raised the issue in the amended motion for new trial. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Because the state failed to prove venue beyond a reasonable doubt, the defendant's appellate counsel provided professionally deficient performance in failing to raise the meritorious issue on appeal, and the defendant was prejudiced thereby; the defendant was convicted in Toombs County of selling cocaine to an informant,

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

and evidence that the drugs sales occurred somewhere in Vidalia, Georgia, was insufficient to establish that the crimes occurred in Toombs County because the habeas court properly took judicial notice that Vidalia was located in two different counties, Toombs and Montgomery. *Thompson v. Brown*, 288 Ga. 855, 708 S.E.2d 270 (2011).

Habeas court erred in granting the petitioner's application for habeas corpus relief because the petitioner could not show that but for the errors of appellate counsel, the outcome of the appeal would have been different in reasonable probability; irrespective of any contention that there was ineffective assistance, the petitioner remained a fugitive from justice, and the petitioner's appeal would have been dismissed. *Tompkins v. Hall*, 291 Ga. 224, 728 S.E.2d 621 (2012).

Failure to dispute the amount of restitution ordered as a condition of probation may have been an error, but that of itself would not constitute ineffective assistance. *Johnston v. State*, 165 Ga. App. 792, 302 S.E.2d 708 (1983).

Failure to appear at arraignment. — Trial counsel was not ineffective for failing to appear at the arraignment because the defendant did not assert any harm arising from counsel's failure to appear other than the loss of the right to a hearing on a motion to suppress; the defendant could not show that the motion to suppress had any likelihood of success. *Coney v. State*, 316 Ga. App. 303, 728 S.E.2d 899 (2012).

Failure to show deficiencies were prejudicial. — Despite the defendant's twenty-one ineffective assistance of counsel claims, the Supreme Court of Georgia analyzed only five of these claims, and found that the defendant failed to show prejudice due to counsel's failure to ask for a continuance, and that the remaining four claims addressed lacked merit. Moreover, the court declined to analyze the deficient performance prong of the defendant's remaining claims of ineffectiveness,

as the defendant could not show how any of those deficiencies were prejudicial. *Ruffin v. State*, 283 Ga. 87, 656 S.E.2d 140 (2008).

Use of hearsay as impacting ineffective counsel claim. — Because the defendant failed to show by the record that the trial court's limited consideration of the alleged hearsay statements at issue adversely affected the sentence imposed, the defendant failed to show that trial counsel was ineffective by failing to object to the consideration of that evidence. *Geyer v. State*, 289 Ga. App. 492, 657 S.E.2d 878 (2008).

Ineffective assistance not shown by failure to view videotape of witness. — Defendant failed to establish that trial counsel provided ineffective assistance based on counsel failing to view before trial a videotaped police interview with one of the state's witnesses that, according to the defendant, revealed information about what benefits the witness expected from police, and counsel could have used the interview to impeach the witness's credibility. In light of the evidence of the defendant's guilt, and the fact that the witness's trial testimony merely corroborated another witness's trial testimony, it was unlikely that the outcome of the trial would have been different had counsel viewed the interview before trial. *English v. State*, 290 Ga. App. 378, 659 S.E.2d 783 (2008).

Lack of preparation by counsel not credible. — The court rejected a claim of ineffective assistance of trial counsel when the trial court found the defendant's claims regarding trial counsel's lack of preparation not to be credible, and at trial the defendant repeatedly stated that the defendant was satisfied with the defendant's representation. *Finnan v. State*, 291 Ga. App. 486, 662 S.E.2d 269 (2008).

Adequate investigation by counsel. — Based on the testimony given at the hearing on a defendant's motion for new trial, the trial court was authorized to find that defense counsel adequately investigated the case and consulted with the defendant about the trial. An assistant attorney testified to meeting with the defendant at least five or six times; the chief public defender, who handled the trial,

testified to meeting with the defendant more than once and that the defendant was informed about what the attorneys were doing; and the defendant testified that the attorneys had gone over the case with the defendant and discussed the defendant's concerns. *Gary v. State*, 291 Ga. App. 757, 662 S.E.2d 742 (2008).

Failure of counsel to seek a mistrial. — Counsel for a defendant was not shown to have been ineffective in the defendant's criminal trial when counsel failed to seek a mistrial upon the admission of testimony that the defendant had committed prior sexual abuse on a family member as the jury was admonished to ignore the remark and the jury was given a curative instruction, and counsel chose not to seek a mistrial as a matter of trial strategy. *Carroll v. State*, 292 Ga. App. 795, 665 S.E.2d 883 (2008).

Failure to inform of repealed section. — Denial of the defendant's motion to withdraw a guilty plea pursuant to Ga. Unif. Super. Ct. R. 33.12(A) was proper because the defendant failed to establish that but for defense counsel's failure to inform the defendant of the repeal of former O.C.G.A. § 17-10-6, which allowed for a sentence review, the defendant would have insisted on a trial; further, the defendant was aware of the maximum sentence, and the availability of a sentence review did not alter the possibility that the defendant could have potentially been required to serve up to 66 years in prison. The record supported a finding that the defendant entered the plea knowingly, intelligently, and voluntarily. *Vaughn v. State*, 298 Ga. App. 669, 680 S.E.2d 680 (2009).

Failure to file appeal as ineffective assistance. — Because there was sufficient evidence to support the defendant's conviction for aggravated assault with intent to rape under O.C.G.A. § 16-5-21(a)(1), counsel's failure to file an appeal could not be deemed ineffectiveness; accordingly, the trial court did not abuse the court's discretion in denying the defendant's motion for an out-of-time appeal. *Clark v. State*, 299 Ga. App. 558, 683 S.E.2d 93 (2009).

Reasonable defense strategy. — Trial court did not err in denying the

defendant's motion for a new trial after the defendant was convicted of statutory rape because the defendant did not receive ineffective assistance of counsel; the trial court's determination that the defendant's trial counsel articulated a reasonable defense strategy was not clearly erroneous because counsel made a strategic decision that a specific line of investigation was unnecessary since the expected finding from the investigation would not have been helpful to the defense employed, and at trial, counsel presented evidence consistent with the defense strategy. *Burce v. State*, 299 Ga. App. 849, 683 S.E.2d 901 (2009).

Counsel decision on calling witness not ineffective. — Trial counsel's performance was not deficient because trial counsel testified that counsel received and reviewed discovery material provided by the district attorney and viewed the crime scenes, that counsel's investigator interviewed witnesses who gave statements to police, that counsel met with the defendant approximately six times in the months before trial, and that counsel ascertained that family members were willing to be alibi witnesses for the defendant, but counsel elected not to have the family members testify since the defendant acknowledged being at the crime scenes. *Haynes v. State*, 287 Ga. 202, 695 S.E.2d 219 (2010).

Ineffectiveness claim founded on prosecutor's opening statement. — Defendant could not succeed on defendant's ineffective assistance claim predicated upon the prosecutor's opening statement because the defendant did not cross-examine the prosecutor at the hearing on the defendant's motion for a new trial or otherwise present any evidence reflecting on what the prosecutor anticipated the evidence would show prior to trial, and, therefore, the defendant could not establish that the prosecutor lacked a good faith basis for the prosecutor's assertions made during the prosecutor's opening statement; the trial court specifically instructed the jury that opening statements were not to be considered as evidence. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

No impermissible conflict of interest impacting effectiveness. — Defen-

Benefit of Counsel (Cont'd)**5. Effective Assistance of Counsel (Cont'd)****B. Obligations of Counsel (Cont'd)**

dant's trial counsel did not render ineffective assistance because none of the alleged failures on the part of trial counsel, who was the chief assistant public defender with more than 20 years of criminal experience and 100 jury trials, were so serious as to deprive the defendant of a fair trial, a trial whose result was reliable; even if it could be said that trial counsel was deficient in counsel's performance, the defendant failed to show that, but for counsel's unprofessional errors, there was a reasonable probability that the outcome of the trial would have been different. *Gresham v. State*, 289 Ga. 103, 709 S.E.2d 780 (2011).

No ineffectiveness in stipulating to admission of statement. — Defendant failed to carry the defendant's burden of showing that trial counsel was ineffective for stipulating to the admissibility of a statement because the defendant failed to make a strong showing that the defendant's statement would have been suppressed had counsel made the motion. *Arellano-Campos v. State*, 307 Ga. App. 561, 705 S.E.2d 323 (2011), cert. denied, No. S11C0801, 2011 Ga. LEXIS 484 (Ga. 2011).

Trial counsel was not ineffective for failing to obtain criminal histories of the state's witnesses prior to trial because there was no showing that any state witness had such a history to discovery; nor was trial counsel found to be ineffective for failing to object when the victim sat outside the courtroom with an assistant district attorney and a bailiff because there was no indication that the victim was coached. *Ashmid v. State*, 316 Ga. App. 550, 730 S.E.2d 37 (2012).

Trial counsel was not ineffective for failing to object to the testimony of the fire chief and the victim's boyfriend about what they overheard on speaker phone on the way to the hotel after the fire, because the testimony was admissible and, thus, could not support such a claim. *Crawford v. State*, 318 Ga. App. 270, 732 S.E.2d 794 (2012).

C. Use of Experts

Expert on defendant's mental health. — Because the defendant failed to offer proof at a motion for a new trial hearing that the defendant's trial counsel was ineffective in that counsel failed to elicit sufficient testimony from an expert at a hearing about the defendant's mental abilities and condition when the defendant made a statement to the police, the defendant failed to demonstrate prejudice and the defendant's claim of ineffective assistance was properly denied. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Expert on police interrogation tactics. — Trial counsel was not ineffective for failing to retain an expert with greater expertise regarding police interrogation tactics and the possibility of false confessions because the question of whether someone might be persuaded to give a false confession through persuasive interrogation techniques was "not beyond the ken of the average juror," and, therefore, the absence of expert testimony on that question would not be prejudicial. *Humphrey v. Riley*, 291 Ga. 534, 731 S.E.2d 740 (2012).

Use of medical experts. — Based on trial counsel's testimony regarding pre-trial consultations with a trauma nurse and a physician, both of whom discounted the suggested alternative explanation for the victim's initial brain injury, trial counsel's strategic decision not to continue hunting for a defense expert, but instead to challenge the state's experts on cross-examination, was not unreasonable and did not constitute deficient performance. *Brown v. State*, 292 Ga. 454, 738 S.E.2d 591 (2013).

Failure to present medical or psychological testimony in child molestation case. — Defense counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to present expert medical or psychological testimony in a child molestation case in which the prosecution had presented four experts including a psychologist and a pediatrician; trial counsel was aware of the substance of the testimony of the state's experts, testimony from credible, objective scientists was available to trial counsel to completely

refute the state's experts' opinions and to substantially undermine the state's case, and the state's evidence, other than opinions from their experts, was far from overwhelming. *Goldstein v. State*, 283 Ga. App. 1, 640 S.E.2d 599 (2006), cert. denied, No. S07C0623, 2007 Ga. LEXIS 338 (Ga. 2007).

Failure to call psychologist. — Even if trial counsel were ineffective in not calling a psychologist to testify for the defense that the defendant was incompetent to stand trial and that the defendant was insane at the time of the crime under O.C.G.A. §§ 16-3-2 and 16-3-3, the defense expert's testimony would not have changed the outcome; the defense expert's opinion was contradicted by a second expert, whose opinion was based on an evaluation over an extended period of time as opposed to the defense expert's evaluation of less than one day, and by testimony of the defendant and trial counsel that the defendant understood the basis of the charges and the nature of the proceedings and assisted in preparing the defense. *Wallin v. State*, 285 Ga. App. 377, 646 S.E.2d 484 (2007).

Expert on DNA analysis. — Defendant's argument that counsel was ineffective for not calling a DNA expert was meritless. The defendant did not produce an expert to testify that the state's DNA evidence was defective, and unlike the case relied upon by the defendant, the DNA evidence was not the sole link between the defendant and the crimes. *Williams v. State*, 284 Ga. 849, 672 S.E.2d 619 (2009).

Because the defense counsel's rationale for not calling a DNA expert witness was not impeached, and counsel's decisions with regard to the choice of what objections to make, defenses to raise, and theories to advance at trial amounted to strategic decisions, the defendant's ineffective assistance of counsel claims lacked merit; moreover, even if the appeals court assumed for the sake of argument that trial counsel was somehow deficient at trial, the defendant failed to show that but for such deficiency, a reasonable likelihood that the outcome of the trial would have been different. *Bharadia v. State*, 282 Ga. App. 556, 639 S.E.2d 545 (2006), cert.

denied, No. S07C0522, 2007 Ga. LEXIS 222 (Ga. 2007).

Defendant did not demonstrate prejudice from trial counsel's failure to call an expert witness to testify on DNA analysis; the defendant failed to introduce any evidence that the defendant could have called an expert witness who would have testified that the crime lab's testing results were unreliable and counsel did employ an expert whose report said that the expert had nothing to add to the lab's report. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

Use of expert on mental capacity of victim. — In a rape and aggravated sodomy case, the trial court properly rejected the defendant's claim that trial counsel was ineffective for not introducing evidence on the adult victim's mental capacity to consent. Because the defendant failed to proffer the testimony of an uncalled witness, the defendant could not prove that there was a reasonable probability that the trial would have ended differently; furthermore, counsel gave a reasonable explanation for not introducing expert testimony in that counsel believed that the victim might have the capacity to consent and that counsel believed that expert testimony on the issue would not sway the jury. *Ravon v. State*, 297 Ga. App. 643, 678 S.E.2d 107 (2009).

Failure to solicit funds for expert witness. — Defendant's ineffective assistance of counsel claim failed since, inter alia, trial counsel's failure to file a motion to suppress eyewitness identification testimony was not erroneous since the testimony of the witnesses established that the in-court identifications had an independent origin apart from any allegedly suggestive pretrial procedures, and counsel's failure to seek funds to retain an expert for the purpose of providing expert testimony on the reliability of eyewitness identifications did not amount to ineffective assistance since the defendant failed to show that the outcome would have been different had trial counsel sought such funds. *Wright v. State*, 265 Ga. App. 855, 595 S.E.2d 664 (2004), overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009).

A defendant failed to show that the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****C. Use of Experts (Cont'd)**

defendant received ineffective assistance of counsel as a result of defense counsel failing to timely request funds for expert assistance so that the defendant could have a firearms expert testify on the defendant's behalf at trial as there was no reasonable probability that the outcome of the trial would have been different, even if defense counsel was deficient in failing to file a timely motion for funds for expert assistance. The defendant was unable to show that the trial court would have granted the motion even if it had been timely and there was no evidence in the record that the state's medical examiner and ballistics expert were biased or incompetent, and the state's case did not rest entirely on the experts' testimony, but rather was also established by the defendant's own admissions. *Fincher v. State*, 289 Ga. App. 64, 656 S.E.2d 216 (2007).

Defendant's claim that counsel was ineffective for failing to seek funds to hire an expert witness failed because the defendant did not show that the outcome of the trial would have been different had counsel requested funds and called such a witness. The defendant did not proffer expert testimony at the hearing on the defendant's motion for new trial and thus did not show prejudice. *White v. State*, 293 Ga. App. 241, 666 S.E.2d 618 (2008).

Defendant's trial counsel was not ineffective for failing to employ, or request funds from the trial court to employ, an expert witness to challenge an officer's testimony that the officer smelled the odor of raw marijuana emanating from the defendant's truck because the defendant was unable to overcome the presumption that counsel made a strategic decision regarding the issue that fell within the broad range of reasonable professional conduct; the defendant did not call trial counsel to testify at the hearing on the motion for new trial so that counsel could explain why counsel did not attempt to employ an expert to challenge the officer's testimony. *Bass v. State*, 309 Ga. App. 601, 710 S.E.2d 818 (2011).

Failure to use expert on eyewitness identification. — Defendant's trial counsel testified that counsel chose not to pursue evidence of an expert in eyewitness identification because counsel feared that doing so would have prompted the state to do the same, which counsel believed ultimately would have harmed the defense; trial counsel's tactical decision that the risks of introducing such expert evidence outweighed its potential benefits did not constitute deficient performance. *Breland v. State*, 287 Ga. App. 83, 651 S.E.2d 439 (2007), cert. denied, 2007 Ga. LEXIS 759 (Ga. 2007).

Failure to present expert witness. — Defendant failed to prove that trial counsel was ineffective for failing to present expert witnesses and obtain additional DNA evidence as the defendant failed to make a proffer of any favorable evidence that could have been elicited if an expert witness had been called. *Wynn v. State*, 322 Ga. App. 66, 744 S.E.2d 64 (2013).

Failure to call expert witness. — Defense counsel did not provide ineffective assistance of counsel in failing to call an expert witness and other allegedly helpful witnesses as defendant failed to proffer the testimony of the witnesses. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Questioning of ballistics expert. — Trial counsel was not ineffective in failing to prepare to cross examine a ballistics expert the state called because counsel testified that counsel had reviewed the ballistics evidence; therefore, counsel was prepared to question a ballistics expert, regardless of the expert's identity and did indeed cross-examine the expert the state called. *Funes v. State*, 289 Ga. 793, 716 S.E.2d 183 (2011).

Physicians. — Counsel's failure, in prosecution for rape, to subpoena the physician who circumcised the defendant and to have in court a picture of the defendant's penis taken after his arrest was not sufficient to establish negligence or unfaithfulness on the part of counsel. *Jones v. Balkcom*, 210 Ga. 262, 79 S.E.2d 1 (1953), cert. denied, 347 U.S. 956, 74 S. Ct. 682, 98 L. Ed. 1101 (1954).

Use of expert in murder trial. — When, in a murder trial, defense counsel

did not secure an expert witness to counter the state's theory that the defendant shot the victim in the head while subduing the victim by sitting on the victim, this was not ineffective assistance of counsel as this amounted to reasonable trial tactics or strategy. *Moore v. State*, 279 Ga. 45, 609 S.E.2d 340 (2005).

Failure to use drug expert. — Trial counsel was not ineffective for failing to hire an expert to testify to the detrimental effects of cocaine use in a case in which the defendant was charged with violating O.C.G.A. § 16-5-43 after swearing in an affidavit that the victim was suicidal and was using crack cocaine; the relevant consideration was what the defendant knew or could show concerning the victim's mental state at the time the defendant had the victim confined, because the defendant had not seen the victim for several months and could not have observed the victim on the date or during the time frame stated in the affidavit. *Washington v. State*, 271 Ga. App. 764, 610 S.E.2d 692 (2005).

Expert on battered woman's syndrome and PTSD. — Trial counsel was not ineffective in failing to present expert testimony that the defendant suffered from battered woman syndrome and post-traumatic stress disorder as the defendant did not admit to participating in the crimes; the defendant was not prejudiced by the failure to establish an evidentiary basis for a coercion defense. *Olarte v. State*, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Use of polygraph experts. — Because trial counsel's decision not to call a polygraph examiner to introduce evidence of the test result was a reasonable strategy and the defendant was not prejudiced thereby, the defendant failed to show that counsel was ineffective. *Keown v. State*, 275 Ga. App. 166, 620 S.E.2d 428 (2005).

Excluded experts. — When defense counsel did not provide the prosecutor with timely notice of defendant's expert witness or timely provide a copy of the witness's report, as required by O.C.G.A. §§ 17-16-4(b)(2), 17-16-7, and 17-16-8(a), and the witness was excluded, the defendant did not receive ineffective assistance of counsel; while counsel was deficient, it

was not shown that the defendant was prejudiced as another expert testified to essentially the same facts and conclusions as the excluded witness, and referred to the excluded witness's findings, so the excluded witness's testimony would have been cumulative, and it was not shown that the outcome of the defendant's trial would have differed had counsel's performance not been deficient. *Mann v. State*, 276 Ga. App. 720, 624 S.E.2d 208 (2005).

Use of nurse practitioner as expert. — Trial counsel was not ineffective in failing to object to expert testimony from a nurse practitioner with respect to an opinion that the victim's version of sexual misconduct committed by the defendant was true, as the expert's testimony was largely predicated on the nurse's own physical examination of the victim and in part on hearsay in other reports, and such was not improper bolstering of the victim's testimony but instead was an expert opinion that the medical evidence supported the victim's story. *Davenport v. State*, 278 Ga. App. 16, 628 S.E.2d 120 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Expert in child sexual abuse syndrome. — Defendant did not receive ineffective assistance of counsel because trial counsel failed to call an expert witness regarding child sexual abuse syndrome as counsel explained that counsel did not employ an expert witness regarding child sexual abuse syndrome because, in counsel's opinion, it was inapplicable. *Tadic v. State*, 281 Ga. App. 58, 635 S.E.2d 356 (2006).

Use of psychologist. — As the jury could have found the defendant guilty after listening to the state's witnesses, a psychologist testimony regarding the defendant's competency did not influence the outcome of the trial; hence, defense counsel's failure to object to the psychologist raising the issue about the defendant's mental health was harmless, part of counsel's reasonable trial strategy, and did not amount to the ineffective assistance of counsel entitling the defendant to a new trial. *Griffin v. State*, 281 Ga. App. 249, 635 S.E.2d 853 (2006).

Use of licensed professional counselor. — Defense counsel was not ineffec-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****C. Use of Experts (Cont'd)**

tive under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 because defense counsel relied on the testimony of a licensed professional counselor to testify regarding the insanity defense relied upon by the defendant; while the defendant claimed that the defendant would have been able to convince the jury that the defendant was insane if defense counsel had sought the expertise of a licensed psychologist or psychiatrist, this argument failed, as an insanity defense did not require the expert testimony of a psychologist or psychiatrist, and the witness had conducted forensic evaluations, sometimes at the request of a court, more than 25 times, and the witness had been qualified as an expert in forensic counseling between eight and 10 times. *Perez v. State*, 281 Ga. 175, 637 S.E.2d 30 (2006).

Use of emergency room physician.

— Defendant's ineffective assistance of counsel claim, which alleged counsel was ineffective in failing to call an expert witness to rebut testimony given by the emergency room physician who treated the victim's injuries and failing to request a lesser included offense jury instruction on the aggravated assault charge, lacked merit, as the defendant made no showing as to what the medical expert would have testified to, and failed to identify any lesser included offense on which counsel should have requested a jury instruction. *Scott v. State*, 281 Ga. App. 813, 637 S.E.2d 751 (2006).

Use of psychiatrist. — Defendant's stalking convictions were upheld on appeal, given that trial counsel was not ineffective in failing to present the testimony from a second psychiatrist regarding the defendant's mental condition, as the defendant failed to show how testimony from a second psychiatrist would have aided the defense, and a request for recharge alone did not prove that the jury was confused on the issue of the defendant's mental condition or that counsel had not provided them with sufficient evidence concerning it. *Albert v. State*, 283

Ga. App. 79, 640 S.E.2d 670 (2006).

Use of firearms expert. — With regard to a defendant's convictions for malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony, the defendant failed to establish that trial counsel's decision not to consult or hire an expert witness to support the defendant's defense of accident was deficient performance because trial counsel's testimony at the defendant's motion for a new trial set forth that trial counsel did not want to challenge the state's firearms expert on the issue of the force necessary to pull the trigger because the defendant had testified that the gun was in the waistband of the defendant's pants and it would not make sense to carry a weapon in that manner if the weapon discharged with little force. As a result, trial counsel's decision not to consult or hire an expert was reasonable, and matters of reasonable trial strategy and tactics did not amount to ineffective assistance of counsel. *Thomas v. State*, 284 Ga. 647, 670 S.E.2d 421 (2008).

Use of blood splatter expert. — In a murder prosecution, defense counsel was not ineffective for failing to properly interview a blood spatter expert before calling the expert as a witness. The expert's discussions with counsel provided support for the defendant's claim that the shooting was accidental, but at trial, the expert's testimony differed from the information relayed to counsel over the phone, and defense counsel was surprised by the testimony, which aided the prosecution. *Watkins v. State*, 285 Ga. 355, 676 S.E.2d 196 (2009).

Failure to hire expert witness to testify on child victim's allegations. — While the defendant argued that the defendant's trial counsel was ineffective for failing to hire an expert witness to testify regarding the child victims' allegations, the defendant failed to produce such an expert at the hearing on the motion for new trial, and the defendant did not proffer evidence showing how such an expert would have changed the outcome of the case; the defendant thus failed to establish the claim of ineffective assistance of counsel. *Sarratt v. State*, 299 Ga. App.

568, 683 S.E.2d 10 (2009).

Failure to call doctor. — Trial counsel did not render ineffective assistance by failing to subpoena a doctor and by failing to recognize that the doctor was a necessary witness for impeachment purpose because the defendant did not make the requisite showing of prejudice; the impeachment evidence purportedly contained in the doctor's medical report was cumulative of evidence that had already been placed before the jury, and the defendant did not allege or show that the doctor's testimony would have been beneficial to defendant's defense in any other respect. *Bearfield v. State*, 305 Ga. App. 37, 699 S.E.2d 363 (2010).

Failure to call expert on consensual sexual intercourse. — Trial counsel was not ineffective in failing to use an expert witness regarding the issue of consensual intercourse because trial counsel testified that counsel did not believe an expert witness would have been helpful to the defense; the defendant failed to make a proffer of any favorable evidence that could have been elicited if an expert witness had been called. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Failure to hire defense reconstruction expert. — Defendant's trial counsel was not ineffective for failing to have a defense reconstruction specialist testify, as the counsel considered whether another expert was needed, but believed that an officer provided the information needed to support the sole defense of misfortune or accident, i.e., that the victim was standing in the middle of the road and it was very dark. *Corbett v. State*, 277 Ga. App. 715, 627 S.E.2d 365 (2006).

With regard to a defendant's convictions on six counts of first degree vehicular homicide and other crimes, the defendant failed to establish ineffective assistance of counsel as defense counsel presented seven witnesses who testified that the defendant was not driving the vehicle at issue; the fact that certain photographs and blood test sampling were not presented into evidence and that there was a significant amount of other evidence that went to the defendant's defense that the defendant was not driving, it was a reasonable strategic decision not to hire an

accident reconstruction expert. *Davis v. State*, 293 Ga. App. 799, 668 S.E.2d 290 (2008).

Failure to hire gun residue expert. — In an aggravated assault prosecution, as the defendant denied involvement in the shooting but told police the defendant's hands would contain gunshot residue because the defendant had handled a gun that day, the defendant was not prejudiced by counsel's failure to order an independent gunshot residue test, which in light of the defendant's statement, would have been expected to yield a positive result. *Carlos v. State*, 292 Ga. App. 419, 664 S.E.2d 808 (2008).

Failing to object to presence of interpreters. — With regard to two defendants' convictions for murder, the defendants failed to show that the defendants received ineffective assistance of counsel based on the defendants' respective trial counsel failing to object to the presence of two sign language interpreters in the jury room as the trial court had the two interpreters take an oath swearing that, during jury deliberations, the interpreters would merely interpret and not interject the interpreters' personal opinions, conclusions, or comments. The defendants failed to present a shred of evidence that the interpreters did anything other than comply fully with the oath taken and that trial counsel had any reasons to suspect the interpreters did otherwise. *Smith v. State*, 284 Ga. 599, 669 S.E.2d 98 (2008).

Failure to object to expert testimony. — Trial counsel's failure to object to testimony by an expert witness for the state in an aggravated battery trial, arising from injuries to the defendant's infant son, was not ineffectiveness as the expert's statement that the case was one of a non-accidental head injury was admissible as to the ultimate issue because it was beyond the ken of the average layperson; further, as the failure to object was clearly part of trial counsel's trial strategy, there was no ineffectiveness. *Lindo v. State*, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Defendant did not establish ineffective assistance of counsel based on defense counsel's failing to object to an expert's testimony despite the fact that counsel allegedly did not receive or review the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****C. Use of Experts (Cont'd)**

psychosexual report prepared by the expert; there was conflicting testimony as to whether counsel had received the report, and even if counsel did not receive the report, there was no reasonable probability that the state's production of the report would have brought about a different result. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

Counsel's failure to object when a sheriff's investigator testified was not ineffective assistance of counsel as the investigator did not state the investigator's opinion as to the veracity of the victims or the defendant; the investigator testified that the victims' injuries, or lack thereof, were either consistent or inconsistent with the physical evidence or the victims' testimony. Thus, the investigator's testimony was not objectionable as impermissible bolstering. *Gray v. State*, 291 Ga. App. 573, 662 S.E.2d 339 (2008).

Trial counsel was not ineffective for failing to object to the testimony of the crime scene investigator that a partial latent print on a handgun could have been the defendant's even though the investigator had also testified that the prints were insufficient to make an identification because in light of the investigator's testimony as a whole, trial counsel did not perform deficiently by failing to object, and the outcome would not have been different had counsel done so; by stating that the fingerprints were insufficient to make a match with anyone, the investigator in essence informed the jury that the fingerprints could have been made by anyone, including the defendant. *Odom v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Trial counsel did not provide ineffective assistance when counsel failed to object to the State of Georgia reviewing an expert's notes at a hearing because trial counsel gave a reasonable strategic explanation for that decision — that there was nothing detrimental to the defendant in the notes. In addition, the defendant did not demon-

strate that, even if trial counsel had objected, there was a reasonable probability that the result of the hearing would have been different. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Testimony from medical examiner.

— The defendant's trial counsel was not ineffective in failing to object when a medical examiner testified that the victim's death was a homicide and not an accident, and despite the defendant's contrary claim, the testimony was not an expression of the witness's opinion on the ultimate issue in the case, as: (1) counsel did not consider the testimony objectionable because there was no dispute that the "manner" of the victim's death was a homicide, and such tactic was not unreasonable; (2) the ultimate issue for the jury to determine was whether the defendant acted with malice, in response to the victim's provocation, or whether self-defense was an issue; (3) counsel testified that an objection would have been in order had the medical examiner invaded the province of the jury by expressing the opinion that the homicide was a murder; and (4) the defendant failed to show any prejudice by the testimony presented. *Berry v. State*, 282 Ga. 376, 651 S.E.2d 1 (2007).

Expert testimony on holster. — Defense counsel was ineffective for failing to object to an expert's inadmissible hearsay testimony that a holster was designed for a .45 caliber pistol, which was based on the expert's conversation with a representative of the holster's manufacturer. The testimony was prejudicial, as it was the only evidence connecting the defendant to a .45 pistol and it buttressed the testimony of the state's key witness, whose credibility was a serious issue. *Cobb v. State*, 283 Ga. 388, 658 S.E.2d 750 (2008).

Testimony of toxicologist. — Defendant failed to establish an ineffective assistance of counsel claim because, inter alia, the defendant's argument that the defendant did not have notice about the state's toxicologist testifying at trial was belied by the record; in the state's pretrial disclosure certificate, the state identified the toxicologist as a potential witness. Thus, an objection to the toxicologist testifying based on an alleged lack of notice would have been entirely without merit,

and counsel's failure to object on this basis did not amount to ineffective assistance. *Rector v. State*, 285 Ga. 714, 681 S.E.2d 157, cert. denied, 558 U.S. 1081, 130 S. Ct. 807, 175 L. Ed. 2d 567 (2009).

Testimony from psychologist. — Defense counsel's failure to object to a psychologist's testimony that the psychologist's evaluation strongly suggested that the victim was sexually abused as alleged was ineffective assistance because, considered in context, the testimony improperly amounted to a factual conclusion regarding whether the child was sexually abused and whether the defendant was the abuser; the expert's opinion was not superfluous, but usurped the jury's authority. It was highly probable that the failure to object to this testimony contributed to the guilty verdict. *Pointer v. State*, 299 Ga. App. 249, 682 S.E.2d 362 (2009).

Trial court did not err in denying a defendant's motion for a new trial based on the ineffective assistance of counsel in failing to object to an expert's opinion testimony because the record did not support the defendant's argument that the expert's testimony was objectionable; the expert's testimony was limited to describing how the expert and doctors in the medical community generally performed genital examinations of female patients and did not touch on whether either the defendant or the victim was telling the truth on whether the defendant committed aggravated sexual battery, and the expert's testimony regarding the typical medical examination of a preadolescent girl's genitals was relevant to the issues raised by the defendant's defense. *Lee v. State*, 300 Ga. App. 214, 684 S.E.2d 348 (2009).

Expert on interviewing techniques. — Defendant did not show that trial counsel provided ineffective assistance of counsel in a child molestation case as counsel did not hire experts on interviewing techniques or on reviewing medical records because: (1) while the testimony of an expert on interviewing techniques was proffered, it was not shown that there was any reasonable likelihood that such testimony would have resulted in a different verdict in defendant's trial; (2) counsel's decision not to hire such experts was one

of reasonable trial strategy, as there was no indication the techniques used to interview the child victim were improper; and (3) no proffer of what an expert on reviewing medical records would have said was made. *Weeks v. State*, 270 Ga. App. 889, 608 S.E.2d 259 (2004).

Testimony from FBI expert. — Defendant unsuccessfully contended that defendant's trial counsel rendered ineffective assistance by failing to object to an FBI agent's testimony that the crime scene appeared to have been staged and that, based on this scene, burglary was an unlikely motive; furthermore, even if trial counsel had objected to this testimony, there was no reasonable probability that the outcome of defendant's trial would have been different, given the overwhelming nature of the evidence against the defendant. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Testimony from child therapist. — Defendant did not establish that defendant's trial counsel was ineffective for failing to object to a child therapist's testimony on the ground that the testimony bolstered the child molestation victim's accusations because the therapist never expressly stated that the therapist believed the victim had been abused; although the defendant argued that the therapist's testimony was subject to that interpretation, the testimony the defendant cited did not address the ultimate issue before the jury or bolster the victim's credibility. *O'Neal v. State*, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

Blood splatter expert. — Trial counsel was not ineffective for failing to limit the trial testimony of the prosecution's blood spatter expert because counsel consulted with a qualified expert and counsel's consultations gave counsel no basis for objecting to the conclusion reached by the prosecution's expert as the expert consulted reached the same conclusion as the prosecution's expert. *Yancey v. State*, 292 Ga. 812, 740 S.E.2d 628 (2013).

Crime scene reconstructionist expert. — Trial counsel's failure to object to testimony from a crime scene investigator was not deficient because the opinion about the victim's physical positioning was within the bounds of a crime scene

Benefit of Counsel (Cont'd)**5. Effective Assistance of Counsel (Cont'd)****C. Use of Experts (Cont'd)**

reconstructionist expert. *Vanstavern v. State*, 293 Ga. 123, 744 S.E.2d 42 (2013).

Failure to request admission of expert's report into evidence. — In a murder prosecution in which the defendant claimed self-defense, a forensic toxicologist testified for the defense that the victim's blood tested positive for a metabolite of cocaine and that paranoia and aggressiveness were side effects of cocaine use. The defendant's claim that counsel was ineffective for withdrawing a request to admit the toxicologist's lab report into evidence failed as the results of the report were read into the record, the toxicologist's testimony was more extensive than the report, and the defendant's assertion that admission of the report would have altered the outcome of the trial was mere speculation. *Timmreck v. State*, 285 Ga. 39, 673 S.E.2d 198 (2009).

D. Objections to Evidence

Failure to object to physical and hearsay evidence. — Trial court did not err in denying the defendant's ineffective assistance of counsel claim, as even assuming that the defendant's counsel did not object to the admission of certain physical and hearsay evidence, the defendant failed to establish the existence of a reasonable probability that the outcome of the defendant's trial would have been different had defense counsel objected, especially since the evidence of the defendant's guilt was overwhelming. *Ferguson v. State*, 262 Ga. App. 28, 584 S.E.2d 618 (2003).

Trial court's determination that the defendant received effective assistance of counsel was not clearly erroneous since: (1) defense counsel failed to object to hearsay evidence that was cumulative, and therefore harmless, as the defendant failed to show that but for the alleged deficiency, the outcome of the proceedings would have been different; and (2) defense counsel failed to object to the defendant's spouse's testimony at the presentencing hearing, as there was no showing that the

improper evidence prejudiced the defendant. *Ingram v. State*, 262 Ga. App. 304, 585 S.E.2d 211 (2003).

Other similar crimes evidence. — Inmate's trial counsel was not ineffective for failing to object to the introduction of evidence of other "similar crimes" since there was no reasonable probability that, had defense counsel objected and the "similar crime" issue been addressed on appeal, the trial court's ruling would have been reversed and a new trial ordered; thus, the inmate was not prejudiced by that failure. *Walker v. Houston*, 277 Ga. 470, 588 S.E.2d 715 (2003).

In a rape prosecution, defense counsel should have objected to the state's method of proving the defendant's prior transaction by introducing only a certified copy of the defendant's prior convictions, but the defendant did not show that the defendant was prejudiced by this error because it was harmless as there was such overwhelming evidence of the defendant's guilt that it was highly probable the error did not contribute to the verdict finding the defendant guilty. *Cole v. State*, 279 Ga. App. 219, 630 S.E.2d 817 (2006).

Failure to object to admission of prior convictions. — Defendant convicted of aggravated assault did not show that defense counsel provided ineffective assistance by: (1) failing to object to the admission of the defendant's prior convictions after the defendant placed the defendant's character in issue; (2) failing to object to the admission, at sentencing, of the defendant's prior convictions, which had been used at trial for impeachment, as the convictions were properly admitted; and (3) making a strategic decision not to request a jury instruction on the defense of accident, which the defendant did not raise until the defendant's own testimony, and any ineffective assistance arising from counsel's failure to investigate the defendant's prior guilty pleas used to enhance the defendant's sentence, which may have been involuntary, was rendered moot by the vacation of the defendant's sentence. *Carswell v. State*, 263 Ga. App. 833, 589 S.E.2d 605 (2003).

In a prosecution for selling marijuana and possessing marijuana with the intent to distribute, given that the state con-

ceded that it failed to file notice regarding its intent to introduce a prior conviction as evidence in aggravation of punishment, the evidence was not introduced; as a result, defense counsel could not be found ineffective for failing to object to the introduction of the prior conviction. *Allen v. State*, 280 Ga. App. 663, 634 S.E.2d 831 (2006).

Defense counsel did not perform deficiently when defense counsel failed to make a meritless objection to the evidence of defendant's conviction for giving false information that was less than 10 years old as former O.C.G.A. § 24-9-84.1(a)(3) and (b) (see now O.C.G.A. § 24-6-609) authorized the admission of convictions 10 years old or less for crimes involving dishonesty or making a false statement, and the trial court did not have to weigh the probative value of the old conviction against the prejudicial effect since the conviction at issue was less than 10 years old. *Habersham v. State*, 289 Ga. App. 718, 658 S.E.2d 253 (2008).

Trial counsel's failure to object to evidence of a past conviction for theft as well as the defendant's guilty plea for drug charges did not amount to ineffective assistance because trial counsel testified that trial counsel allowed the admission of the drug offenses because counsel was pursuing a strategy of admitting those offenses and denying the molestation. Furthermore, trial counsel's failure to object to testimony about the existence of pornography in the defendant's bedroom did not support a claim of ineffective assistance because the pornography itself was not admitted and the pornography was sufficiently relevant. *Worley v. State*, 319 Ga. App. 799, 738 S.E.2d 641 (2013).

Failure to object to sufficiency of similar transaction notice. — Defendant's allegations of ineffective assistance of counsel lacked merit since the defendant failed to demonstrate that an objection to the sufficiency of a similar transaction notice would have been sustained, or that the defendant suffered harm as a result of counsel's inaction; further, defense counsel was not ineffective since the defendant failed to show that additional actions on counsel's part would have changed the trial court's fashioning of an

alternative remedy to a continuance. *Joiner v. State*, 265 Ga. App. 395, 593 S.E.2d 936 (2004).

Objection to "always" carrying a gun. — Counsel's failure to object or move in limine to exclude testimony that the defendant "always" carried a gun, evidence that the defendant alleged constituted bad character evidence, did not amount to ineffective assistance since the evidence did not have the prejudicial effect attributed to it by the defendant. *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Objection to word "stories". — Counsel's failure to object when the state asked a police officer whether the "stories" the defendant told made sense in light of other evidence did not amount to ineffective assistance since the question and its negative response were not prejudicial to the defendant in light of the defendant's own testimony in which the defendant referred to the defendant's several different statements to the police as "stories." *Williams v. State*, 277 Ga. 853, 596 S.E.2d 597 (2004).

Failure to object not ineffective assistance. — Defendant's claim that the defendant was denied effective assistance of counsel failed when counsel's failure to ask for a curative instruction because of the admission of testimony by a co-conspirator was not an error as the testimony was admissible under the co-conspirator exception to the hearsay rule, counsel's failure to promptly interview restaurant employees did not amount to ineffective assistance as the purported witnesses alleged that they knew nothing and the defendant failed to make a proffer about what they might have said if interviewed earlier, counsel's failure to object and request a mistrial following certain comments by the assistant district attorney during closing arguments did not amount to ineffective assistance since the gravamen of the argument was to urge the jury to find from the inconsistencies that a witness had lied, and counsel's use of a videotaped police interview did not constitute ineffective assistance but was a tactical decision made to support the defense theory. *Robinson v. State*, 278 Ga. 31, 597 S.E.2d 386 (2004).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****D. Objections to Evidence (Cont'd)**

Failure to object to certain statements. — Evidence supported the trial court's finding that the defendant did not meet the defendant's burden of showing deficient performance or prejudice based on defense counsel's actions. Because the evidence sufficed to sustain the conviction, as a matter of law, counsel's failure to move for a directed verdict did not constitute ineffective assistance, and the defendant failed to show prejudice from the defendant's defense trial counsel's failure to object to certain statements. *Sneed v. State*, 267 Ga. App. 640, 600 S.E.2d 720 (2004).

Defendant could not demonstrate that the defendant was prejudiced by trial counsel's failure to object to a witness's testimony because the gist of the testimony was that the shooting of the victim was unprovoked, and the defendant failed to show that, but for counsel's failure to object to the specific statements, the outcome of the trial would have been any different. *Nations v. State*, 290 Ga. 39, 717 S.E.2d 634 (2011).

Failure to object to lineup. — Because a burglary victim recognized the defendant before a photographic lineup was introduced, the defendant did not show deficient performance or prejudice based on trial counsel's failure to object to the lineup; in any event, the evidence was sufficient to sustain the convictions for armed robbery, aggravated assault, burglary, making terroristic threats, and possession of a firearm during the commission of the felonies under O.C.G.A. §§ 16-5-21(a)(1), (a)(2), 16-7-1(a), 16-8-41(a), 16-11-37(a), and 16-11-106(b)(1). *Williams v. State*, 270 Ga. App. 845, 608 S.E.2d 310 (2004).

Objections to double hearsay. — Counsel was not ineffective for failing to object more fully to "double hearsay" testimony as the evidence was admissible. *Dillard v. State*, 272 Ga. App. 523, 612 S.E.2d 804 (2005).

Objections to alco-sensor results. — Counsel's failure to object to an officer's

testimony that the defendant's alco-sensor result was .089 did not constitute ineffectiveness of counsel as the results were admissible under O.C.G.A. § 24-9-82 to impeach and rebut defendant's testimony that the result was .06. *Capps v. State*, 273 Ga. App. 696, 615 S.E.2d 821 (2005).

Objections to admission of videotape confession. — Trial counsel was not ineffective for allowing a videotaped confession to be played for the jury without objection and for not allowing the defendant to testify as the trial court did not find the defendant's version of events credible. *Brooks v. State*, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Objections during child sexual abuse cases. — Because a child victim testified about the defendant's sexual abuse and that the defendant showed the victim "pictures or movies where people didn't have any clothes on," the trial court properly admitted the videotapes and determined that a psychotherapist's testimony was admissible under O.C.G.A. § 24-3-16; consequently, defendant failed to show that trial counsel was ineffective. *Johnson v. State*, 274 Ga. App. 69, 616 S.E.2d 848 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006); overruled on other grounds, *Miller v. State*, 285 Ga. 285, 676 S.E.2d 173 (2009); cert. denied, *Johnson v. Hart*, 2015 U.S. Dist. LEXIS 168059 (N.D. Ga. 2015).

In a child molestation prosecution, as evidence of the defendant's uncharged molestation of the victim was admissible without notice or a hearing, defense counsel was not ineffective for not objecting to such evidence. Furthermore, defense counsel was not ineffective for not objecting or requesting a mistrial after a witness testified that the defense had decided not to call the witness in its case in chief, as the testimony had little relevance to the facts in the case, and the trial court instructed the jurors at the close of the evidence that the defendant had no burden of proof. *Stillwell v. State*, 294 Ga. App. 805, 670 S.E.2d 452 (2008), cert. denied, No. S09C0493, 2009 Ga. LEXIS 222 (Ga. 2009).

In a child molestation prosecution,

counsel was not deficient for failing to object to evidence of the defendant's alleged physical abuse of the victims, an uncharged crime, as counsel testified that the defense theory was that the children lied about being molested because the defendant was overly strict and spanked the children, and the children wanted to get the defendant out of the house. This was a strategic decision, not an oversight. *Ortiz v. State*, 295 Ga. App. 546, 672 S.E.2d 507 (2009), cert. denied, No. S09C0803, 2009 Ga. LEXIS 269 (Ga. 2009).

Failure to object to burglar alarm. — Defense counsel's failure to object to evidence that a burglar alarm went off at the house where the defendant was arrested shortly before the defendant was arrested was not ineffective assistance of counsel because even if this evidence improperly placed the defendant's character into evidence, contrary to O.C.G.A. § 24-2-2, there was no reasonable probability that the defendant would have been acquitted, given the strength of other evidence against the defendant. *Patterson v. State*, 274 Ga. App. 341, 618 S.E.2d 81 (2005).

Failure to object to jacket and screwdriver. — Defense counsel's failure to object to evidence that a jacket and screwdriver were found under a deck where the defendant was arrested and the failure to object to the defendant being "asleep" at the time of arrest, was not ineffective assistance of counsel because the circumstances surrounding the arrest and the evidence was not irrelevant as the items had not been there the day before the defendant was arrested, and the defendant had been wearing a jacket when the defendant committed the crimes, and a screwdriver was used against a victim, so a jury could find that the items belonged to the defendant and linked the defendant to the crimes. *Patterson v. State*, 274 Ga. App. 341, 618 S.E.2d 81 (2005).

Failure to object to assault on accomplice evidence. — Counsel's failure to object to the admission of evidence that the defendant had, on a prior occasion, assaulted the defendant's accomplice was not ineffective assistance of counsel be-

cause the evidence was offered as impeachment of the defendant's testimony that the accomplice was the abusive partner in their romantic relationship. *Thornton v. State*, 279 Ga. 676, 620 S.E.2d 356 (2005).

Objections to videotape of eyewitness interview. — When, in a prosecution for murder, the prosecutor proposed to play a videotape for the jury of a portion of an eyewitness's interview, deleting a portion in which the witness made derogatory comments about the defendant, and defense counsel insisted that the entire videotape be played, if this was an unreasonable decision by defense counsel, the defendant did not show the defendant was prejudiced, given the weight of the evidence against the defendant, as it could not be found that the outcome of the trial would have been different had the entire tape not been played to the jury. *Washington v. State*, 279 Ga. 722, 620 S.E.2d 809 (2005).

Failure to object to evidence showing motive. — Defendant failed to establish that the defendant received ineffective assistance of counsel because, even assuming that the transcript was accurate and that the involvement of drug money was placed before the jury, the question elicited testimony which constituted relevant evidence of the defendant's motive, and thus defense counsel was not ineffective in failing to object, since any objection would have been fruitless. *Jones v. State*, 280 Ga. 205, 625 S.E.2d 1 (2005).

Defendant failed to establish a claim of ineffective assistance of trial counsel in the defendant's trial for the murder of the defendant's wife based on counsel's failure to object to evidence that the defendant held an accidental death policy in the amount of \$243,750, payable to the defendant in the event of the wife's accidental death and to evidence showing that the defendant inquired into the wife's compensation and death benefits available through the wife's employer; there was independent evidence directly relating the existence of the insurance policies and death benefits to the defendant's financial motive for the murder. Financial gain from the defendant's marriage to the wife, clearly including the wife's insurance and

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****D. Objections to Evidence (Cont'd)**

employment benefits, and the prevention, at all costs, of the loss of such financial gain by virtue of a divorce, provided a compelling motive for the murder, and, thus, such evidence was admissible and any attempt to exclude the evidence would have been unsuccessful. *Slakman v. State*, 280 Ga. 837, 632 S.E.2d 378 (2006), cert. denied, 549 U.S. 1218, 127 S. Ct. 1273, 167 L. Ed. 2d 95 (2007).

Trial counsel did not render ineffective assistance by failing to object to the state's evidence regarding life insurance policies covering the defendant's spouse because there was a nexus between the life insurance and the spouse's murder when independent evidence directly related the existence of the insurance policies to the defendant's motive for murder; the defendant asked the defendant's employer about insurance proceeds on the day the murder was discovered, the defendant made it clear to others that the defendant wanted and needed the insurance money, and the defendant explained to fellow inmates that, as a result of the defendant's commission of the murder, the defendant would be receiving a large sum in insurance proceeds. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial counsel was not ineffective for failing to object to evidence that the defendant had been fired, for violating a no-violence policy, from the restaurant which was robbed because the testimony was relevant to the issue of the defendant's motive for the defendant's actions and the evidence only incidentally placed the defendant's character into evidence. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Because evidence of the defendant's prior drug use was introduced to show evidence of motive, it did not violate former O.C.G.A. § 24-2-2 (see now O.C.G.A. § 24-4-404); therefore, counsel was not ineffective for failing to raise a meritless objection. *Simons v. State*, 311 Ga. App. 819, 717 S.E.2d 319 (2011).

Trial counsel did not render ineffective

assistance by failing to object, request a limiting instruction, or move for a mistrial in response to the testimony of the victim's cousin regarding an altercation between the victim and the defendant on the night before the shooting because the testimony was admissible under the necessity exception to hearsay as a prior difficulty, showing the defendant's motive, intent, and bent of mind; trial counsel was not deficient for failing to raise a meritless objection. *Evans v. State*, 288 Ga. 571, 707 S.E.2d 353 (2011).

Defense counsel was not ineffective for failing to object to evidence that the defendant was angry at the victim because the victim failed to pay the defendant for drugs and started buying from another supplier as the evidence was relevant to motive and, thus, admissible. *Griffin v. State*, 292 Ga. 321, 737 S.E.2d 682 (2013).

Failure to object to evidence seized from vehicle. — Trial counsel did not provide ineffective assistance of counsel for not objecting to the introduction of evidence seized from the defendant's vehicle and for not preserving any objections to the jury charge; the trial court properly admitted the evidence seized from the vehicle and the trial court's jury instructions were not confusing. *Scott v. State*, 277 Ga. App. 126, 625 S.E.2d 526 (2006).

Failure to object to warrantless entry. — Trial counsel was not ineffective for failing to challenge an officer's warrantless entry of a residence, as the man who consented to the entry had common authority over the premises. *Mobley v. State*, 277 Ga. App. 267, 626 S.E.2d 248 (2006).

Failure to object to prosecutor refreshing recollection. — Defendant was not denied effective assistance of counsel since when a prosecutor refreshed a victim's recollection with the victim's letter to the district attorney's office, the counsel failed to discuss the letter with the defendant and to seek a continuance, as: (1) the prosecutor's use of the letter to refresh the victim's recollection was proper; (2) counsel was permitted to review the letter beforehand; (3) there was no basis upon which a continuance might have been granted; and (4) the defendant failed to show how a continuance would have aided the defense. *Haggins v. State*, 277 Ga.

App. 742, 627 S.E.2d 448 (2006).

Failure to object to similar transaction evidence. — In a rape prosecution, defense counsel was not ineffective for not objecting to the admission of similar transaction evidence; since this evidence was admissible, any objection by counsel would have been fruitless. *Robertson v. State*, 278 Ga. App. 376, 629 S.E.2d 79 (2006).

Trial counsel was not ineffective for: (a) failing to object to the state's similar transaction evidence; (b) failing to object to alleged hearsay testimony; (c) failing to object to a certain state's exhibit; and (d) failing to request a jury charge on equal access, as: (1) the similar transactions were properly admitted for the limited purpose of showing the defendant's bent of mind; (2) regardless of whether or not trial counsel should have objected to either the alleged hearsay or to the challenged state's exhibit, no prejudice resulted from counsel's failure to do so; and (3) the contested jury charge, as a whole, adequately covered the principles contained in an equal access charge. *Johnson v. State*, 279 Ga. App. 98, 630 S.E.2d 612 (2006).

While it was improper for the prosecutor to cross-examine the defendant about the punishment received for prior convictions admitted as similar transactions evidence, and trial counsel's decision to forego raising an objection was not strategic, the defendant failed to show that the outcome of the trial would have been different had counsel objected; moreover, the improperly elicited testimony was one brief instance that occurred over a two-day jury trial, and the prosecutor did not attempt to capitalize on this specific testimony at any other point during the proceedings. *Collins v. State*, 283 Ga. App. 188, 641 S.E.2d 208 (2007).

Because there was nothing improper in a statement the trial court made to the panel during voir dire, counsel did not perform deficiently by failing to object to the statement, and counsel was not ineffective for failing to object to properly admitted similar transaction evidence. *Edwards v. State*, 282 Ga. 259, 646 S.E.2d 663 (2007).

Because: (1) the defendant failed to

meet the burden of establishing that the state possessed favorable information, or that the trial's outcome might have been different if videotapes from the cameras on the vehicles of the two responding officers had been produced; and (2) counsel was not required to make an objection to the admission of similar transaction evidence since such would have been futile, the defendant was not entitled to a new trial as a result. *Hinton v. State*, 290 Ga. App. 479, 659 S.E.2d 841 (2008).

In a malice murder prosecution, the trial court did not abuse the court's discretion in admitting testimony concerning the violent relationship between the defendant and the victim (the defendant's paramour) as the testimony qualified as prior difficulties or similar transaction evidence. Defense counsel was not ineffective for failing to object to such testimony as the objection would have been overruled. *Smith v. State*, 284 Ga. 304, 667 S.E.2d 65 (2008).

Even if a decision with regard to similar transaction evidence had the effect that the defendant claimed it did, it could not be used to support an ineffective assistance of counsel claim based on failure to object because it was decided after the defendant's trial was completed. Failure to make a meritless objection did not amount to ineffective assistance of counsel. *Walley v. State*, 298 Ga. App. 483, 680 S.E.2d 550 (2009).

Defendant failed to establish prejudice as a result of any failure on the part of trial counsel to object to the state's similar transaction evidence because there was overwhelming evidence against the defendant and, thus, the defendant could not show that the admission of the similar transaction evidence resulted in a guilty verdict. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Failure to object to weapon. — Trial counsel was not ineffective for failing to object to a reassembled rifle being used as an exhibit at a trial on a charge of aggravated assault based on the fact that the rifle did not include the stock of the weapon, because the officer's testimony on direct and cross-examination made clear that the defendant pointed an incomplete weapon at the officer, even though the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****D. Objections to Evidence (Cont'd)**

officer did not know at the time that the rifle's stock had been removed and instead believed that it was operational. *Stancil v. State*, 278 Ga. App. 843, 630 S.E.2d 130 (2006).

Trial counsel was not ineffective in failing to object to testimony that a gun and ammunition, which were not alleged to be the murder weapon, were seized from the defendant's home and to the introduction of those items into evidence because the evidence was relevant and probative of the charge of possession of a firearm by a convicted felon, and an objection to its admissibility would have been fruitless. *Ardis v. State*, 290 Ga. 58, 718 S.E.2d 526 (2011).

Trial counsel was not ineffective for failing to object to hearsay testimony that the person who was arrested with the defendant yelled that there was a gun in the car when the person and the defendant were apprehended because the defendant did not establish prejudice since there was direct evidence from an officer that a gun was found in the car. *Chatman v. State*, 306 Ga. App. 218, 702 S.E.2d 51 (2010).

Failure to object to statements. — Defendant failed to establish a claim of ineffective assistance of counsel because defense counsel's failure to object to the admission of a witness's pretrial statement to police was not ineffective assistance of counsel since admission of the statement was proper; the defendant also failed to show that defense counsel's failure to object to opinion evidence given by police officers was not the result of a reasonable trial strategy on counsel's part, or that the result of the trial would have been different had counsel objected. Finally, the defendant failed to show that defense counsel's cooperating in the introduction of a witness's prior testimony was anything other than a decision made in the reasonable exercise of professional judgment. *Cummings v. State*, 280 Ga. 831, 632 S.E.2d 152 (2006).

Trial counsel was not ineffective in fail-

ing to object to the admissibility of a codefendant's custodial statement, which was redacted to eliminate the defendant's name and was read into evidence at trial, because the defendant did not show a reasonable likelihood that the outcome of the trial would have been different had counsel made a proper objection and succeeded in excluding the statement; the codefendant's statement was cumulative of other properly admitted evidence, and given the overwhelming evidence of the defendant's guilt, including the defendant's admission to a close friend that the defendant shot at the victim, any possible error was harmless beyond a reasonable doubt. *Ardis v. State*, 290 Ga. 58, 718 S.E.2d 526 (2011).

Failure to object to hearsay. — Defendant did not receive ineffective assistance of counsel due to counsel's failure to object to hearsay testimony of a note-passing inmate as the hearsay statements fell within the exception permitting hearsay statements made by co-conspirators during the pendency of the conspiracy; the failure to object did not constitute deficient performance. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Trial counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to object to a witness's hearsay testimony that the codefendant told the witness that the three defendants acted together in carrying out the robbery and murder; this testimony was properly admitted as a statement by a coconspirator under O.C.G.A. § 24-3-5. *Brooks v. State*, 281 Ga. 14, 635 S.E.2d 723 (2006), cert. denied, 549 U.S. 1215, 127 S. Ct. 1266, 167 L. Ed. 2d 91 (2007).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 for failing to object when the state allegedly presented the hearsay statements of a nontestifying codefendant to a second codefendant and to an acquaintance of the defendant's that inculpated the declarant in the offenses; the defendant was unable to prove that the defendant was prejudiced, as the strength of the evidence against the defendant included the defen-

dant's statements to the codefendant and acquaintance and to the police admitting to shooting the victim, and the evidence included the murder weapon that was recovered from the defendant. *Chenoweth v. State*, 281 Ga. 7, 635 S.E.2d 730 (2006).

Failure to object to court procedures. — Denial of a defendant's motion for a new trial was proper as the trial counsel did not provide ineffective assistance of counsel by failing to object and to move for a mistrial on the basis of the trial court's comments during a discussion of whether and why the trial counsel should be allowed to continue a line of questioning of the defendant's housemate regarding the defendant's crying after the defendant's arrest; there was nothing to support the defendant's claim that the trial court improperly commented on the evidence under O.C.G.A. § 17-8-57 when the court discussed whether and why the court should allow the line of questioning to continue. *Temples v. State*, 280 Ga. App. 874, 635 S.E.2d 249 (2006).

Failure to object to admission of defendant's statement. — Appeals court rejected the defendant's ineffective assistance of counsel claim based on counsel's waiver of an objection to the admission of a statement the defendant made to police, as the defendant could not establish the requisite prejudice flowing from the waiver since the statement was properly admitted. *Givens v. State*, 281 Ga. App. 370, 636 S.E.2d 94 (2006).

Failure to object to admission of bond order. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to the trial court's admission of the bond order, allegedly violated by the defendant in the instant case, and the defendant's guilty plea to stalking based on the incident that led to the bond condition that the defendant allegedly violated by illegally stalking the defendant's wife, which resulted in the defendant's convictions in the instant case; any objection would have been meritless since the bond order was direct evidence of the court order that barred the defendant's conduct that led to the criminal charges at issue, and the record revealed that defense counsel had tried to exclude the prior aggravated stalking plea

and the other protective orders prior to the commencement of trial. *Fields v. State*, 281 Ga. App. 733, 637 S.E.2d 136 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Failure to object to child sexual abuse victim's videotape. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to request that the portion of the child sexual abuse victim's videotaped interview with the police, in which the victim mentioned the defendant's marijuana use, be redacted; because the videotape was relevant as evidence of the sexual abuse, as well as the victim's consistent account of that abuse, the entire videotape was admissible even though certain comments may have incidentally placed the defendant's character in issue, and, in light of the evidence in support of the defendant's conviction, the defendant could not show a reasonable probability that absent the alleged error in the admission of the victim's testimony regarding the defendant's past drug use, the results of the trial would have been different. *Anderson v. State*, 282 Ga. App. 58, 637 S.E.2d 790 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Failure to make futile objections. — Trial counsel's choice not to cross-examine a witness based upon a position that the testimony was and would be further damaging to the defendant was found to be an acceptable strategy and did not constitute ineffective assistance of counsel; moreover, a failure to make a futile objection could not serve as a basis for a claim of ineffective assistance. *Meeker v. State*, 282 Ga. App. 77, 637 S.E.2d 806 (2006).

Failure to object to prior difficulties evidence. — In a malice murder prosecution, trial counsel was not required to object when a witness testified about an encounter a few days before the victim was killed in which the defendant held a gun to the head of a friend of the victim, as the testimony amounted to evidence of prior difficulties between the defendant and the victim, and was admissible without notice and a hearing pursuant to Ga. Unif. Super. Ct. R. 31.3; hence,

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****D. Objections to Evidence (Cont'd)**

counsel could not be deemed ineffective for a failure to voice an objection to said that evidence. *Sims v. State*, 281 Ga. 541, 640 S.E.2d 260 (2007).

Failure to object to admission of fingerprints. — Because the defendant was lawfully arrested pursuant to the fifth warrant for the crime of armed robbery, and the warrant was sworn to, signed, and executed, the defendant's arrest was not illegal, and the defendant's fingerprints were not subject to exclusion; thus, trial counsel could not be found ineffective in failing to move for exclusion of the fingerprints. *Skaggs-Ferrell v. State*, 287 Ga. App. 872, 652 S.E.2d 891 (2007).

Failure to object to victim's videotape. — Although the defendant's trial counsel's performance fell below the objective standard of reasonableness under the first prong of the Strickland ineffective assistance of counsel test, the error however was harmless because although the defendant's trial counsel performed deficiently in failing to raise a hearsay objection to admission of the victim's statements contained in the videotaped interview, the defendant did not show that trial counsel's error prejudiced the defense since the statements made by the victim during the videotaped interview were merely cumulative of testimony the victim had offered at trial and for which the victim was cross-examined by trial counsel. *Forde v. State*, 289 Ga. App. 805, 658 S.E.2d 410 (2008).

Failure to object to identification evidence. — Trial counsel provided ineffective assistance by failing to object to witness testimony identifying the defendant as the person depicted in photographs derived from bank security videotapes. Trial counsel testified that the basis of the defense was misidentification, and inasmuch as the excludable testimony went to the heart of the defense, if the identification testimony had been excluded, there was a reasonable probability that the defendant would have been acquitted. *Grimes v. State*, 291 Ga. App. 585,

662 S.E.2d 346 (2008).

Failure to object to introduction of evidence in aggravation of punishment. — Defense counsel was not ineffective for failing to object to the state's introduction of evidence in aggravation of punishment on the ground that the notice was untimely and that the state had failed to list specifically what convictions were to be introduced. By filing notice five days before trial, the state had given timely notice under O.C.G.A. § 17-16-4, and the state, counsel, and the trial court had discussed the prior convictions in detail at two pretrial hearings more than 60 days before trial. *McClam v. State*, 291 Ga. App. 697, 662 S.E.2d 790 (2008), cert. denied, 2008 Ga. LEXIS 798 (Ga. 2008).

Failure to object to investigator's statements. — Trial counsel's failure to object to an investigator's statements was not ineffective assistance of counsel since trial counsel was not questioned about counsel's failure to object to the investigator's allegedly improper testimony, and without trial counsel's testimony regarding this issue, it could not be assumed that counsel's actions did not fall within the wide range of reasonable professional assistance. *Shaffer v. State*, 291 Ga. App. 783, 662 S.E.2d 864 (2008).

Objection to "scraggly" appearance. — Trial counsel was not ineffective for not objecting to testimony that the defendant had a "scraggly" appearance and was not well groomed when the defendant was arrested. Counsel testified that counsel did not consider this evidence of bad character and thought it might rebut the notion that the defendant was the type of person who would deal in 63 pounds of marijuana; moreover, any error in failing to object was harmless because the overwhelming evidence supporting the verdict rendered it highly unlikely that the testimony about the defendant's appearance contributed to the verdict. Finally, counsel's failure to object to evidence that a defendant had been incarcerated in connection with the crime for which the defendant was on trial did not place the defendant's character in issue and did not result in ineffective assistance. *Dade v. State*, 292 Ga. App. 897, 666 S.E.2d 1 (2008).

Failure to object as ineffective assistance. — As the state could not comment on a defendant's failure to come forward, defense counsel was ineffective in not objecting when the state elicited testimony that the defendant knew police were looking for the defendant in connection with the charged crimes, but did not contact the authorities. As the defendant testified about "bad blood" between the defendant and the victim, raising a credibility issue, there was a reasonable probability that counsel's deficient performance affected the outcome, entitling the defendant to a new trial. *Johnson v. State*, 293 Ga. App. 728, 667 S.E.2d 637 (2008).

Failure to object to 9-1-1 call admission. — Any error by counsel in failing to object to the contents of a 9-1-1 call was cumulative of admissible evidence and therefore harmless. *Eller v. State*, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

Objection to hearsay testimony of emergency room physician. — With regard to a defendant's convictions for aggravated sodomy, rape, and other related crimes, trial counsel's decision not to object to hearsay testimony of the emergency room physician who treated the victim did not amount to ineffective assistance of counsel as the physician's testimony was admissible under the hearsay exception set forth in former O.C.G.A. § 24-3-4 (see now O.C.G.A. § 24-8-803) since the challenged statements related to the cause of the victim's injuries and were made for the purpose of the victim's diagnosis and treatment. As a result, the trial court did not err in admitting the statements and, therefore, since the statements were admissible, there was no merit to the defendant's contention that the defendant's trial counsel's failure to object to the hearsay testimony was ineffective assistance. *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009).

Objections to admission of videotape confession. — Defense counsel was deficient for failing to object to the admission, during the state's case-in-chief, of a videotape of the defendant's custodial interview, which was conducted in violation of *Miranda*. As there was reasonable prob-

ability that the outcome of the trial would have been different absent the admission of the defendant's custodial statement, the defendant established ineffective assistance of counsel. *Frazier v. State*, 298 Ga. App. 487, 680 S.E.2d 553 (2009).

Failure to object to public drunkenness. — Counsel's decision not to object to evidence of the defendant's public drunkenness arrest in an armed robbery trial did not constitute ineffective assistance because a gun found on the defendant during that arrest was relevant, the circumstances surrounding the gun's discovery were part of the *res gestae*, and the gun's admission was proper; given trial counsel's testimony that trial counsel chose not to pursue a motion in limine because the gun was coming into evidence and trial counsel would rather the jury know that the defendant came into possession of the handgun while intoxicated, rather than to speculate that the gun was for something more serious, the trial court was authorized to find that counsel's decision not to object to the evidence surrounding the gun's discovery was a matter of reasonable strategy. Even if the failure to request a limiting instruction was deficient performance, the lack of such an instruction was not prejudicial because evidence of public drunkenness was not so prejudicial that it would have swayed the jurors to convict, and, moreover, the evidence of guilt was overwhelming. *Bonker v. State*, 298 Ga. App. 867, 681 S.E.2d 256 (2009).

Objection to testimony concerning incriminating statements. — Trial counsel did not render ineffective assistance by failing to object to testimony concerning incriminating statements the defendant made to a jail cell informant because the testimony was merely cumulative of the admissible testimony of two other fellow inmates; therefore, the defendant failed to show the requisite prejudice to support the defendant's claim of ineffective assistance, and the trial court did not err in the court's determination that had trial counsel objected to the testimony, there was not a reasonable probability that the outcome of the trial would have been different. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****D. Objections to Evidence (Cont'd)**

Failure to object to inadmissible evidence on other bad acts. — Defendant could not establish that defendant's trial counsel was deficient for failing to object to inadmissible evidence concerning other bad acts because trial counsel objected to the admission of the evidence and obtained a ruling from the trial court, and regardless of the format of trial counsel's objections, the allegations were made with sufficient specificity for the trial court to identify their precise basis since they specifically pointed out how the proposed evidence violated some established rule of evidence or procedure; even if counsel's performance was deficient, the defendant did not show there was a reasonable probability that the outcome of the trial would have been different but for counsel's purported omission because there was overwhelming evidence of the defendant's guilt. *Ellis v. State*, 287 Ga. 170, 695 S.E.2d 35 (2010).

Failure to object to cross-examination regarding accomplice's motives. — Trial counsel was not ineffective for failing to object to the introduction of a recording of an accomplice's interrogation because the veracity of the accomplice was placed in issue by cross-examination regarding the accomplice's motives in testifying, and, therefore, the accomplice's prior consistent statements were admissible and were not improperly admitted to bolster the credibility of the accomplice in the eyes of the jury; the accomplice's statement explaining that the accomplice purchased a gun for the defendant because the defendant could not do so since the defendant had a criminal record and that the purpose of the crime was to obtain drugs were admissible to explain the accomplice's conduct. *Ward v. State*, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Objections to admission of videotaped confessions. — Trial counsel was not deficient in declining to challenge the admission of the defendant's videotape police interview on the ground that the

defendant was intoxicated because a detective testified at trial that the defendant appeared intoxicated but not to the point that the defendant was unable to comprehend the questions posed to the defendant and respond accordingly; the videotape clearly showed that the defendant was coherent and responsive during the course of the interview. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Trial counsel was not deficient in failing to challenge the admission of the defendant's videotape police interview on the ground that the defendant had requested an attorney because the videotape itself showed the defendant waiving defendant's Miranda rights and consenting to speak with a detective without an attorney present, and at no point in the videotape did the defendant request an attorney; trial counsel was not required to anticipate that the defendant would take the stand and claim for the first time that the defendant had requested an attorney before speaking to the detective. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Failure to object to admission of juvenile court disposition order. — Trial counsel's failure to object specifically to admission of the sentencing portions of a juvenile court disposition order at trial constituted deficient performance because counsel's general relevancy objection and exception to a previous ruling made by another trial judge were not adequately specific and failed to give the judge presiding over the trial an opportunity to consider the need for redaction; there was a reasonable probability that the outcome of the defendant's rape and aggravated sodomy trial would have been different had the damaging information been excluded from the jury's consideration because the evidence was not overwhelming since the evidence was introduced that the defendant's encounter with the victim could have been consensual. *Higgins v. State*, 304 Ga. App. 771, 698 S.E.2d 335 (2010).

Failure to object to recalled officer. — Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to object when a police officer was recalled to the stand in

order to testify about some of the state's exhibits, by failing to object to the admission of those exhibits, and by failing to cross-examine the officer because trial counsel joined in the objection to the state's recalling of the officer that was made by codefendants' counsel, and the defendant failed to cite any grounds upon which defendant's counsel should have objected to the admission of the state's exhibits; the defendant failed to provide any evidence that cross-examination of the recalled officer would have affected the outcome of the trial. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Failure to object to fingerprint analysis. — Defendant failed to show that defendant's trial counsel's failure to object to the admission of the state's fingerprint analysis was deficient performance because that evidence did not prejudice the defendant's trial strategy, which was to contest the occurrence of any kidnapping offense and concede the lesser crimes; there was no allegation in the record or on appeal that the state acted in bad faith in providing the defendant with the fingerprint analysis when it did, so the trial court was not required to exclude the evidence, and the defendant could not show that the trial court would have sustained an objection to the admission of the fingerprint report. *Thornton v. State*, 305 Ga. App. 692, 700 S.E.2d 669 (2010).

Failure to object to admission of drug evidence. — Defendant's trial counsel was not deficient in failing to object to the admission of a substance contained in the corner tie that defendant sold to the undercover officer as heroin on the ground that the state was unable to show the purity of the heroin it contained because the state was not required to establish the purity of the substance under O.C.G.A. § 16-13-31(b). *Thomas v. State*, 306 Ga. App. 279, 701 S.E.2d 895 (2010).

Counsel's failure to understand contemporaneous objection rule. — Trial counsel was not ineffective for failing to understand the contemporaneous objection rule because the defendant did not show that a reasonable probability existed that trial counsel's failure to object properly resulted in the admission of evidence,

which if excluded, would have resulted in a different outcome; the defendant pointed to no evidence that was erroneously admitted because of trial counsel's deficient performance. *Chatman v. State*, 306 Ga. App. 218, 702 S.E.2d 51 (2010).

Objection to introduction of letter. — Because a letter addressed to the defendant was relevant and admissible in the defendant's trial for theft by taking of a car, an objection to its admission would have been futile, and trial counsel was not ineffective for failing to object; the letter, which was found inside a bag police officers found near a second stolen vehicle, was relevant and admissible to prove identity because the letter tended to prove that the bag found near the second vehicle belonged to the defendant, and that fact tended to prove that the defendant was, in fact, the person who stole the second vehicle. *Ferguson v. State*, 307 Ga. App. 232, 704 S.E.2d 470 (2010).

Objections to chain of custody. — Defendant did not receive ineffective assistance of trial counsel because the defendant did not show a reasonable probability that the outcome of the trial would have been different had trial counsel objected to the chain of custody of the sexual assault kit. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Failure to object to victim's identification. — Trial counsel was not ineffective for failing to object to the victim's in-court identification of the defendant because the victim's in-court identification of the defendant was not tainted since the victim immediately identified the defendant from a photo array three days after the incident; the booking photo was provided to the victim by the victim's civil attorney, and trial counsel's failure to object to the photo's introduction or to request that the in-court identification be struck was not deficient. *Delgiudice v. State*, 308 Ga. App. 397, 707 S.E.2d 603 (2011).

Objections to evidence found in car. — Trial counsel's performance was not deficient due to counsel's failure to object on grounds of relevancy to evidence concerning a partially-empty bottle of vodka found in the defendant's car upon the defendant's arrest because given the over-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****D. Objections to Evidence (Cont'd)**

whelming evidence in the case, it was highly likely that the evidence concerning the vodka bottle did not contribute to the guilty verdict and was therefore harmless; even assuming that the defendant's counsel was deficient in failing to object to the evidence concerning the vodka bottle found in the defendant's car, the defendant did not show a reasonable likelihood that, but for counsel's error, the outcome of the trial would have been different. *Brown v. State*, 309 Ga. App. 511, 710 S.E.2d 674 (2011).

Failure to object to character evidence. — Defendant failed to establish that there was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because, even assuming that trial counsel performed deficiently by failing to object to character evidence, the defendant failed to show a reasonable probability that the outcome of the trial would have been different; the evidence of the crime charged was overwhelming. *Lowe v. State*, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

Because the defendant did not seek a hearing on the motion for a new trial or present evidence in support of the claim that trial counsel was ineffective for failing to redact bad character evidence from a witness's testimony, the defendant failed to show that trial counsel was deficient in the handling of the evidence or that there was a reasonable probability that the outcome of the trial would have been different if the testimony had been excluded. *Newkirk v. State*, 290 Ga. 581, 722 S.E.2d 760 (2012).

Defendant failed to demonstrate that trial counsel rendered ineffective assistance by failing to challenge the admission of bad character evidence against a codefendant because the defendant failed to call trial counsel as a witness during the motion for new trial hearing, and the record supported the trial court's finding that counsel made a conscious, strategic decision not to oppose the admission of

evidence of the codefendant's cocaine conviction. *Smith v. State*, 316 Ga. App. 175, 728 S.E.2d 808 (2012).

Failure to object to admission of bloodstained clothes. — Trial counsel was not ineffective for failing to object to the admission of the defendant's bloodstained clothes without a showing of a chain of custody because the defendant was unable to make the requisite showing of prejudice since the evidence against the defendant was strong, including that the defendant was obsessed with the victim and acted aggressively toward the victim for several months, the victim was stabbed more than 100 times, and the defendant broke into the victim's home on more than one occasion within days of the victims' death and assaulted and attempted to rape the victim at knife-point. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

Trial counsel was not ineffective for failing to object to the admission of the defendant's bloodstained clothes without a showing of a chain of custody because the record showed that every police officer on duty the day of the defendant's arrest had actual knowledge of facts sufficient to support a finding of probable cause for the arrest; thus, the seizure of the defendant's bloody clothes after the arrest was proper. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

Failure to object to authentication of bank video. — Defense counsel was not ineffective for failing to object to the authentication of a bank video that depicted the robbery because the defendant did not show that an objection to the authentication of the surveillance tape would have been sustained or a reasonable possibility that allowing the tape to be viewed by the jury changed the outcome of the trial; defense counsel testified that the person was completely covered, so the video would show what it showed but would not help in any way in pointing towards the defendant. *Williams v. State*, 312 Ga. App. 22, 717 S.E.2d 532 (2011).

Failure to object to speculation. — Defendant was not prejudiced by trial counsel's failure to object to testimony speculating as to the defendant's state of mind because there was no reasonable

likelihood that the testimony contributed to the guilty verdict on the lesser charge of attempted rape; the testimony regarding the victim's belief as to why the defendant was following the van in which the victim was traveling was not relevant to the consideration of the charges against the defendant, rape or attempted rape. *Gomez-Oliva v. State*, 312 Ga. App. 105, 717 S.E.2d 689 (2011).

Objection to prior convictions. — Trial counsel was not ineffective for failing to object when the prosecuting attorney offered certified copies of the defendant's prior felony conviction to impeach the defendant's testimony under former O.C.G.A. § 24-9-84.1(a) (see now O.C.G.A. § 24-6-609) because the trial court properly could have concluded that the probative value of the conviction substantially outweighed any prejudicial effect, so the failure to object was not unreasonable; the prior conviction was recent, probative of the defendant's credibility as a testifying witness, and involved conduct dissimilar to the burglary for which the defendant was on trial. *Robinson v. State*, 312 Ga. App. 110, 717 S.E.2d 694 (2011).

Failure to object to investigator's testimony. — Trial counsel was not ineffective for failing to object to an investigator's testimony that was not opinion testimony, but fact testimony which itself contained an opinion. Further, trial counsel was not ineffective for failing to object when an investigator testified that the defendant killed the victim or when a medical examiner testified that the death was a homicide as the identity of the person who caused the victim's death and the fact that the death was a homicide were not disputed; thus, the failure could not have affected the outcome of the trial. *Butler v. State*, 292 Ga. 400, 738 S.E.2d 74 (2013).

Failure to object to letter going to jury room during deliberations. — Claim that defense counsel was ineffective for failing to prevent a letter written by a jailhouse informant from going into the jury room during deliberations failed because the defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different since the contents of the letter

were not particularly harmful to the defendant. *Young v. State*, 292 Ga. 443, 738 S.E.2d 575 (2013).

Defense counsel was not ineffective for failing to object when a witness read into the record a letter the witness received from the jailhouse informant because it was a reasonable trial strategy to introduce the letter so that defense counsel could refute the informant's claims on more than one occasion. *Young v. State*, 292 Ga. 443, 738 S.E.2d 575 (2013).

Failure to object to admission of computer. — Trial counsel was not ineffective for failing to object or move for a mistrial when a laptop computer found during a search was introduced into evidence because counsel sought to exclude the computer and the images and links through a pre-trial motion to suppress and a motion in limine, both of which the trial court denied, obviating the need for counsel to object again at trial. *Henry v. State*, 316 Ga. App. 132, 729 S.E.2d 429 (2012).

Failure to object to evidence of incarceration. — State of Georgia did not elicit improper character evidence from the defendant, regarding the defendant's prior incarceration, during cross-examination as the defendant mentioned the prior incarceration during the defendant's testimony. Therefore, defense counsel's failure to object to the evidence of the defendant's prior incarceration was not ineffective assistance of counsel. *Baker v. State*, 307 Ga. App. 884, 706 S.E.2d 214 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. 2011).

Chain of custody objections. — Defendant's argument, that defense counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failure to object to the admission of cocaine evidence based on a deficient chain of custody, failed; the state's evidence showed a proper chain of custody as to the cocaine in issue, and the failure to make a meritless objection did not amount to ineffective assistance of counsel. *Copeland v. State*, 281 Ga. App. 11, 635 S.E.2d 283 (2006).

Defendant's argument that defense counsel was ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****D. Objections to Evidence (Cont'd)**

raise a chain-of-custody objection to the drugs seized in the case failed, as counsel was not ineffective for failing to make an objection lacking in merit; because there was no affirmative evidence of tampering or substitution, a missing link in the chain of custody did not alone require exclusion of the evidence, and testimony presented by the state showed that an adequate chain of custody was established authorizing the admission of the state's exhibit. *Franklin v. State*, 281 Ga. App. 409, 636 S.E.2d 114 (2006).

Defendant's trial attorney did not perform deficiently because the attorney did not object to the admission of cocaine evidence on the ground that the state failed to establish an adequate chain of custody; because the evidence showed that the state established an adequate chain of custody, any motion to suppress on the ground that the state failed to do so would have been properly denied; at trial, an officer and a forensic chemist examined the state's exhibit, which was presented as cocaine retrieved from defendant's truck, and testified that it was the same bag that they had sealed and placed either in the evidence vault or the lock-box; in addition, both confirmed that their respective seals remained unbroken. *Buckholts v. State*, 283 Ga. App. 254, 641 S.E.2d 246 (2007).

Defendant failed to show that counsel provided ineffective assistance in violation of U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. 1, Para. XIV, based on counsel's failure to have objected to evidence regarding the chain of custody of drugs that were seized from the crime scene, as the evidence showed that the police placed the drugs in a tamper-proof identifiable container and that the crime lab technician who tested it received it in the same container, and there was no indication that there had been any tampering or substitution. *Reason v. State*, 283 Ga. App. 608, 642 S.E.2d 236 (2007).

Failure to object to chaos in courtroom. — Defense counsel was not ineffec-

tive under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to object to alleged chaos in the courtroom or to several jurors sleeping; evidence was presented, however, that the courtroom was neither chaotic nor were jurors sleeping during trial, and the defendant, therefore, failed to show deficient performance or prejudice. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

E. Jury Instructions**Voluntary manslaughter charge requested by defendant properly given.**

— As a charge on voluntary manslaughter was justified, trial counsel was not ineffective for requesting it; furthermore, trial counsel was not ineffective for not making meritless objections. *Hayles v. State*, 287 Ga. App. 601, 651 S.E.2d 860 (2007).

Failure to request jury instruction on accomplice testimony.

— Trial counsel was not ineffective for failing to request a jury instruction on the requirement for corroboration of accomplice testimony because the evidence did not require such an instruction given that there was other evidence corroborating the incriminating testimony from the accomplice. *Brown v. State*, 321 Ga. App. 198, 739 S.E.2d 118 (2013).

Failure to request jury charge in writing.

— In a defendant's prosecution for, inter alia, armed robbery, trial counsel was not ineffective because although counsel failed to file written jury charge requests on the lesser included crimes of false imprisonment and theft, those requests were made orally and were considered on the merits. *Wesley v. State*, 294 Ga. App. 559, 669 S.E.2d 511 (2008).

Failure to request a charge on criminal negligence.

— Trial counsel was not ineffective for failing to request a jury charge on criminal negligence because the trial court properly charged the jury on first and second degree vehicular homicide, and a charge on criminal negligence would not have helped the jury distinguish the two offenses. *Fouts v. State*, 322 Ga. App. 261, 744 S.E.2d 451 (2013).

Failure to request jury charge on mere presence.

— Trial counsel was not ineffective for withdrawing a request for a jury charge on mere presence after the

defense changed from the defendant did not shoot the victim to the defendant was not present at the scene of the offense. *Graves v. State*, 322 Ga. App. 24, 743 S.E.2d 582 (2013).

Failure to object to proper jury instruction. — In a defendant's prosecution for malice murder, trial counsel was not ineffective for requesting a jury instruction that was allegedly contrary to the defense strategy of convincing the jury that there was insufficient corroboration of the defendant's statement because the jury instruction was virtually identical to the standard instruction and actually supported the defense theory; at any rate, the state requested the exact same jury instruction. *Hill v. State*, 284 Ga. 521, 668 S.E.2d 673 (2008).

Defense counsel was not ineffective for failing to object to an instruction that if the jury found the defendant was not guilty of armed robbery, the jury could not find the defendant guilty of possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106(b). As the commission of the underlying felony was an essential element of § 16-11-106(b), the instruction was a correct statement of the law. *Soloman v. State*, 294 Ga. App. 520, 669 S.E.2d 430 (2008).

Defendant's trial counsel was not ineffective for failing to object to the trial court's instruction regarding the charge of possession of a firearm during the commission of a crime because the defendant did not point to any jury charge that was objectionable or any jury charge that should have been given but was not. *Smith v. State*, 302 Ga. App. 222, 690 S.E.2d 867 (2010).

Defendant was not denied effective assistance of trial counsel due to counsel's failure to object to an allegedly sequential jury instruction and to attempt to exclude an allegedly prejudicial charge on adultery because the trial court's charge was not improperly sequential, and counsel could not be considered professionally deficient for failing to object to the charge; the charge on adultery did not prevent the jurors from considering adultery as provocation for a verdict of voluntary manslaughter because the trial court specifically charged the jury that the jury could

consider voluntary manslaughter if it was shown by the evidence that the killing was done by the defendant without malice and not in the spirit of revenge but under a violent, sudden impulse of passion created in the mind of the defendant by ongoing adultery or recent discovery of past adultery. *Loadholt v. State*, 286 Ga. 402, 687 S.E.2d 824 (2010).

Trial court did not err in finding that trial counsel was not deficient in failing to object to a pre-trial instruction that was given to the jury pool because the pre-trial instruction was proper, and trial counsel found the instruction advantageous; the pre-trial charge, as a whole, did not shift the burden of proof to the defendant, and one of the defendant's trial counsel testified that counsel believed that the defendant actually benefitted from the instruction because the instruction sounded as if the instruction was in defendant's favor and that the giving of the instruction aided the defendant in effectively questioning the jurors regarding their viewpoints on the law during voir dire. *Bridges v. State*, 286 Ga. 535, 690 S.E.2d 136 (2010).

Trial counsel was not deficient for failing to object to the trial court's instruction on the lesser included offense of possession of MDMA (Ecstasy) because the instruction explained the elements of possession of MDMA with intent to distribute and delineated that charge from simple possession of MDMA; the charge substantially covered the principles in the defendant's request to charge and adequately instructed the jury as to the jury's consideration of the charged offense and the lesser offense, and since there was overwhelming evidence of the defendant's guilt, in that the defendant possessed a distribution amount of MDMA, the defendant could not show a reasonable probability that the outcome of the defendant's trial would have been different. *Taylor v. State*, 306 Ga. App. 175, 702 S.E.2d 28 (2010).

Defendant's claim that the defendant's trial counsel rendered ineffective assistance by failing to object to the trial court's Allen charge was unsupported, and the defendant could not show prejudice or harm because there was no error on which

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****E. Jury Instructions (Cont'd)**

to premise the claims of ineffective assistance; the record would not support a finding that the trial court's Allen charge improperly coerced the jury because the jurors deliberated for a considerable time after the instruction was given, and the jurors reaffirmed the verdict when polled. *Sharpe v. State*, 288 Ga. 565, 707 S.E.2d 338 (2011).

Defendant's trial counsel was not ineffective in failing to object to the aggravated assault charge because the defendant could show neither deficient performance nor prejudice in that the charge was based on the applicable aggravated assault code section and the charge as a whole was not erroneous. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Counsel's failure to pursue correct jury instruction. — Defendant did not show that defendant received ineffective assistance of counsel when defendant's trial counsel did not request a broader jury instruction on justification that would have stated that a victim's threats and menaces could justify a defendant's use of deadly force, as the justification charge the trial court gave the jury was adequate; moreover, since defendant's trial counsel did not testify at defendant's motion for a new trial, defendant did not show why defendant's counsel did not request a broader charge, and, thus, defendant did not overcome the presumption that the attorney's conduct was within the wide range of reasonable professional assistance because the attorney might have had several legitimate reasons for not requesting a broader charge, which also meant defendant could not show one required component of ineffectiveness, that the attorney's representation was deficient. *Garrett v. State*, 276 Ga. 556, 580 S.E.2d 236 (2003).

Defendant was not denied effective assistance of counsel when counsel did not request a misidentification charge, despite misidentification being the defendant's sole defense, because the jury

charge as a whole correctly and thoroughly instructed the jury on such issues as the presumption of innocence, reasonable doubt, burden of proof, credibility of witnesses, and impeachment of witnesses, and when there was overwhelming evidence of defendant's guilt. *Brown v. State*, 260 Ga. App. 627, 580 S.E.2d 348 (2003).

Defendant was not denied effective assistance of counsel when the attorney did not request a charge on impeachment of a witness by a prior conviction of a crime of moral turpitude in light of the overwhelming evidence of defendant's guilt, even if the convicted witness's testimony had been discounted. *Holt v. State*, 260 Ga. App. 826, 581 S.E.2d 257 (2003).

Defendant did not show that defendant received ineffective assistance of counsel when defendant's trial counsel did not request a limiting instruction when the state introduced evidence that defendant had previously been convicted for possession of cocaine with intent to distribute; although defendant wanted that instruction to say that such evidence was limited to a firearms charge against defendant, and should not be considered in connection with the other charge against defendant of possession of cocaine with intent to distribute, the trial court was not required to give that instruction because such evidence was admissible to show defendant's identity, and, thus, trial counsel was not ineffective for not requesting that instruction. *Laye v. State*, 261 Ga. App. 327, 582 S.E.2d 505 (2003).

Defense counsel did not provide ineffective assistance of counsel by failing to request a charge of mistake of fact under O.C.G.A. § 16-3-5 as the charge was not supported by the evidence since defendant testified that defendant was totally unaware of any of the codefendants' plans for breaking or entering the house; thus, the defense was a lack of knowledge of the crime, not that defendant knew they had broken into the victim's house, but believed that they were authorized to do so, and the trial court charged the jury on mere presence, mere association, and the requirement that the state prove beyond a reasonable doubt that defendant knew that a crime was being committed. *Botelho v. State*, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

Defendant's ineffective assistance of counsel claim was rejected as the jury instructions properly informed the jury of the state's need to prove defendant guilty beyond a reasonable doubt and the type of evidence that could satisfy that burden; an additional charge on mere suspicion or speculation would not have produced a different outcome at trial. *New v. State*, 270 Ga. App. 341, 606 S.E.2d 865 (2004).

Defendant's ineffective assistance of counsel claim was rejected as the jury instructions properly informed the jury of the state's need to prove defendant guilty beyond a reasonable doubt and the type of evidence that could satisfy that burden; trial counsel's failure to object to the charge did not prejudice defendant. *New v. State*, 270 Ga. App. 341, 606 S.E.2d 865 (2004).

When, in a murder prosecution, the trial court erroneously charged the jury that it could infer defendant's intent to kill the victim from the use of a deadly weapon, but defendant did not object to this charge, defendant did not show that the counsel provided ineffective assistance, even if the failure to object was deficient performance, because the evidence of malice against defendant was overwhelming, so the error, if preserved, would have been found harmless, and defendant could not show prejudice. *Morgan v. State*, 279 Ga. 6, 608 S.E.2d 619 (2005).

Defendant's trial counsel was not ineffective in failing to object to: (1) the trial court's instruction to the jury on aggravated assault for failing to define a deadly weapon; (2) the trial court's instruction to the jury on aggravated assault for failing to highlight the requirement that defendant knew that the victim was a police officer; and (3) the trial court's admission and treatment of defendant's prior convictions at sentencing; since there would have been no merit to any such objections, defendant's counsel could not have been ineffective in failing to make them. *Milton v. State*, 272 Ga. App. 908, 614 S.E.2d 140 (2005).

Trial counsel did not provide ineffective assistance of counsel by failing to object to language in the jury instructions to consider only evidence offered by the state in

determining guilt or innocence as, read in its entirety, the jury charge properly instructed jurors on the state's burden of proof, reasonable doubt, and the definition of evidence; moreover, even if the trial court erred in including the complained-of language in the charge, such error did not require reversal because the charge as a whole was neither confusing nor misleading. *Olarte v. State*, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Trial court did not give an improper "sequential jury instruction" and counsel's failure to object on that ground did not constitute ineffective assistance because the instructions did not require the jury to acquit defendant of armed robbery before deliberating on the lesser offenses; the jurors were specifically told that they could consider the lesser offenses if they were unable to reach a verdict on armed robbery. *Olarte v. State*, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Defense counsel was not ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to request a charge on circumstantial evidence based on O.C.G.A. § 24-4-6, which imposed certain requirements for convictions based on circumstantial evidence; the trial court adequately charged the jury on reasonable doubt, and direct evidence for both offenses was presented. *Guillen v. State*, 275 Ga. App. 316, 620 S.E.2d 518 (2005).

Defendant was not entitled to a new trial due to ineffective assistance of counsel as there was no basis to argue or to seek a jury instruction that defendant justifiably threatened to kill an officer arresting the defendant. *Mayfield v. State*, 276 Ga. App. 544, 623 S.E.2d 725 (2005).

Defendant did not receive ineffective assistance of counsel by the failure to object to a jury instruction on the entire definition of what constituted a violation of O.C.G.A. § 16-13-30; any objection to the jury charge would have been futile. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Defendant did not receive ineffective assistance of counsel based on defense counsel's withdrawal of a request for a justification instruction as defendant's testimony that defendant did not act with the intent to inflict injury on the victim

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****E. Jury Instructions (Cont'd)**

did not support an instruction on justification. *Alston v. State*, 277 Ga. App. 117, 625 S.E.2d 475 (2005).

Defendant did not receive ineffective assistance of counsel based on counsel's failure to request an instruction on reckless conduct as defendant testified at trial and trial counsel testified at the new trial hearing that the defense strategy was to portray the stabbing of the victim as an accident; thus, the incident was either an accident or an aggravated assault and a charge on reckless conduct was unwarranted. *Alston v. State*, 277 Ga. App. 117, 625 S.E.2d 475 (2005).

Defense counsel's untimely submission of written requests to charge on lesser included offenses was not ineffective assistance, as the proposed jury charges submitted were not warranted by the evidence. *Robertson v. State*, 278 Ga. App. 376, 629 S.E.2d 79 (2006).

Since the trial court's charge on justification was proper, counsel's failure to object to the charge did not amount to ineffective assistance. *Jones v. State*, 279 Ga. App. 139, 630 S.E.2d 643 (2006).

Since the appellate counsel argued the defendant's motion for new trial but failed to raise an ineffective assistance of counsel claim, this claim was waived; in any event, since the trial court's charge on accomplice testimony was virtually identical to the charge on accomplice testimony contained in the pattern jury instructions and specifically approved by the Supreme Court of Georgia, trial counsel was not ineffective in not failing to object to the jury charge. *Chapman v. State*, 279 Ga. App. 200, 630 S.E.2d 810 (2006).

Trial counsel was not ineffective in requesting an inapplicable impeachment charge as the improper language was a mere passing reference in a lengthy instruction and the defendant could not show a reasonable probability that trial counsel's performance changed the outcome of the trial. *Miller v. State*, 281 Ga. App. 354, 636 S.E.2d 60 (2006), cert. de-

nied, No. S07C0087, 2007 Ga. LEXIS 106 (Ga. 2007).

Trial counsel did not provide ineffective assistance of counsel in failing to request a jury instruction on specific forcible felonies since even assuming that trial counsel was deficient, the defendant could not show prejudice as the trial court charged the jury on the presumption of innocence, reasonable doubt, the burden of proof, and the defense of justification, including the definition of a forcible felony; the jury was fairly informed as to when a homicide was justified and there was not a reasonable probability that the jury would have reached a different result if an instruction on specific forcible felonies had also been given. *Lott v. State*, 281 Ga. App. 373, 636 S.E.2d 102 (2006).

In a prosecution for trafficking in cocaine, the trial court did not err in refusing to instruct the jury on the affirmative defense of entrapment, as: (1) sufficient evidence was presented that the defendant voluntarily committed the offense upon being given the opportunity to do so; and (2) no evidence was presented to show that the informant employed undue persuasion, incitement or deceit to induce the defendant into selling drugs; thus, the defendant's claim of ineffective assistance of counsel for failing to present evidence to support an entrapment defense was rejected and did not warrant a new trial. *Campbell v. State*, 281 Ga. App. 503, 636 S.E.2d 687 (2006).

In a prosecution for armed robbery, possession of a firearm during the commission of a felony, and obstruction, the defendant was not entitled to a new trial based on allegations that trial counsel was ineffective, as: (1) a jury charge on the testimony of an accomplice was not required; and (2) in light of trial counsel's cross-examination of the accomplice, the court's credibility charge, as well as the overwhelming evidence of the defendant's guilt, a leniency instruction was unnecessary. *Hayes v. State*, 281 Ga. App. 749, 637 S.E.2d 128 (2006).

Although the defendant's counsel failed to secure a transcript of the defendant's child's juvenile court proceeding, wherein the child claimed sole responsibility for having shoplifted various items from a

store, it was not shown that such a transcript or a jury charge on the child's prior consistent statements would have caused the jury to reject the testimony of the store's asset protection agent that the agent observed the defendant tear packaging off items of merchandise in defendant's shoplifting trial; accordingly, there was no ineffective assistance of the defendant's counsel in violation of the Sixth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIV, and the failure of the trial court to have given the jury prior consistent statement jury instructions under O.C.G.A. § 5-5-24(b) was not harmful error. *Tucker v. State*, 282 Ga. App. 807, 640 S.E.2d 310 (2006).

Because the trial court thoroughly instructed the jury that it was the arbiter of each witness's credibility and that it should give consideration to each witness's interest or lack thereof in the outcome of the case, no other instructions were necessary, as this charge adequately covered the possible motive, interest, or bias of a state witness; thus, counsel was under no obligation to request an additional instruction regarding motive, interest, or bias. *Lee v. State*, 281 Ga. 776, 642 S.E.2d 835 (2007).

Because an erroneous jury instruction on an offense of aggravated child molestation violated an inmate's due process rights by allowing the jury to convict in a manner not charged in the indictment, and the inmate's trial counsel was ineffective in failing to object to the instruction, the inmate was properly granted habeas relief. *Hall v. Wheeling*, 282 Ga. 86, 646 S.E.2d 236 (2007).

Defendant's trial counsel was not ineffective in failing to request a charge related to how the jury could consider the testimony of the lead detective who was excepted from the rule of sequestration given the overwhelming evidence of the defendant's guilt because the state sufficiently showed that the state needed the lead detective's presence in the courtroom for an orderly presentation of the case, and the defendant failed to show that any prejudice resulted from the trial court's failure to give the charge. *Morgan v. State*, 287 Ga. App. 569, 651 S.E.2d 833 (2007).

Trial counsel was not ineffective for

failing to request in writing a jury instruction that excluded a statement that witnesses were presumed to speak the truth unless impeached. The court charged the jury that it could consider a number of factors, including a witness's manner of testifying, their means and opportunity for knowing the facts to which they testified, and the probability or improbability of their testimony. *Stanford v. State*, 288 Ga. App. 463, 654 S.E.2d 173 (2007), cert. denied, 2008 Ga. LEXIS 461 (Ga. 2008).

Trial court did not improperly instruct the jury on each of the elements of O.C.G.A. § 40-6-391, including intoxication by toxic vapors, as the charge stated the law accurately, and the complained-of language concerning toxic vapors was mere surplusage. Hence, trial counsel was not ineffective in failing to object to that instruction. *Rylee v. State*, 288 Ga. App. 784, 655 S.E.2d 239 (2007).

As a jury charge was sufficient, defendant could not prove that trial counsel's failure to object to charge as given or to request certain charges fell outside the range of reasonable professional conduct; moreover, given the overwhelming evidence of guilt, defendant could not show prejudice. *Gathuru v. State*, 291 Ga. App. 178, 661 S.E.2d 233 (2008).

Defendant could not demonstrate a reasonable probability that the outcome of defendant's trial would have been different but for counsel's failure to object to language in an improper Allen charge. The language at issue was but one small part of an otherwise fair and balanced charge, and the charge as a whole could not be deemed unduly coercive; the jury was polled, and each juror affirmed the verdict as the one the juror had reached and agreed upon. *Gilbert v. State*, 291 Ga. App. 898, 663 S.E.2d 299 (2008), cert. denied, 2008 Ga. LEXIS 883 (Ga. 2008).

Trial counsel was not ineffective in failing to request charges on voluntary manslaughter, self-defense, and accident as such instructions were contrary to the defense strategy, based on the defendant's testimony, of contending that the defendant did not have a gun in the defendant's hands until the fighting and shooting were finished. *Savior v. State*, 284 Ga. 488, 668 S.E.2d 695 (2008).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****E. Jury Instructions (Cont'd)**

Defendant failed to demonstrate that defendant's trial counsel provided ineffective assistance because the failure to submit written charges was deficient or prejudicial, and although the defendant contended that defendant's trial counsel should have submitted written jury charges, the defendant failed to indicate which charges should have been requested; at the charge conference, trial counsel sought, unsuccessfully, to have the court charge on lesser included offenses and participated in the formulation of the remaining charges, including a detailed discussion on the identification charge. *Smith v. State*, 303 Ga. App. 831, 695 S.E.2d 86 (2010).

Trial counsel was not ineffective for failing to have the case submitted to the jury solely on the charge of voluntary manslaughter because the defendant failed to show deficient performance on trial counsel's part in withdrawing defendant's request to instruct the jury as to voluntary manslaughter since the crux of the defense was justification in defense of self. *Kendrick v. State*, 287 Ga. 676, 699 S.E.2d 302 (2010).

Trial counsel was not ineffective for withdrawing jury instructions on the defenses of accident and self-defense because no evidence was elicited at trial that would support a defense of accident or self-defense. *Jones v. State*, 287 Ga. 770, 700 S.E.2d 350 (2010).

Defendant failed to show prejudice due to trial counsel's failure to request a legally accurate charge on the specific factors the jury could consider in deciding witness credibility because the record showed that the trial court would have omitted a specific list of factors from the court's charge on witness credibility even if a proper request had been made; the jury was not restricted to only considering impeachment and prior difficulties when deciding whether a witness was credible. *Weeks v. State*, 316 Ga. App. 448, 729 S.E.2d 570 (2012).

Trial counsel could not be ineffective for

failing to object to a jury instruction that did not affect the outcome of the trial or for failing to object to testimony, a tactical decision. *Gaither v. State*, 321 Ga. App. 643, 742 S.E.2d 158 (2013).

Failure to request jury charge on proximate causation. — Trial counsel was not ineffective for failing to request a jury charge on proximate causation as the jury charge was sufficient to inform the jury that, in order to convict the defendant of felony murder, the jury had to determine that the defendant caused or was a party with the codefendant in causing the victim's death during the escape phase of the underlying felonies. *Pennie v. State*, 292 Ga. 249, 736 S.E.2d 433 (2013).

Counsel's failure to request instruction on identification. — During defendant's trial for aggravated stalking and criminal trespass, trial counsel was not ineffective for failing to request pattern jury charges on identification. The jury saw the surveillance videos for themselves, and was able independently to judge the validity of the victim's identification; the defendant failed to show that the outcome would have been different if counsel had requested pattern jury charges on identification. *Reed v. State*, 309 Ga. App. 183, 709 S.E.2d 847 (2011).

Counsel's failure to request charge on individual determination of guilt. — Defense counsel did not provide ineffective assistance of counsel in failing to request a charge on individual determination of guilt as the trial court charged the jury that, although four individuals were indicted together, the jury was only to consider the case against the defendant. *Botelho v. State*, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

Failure to request instruction on abandonment. — Trial counsel was not ineffective for failing to request a jury instruction on abandonment because the defendant made no admission to engaging in the underlying crime. *Simmons v. State*, 289 Ga. 773, 716 S.E.2d 165 (2011).

Instructions on right to remain silent or testify. — Trial counsel was not deficient for failing to object to the trial court's instruction to the defendant concerning the right to testify; in any event, the defendant could not show prejudice

because the defendant did not testify at a hearing on the motion for a new trial. *Moss v. State*, 278 Ga. App. 362, 629 S.E.2d 5 (2006).

Failure to request justification charge. — Defense counsel was not ineffective for failing to request for a jury charge on justification in accordance with O.C.G.A. § 16-3-20(6), as the defendant could not show that the defendant was justified in firing shots at the victim since the victim had only fired the victim's gun one time in the air and then was in a car and leaving at the time that the defendant and the codefendant fatally shot back. *Stinchcomb v. State*, 280 Ga. 170, 626 S.E.2d 88 (2006).

Trial court did not err in denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because there was no evidence to support an instruction on defense of habitation pursuant to O.C.G.A. § 16-3-23 and, thus, trial counsel did not perform deficiently in failing to request such an instruction; there was no evidence that the victim was attempting to unlawfully enter or attack the defendant's vehicle at the time the defendant stabbed the victim, and under the facts, there could be no reasonable belief that stabbing the victim was necessary to prevent or terminate the other's unlawful entry into or attack upon a motor vehicle. *Philpot v. State*, 311 Ga. App. 486, 716 S.E.2d 551 (2011).

Failure to request defense of habitation charge. — If the jury had been properly charged on defense of habitation (as opposed to only a self-defense instruction), it was reasonably probable that they would have accepted the substantial evidence that the victim unlawfully entered defendant's car in a violent and tumultuous manner for the purpose of offering personal violence to the occupants, and that defendant was justified under the circumstances in using deadly force to repel the attack; thus, defendant established that but for counsel's error there was a reasonable probability the result of the proceeding would have been different and that counsel was ineffective. *Benham v. State*, 277 Ga. 516, 591 S.E.2d 824 (2004).

Trial counsel was not ineffective for

failing to request a charge on the defense of habitation, O.C.G.A. § 16-3-23, because there was no evidence that the victim attempted to enter an apartment to harm anyone inside the building, and the evidence demonstrated that the victim went inside the apartment to escape from the defendant when the victim saw that the defendant had a gun; the evidence did not reflect that the victim's intent was other than to change the locks of the apartment. *Mubarak v. State*, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

Failure to request charge on mutual combat. — Trial counsel did not perform deficiently by failing to request a charge on mutual combat because there was no evidence of a mutual intention to fight; at trial, the defendant presented the defense of accident and asserted that the defendant lacked any intention to shoot the victim, but there was no evidence that reflected that the defendant and the victim mutually agreed to fight each other. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

Failure to request self defense instruction. — Counsel was not ineffective for failing to pursue a request for a voluntary manslaughter instruction in a felony murder prosecution as the defendant's unequivocal testimony was that the defendant acted in self-defense out of fear of the victim, and without evidence that the defendant was provoked provided no basis for the instruction. *Browning v. State*, 283 Ga. 528, 661 S.E.2d 552 (2008).

Failure to object to charge defining sodomy. — Defense counsel was not ineffective in not objecting to a charge defining "sodomy" as "performing or submitting to a sexual act involving the sex organs of one and the mouth or anus of another" on the ground that the jury could have convicted the defendant of aggravated child molestation in a manner not alleged in the indictment; the only evidence of sodomy involving the child in question corresponded to the facts alleged, and thus an objection would have been meritless. *Cherry v. State*, 283 Ga. App. 700, 642 S.E.2d 369 (2007).

Failure to object to jury charge on kidnapping. — With regard to a defendant's convictions for aggravated sodomy,

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****E. Jury Instructions (Cont'd)**

rape, and other related crimes, trial counsel's decision not to object to the jury charge on kidnapping with bodily injury did not amount to ineffective assistance of counsel as the trial court employed the language of the relevant statute, O.C.G.A. § 16-5-40, and instructed the jury that the offense of kidnapping with bodily injury occurs when a person abducts "or" steals away any person. The fact that the indictment charged the defendant with abducting "and" stealing away the victim did not require trial counsel to object to the jury charge as the statute provided only one way in which kidnapping can be committed, namely by abducting or stealing away the victim, and the jury charge using the statutory language was appropriate, even though the indictment used the conjunctive. *Greene v. State*, 295 Ga. App. 803, 673 S.E.2d 292 (2009), cert. denied, No. S09C0862, 2009 Ga. LEXIS 259 (Ga. 2009).

Failure to object to jury charge on armed robbery. — Trial counsel was not ineffective for failing to object to a discrepancy between the armed robberies as alleged in the indictment and the manner in which the jury was charged on the armed robbery offenses because the evidence uniformly showed that the article used in the robbery was a handgun; there was not a reasonable likelihood that the jury convicted the defendant of robbing the victims with a replica, which was mentioned in the trial court's charge to the jury, because each victim referred to the weapon only as a handgun and explicitly referred to the victims' fear of being shot. *Green v. State*, 310 Ga. App. 874, 714 S.E.2d 646 (2011), cert. denied, 2012 Ga. LEXIS 232 (Ga. 2012).

Failure to object to charge on transferred intent. — Trial counsel performed deficiently by failing to object to the giving of a charge on transferred intent and the prosecutor's closing argument addressing the inapplicable principles of transferred intent because the charge was not adjusted to the evidence since there was no

evidence that the defendant was intending to shoot any other person when the defendant shot the victim so as to bring the case within the typical "innocent bystander" scenario in which the doctrine of transferred intent was applied; however, in light of the overwhelming evidence of the defendant's guilt, it was highly probable that the charge did not contribute to the verdict, and the defendant failed to show the requisite prejudice, in that there was no reasonable probability that the outcome of the trial would have been different had trial counsel objected to the prosecutor's argument and the trial court's charge. *Boatright v. State*, 289 Ga. 597, 713 S.E.2d 829 (2011).

Failure to request instruction on hearsay testimony. — Trial counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to or request a curative instruction regarding the investigating officer's hearsay testimony in which the officer discussed the property manager's note that placed the defendant at the scene of the crime; this hearsay testimony was cumulative, so the defendant was unable to show that there was a reasonable probability that, but for the admission of the officer's testimony, the defendant would not have been found guilty of the charged offenses. *Mikell v. State*, 281 Ga. App. 739, 637 S.E.2d 142 (2006).

Failure to request charge on "maliciously." — Trial counsel's failure to request a charge on the definition of "maliciously" did not constitute ineffective assistance of counsel in a trial on charges arising from injuries to the defendant's infant son, as the word had such obvious significance that it required no definition, and further, decisions on requests to charge involved trial tactics by counsel, which did not amount to ineffectiveness. *Lindo v. State*, 278 Ga. App. 228, 628 S.E.2d 665 (2006).

Failure to request instruction on specific intent. — In a prosecution under O.C.G.A. § 16-6-4, counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to request a jury instruction on specific intent or in objecting to the trial court's failure to give such an instruction; the jury was adequately

instructed on the specific intent of the crime of child molestation, as the trial court informed the jury that child molestation was a crime of specific intent by reading the indictment to the jury and by instructing the jury on the statutory definition of child molestation, the trial court charged the jury that intent was an essential element of the crime that the state had to prove beyond a reasonable doubt, and the trial court stated that the jury would have to acquit if it found that the subject incident occurred as a result of accident. *Malone v. State*, 277 Ga. App. 694, 627 S.E.2d 378 (2006).

Failure to object to jury instruction on intelligence. — Because no reversible error occurred with respect to the instruction that the jury could consider the intelligence of the witnesses to decide the witnesses credibility, the codefendant could not succeed on the alternative claim that trial counsel rendered ineffective assistance in failing to object to that instruction. *Howard v. State*, 288 Ga. 741, 707 S.E.2d 80 (2011).

Failure to object to jury charge on impeachment. — Trial counsel was not effective for failing to object to an instruction regarding impeachment of a witness by proof of prior contradictory statements because the charge did not constitute an expression of opinion as to the guilt of the accused in violation of O.C.G.A. § 17-8-57; the charge stated the law accurately and was mere surplusage that did not mislead the jury. *Bellamy v. State*, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

Failure to object to jury charge on burglary. — Trial counsel was not ineffective for failing to object to the trial court's recharge as, contrary to the defendant's contention, the recharge did not overemphasize the state's case and cause undue prejudice to the defendant. The charge and recharge were not misleading; the charges did not imply that a burglary could not be committed in any way other than that charged and were not presented in a way which could possibly mislead the jury. *Russell v. State*, 322 Ga. App. 553, 745 S.E.2d 774 (2013).

Failure to request charge on lesser included offense. — Since no instruction on lesser included offenses was required,

trial counsel was not ineffective for failing to request such an instruction; also, in light of the attack on a detective's techniques in interviewing an alleged child victim of molestation made by trial counsel in cross-examination and closing argument, the defendant failed to show that there would have been a different outcome if counsel requested funds and called an expert witness similarly to attack those techniques, and failed to establish a claim of ineffective assistance in this regard; finally, trial counsel's decision to not call two witnesses was based on sound strategy and the defendant failed to show prejudice from the failure. *Tyler v. State*, 279 Ga. App. 809, 632 S.E.2d 716 (2006), cert. denied, 2006 Ga. LEXIS 810 (Ga. 2006); overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Defendant's motion for a new trial was properly denied as the trial counsel did not provide ineffective assistance in failing to request jury instructions on lesser included offenses; given that the defendant failed to specify what charges should have been requested, the defendant failed to meet the defendant's burden of showing prejudice. *Lawson v. State*, 280 Ga. App. 870, 635 S.E.2d 259 (2006).

In a murder prosecution, the appeals court rejected the defendant's claims that trial counsel was ineffective in failing to pursue a battered woman syndrome defense and by failing to request a jury instruction on the lesser offense of voluntary manslaughter, as: (1) the evidence showed that the defendant, after consultation with counsel, instead chose to focus exclusively on the defense of justification; (2) the evidence did not support a voluntary manslaughter charge; and (3) the defendant did not want the trial court to charge on that offense. Moreover, because appellate counsel did not ask trial counsel about the decision not to seek the manslaughter instruction, that decision was presumed to be a strategic. *Ballard v. State*, 281 Ga. 232, 637 S.E.2d 401 (2006).

Because a trial counsel's decision not to request a jury charge on a lesser-included offense in order to pursue an all-or-nothing defense was a matter of trial strategy, and there was no indication that the defendant would have agreed to

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****E. Jury Instructions (Cont'd)**

charges on lesser-included offenses, given that the defendant relied on a claim of innocence, counsel was not ineffective in failing to request an instruction on a lesser-included offense. *Davis v. State*, 287 Ga. App. 786, 653 S.E.2d 104 (2007).

Because trial counsel made a strategic decision not to present a written request for a lesser-included misdemeanor obstruction charge given that the defendant decided to pursue an “all or nothing” defense, and as a result, the trial court did not err in not charging the jury on misdemeanor obstruction, *sua sponte*, which would have undermined that defense, trial counsel was not ineffective in failing to request the instruction; hence, the defendant was not entitled to a new trial on those grounds. *Owens v. State*, 288 Ga. App. 771, 655 S.E.2d 244 (2007), cert. denied, 2008 Ga. LEXIS 274 (Ga. 2008).

Defendant’s trial counsel was not ineffective in failing to request jury instruction on reckless conduct as lesser-included offense of aggravated assault as there was no evidence that would support a finding that defendant’s driving a vehicle directly at a deputy and not stopping at a police roadblock was criminally negligent rather than intentional; further, trial counsel testified that the decision to not request a jury charge on the lesser included offense was a matter of trial strategy to pursue an all or nothing defense for the aggravated assault charge. *Taul v. State*, 290 Ga. App. 288, 659 S.E.2d 646 (2008).

Defendant failed to establish that defendant received ineffective assistance of counsel because trial counsel erroneously acceded to a simple assault charge and failed to request a jury charge on battery because the jury’s finding of guilt on aggravated assault necessarily required a finding that defendant used defendant’s hands in a way that did or was likely to result in serious bodily injury, which required the jury to reject the opportunity to find mere violent injury, which would have been the basis for a simple assault. Accordingly, the trial court was authorized to

find that defendant failed to meet the burden to show that defendant’s defense was so prejudiced that there was a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Armstrong v. State*, 292 Ga. App. 145, 664 S.E.2d 242 (2008).

Trial counsel was not ineffective for failing to request a jury charge on the lesser included offense of reckless conduct. Counsel explained that the defendant was adamant that the defendant was not guilty of any crime and “we didn’t want to be in a situation where a jury could just — could fall back on a lesser charge that may not have been justified.” *Atwell v. State*, 293 Ga. App. 586, 667 S.E.2d 442 (2008).

Evidence was insufficient to establish a reasonable probability that the jury would have found defendant guilty of voluntary manslaughter and thus trial counsel was not ineffective in requesting this instruction since the evidence demonstrated that the victim and defendant were in rival gangs; that the victim and others drove into an apartment complex to pick up a friend; that an occupant in the victim’s vehicle poked a gun out of a window; and that defendant and the defendant’s codefendant shot at the vehicle, killing the victim and wounding others. *Hung v. State*, 284 Ga. 796, 671 S.E.2d 811 (2009).

In a malice murder prosecution, defense counsel was not ineffective in failing to request an instruction on voluntary manslaughter, as the defendant was fully advised on this issue and decided to pursue an “all or nothing” strategy and rely solely on self-defense. *Brown v. State*, 285 Ga. 324, 676 S.E.2d 221 (2009).

Although the defendant claimed that trial counsel was ineffective in failing to request a jury charge on robbery as a lesser included crime in armed robbery, the defendant failed to raise that argument in the motion for new trial; thus, the defendant waived the right to argue this issue on appeal. *Ransom v. State*, 298 Ga. App. 360, 680 S.E.2d 200 (2009).

Because the defendant could show neither deficient performance nor prejudice due to counsel’s failure to request jury charges on lesser included offenses, defen-

dant's claim of ineffective assistance of counsel claim was correctly rejected by the trial court when trial counsel ensured that the jury was allowed to consider involuntary manslaughter as a lesser included offense of the felony murder counts, and the verdict form included options for finding the defendant guilty of murder or the lesser included offense of involuntary manslaughter or not guilty; since the jury found the defendant guilty of the felony murder counts, rejecting the lesser included offense of involuntary manslaughter based on reckless conduct or simple battery, there was no reasonable probability that the outcome of the trial would have been different if counsel had also requested charges on reckless conduct and simple battery. *Sigman v. State*, 287 Ga. 220, 695 S.E.2d 232 (2010).

During the defendant's trial for child molestation, defense counsel was not ineffective for failing to request charges on sexual battery and the defense of accident or on mistake of fact because under the evidence, charges on those subjects were not authorized; counsel testified that counsel did not seek a charge on sexual battery because the defendant denied touching the victim, and as all of the charges the defendant contended should have been requested would require that the defendant admit that the defendant touched the victim as alleged, the charges would have been inconsistent with the defense's theory that there was no touching at all and were inconsistent with the defendant's adamant denial that the defendant touched the victim as the victim contended. *Kay v. State*, 306 Ga. App. 666, 703 S.E.2d 108 (2010).

Defendant failed to show that defendant's trial counsel rendered ineffective assistance by failing to request jury charges as to the lesser included offenses of robbery by intimidation and theft by taking although trial counsel could not recall counsel's specific reasons for not requesting a charge on the lesser-included offenses of armed robbery, the defendant nevertheless failed to show that trial counsel's decision was not a reasonable trial strategy or that such a request would have affected the outcome of the trial. *Cruz v. State*, 305 Ga. App. 805, 700 S.E.2d 631 (2010).

Trial counsel's performance was not deficient due to counsel's failure to request a jury charge on simple assault as a lesser included offense of the charged crime of aggravated assault because there was no evidence showing that the defendant committed merely simple assault; the evidence showed that the defendant's assault upon the victim was with a screwdriver within the purview of the aggravated assault statute, O.C.G.A. § 16-5-21(a)(2). *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Defendant failed to demonstrate that the defendant's trial counsel erred by failing to request a jury charge on simple battery as a lesser included offense of the charged crime of aggravated assault because there was no evidence that the defendant made physical contact with the victim or caused physical harm to the victim; since the state's evidence establishes all of the elements of an offense, and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. *Davis v. State*, 308 Ga. App. 7, 706 S.E.2d 710 (2011).

Defendant's trial counsel was not ineffective in failing to request a jury charge on assault as a lesser included offense of aggravated assault because the evidence did not reasonably raise the issue that the defendant was guilty only of the lesser crime. *Gross v. State*, 312 Ga. App. 362, 718 S.E.2d 581 (2011).

Trial counsel was not ineffective in failing to request jury instructions on a lesser included offense because the evidence did not reasonably raise the issue that the defendant could be guilty only of the lesser crimes; trial counsel testified that based on the evidence, the defendant did not believe there was a valid basis for requesting any lesser included offenses. *Ellis v. State*, 316 Ga. App. 352, 729 S.E.2d 492 (2012).

Since the jury found the defendant guilty of armed robbery and rejected the lesser offense of robbery by intimidation, counsel was not ineffective for failing to request a jury charge on theft by taking as a lesser included offense as there was no reasonable probability that the outcome would have been different. *Bradley v.*

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****E. Jury Instructions (Cont'd)**

State, 322 Ga. App. 541, 745 S.E.2d 763 (2013).

Failure to request instruction on abandonment and accessory after the fact. — In an armed robbery prosecution, defense counsel was not deficient in not requesting jury charges on the law of abandonment and accessory after-the-fact as there was no evidence that the defendant abandoned the crime before an overt act occurred, or that the defendant was an accessory after the fact rather than a party to the robbery. *Bihlear v. State*, 295 Ga. App. 486, 672 S.E.2d 459 (2009).

Failure to request instruction on accessory after the fact. — Trial counsel was not ineffective for failing to request a jury instruction on accessory after the fact because regardless of whether any evidence would have authorized the jury to conclude that the defendant's connection with the crime of murder charged in the bill of indictment was that of an accessory after the fact, the trial court would not have been authorized to give any charge on accessory after the fact when the defendant was not indicted for both murder and hindering the apprehension of a criminal or any other offense in the nature of an obstruction of justice. *Vergara v. State*, 287 Ga. 194, 695 S.E.2d 215 (2010).

Failure to request limiting instruction. — Defendant's statement that the defendant had just been released from jail was an integral part of the *res gestae* and was admissible even though it placed the defendant's character in issue, so defense counsel was not ineffective for failing to object to this admissible evidence; further, the trial court gave instructions concerning the limited use of the defendant's prior felony conviction, and, thus, trial counsel's failure to request a limiting instruction had no effect on the outcome of the trial. *Lee v. State*, 280 Ga. 521, 630 S.E.2d 380 (2006).

Trial counsel's action in failing to request limiting instructions as to "bad character" evidence could have been stra-

tegic, so as not to highlight the evidence, and was thus presumed strategic, rather than deficient, in the absence of testimony to the contrary; since defense counsel did not testify at the motion for new trial, the defendant failed to show that any purported deficiencies in the defendant's representation amounted to ineffective assistance. *Tarver v. State*, 280 Ga. App. 89, 633 S.E.2d 415 (2006).

Prior inconsistent statement of a witness who took the stand and who was subject to cross-examination was admissible as substantive evidence. Thus, because the defendant, who testified at trial, was not entitled to a limiting instruction as to the use of the defendant's prior inconsistent statements, counsel was not ineffective for failing to request the instruction; likewise, the defendant's claim that counsel was ineffective for failing to object to the state's closing argument telling the jurors that they could consider this testimony as substantive evidence also failed. *Gregory v. State*, 297 Ga. App. 245, 676 S.E.2d 856 (2009).

Trial counsel was not ineffective by failing to request a limiting instruction regarding the jury's consideration of evidence of the defendant's prior felony convictions because assuming deficient performance in the failure to request a limiting instruction, the defendant did not establish prejudice therefrom; the defendant failed to show that the outcome of defendant's trial would have been different had the jury been told the jury was to consider the prior convictions only for the purposes of establishing the predicate offenses of the counts in which the convictions were described. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Defendant was not deprived of the defendant's right to effective assistance of counsel because the defendant's trial counsel's failure to request the limiting charge suggested by the defendant was a reasonable trial tactic and did not amount to deficient performance, and the defendant did not show that the defendant was prejudiced by trial counsel's failure to request the charge in light of the overwhelming evidence adduced against the defendant; counsel made a strategic decision not to request a charge on conspiracy

on the ground that the charge could operate to the defendant's detriment. *White v. State*, 308 Ga. App. 38, 706 S.E.2d 570 (2011).

Failure to request circumstantial evidence instruction. — Because the evidence rested largely on the direct evidence provided by the eyewitnesses to the event, and there was no reasonable likelihood that had the circumstantial evidence charge been given to the jury the outcome of the trial would have differed, the defendant's trial counsel could not be found ineffective in failing to request the instruction. *Holden v. State*, 287 Ga. App. 472, 651 S.E.2d 552 (2007), cert. denied, No. S08C0189, 2008 Ga. LEXIS 153 (Ga. 2008).

Failure to request curative instruction. — Trial court did not err in denying defendant a new trial on grounds that the defendant's trial counsel was ineffective, as: (1) no harm resulted from trial counsel's failure to move for a curative instruction regarding a prospective juror's comment, as that juror was excused for cause; (2) counsel could have decided that additional character witnesses were unnecessary and would detract from character evidence already presented via testimony from defendant's pastor; and (3) claims regarding the failure to provide a curative instruction as to a prospective juror's opinion regarding the truthfulness of an investigator, and in allowing the jury to consider the charge of statutory rape, were waived, and even if they would have been raised before the trial court, they lacked merit. *McCoy v. State*, 278 Ga. App. 492, 629 S.E.2d 493 (2006).

Trial court did not err by denying a defendant's motion for a new trial based on the defendant's contention that the defendant received ineffective assistance of counsel regarding convictions for aggravated sexual battery and child molestation involving the defendant's eight-year-old child, since despite trial counsel acknowledging that trial counsel failed to move for a mistrial or request a curative instruction after the state questioned the defendant about a prior act of sodomy on a 14-year-old, trial counsel's objection to the testimony was sustained. Thus, the jury heard no evidence concern-

ing the circumstances giving rise to the sodomy charge and, further, heard no evidence refuting or contradicting the defendant's testimony that the defendant was acquitted of that charge. *Dyer v. State*, 295 Ga. App. 495, 672 S.E.2d 462 (2009).

Defendant failed to show any prejudice from trial counsel's failure to request a curative instruction directing the jurors to consider only the predicate offenses currently before the jury because the trial court repeatedly and thoroughly instructed the jury not to consider the allegations of the indictment as evidence. *Hicks v. State*, 315 Ga. App. 779, 728 S.E.2d 294 (2012).

Failure to object to or request more expansive instruction. — Because the charge that was given was adjusted to the evidence and was not erroneously incomplete, defense counsel was not ineffective in failing either to object or to request a more expansive instruction. *Roper v. State*, 281 Ga. 878, 644 S.E.2d 120 (2007).

Failure to object to instruction did not preclude appellate review when plain error exists. — Trial court erred in instructing the jury that the jury could convict the defendant of committing terroristic threats, O.C.G.A. § 16-11-37(a), in a manner not alleged in the indictment because the indictment alleged that the defendant threatened to commit murder with the purpose of terrorizing the victim, but the trial court twice instructed the jury that terroristic threats involved any violence or any crime of violence; under the circumstances, without a remedial instruction, it was probable that the jury found the defendant guilty of committing the act of terroristic threats in a manner not charged in the indictment, and defendant's right to due process was violated due to a fatal variance between the proof and the indictment. The jury charge constituted plain error which affected substantial rights of the defendant, and thus the failure to object to the jury instruction did not preclude appellate review of the charge. *Milner v. State*, 297 Ga. App. 859, 678 S.E.2d 563 (2009).

Failure to request charge on limitations on consideration of prior offenses. — Because trial counsel's failure to request an adequate charge on the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****E. Jury Instructions (Cont'd)**

limits to consideration of the defendant's prior conviction for felony firearms possession did not raise a reasonable probability that but for counsel's deficient performance, the outcome of the trial would have been different, the defendant's ineffective assistance of counsel claim failed. *Holsey v. State*, 281 Ga. 177, 637 S.E.2d 32 (2006).

Failure to request bare suspicion instruction. — Defendant's contention on appeal that defense counsel was ineffective for failing to timely request a charge on bare suspicion or to object to the trial court's refusal to give the charge once requested failed because defendant was not entitled to such a charge. Additionally, the charges that the trial court gave on presumption of innocence and reasonable doubt embodied all the elements of a bare suspicion charge, rendering such a charge unnecessary. *Range v. State*, 289 Ga. App. 727, 658 S.E.2d 245 (2008).

Slip of the tongue in jury instruction. — Defense counsel did not provide ineffective assistance of counsel in failing to preserve an objection to a slip of the tongue in the jury charge that did not mislead the jury. *Brantley v. State*, 271 Ga. App. 733, 611 S.E.2d 71 (2005).

Counsel did not render ineffective assistance by failing to object or request a mistrial after the trial court stated that the indictment was an implication of guilt, as any potential error was cured by multiple instructions of the trial court, and the defendant could not show that there was harm from that minor slip of the tongue. *Stinchcomb v. State*, 280 Ga. 170, 626 S.E.2d 88 (2006).

Although the trial court merely made a slip of the tongue when it did not properly state the state's burden of proof on one affirmative defense, the court correctly stated the burden of proof in a second affirmative defense, defendant's attorney also informed the jury about the burden of proof, and written instructions were given to the jury; accordingly, defendant's ineffective assistance of appellate counsel

claim was properly denied. *Arthur v. Walker*, 285 Ga. 578, 679 S.E.2d 13 (2009).

Although the defendant claimed that the defense attorney failed to object to a portion of the charge to the jury regarding the defense of justification, the existence of a mere verbal inaccuracy in the jury instruction, resulting from a palpable slip of the tongue and which could not have misled or confused the jury, did not provide a basis for reversal of the conviction. Therefore, the defendant did not prevail on the defendant's ineffective assistance of counsel claim because the defendant could not show that a reasonable probability existed that, but for counsel's errors the outcome at trial would have been more favorable. *Render v. State*, 288 Ga. 420, 704 S.E.2d 767 (2011).

Failure to request instruction on witness testifying under immunity. — In a defendant's criminal prosecution for, inter alia, felony murder, defense counsel was not ineffective for failing to request a jury charge on a witness testifying pursuant to a grant of immunity because the witness at issue was never charged, arrested, or prosecuted as to the events forming the basis of the instant case. *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

Failure to request instruction on alibi. — Ineffective assistance of counsel claim failed because the absence of an alibi charge did not change the fact that no juror who believed the defendant's testimony could have found that the state had carried the state's burden of proof and, thus, the defendant failed to show a reasonable probability that the outcome of the trial would have been different had counsel requested and received an alibi instruction. *Riley v. State*, 319 Ga. App. 823, 738 S.E.2d 659 (2013).

Failure to request charge on entrapment. — Trial counsel's failure to request a jury charge on entrapment was not deficient performance of counsel because the defendant was not entitled to a jury charge on entrapment; the defendant did not admit to the commission of the crime, and the state's case did not show any evidence of entrapment. *Bolton v. State*, 310 Ga. App. 801, 714 S.E.2d 377 (2011).

Failure to request charge on fingerprint evidence. — Trial counsel was not ineffective in failing to request a jury charge on fingerprint evidence as the defendant failed to show that trial counsel's decision was patently unreasonable when trial counsel testified that counsel deliberately chose not to request the charge because the evidence was consistent with the defense that the defendant's fingerprints were on a television two burglars were selling because the defendant was inspecting the television to buy the television. *Chandler v. State*, 320 Ga. App. 516, 740 S.E.2d 256 (2013).

F. Strategic Decisions

Strategy on defendant testifying. — Defendant failed to show that defense counsel's performance was deficient regarding advising defendant as to defendants' right to testify because counsel's advise to defendant not to testify constituted trial strategy. *Smith v. State*, 306 Ga. App. 693, 703 S.E.2d 329 (2010).

Strategy to argue that drug did not belong to defendant. — Trial counsel was not ineffective for failing to move to suppress evidence of the cocaine the arresting officer found on the floor. Counsel's strategy was to argue that the drug did not belong to the defendant, and the defendant would have had to admit ownership before the defendant could claim that the officer obtained the drug by exceeding the permissible scope of a patdown search. *Hardy v. State*, 301 Ga. App. 115, 686 S.E.2d 789 (2009).

Analyzing fingerprint evidence not material to strategy. — Defendant failed to show that defendant's trial counsel's failure to obtain a continuance to challenge fingerprint evidence was the result of deficient performance because the defendant could not show prejudice resulting from the lack of opportunity for expert review of the fingerprint report when no expert testified at the motion for new trial hearing, and without that testimony, the court of appeals could not evaluate whether there was a reasonable probability that the outcome of the proceeding could have been different; the trial court noted in the new trial hearing that counsel's strategy was to contest the

occurrence of any kidnapping offense and concede the lesser crimes, and further analyzing the fingerprint evidence was not material to the trial strategy. *Thornton v. State*, 305 Ga. App. 692, 700 S.E.2d 669 (2010).

Failure to call expert as trial strategy. — Trial counsel's decision not to call an expert was reasonable trial strategy and did not support a claim of ineffective assistance of counsel because trial counsel testified that counsel consulted with an expert, and after weighing the pros and cons of calling an expert witness at trial, counsel decided, as a matter of trial strategy, not to do so. *Wade v. State*, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, 131 S. Ct. 3066, 180 L. Ed. 2d 893 (2011).

Strategy about calling defendant's child as witness. — Counsel's refusal to call the defendant's child as a witness in defendant's criminal trial on charges of having molested the child's friend was a matter of trial strategy based on the child's insistence that the child would not testify that the friend had initially molested the child and that the friend was now blaming the defendant in order to cover up the friend's own actions; there was no ineffectiveness in counsel's actions. *Lester v. State*, 278 Ga. App. 247, 628 S.E.2d 674 (2006).

Strategy to reserve opening and closing argument. — Trial counsel was not ineffective for failing to interview and present an allegedly exculpatory witness as counsel received during discovery the witness statement to the police and it did not point to another assailant; further, the defendant did not present the witness at the new trial hearing and trial counsel testified that their strategy was to reserve opening and closing argument. *Rakestrau v. State*, 278 Ga. 872, 608 S.E.2d 216 (2005).

Strategy in drug possession cases. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in asking two questions on cross-examination that allegedly elicited evidence damaging to the defendant; it was defense counsel's reasonable trial strategy in the case involving constructive possession of drugs to show that the de-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****F. Strategic Decisions (Cont'd)**

fendant and another person in the house were the targets of the investigation in order to raise doubt as to whether the drugs allegedly constructively possessed by the defendant were really the defendant's drugs. *Jackson v. State*, 281 Ga. App. 83, 635 S.E.2d 372 (2006).

Strategy in questioning defendant's drug usage. — Trial counsel was not ineffective by eliciting testimony from a narcotics investigator on cross-examination that a confidential informant told the investigator that the informant had bought drugs from the defendant in the past because trial counsel's testimony provided some evidence that counsel's decision about what questions to ask on cross-examination of the investigator was a matter of reasonable trial strategy, and the defendant failed to rebut the presumption that the strategy was reasonable; trial counsel testified that counsel's trial strategy had been to show that because the investigator continued to rely upon the informant in other cases, the investigator had an incentive to exaggerate or lie about the informant's prior dealings with the defendant. *Martinez v. State*, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Trial counsel was not ineffective for failing to object to a witness's reference to marijuana because any challenge to the testimony would have failed; even if the testimony incidentally placed the defendant's character in issue, all circumstances with an accused's arrest were admissible if the circumstances were shown to be relevant, and that was so even if the evidence incidentally put the accused's character in issue. *Odom v. State*, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

Strategy to implicate codefendants. — Trial court did not err in denying the defendant's motion for new trial on the basis of ineffective assistance of counsel because the defendant failed to rebut the presumption that trial counsel performed

within the wide range of reasonable professional assistance in failing to challenge hearsay testimony; requesting a curative instruction, after a successful objection by co-counsel, could have called more attention to the remark, and a remark implicating two African-Americans fit in with the defendant's trial strategy to implicate the two codefendants. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Strategy to highlight inconsistencies in testimony. — Trial counsel was not ineffective for failing to make a hearsay objection to the investigating officer's testimony concerning statements that a witness and the victim's mother made to the officer recounting the allegations of the victim because counsel's trial strategy was to highlight the inconsistencies between what the witness and the mother said the victim told them and what the victim subsequently told the forensic interviewer. *Henry v. State*, 316 Ga. App. 132, 729 S.E.2d 429 (2012).

Strategy to show coaching of victim. — Trial counsel was not ineffective for failing to object to the trial court's determination that the victim was present and available to testify without further inquiring into the reliability of the victim's out-of-court statements under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) because counsel did not want the statements to be excluded in light of counsel's trial strategy to show that the victim had been coached. *Henry v. State*, 316 Ga. App. 132, 729 S.E.2d 429 (2012).

Failure to call expert witness matter of trial strategy. — Trial counsel's decision not to call an expert witness was within the realm of trial tactics and strategy and provided no basis for a claim of ineffective assistance of counsel because trial counsel testified that after conferring with the defendant, they decided together not to call the witness; in its order denying the defendant's motion for new trial, the trial court reviewed the evidence presented at the motions hearings and concluded that trial counsel provided a logical and strategic basis for not calling the defense expert as a witness during the trial. *O'Neal v. State*, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

Strategic decision not to object to evidence. — Defendant failed to establish a claim of ineffective assistance of counsel based on trial counsel's failure to object to certain hearsay because defense counsel testified at the hearing on the motion for new trial that the decision not to raise numerous objections, including objections to hearsay, was a tactical one; because defense counsel believed that most of the evidence was consistent with the defense, counsel chose to follow a strategy of allowing the jury to focus on that defense, rather than a strategy of disrupting the flow of the testimony with numerous technical objections, and stated further that defense counsel was "not a big fan of objecting to hearsay anyway. If you catch it too late and then stand up, then they get to hear it two or three times." *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

Strategic decisions in general. — When the allegations of ineffectiveness of counsel refer to activities which are properly described as trial tactics which are within the exclusive province of the lawyer after consultation with the client, such decisions of counsel do not equate to ineffective assistance of counsel. *Scott v. State*, 157 Ga. App. 608, 278 S.E.2d 49 (1981).

Defendant did not show that the defendant received ineffective assistance of counsel, even though the defendant alleged that defense counsel failed to impeach a witness using a purported prior inconsistent statement, that defense counsel did not present a defense of coercion based on the fact that the defendant's crimes were committed with another man, and that defense counsel did not call character witnesses, as the trial court's finding on denying the defendant's motion for a new trial that the alleged actions all involved strategic decisions by defense counsel was not clearly erroneous. *Washington v. State*, 276 Ga. 655, 581 S.E.2d 518 (2003).

Defendant did not show that the defendant received ineffective assistance of counsel when trial counsel asked the defendant at trial about a prior conviction, when trial counsel did not attempt to exclude evidence that right before the

crime was committed that the defendant was using marijuana, and when trial counsel did not redact part of a first statement about whether the defendant would take a polygraph test, as the defendant did not show that the defendant's trial counsel's actions, which involved strategic decisions, prejudiced the defendant. *Collins v. State*, 276 Ga. 726, 583 S.E.2d 26 (2003).

Defendant's 16 challenges to trial counsel's assistance were rejected as the challenges were decisions made after thorough investigation and client consultation, and all involved trial strategy; the decisions concerned: (1) which witnesses to call; (2) whether to put on evidence so as to preserve the final word in closing argument; (3) how to conduct cross-examinations; (4) what motions to file; and (5) what objections to make. *Rowe v. State*, 263 Ga. App. 367, 587 S.E.2d 781 (2003).

Trial court properly denied defendant's claim of ineffective assistance of counsel since defense counsel met with defendant seven times, disagreed with defendant's assertion that certain defense witnesses were improperly dressed for court, rejected certain witnesses to avoid entering into evidence defendant's prior convictions, and made several other tactical decisions about the conduct of defendant's defense. *Anderson v. State*, 264 Ga. App. 362, 590 S.E.2d 729 (2003).

Trial court's denial of the defendant's ineffective assistance of counsel claim was not clearly erroneous, as the record showed that trial counsel's decisions were either strategic in nature or the result of defendant's insistence; accordingly, the defendant did not show that trial counsel was inadequately prepared or that trial counsel otherwise rendered ineffective assistance. *Cummings v. State*, 261 Ga. App. 281, 582 S.E.2d 231 (2003), cert. denied, 543 U.S. 824, 125 S. Ct. 40, 160 L. Ed. 2d 35 (2004).

Defense counsel's decision not to object to testimony about defendant's failure to tell a police officer that defendant was on the scene to pick up defendant's friends, including both what defendant said and what defendant did not say, was a matter of trial strategy and was not ineffective

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****F. Strategic Decisions (Cont'd)**

assistance of counsel; defense counsel thought that the testimony was helpful to defendant because it tended to show defendant's ignorance of the codefendants' intent to commit a crime. *Botelho v. State*, 268 Ga. App. 129, 601 S.E.2d 494 (2004).

Failure to place character in issue as strategy. — Defendant's trial counsel's decision not to place the defendant's character in issue was a matter of trial tactics and did not constitute ineffective assistance of counsel. *Owens v. State*, 207 Ga. App. 153, 427 S.E.2d 529 (1993).

Strategic decision to avoid giving prosecution "ammunition". — Although the defendant claimed that defense counsel: (1) allegedly met with the defendant only three times prior to the defendant's felony murder trial; (2) did not seek the help of an investigator; (3) failed to subpoena witnesses who would have testified on the defendant's behalf; (4) neglected to inform the trial court that the defendant had conflicts with two prospective jurors; and (5) failed to have the defendant testify at a Jackson-Denno hearing, the defendant failed in the defendant's burden of establishing the defendant's claim of ineffective assistance, as the trial court's credibility determinations on the issue were binding if not clearly erroneous, and the trial court found that defense counsel was not deficient after hearing testimony from defense counsel that defense counsel met with the defendant numerous times, investigated the case personally, contacted the witnesses suggested by the defendant and did not find them helpful, sought other witnesses, did not recall being told of conflicts with potential jurors, and did not call the defendant at the Jackson v. Denno hearing because of a strategic decision to avoid giving the prosecution further "ammunition." *Salyers v. State*, 276 Ga. 568, 580 S.E.2d 240 (2003).

Strategy in shoplifting cases. — Defendant's counsel was not ineffective in the defendant's shoplifting case given that: (1) the decision not to view the

videotape was a matter of trial strategy based upon counsel's knowledge that the videotape was defective and that the tape would not have been useful because the store manager saw the defendant place the items in the trunk of the defendant's car such that the police had probable cause to search the car even without the defendant's valid consent, which, also meant that, even if counsel erred, the error did not prejudice the defendant because a suppression motion would not have been successful; and (2) counsel investigated and interviewed witnesses and determined that the value of the merchandise was irrelevant due to the defendant's criminal history and also made the strategic decision not to introduce evidence regarding pricing and valuation, as that would have eliminated counsel's right to present the opening and concluding remarks during closing argument. *Horne v. State*, 260 Ga. App. 640, 580 S.E.2d 644 (2003).

Strategic decision not to object to officer's testimony. — Defendant did not show that the defendant received ineffective assistance of counsel when trial counsel did not object to the testimony of an officer who stated that the officer believed the defendant was the driver of the van involved in the accident as trial counsel's decision not to object to testimony that had already been introduced through another witness, but, instead, to attack it on the cross-examination of the officer was a matter of trial tactics and strategy, and did not show that the defendant received ineffective assistance of counsel. *Lanning v. State*, 261 Ga. App. 480, 583 S.E.2d 160 (2003).

Trial strategy decisions not basis for reversals. — Defendant's conviction for molesting the defendant's minor daughter as part of Wiccan sexual rituals had to be affirmed, even though the defendant argued ineffective assistance of counsel, as the defendant did not provide the appellate court with evidence that any of the deficiencies alleged, even if assumed to be true, actually prejudiced the defendant's coercion defense in any way; furthermore, the bulk of the allegations involved issues of trial strategy, which could not serve as the basis for the reversal of

the defendant's conviction. *Laymon v. State*, 261 Ga. App. 488, 583 S.E.2d 165 (2003).

Defendant with burden to show not deliberate trial strategy. — Defendant's motion for a new trial was denied as the defendant failed to obtain the lawyer's testimony as to why defense counsel failed to tender the police report to impeach a detective's testimony; the defendant failed to carry the defendant's burden of establishing that the purported deficiency in trial counsel's representation was indicative of ineffectiveness and was not an example of a conscious and deliberate trial strategy. *McPetrie v. State*, 263 Ga. App. 85, 587 S.E.2d 233 (2003).

Strategy to brand victim as liar. — When defendant's counsel did not object to an officer's testimony which bolstered the victim, this was not ineffective assistance of counsel because the officer's statements were elicited by counsel's line of questioning, which was not an unreasonable trial strategy, because it was consistent with counsel's announced trial strategy of trying to brand the victim as a liar. *Johnson v. State*, 268 Ga. App. 1, 601 S.E.2d 392 (2004).

Strategic decision not to call investigator. — Because counsel's tactical decision not to call an investigator as a witness fell within the bounds of reasonable professional conduct, defendant failed to show that counsel was ineffective; accordingly, the trial court did not err by denying defendant's motion for new trial. *Hunt v. State*, 278 Ga. 479, 604 S.E.2d 144 (2004).

Choosing defense strategy. — Because defendant's allegations of ineffective assistance of counsel on grounds that counsel was inadequately prepared for trial were factually meritless, based on testimony given by counsel at a hearing on defendant's motion for a new trial, or did not prejudice defendant, defendant failed to prove the attorney's ineffectiveness; moreover, a decision whether to interpose certain objections and a choice made over what defenses and theories to advance was a matter of trial strategy and tactics. *Eason v. State*, 270 Ga. App. 120, 605 S.E.2d 830 (2004).

Strategic decision to pursue coercion defense. — Trial court did not err in

concluding that defendant failed to carry defendant's burden of showing ineffective assistance; trial counsel's decision to pursue the coercion defense, O.C.G.A. § 16-3-26, for armed robbery rather than a mistaken identity defense, was clearly a strategic decision based upon the evidence. *Lewis v. State*, 270 Ga. App. 48, 606 S.E.2d 77 (2004).

Strategic decision not to pursue coercion defense. — Defendant was not denied the effective assistance of counsel by counsel's failure to present a coercion defense to armed robbery, aggravated assault, and kidnapping charges as the decision about what defense to present was a matter of strategy; there was no evidence that the codefendant threatened defendant during the offenses or forced the defendant to drive the getaway car and defendant did not testify about any coercion by the codefendant until the police chase. *Maxey v. State*, 272 Ga. App. 800, 613 S.E.2d 236 (2005).

Strategy not to object. — Defendant did not show ineffective assistance of counsel at trial despite claims that defendant's defense attorney should have made certain objections; the matter of when and how to make objections was generally a matter of trial strategy and defendant did not show that trial counsel's decision to forego making certain objections involved a professionally unreasonable choice, especially because it appeared that the impact of making the objections defendant wanted would be negligible. *Ogle v. State*, 270 Ga. App. 248, 606 S.E.2d 303 (2004).

Actions might have been strategic. — Defendant's counsel was not ineffective because: (1) trial counsel liberally used the transcripts to question the detective about the detectives interviews with defendant, and trial counsel brought forth the key statements by the detective regarding the voluntariness of defendant's statements issue; (2) counsel's failure to move for a mistrial or to strike a witness's answer might have been a strategic decision and defendant did not question trial counsel concerning that decision; and (3) defendant failed to show that counsel erred in failing to object to a part of the prosecutor's closing argument. *Dyer v. State*, 278 Ga. 656, 604 S.E.2d 756 (2004),

Benefit of Counsel (Cont'd)**5. Effective Assistance of Counsel (Cont'd)****F. Strategic Decisions (Cont'd)**

cert. denied, 546 U.S. 845, 126 S. Ct. 95, 163 L. Ed. 2d 111 (2005).

Tactical decisions. — Trial counsel's decisions not to interpose objections to the state's eliciting of purported hearsay testimony from investigators, conduct of voir dire, and failure to seek a mistrial in response to a prosecutor's second improper reference to defendant's pre-trial silence did not constitute ineffective assistance as the decisions were tactical decisions. *Lewis v. State*, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

In a case in which defendant was charged with unlawful dumping, the defendant did not show that defense counsel provided ineffective assistance by not objecting to certain testimony, as counsel made reasonable tactical decisions; even if counsel's performance were deficient, properly admitted evidence overwhelmingly showed defendant's guilt, so there was no reasonable probability that any deficiency influenced the outcome of the trial. *Crouse v. State*, 271 Ga. App. 820, 611 S.E.2d 113 (2005).

Counsel did not provide ineffective assistance by introducing evidence, causing counsel to lose the right to final closing argument, as this was a tactical decision; counsel had a reasonable explanation for the decision and the defendant gave no basis for concluding that the trial would have had a different result based on the order of closing argument. *Giddens v. State*, 276 Ga. App. 353, 623 S.E.2d 204 (2005).

Because trial counsel's decision not to object to statements that might have impugned the defendant's character was a tactical one, the trial court properly found that trial counsel was not ineffective. *Page v. State*, 287 Ga. App. 182, 651 S.E.2d 131 (2007).

Because counsels' advice against putting the defendant on the stand was tactical, counsel made the strategic decision not to strike a challenged juror, and the record reflected the basis for counsels'

objection and motion for a mistrial during the state's closing argument, the defendant's allegations of ineffective assistance of counsel lacked merit; thus, the defendant was not entitled to a new trial as a result. *Warner v. State*, 287 Ga. App. 892, 652 S.E.2d 898 (2007).

Trial counsel's trial tactics and strategy could not form the basis of an ineffective assistance of counsel claim. Moreover, although the defendant initially wanted to accept a plea offer, when the defendant decided to go to trial instead, an ineffective assistance of counsel claim attached to that decision lacked merit as the defendant failed to show that counsel's advice in this regard was insufficient or erroneous. *Starks v. State*, 283 Ga. 164, 656 S.E.2d 518 (2008).

While defense counsel's cross-examination of an eyewitness elicited a non-responsive statement that might have impugned the defendant's character, counsel was pursuing a reasonable and legitimate trial strategy during counsel's questioning. Since counsel's decision not to object to the statement was a tactical one, counsel did not provide ineffective representation. *Herieia v. State*, 297 Ga. App. 872, 678 S.E.2d 548 (2009).

Defendant did not establish that trial counsel was ineffective for failing to object to testimony of prior investigations of drug activity at the defendant's home. Counsel testified the failure to object was a tactical decision as counsel wanted to highlight the fact that police found only a small quantity of drugs during two of eight investigations; it could not be said that counsel's strategy was unreasonable. *Kessinger v. State*, 298 Ga. App. 479, 680 S.E.2d 546 (2009).

Trial counsel was not ineffective for failing to object to a paramedic's testimony that the paramedic thought a domestic situation occurred because the defendant did not show that trial counsel's tactical decision not to object to the testimony was outside the range of reasonably effective assistance; trial counsel testified that counsel did not object because there was no doubt that a domestic dispute had occurred. *Brockington v. State*, 316 Ga. App. 90, 728 S.E.2d 753 (2012).

Decisions presumed to be strategic. — Defendant failed to show that trial

counsel was ineffective for failing to object to the introduction of a doll found on the victim's bed and two photographs of the same doll that were used to suggest that the victim tried to communicate by putting the doll's legs and dress in a position that suggested a sexual encounter as trial counsel did not testify at the ineffective assistance hearing and the decision was presumed to be strategic. *Page v. State*, 271 Ga. App. 541, 610 S.E.2d 171 (2005).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to call the defendant's brother as a witness and for failing to object when the trial court repeated the jury charge on similar transaction evidence; these were matters of trial strategy that required trial counsel's testimony, and, because trial counsel did not testify at a hearing, trial counsel's actions were presumed strategic and were not subject to a finding of ineffective assistance. *Allen v. State*, 281 Ga. App. 294, 635 S.E.2d 884 (2006).

A defendant had not shown ineffective assistance of trial counsel when there had been no evidence or testimony of any kind presented to support the ineffective assistance claim; without such evidence, it was presumed that trial counsel's actions were part of trial strategy. *Ingram v. State*, 286 Ga. App. 662, 650 S.E.2d 743 (2007).

Because a defendant had not questioned trial counsel at the hearing on the motion for new trial about counsel's alleged failure to object to certain comments, any decision not to object was presumed to be a strategic one that did not amount to ineffective assistance. *John v. State*, 282 Ga. 792, 653 S.E.2d 435 (2007).

Requesting of jury charge is trial strategy. — Defense counsel did not provide ineffective assistance of counsel in failing to request a jury charge on alibi and mere association as the decision on whether to request a jury charge was a matter of trial strategy. *Brantley v. State*, 271 Ga. App. 733, 611 S.E.2d 71 (2005).

Decisions on jurors to strike is trial strategy. — Defense counsel did not provide ineffective assistance of counsel in failing to strike jurors during voir dire according to defendant's directions as the

decision on which jurors to strike was a matter of trial strategy. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Defendant was not denied the effective assistance of counsel after counsel failed to exercise a peremptory strike to strike a sitting judge from the jury panel as the defendant failed to timely advise counsel that the judge had presided over a speeding case in which the defendant had pled guilty; counsel and the codefendant's counsel coordinated their use of peremptory strikes and made a tactical decision to strike other jurors whom they found more objectionable. *McKinney v. State*, 274 Ga. App. 32, 619 S.E.2d 299 (2005).

Failure to object as strategy. — Counsel was not ineffective for failing to object to a police officer's hearsay testimony about the identification of defendant from a photograph as the failure to object was a matter of strategy; further, defendant could not show harm as defendant admitted that defendant was in the photograph and another witness also identified the defendant. *Dillard v. State*, 272 Ga. App. 523, 612 S.E.2d 804 (2005).

In a prosecution for kidnapping with bodily injury and aggravated assault, it was not ineffective assistance of counsel for the defense counsel not to object to a detective's response to a question about the defendant's last known address, in which the detective said the person defendant was staying with wanted defendant out because that person felt uneasy, as counsel believed interposing an objection would only draw further attention to a matter resolved by the trial court, when the judge directed the witness not to volunteer information, so the counsel's failure to object was reasonable trial strategy. *Nelson v. State*, 278 Ga. App. 548, 629 S.E.2d 410 (2006).

Although trial counsel failed to object to the testimony concerning a guilty plea of a codefendant pursuant to O.C.G.A. § 24-3-52 arising from the same incident that defendant was on trial for, as well as a reference to that plea by the prosecutor during closing argument, the decision not to object was a matter of trial strategy and, accordingly, deference was provided such that there was no finding of ineffec-

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tive assistance. *Johnson v. State*, 279 Ga. App. 182, 630 S.E.2d 778 (2006).

Trial counsel was not ineffective in failing to object to every instance of hearsay because such was made as a strategic decision not to object in order to avoid alienating a jury that would ultimately determine whether to impose a death sentence upon defendant; moreover, defendant failed to show that any prejudice resulted by counsel's conduct. *Buttram v. State*, 280 Ga. 595, 631 S.E.2d 642 (2006).

Defense strategy not second guessed on appeal. — Trial strategy and tactics do not equate with ineffective assistance of counsel; thus, defendant's complaints concerning inadequate preparation, limited contact with the attorney, and failure to file a suppression motion regarding a one-on-one showup identification did not rise to the level of ineffective assistance of counsel, but were merely a part of defense counsel's trial strategy which will not be second guessed on appeal. *Johnson v. State*, 272 Ga. App. 881, 614 S.E.2d 128 (2005).

When trial counsel testified that counsel made a strategic decision not to object to a portion of the prosecutor's closing argument so as to avoid drawing the state's attention to refuting an accident defense, the appellate court would not second-guess counsel's decision. *Hill v. State*, 285 Ga. App. 503, 646 S.E.2d 718 (2007).

In appeal, necessary to call attorney as to strategy. — Trial counsel did not provide ineffective assistance of counsel in failing to move for a mistrial based on the continued service of a juror who approached a state's witness during trial; defendant failed to show that any deficiency in trial counsel's representation was indicative of ineffectiveness and was not an example of a conscious and deliberate trial strategy as defendant failed to call trial counsel as a witness at the hearing on defendant's motion for new trial. *Cayruth v. State*, 273 Ga. App. 166, 614 S.E.2d 809 (2005).

A trial court did not err by denying a defendant's motion for a new trial as to the defendant's challenge to an aggravated assault conviction based on ineffective assistance of counsel because, even though the defendant called other witnesses who offered some testimony in support of the ineffective assistance of counsel claims, the defendant never called trial counsel, allowing the trial court to properly assume that trial counsel's actions were strategy. *Worthy v. State*, 286 Ga. App. 77, 648 S.E.2d 682 (2007).

Strategic decision not to call deputies. — Trial counsel's failure to subpoena deputies who participated in an investigation into an incident in which defendant threw hot bleach into the face of a victim was presumed to be a matter of strategy; further, defendant failed to show prejudice from the alleged error. *Payne v. State*, 273 Ga. App. 483, 615 S.E.2d 564 (2005).

Strategic decision to stipulate to felon status. — Defendant was not denied effective assistance of counsel as counsel's decision to stipulate to the fact that defendant was a convicted felon was presumed to be a strategic decision; further, defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different had the decision not been made. *Moore v. State*, 274 Ga. App. 432, 618 S.E.2d 122 (2005).

Strategy as to bifurcation of trial. — Defendant was not denied effective assistance of counsel as counsel's failure to seek to bifurcate the possession of a firearm by a convicted felon charge from the other charges was presumed to be a strategic decision; further, defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different had the decision not been made. *Moore v. State*, 274 Ga. App. 432, 618 S.E.2d 122 (2005).

Strategy not to ask for lesser included offense charge. — Counsel was not ineffective for choosing not to ask for a lesser included offense charge as trial counsel made defendant aware of counsel's trial strategy, which led defendant to decide to not ask for the charge, and was diligent in conferring with defendant throughout the trial; there were no indi-

cations that the trial's outcome would have been different but for the alleged ineffective acts. *Mendoza v. State*, 274 Ga. App. 662, 618 S.E.2d 712 (2005).

Trial counsel was not ineffective for asking for a charge on a lesser-included offense because the trial court's finding that counsel discussed the strategy of seeking a charge on the lesser-included offense with the defendant, who did not oppose the charge, was supported by the record and was not clearly erroneous; therefore, the court of appeals had to accept the charge. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Strategy to sever trial from codefendants. — When counsel's failure to seek to sever defendant's trial from that of defendant's accomplice was based on trial strategy, counsel did not provide ineffective assistance of counsel. *Thornton v. State*, 279 Ga. 676, 620 S.E.2d 356 (2005).

Defendant was not denied the effective assistance of counsel, and claims that the counsel was ineffective by failing to: (a) offer testimony of certain alibi witnesses; (b) adequately consult with the defendant prior to trial; and (c) move to sever the trial from that of the codefendants were rejected, given that the defendant never provided counsel with any alibi witnesses, a claim that counsel failed to consult with the defendant was unfounded, and counsel's strategy to have the codefendants tried together was sound. *Adkins v. State*, 280 Ga. 761, 632 S.E.2d 650 (2006).

In a trial for malice murder, felony murder, and cruelty to children, a defendant was not denied effective assistance of counsel because the defendant's attorney failed to move to sever the defendant's trial from that of the defendant's codefendant and failed to object to the prosecutor's allegedly improper closing argument; trial counsel testified that counsel did not seek a severance so that the jury would focus the jury's outrage on the codefendant rather than the defendant, and the prosecutor's use of phrases such as "I think" and "I know" did not amount to an impermissible statement of personal opinion. *Jackson v. State*, 281 Ga. 705, 642 S.E.2d 656 (2007).

Strategy to admit polygraph. — Counsel's stipulation to the admission of

the results of defendant's polygraph examination at trial was permissible trial strategy, so the defendant did not receive ineffective assistance of counsel. *Thornton v. State*, 279 Ga. 676, 620 S.E.2d 356 (2005).

Strategy in child molestation and sexual battery case. — Defendant did not show that defendant received ineffective assistance of counsel after the defendant was convicted of aggravated sexual battery and four counts of child molestation based on various incidents involving defendant's three nieces; the record showed that counsel did introduce evidence to impeach the victims' testimony by showing that the victims had a propensity to lie and that counsel also showed the victims' motivation for fabricating stories, and, thus, it did not matter that another attorney might have tried the case differently. *Aaron v. State*, 275 Ga. App. 269, 620 S.E.2d 499 (2005).

Failure to interview witness as trial strategy. — In an armed robbery case, defense counsel's failure to interview an alleged alibi witness was not ineffective assistance because it was a matter of trial strategy, as: (1) the witness was unsure defendant was in the witness's home on the night of the robbery, so it could not be said that defendant had a strong alibi defense; (2) the witness gave no credible explanation for the witness's failure to come forward as a possible alibi witness; and (3) three witnesses identified defendant as one of the perpetrators of the robbery, so, even if counsel's failure to interview the witness was deficient, no reasonable probability was shown that any such deficiency affected the trial's outcome. *Shannon v. State*, 275 Ga. App. 550, 621 S.E.2d 540 (2005).

Failure to preserve motion for mistrial as strategy. — Defendant did not receive ineffective assistance of counsel in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV, during a trial on charges of kidnapping and other crimes, as trial counsel's decision not to preserve a motion for mistrial was a matter of trial strategy, as counsel did not wish to reinforce the matter of improper character evidence in the minds of the jury, and counsel was not ineffective for failing to make a Batson

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challenge as to two jurors as counsel believed the challenge would not be successful, which was not an unreasonable decision given that the state gave racially neutral reasons for the strikes of the jurors in question. *Adams v. State*, 276 Ga. App. 319, 623 S.E.2d 525 (2005).

Strategic decisions virtually unchallengeable. — Trial counsel's strategic decisions made after thorough investigation are virtually unchallengeable, and provide no grounds for reversal unless such tactical decisions are so patently unreasonable that no competent attorney would have chosen those strategies; defendant failed to establish that defendant was entitled to a new trial based on alleged instances of ineffective assistance of counsel in failing to object to the testimony of the child counselor which impermissibly bolstered the child victim's credibility, failing to request that the counselor first testify outside the presence of the jury in order to establish that the child's out-of-court statements bore sufficient indicia of reliability, replaying the videotape of the forensic interview, calling the child psychologist as a witness while not calling other potential defense witnesses, failing to introduce testimony regarding the child's prior false accusations of sexual misconduct, failing to impeach the testimony of the child's current foster parents, and failing to object to evidence of physical abuse. *Frazier v. State*, 278 Ga. App. 685, 629 S.E.2d 568 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Presumption made that trial tactics strategic. — While the defendant submitted an exhaustive list of alleged errors to support allegations of trial counsel's ineffectiveness, the claims lacked merit as they merely listed counsel's deficiencies with arguments that were perfunctory, at best; further, absent testimony explaining counsel's rationale, the court had to presume that the trial decisions made were strategic. *Hall v. State*, 282 Ga. App. 562, 639 S.E.2d 341 (2006).

Trial counsel was not deficient for failing to present evidence showing that a company breached the company's contract with the defendant because the defendant failed to show that trial counsel's actions were not strategic; even if trial counsel performed deficiently, the defendant could not establish that the defendant was prejudiced by counsel's performance. *Bearden v. State*, 316 Ga. App. 721, 728 S.E.2d 874 (2012).

Overall defense trial strategy. — Supreme Court of Georgia rejected the defendant's five ineffective assistance of counsel claims as lacking merit because the defendant failed to show that trial counsel's trial tactics and investigation were deficient, counsel explained that choices as to when and when not to object were part of the overall defense trial strategy, the defendant failed to show prejudice by permitting the state to elicit speculation that the person who killed the victim could be the person who called an anonymous tip line to suggest various suspects, and any claims not raised in the defendant's motion for a new trial were waived. *Lynch v. State*, 280 Ga. 887, 635 S.E.2d 140 (2006).

Use of accident defense as strategic. — Defense counsel's decision to pursue an accident defense was an informed strategic choice and was not ineffective assistance of counsel as the decision was not due to a misunderstanding of the law or the facts of the case; rather, counsel consulted with the defendant and learned that the defendant contended that the gun accidentally discharged; there was no evidence that the defendant pointed the gun at the victim before the shooting occurred and there was no dispute as to how the fatal injury was inflicted. *Mayberry v. State*, 281 Ga. 144, 635 S.E.2d 736 (2006).

Strategy of admitting sexual activity between victim and defendant. — Counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for admitting in the opening and closing statements that the defendant performed sexual acts with the victim; this was a matter of trial strategy that did not amount to ineffective assistance. *Hutchens v. State*, 281 Ga. App. 610, 636 S.E.2d 773 (2006), overruled on other

grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Strategy to portray ex-spouse as vengeful and bitter. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for tendering expired protective orders issued against the defendant into evidence in a case in which the defendant was accused of stalking the wife and of burning the spouse's house; the trial counsel's strategy was reasonable, as the trial counsel attempted to discredit the spouse by portraying the spouse as a bitter and vengeful ex-spouse manipulating the legal system. *Fields v. State*, 281 Ga. App. 733, 637 S.E.2d 136 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Strategy to admission of hearsay. — Trial court properly determined that defendant's counsel was not ineffective in eliciting improper hearsay testimony from a witness for the state regarding the identification of the defendant and in failing to object to improper character evidence, as it was a matter of trial strategy not to object to certain testimony in order to minimize it by not bringing it to the jury's attention. *Johnson v. State*, 279 Ga. App. 182, 630 S.E.2d 778 (2006).

Counsel's trial strategy in failing to object to hearsay from a non-testifying codefendant was supported by a decision that the testimony was more beneficial than prejudicial, and that the complained-of testimony was necessary to refute the state's theory that the gun admitted against the defendant could have been thrown from the defendant's car; moreover, the defendant failed to show that but for the admission of that evidence, the outcome of the trial would have been different. *Ross v. State*, 281 Ga. App. 891, 637 S.E.2d 491 (2006).

Because the way trial counsel chose to handle the trial and present the defendant's defense did not amount to ineffective assistance of counsel, when although counsel elicited prejudicial hearsay, the related questions were based on a strategic decision to attempt to show that the police had very little to link the defendant to the crimes charged, and any damaging hearsay was cumulative of testimony by

the defendant's girlfriend, the claim lacked merit. *Allen v. State*, 286 Ga. App. 469, 649 S.E.2d 583 (2007).

Strategy for speedy trials. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to file a demand for a speedy trial; at the time defense counsel discovered that the defendant wanted a speedy trial, a request would have been untimely, and the decision not to file a speedy trial request was a tactical one, and counsel believed that the defendant's best chance was if the state's strong case fell apart over time. *Jenkins v. State*, 282 Ga. App. 55, 637 S.E.2d 785 (2006).

Strategy to allow admission of simple battery arrest. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to object to the prosecutor's impeachment of the defendant through reference to the defendant's arrest for simple battery; trial counsel made the strategic decision not to object to questioning of the defendant about the defendant's simple battery arrest because the arrest had previously been referenced and counsel did not want to appear that the defendant had something to hide, and, once the defendant addressed the issue on direct, an objection by defense counsel to questioning on cross-examination would have been meritless. *Mattis v. State*, 282 Ga. App. 49, 637 S.E.2d 787 (2006).

Strategy to allow victim's testimony during guilt—innocence phase. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for making the strategic decision not to object to the victim's testimony during the guilt/innocence portion of the trial about the victim's injuries; since the defendant's testimony was likely to show that the defendant severely struck the victim, the victim's testimony was not important, and defense counsel decided not to further emphasize it by objecting. *Mattis v. State*, 282 Ga. App. 49, 637 S.E.2d 787 (2006).

Strategy in questioning detective's testimony. — No ineffectiveness of counsel was shown in a defendant's malice murder trial by the trial counsel's purported bolstering of the testimony of a

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detective who was a prosecution witness; when, after pointing out inconsistencies and contradictions in the testimony of a witness whose statements the detective had relied upon in concluding that the defendant was responsible for the murder, the trial counsel asked the detective whether, in light of those matters, the detective believed the witness, the trial counsel was engaging in trial strategy intended to undermine the testimony of the witness rather than seeking to bolster that testimony. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Strategy in shaken baby cases. — In a shaken baby case, defense counsel was not ineffective in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV in allegedly failing to adequately investigate the medical evidence or to thoroughly cross-examine the expert forensic pediatrician; the trial strategy, which was generally unassailable in an ineffective assistance claim, was for the defendant to argue that the defendant did not injure the victim and that the defendant did not know how the injuries occurred, and, although defense counsel questioned the forensic pediatrician about the possibility that one of the other children, ages four and five, who had allegedly been alone with the victim, committed the crime, there was no evidence, as the defendant claimed, that defense counsel was blaming the other children for the offense. *Mahan v. State*, 282 Ga. App. 201, 638 S.E.2d 366 (2006).

Disagreement with strategy is not ineffective assistance. — Defendant did not receive ineffective assistance of counsel as the trial counsel objected to the testimony of a state's witness, but the objection was overruled; that the defendant and the appellate counsel disagreed with the difficult decisions regarding trial tactics and strategy made by the trial counsel did not require a finding that the defendant received ineffective assistance of counsel. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

In a defendant's appeal of convictions for murder, felony murder, and aggravated assault, the defendant failed to rebut the presumption that defense counsel's conduct fell within the range of reasonable professional assistance as to defense counsel introducing the fact that the defendant was on probation at the time of the murder, which defense counsel chose to do in order to offer an explanation to the jury of why the defendant was afraid to report the victim's death to the police; even though a different attorney might have chosen a different trial strategy, that did not equate to ineffective assistance of counsel. *Warbington v. State*, 281 Ga. 464, 640 S.E.2d 11 (2007).

Strategic decisions did not amount to ineffectiveness. — Trial counsel's strategic decisions in representing the defendant did not amount to ineffectiveness as: (1) the defendant's own self-serving general statements regarding a purported psychological condition at the time of the offense were insufficient to substantiate any claim of a mental condition which would have provided a possible defense; (2) counsel's determination to rely exclusively on the prior difficulties between the defendant and the victim proved no deficiency; and (3) no ineffectiveness resulted by counsel's failure to object to the prosecutor's alleged improper remarks during closing argument. *Nichols v. State*, 281 Ga. 483, 640 S.E.2d 40 (2007).

The defendant's trial counsel was not ineffective in failing to object to specifically challenged testimony presented against the defendant, and a new trial was not warranted based on the ineffectiveness, as: (1) counsel explained at the hearing on the new trial motion that objections were not made for strategic and tactical reasons, so as to not draw attention to some of the testimony; (2) some of the testimony hurt the credibility of the state's witnesses while enhancing the credibility of the defense theory; (3) counsel attempted to engender sympathy for the defendant; and (4) the defendant failed to show that the outcome of the trial would have been different if the objections would have been made. *Walls v. State*, 283 Ga. App. 560, 642 S.E.2d 195 (2007).

Decision not to object to the admission

of a codefendant's guilty plea could have been the result of reasonable trial strategy; since defendant did not call the defendant's trial counsel to testify at the hearing on the motion for new trial, and in the absence of evidence to the contrary, counsel's decisions were presumed to be strategic and thus insufficient to support an ineffective assistance of counsel claim. In any event, the evidence of the defendant's guilt was overwhelming, there was no reasonable probability the outcome would have been more favorable had counsel done the things defendant claimed that counsel should have, and no prejudice was shown. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

Trial court did not err by denying a defendant's motion for a new trial based on the defendant's contention that the defendant received ineffective assistance of counsel regarding convictions for aggravated sexual battery and child molestation involving the defendant's eight-year-old child as the trial transcript confirmed that trial counsel attempted to use the allegations that the defendant had abused siblings in the past in an effort to impeach or discredit the young victim on the premises that the young victim received the information from the other parent, which was trial strategy that did not amount to ineffective assistance. *Dyer v. State*, 295 Ga. App. 495, 672 S.E.2d 462 (2009).

Trial court did not err by denying the defendant's motion for new trial on the ground of ineffective assistance of counsel because the defendant's claims of ineffectiveness were basically unsubstantiated conclusions when many of the instances of alleged deficient performance, such as the alleged failure to properly or "ardently" examine witnesses, failure to make certain objections, failure to elicit certain testimony, and the failure to request certain charges fell under the heading of trial strategy and generally would not support a claim for ineffective assistance of counsel; although the defendant contended that counsel failed to pursue a motion to suppress on fingerprint evidence, the defendant made no attempt to show that the motion would have been successful. *Moore v. State*, 301 Ga. App. 220, 687 S.E.2d 259

(2009), cert. denied, No. S10C0544, 2010 Ga. LEXIS 333 (Ga. 2010).

Defendant failed to meet defendant's burden of showing deficient performance and prejudice from trial counsel's actions because trial counsel's decisions to not give an opening statement and to not cross-examine the state's witnesses were reasonable trial strategies and did not amount to ineffective assistance; at the hearing on the defendant's motion for new trial, counsel testified that counsel made a strategic decision not to give an opening statement in order to "leave the door open" for counsel to pursue whatever strategy would turn out to be the most advantageous for the defendant after hearing the evidence that the state would present, and the defendant failed to show what favorable evidence could have been elicited from the witnesses who were not cross-examined by defendant's trial attorney. *Lawrence v. State*, 286 Ga. 533, 690 S.E.2d 801 (2010).

There was no merit to the defendant's claim that the defendant received ineffective assistance of counsel on the ground that defendant's trial attorney failed to learn Georgia law on child molestation and did not know that the Georgia rape shield statute did not apply to child molestation and sexual battery cases based upon trial counsel's testimony to the contrary during the motion for new trial hearing because to the extent the defendant argued that the alleged lack of knowledge precluded a defense based upon an alleged sexual relationship between the victim and the defendant's son, trial counsel testified that counsel actually considered and rejected that defense as a matter of trial strategy; even though counsel decided to advocate a different defense, counsel still brought out some evidence from which a jury could infer that such a relationship existed. *Wade v. State*, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, 131 S. Ct. 3066, 180 L. Ed. 2d 893 (2011).

Trial court did not err when the court denied the portion of the codefendant's motion for new trial alleging ineffective assistance of trial counsel because the alleged deficiencies in trial counsel's performance were either without factual ba-

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sis or were decisions made as matters of trial strategy; trial counsel did not speak with the deputy medical examiner who performed the autopsy before trial because the autopsy report was favorable to the codefendant's version of events, and trial counsel testified counsel did not ask for a jury instruction on voluntary manslaughter because it would have required an admission that the codefendant had committed an unlawful act. *Smith v. State*, 290 Ga. 428, 721 S.E.2d 892 (2012).

Trial counsel was not ineffective for failing to object to the prosecutor's remarks about the defendant because counsel employed a reasonable strategy in an effort to minimize the potential effect of the similar transaction evidence that had been admitted at trial; therefore, counsel's decision not to object to the state's further comment on the defendant was reasonable as well. *Wheeler v. State*, 290 Ga. 817, 725 S.E.2d 580 (2012).

Trial counsel was not ineffective for failing to object when the first victim testified that the first victim had been scared to come to court and testify because the first victim had been held at gunpoint during the robbery, that the first victim did not want to get involved, and that the first victim did not want to put the first victim in danger, as such presumably strategic decisions could not support a claim of ineffectiveness. *Wickerson v. State*, 321 Ga. App. 844, 743 S.E.2d 509 (2013).

Defendant did not show that trial counsel was ineffective. Defense counsel's failure to object to hearsay because counsel knew that the statements would be corroborated by the defendant's testimony later in the trial was trial strategy; counsel's failure to object to statements that counsel thought would be admissible as part of the *res gestae* was reasonable trial strategy; counsel believed that certain testimony was not hearsay and would also work to the defendant's benefit; counsel chose not to object to prior consistent testimony of the victim because counsel believed that the testimony showed that

some of the victim's testimony was inconsistent and thus would undermine the victim's credibility; and contrary to the defendant's contention, certain testimony did not show that the defendant had a prior criminal history. *Abernathy v. State*, 299 Ga. App. 897, 685 S.E.2d 734 (2009).

Strategic decisions not basis for ineffective assistance claim. — Defendant's claims of ineffective assistance of counsel lacked merit as some of the alleged errors were strategic decisions which could not be the basis for such a claim and there was no evidence that absent the alleged errors by counsel that the outcome of the trial would have been different. *Pinson v. State*, 266 Ga. App. 254, 596 S.E.2d 734 (2004).

Trial strategy not ineffective assistance. — Trial court did not commit reversible error when the court: (1) granted the state's motion in limine prohibiting admission of evidence that another person confessed to the crime; (2) permitted a police officer to explain the officer's conduct under O.C.G.A. § 24-3-2; and (3) allowed the state to introduce evidence of defendant's prior misdemeanor convictions under O.C.G.A. §§ 24-2-2 and 24-9-20(b); thus, defendant failed to show that counsel's trial strategies on these issues constituted ineffective assistance of counsel. *Harris v. State*, 279 Ga. 522, 615 S.E.2d 532 (2005).

Defense counsel's representation was not deficient merely because counsel failed to properly challenge the state's use of eyewitness identification evidence, failed to request a jury instruction on eyewitness identification, and failed to interview and subpoena a crucial defense witness as: (1) counsel's trial strategy could not amount to ineffective assistance of counsel; (2) defendant failed to show that had counsel pursued these endeavors, the outcome would have been different; and (3) the witness defendant sought would not have helped defendant's defense. *Winfield v. State*, 278 Ga. App. 618, 629 S.E.2d 548 (2006).

Strategy for evidence seized pursuant to defective warrant affidavit. — The trial court did not abuse the court's discretion in denying the defendant's plea withdrawal motion on ineffective assis-

tance of counsel grounds as the evidence showed that trial counsel made a reasonable strategic decision, based on the defendant's own statements that failed to show standing, not to move for suppression of the evidence seized pursuant to an allegedly defective warrant affidavit, and as a result the defendant failed to show prejudice based upon that failure. *Lawton v. State*, 285 Ga. App. 45, 645 S.E.2d 571 (2007), cert. denied, 2007 Ga. LEXIS 670 (Ga. 2007).

Strategy on impeachment of witnesses. — Because the record showed that trial counsel's decision to not impeach a state's witness with evidence of two prior shoplifting convictions was part of a sound trial strategy to preserve the right to make the final closing argument under O.C.G.A. § 17-8-71, and counsel instead pursued alternative impeachment methods to establish bias, counsel was not ineffective; moreover, given this fact and the state's evidence, it was unlikely that introduction of the shoplifting convictions would have produced a different outcome at trial. *Duggan v. State*, 285 Ga. App. 273, 645 S.E.2d 733 (2007), cert. denied, 2007 Ga. LEXIS 662 (Ga. 2007).

Partially successful strategic decisions within range of professional conduct. — Defense counsel was not ineffective for failing to object to several comments made by the prosecutor during closing argument in which the prosecutor potentially interjected extrinsic evidence and the prosecutor's opinion with respect to witness credibility; defense counsel stated that counsel had not believed that the prosecutor's argument was very effective, and based on the testimony that defense counsel made deliberate, even partially successful, strategic decisions during the closing argument, the trial court did not clearly err in finding that the representation was within the wide range of reasonable professional conduct. *Phillips v. State*, 284 Ga. App. 683, 644 S.E.2d 535 (2007).

Reasonable trial strategy found. — A defendant had not shown that trial counsel was ineffective with regard to a witness, and counsel's actions were the result of a reasonable trial strategy; a component of the defense was that an

investigator was persecuting the defendant because the defendant had rebuffed the investigator's sexual advances, and trial counsel did not wish to ask the witness about a discussion with the investigator because it would emphasize to the jury that at an earlier stage in the investigation than suited this theory, the investigator had information implicating the defendant. *Conway v. State*, 281 Ga. 685, 642 S.E.2d 673 (2007).

The defendant's numerous claims of ineffective assistance of counsel were rejected as the way counsel handled the defense was part of a reasonable trial strategy, even though the defendant claimed that counsel should have: (1) conducted a more in depth voir dire; (2) called the experts who prepared allegedly exculpatory laboratory reports; (3) examined the alibi witnesses about their prior criminal histories; (4) presented evidence to counter the state's evidence of robbery as a motive; and (5) interviewed the defendant's Army friend to determine that a discharge against that individual was dishonorable; even if counsel had undertaken these steps, the outcome would not have changed. *Tolbert v. State*, 282 Ga. 254, 647 S.E.2d 555 (2007).

The defendant's ineffective assistance of counsel claims lacked merit as a motion to strike or for a mistrial after the state's expert offered an opinion as to the victim's failure to immediately report the abuse was meritless, and counsel's decision as to how to present the defendant's testimony fell within the realm of reasonable trial strategy, and therefore could not be considered deficient. *Gaines v. State*, 285 Ga. App. 654, 647 S.E.2d 357 (2007).

Because trial counsel did not provide the defendant with ineffective assistance to the extent that the relevant strategic decisions made would not have affected the outcome of the trial, and counsel properly chose not to object to the court's failure to merge a kidnapping and false imprisonment conviction, as they were independent offenses, the defendant's motion for a new trial was properly denied. *Snelson v. State*, 286 Ga. App. 203, 648 S.E.2d 647 (2007).

A defendant had not shown ineffective assistance of counsel since counsel cited

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strategic reasons for failing to file a motion to sever offenses, for failing to object to the service of a juror who had a prior first-offender conviction, and for failing to object to identification testimony; counsel's failure to file a motion for a directed verdict based on the sufficiency of the evidence did not prevent the defendant from challenging the sufficiency of the evidence, and certain objections would have been meritless. *Griffith v. State*, 286 Ga. App. 859, 650 S.E.2d 413 (2007).

Strategy that backfired is not ineffective assistance. — While with the benefit of hindsight, it appeared that trial counsel's strategy might have backfired, the circumstances did not support a finding of ineffectiveness; further, because the defendant failed to show a reasonable probability that the result of the trial would have been different had counsel done things differently, the defendant's claims failed. *Boyt v. State*, 286 Ga. App. 460, 649 S.E.2d 589 (2007).

Defendant's claim that trial counsel's failure to preserve an issue constituted ineffective assistance of counsel was without merit because trial counsel's testimony showed that counsel pursued the reasonable strategy, however mistaken it could appear with hindsight, of placing the damaging information before the jury through the defendant's direct testimony, rather than risk having the information extracted from the defendant on cross-examination. *Collier v. State*, 288 Ga. 756, 707 S.E.2d 102 (2011).

Defendant failed to show ineffective assistance of counsel because the defendant, in view of the strength of the evidence implicating the defendant in the shootings of the two victims, failed to show that trial counsel's choice of strategies was unreasonable, and, thus, ineffective. The fact that the defendant, in hindsight, questioned the efficacy of the chosen defense strategy did not establish ineffective assistance. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Strategy on photographs. — A defendant's ineffective assistance of counsel

claims failed as photographs showing weapons inside the defendant's house were relevant to issues before the jury and it was part of defense counsel's trial strategy to admit that the defendant grew marijuana and to deny that the defendant was involved in a home invasion. *Medlin v. State*, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

Strategy to present alibi defense. — Counsel was not ineffective for presenting an alibi defense when the defendant contended before trial that the defendant was at home when the crime occurred; counsel's decision was a reasonable trial tactic and did not amount to ineffectiveness because the defendant and the defendant's present counsel questioned its efficacy. *Johnson v. State*, 282 Ga. 235, 647 S.E.2d 48 (2007).

Strategy on alibi defense. — Defendant failed to establish a claim of ineffective assistance of counsel based on defense counsel's strategy in not presenting evidence that the defendant was at the defendant's mother's home on the night of the crime as an alibi defense because counsel testified that although the defendant offered multiple alibi defenses, the defendant did not tell counsel that the defendant was at the mother's home on the night of the murder, that counsel did not consider the defendant's mother a good source of defense evidence because the mother's extensive history of substance abuse presented a major obstacle to the mother's credibility, and that counsel believed that the defendant's fiancé was not credible because the fiancé had previously posed as a reporter conducting interviews about the murder and counsel believed there was a high probability of that fact damaging the defendant's defense; counsel also testified that counsel did not want to introduce any evidence in order to preserve the right to opening and closing argument, which was a valid trial strategy. *Phillips v. State*, 280 Ga. 728, 632 S.E.2d 131 (2006).

Defendant failed to establish a claim of ineffective assistance of counsel based on counsel's failure to present an alibi witness because counsel testified that counsel thought the jury would believe that the alibi witness, the defendant's sister, was

lying for the defendant, and because counsel did not call the sister in order to preserve the right to final closing argument; further, because variances in the pronunciation and spelling of proper names were immaterial, an objection based on such variances would have been futile and trial counsel was not ineffective for failing to object. *Walker v. State*, 280 Ga. App. 457, 634 S.E.2d 93 (2006).

Strategy to focus on alibi witness. — During defendant's trial for aggravated stalking and criminal trespass, trial counsel was not ineffective for failing to introduce evidence of a hotel receipt or for failing to object to an improper question impeaching a defense witness; trial counsel's decision to focus on defendant's alibi witness was a matter of trial strategy which was not patently unreasonable. *Reed v. State*, 309 Ga. App. 183, 709 S.E.2d 847 (2011).

Strategy on alibi witness. — Ineffective assistance of counsel claims raised by the defendant on appeal were rejected as the evidence presented failed to show how counsel's additional meetings with the defendant would have aided the defense and how counsel's oversights during trial were prejudicial; but, the evidence sufficiently showed that counsel's decision not to call certain alibi witnesses who could not help the defense was part of an effective trial strategy. *Smith v. State*, 281 Ga. App. 587, 636 S.E.2d 748 (2006).

Defendant's counsel did not provide ineffective assistance during the defendant's trial for armed robbery and other crimes by failing to present an alibi witness; the testimony at the hearing on the motion for new trial showed that the witness could not have provided an alibi for the defendant for the time when the alleged crimes occurred, and it followed that failure to call the witness did not constitute ineffective assistance. *Metoyer v. State*, 282 Ga. App. 810, 640 S.E.2d 345 (2006).

Strategy on use of experts. — Because it appeared that trial counsel's strategy was to convince the court that insufficient circumstantial evidence had been presented in order to convict the defendant, and counsel's decision not to hire an expert to testify as to how quickly

the defendant could become intoxicated was a tactical matter to avoid getting into a battle of the experts, those decisions did not amount to ineffective assistance of counsel sufficient to warrant a new trial. *O'Connell v. State*, 285 Ga. App. 835, 648 S.E.2d 147 (2007).

Strategy of different attorneys not controlling. — Trial counsel was not ineffective for not emphasizing that no blood was found in the rooming house where a murder defendant and the victim lived; defense counsel had established the absence of forensic evidence, which would include blood evidence, inside the house, and had emphasized this during closing argument, and it could not be said that counsel was ineffective simply because another attorney might have placed more or a different emphasis on the evidence. *Jones v. State*, 282 Ga. 306, 647 S.E.2d 576 (2007).

Strategy on re-reading of testimony. — In light of trial counsel's reasonable strategy in acquiescing in the trial court's refusal to permit the jury to re-hear the testimony of a witness, trial counsel's performance was not deficient; counsel was concerned that re-reading the testimony would place undue emphasis on it. *Williams v. State*, 282 Ga. 561, 651 S.E.2d 674 (2007).

Strategy not to impeach witness. — Trial counsel's decision not to impeach a witness and to develop that witness as a suspect in the murder for which the defendant was on trial, as part of the strategy to preserve the right to final argument under O.C.G.A. § 17-8-71, did not amount to deficient performance. *Eason v. State*, 283 Ga. 116, 657 S.E.2d 203 (2008).

Strategic decisions on jury instructions. — Defendant did not show that trial counsel was ineffective for not requesting certain charges as these would have been inconsistent with the defendant's "mere presence" defense. Thus, the trial court properly found that this was a strategic decision made in the exercise of reasonable professional judgment. *Whitley v. State*, 293 Ga. App. 605, 667 S.E.2d 447 (2008).

In an aggravated sodomy case, counsel was not ineffective when counsel failed to object to hearsay statements made by the

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****F. Strategic Decisions (Cont'd)**

state's witnesses as part of a strategy to bolster the witnesses; when counsel agreed to exclude any evidence of the victim's criminal history on the ground that counsel believed that the jury would be offended if counsel appeared to be attacking the victim; and when counsel did not request a lesser included offense instruction because counsel believed that the defendant would be convicted on a lesser offense and that counsel's strategy was that the jury would either believe the defense or they would not. *Eller v. State*, 294 Ga. App. 77, 668 S.E.2d 755 (2008).

Strategy to “put everything on the table.” — Trial counsel was not ineffective for having the defendant testify about the defendant's criminal history, as the trial counsel stated that counsel had discussed this issue with the defendant and had decided that the best strategy was to “put everything on the table” to make the defendant seem credible; furthermore, trial counsel was not ineffective for failing to make meritless objections. *Gonzales v. State*, 286 Ga. App. 821, 650 S.E.2d 401 (2007), cert. denied, No. S07C1765, 2008 Ga. LEXIS 70 (Ga. 2008).

Strategy to “put everything out there”. — Counsel was not ineffective in allowing the defendant to testify about the defendant's criminal history as this was part of counsel's trial strategy to “put everything out there,” so that the jury would be convinced the defendant was telling the truth. *Spencer v. State*, 296 Ga. App. 828, 676 S.E.2d 274 (2009).

Defendant failed to demonstrate ineffective assistance of counsel in the defendant's prosecution for, inter alia, robbery by force because it was a reasonable strategy to agree to the admission under former O.C.G.A. § 24-9-84.1(b) (see now O.C.G.A. § 24-6-609) of a prior 1992 Texas conviction for possession of cocaine, although the conviction was over 10 years old, as the defendant testified on the defendant's own behalf and wanted to put it all out there. *Everett v. State*, 297 Ga. App. 351, 677 S.E.2d 394 (2009).

Strategy as to testimony of defendant. — In a defendant's prosecution for, inter alia, felony murder, defense counsel's opening statement that the defendant would testify to explain why the defendant carried a gun was not ineffective assistance for causing a negative inference when the defendant did not testify as defense counsel used proper strategy in not having the defendant testify after concluding that the state failed to carry the state's burden during trial. *Watkins v. State*, 285 Ga. 107, 674 S.E.2d 275 (2009).

Strategy regarding prosecutor's “ludicrous” and “crazy” comments. — Counsel was not ineffective for failing to object to the state's opening comment that the defendant's story was “ludicrous” and “crazy.” Counsel testified that counsel did not object because the statement was not evidence and because objecting could bring attention to the comments; this was a conscious and deliberate trial strategy. *Raymond v. State*, 298 Ga. App. 549, 680 S.E.2d 598 (2009), cert. denied, No. S09C1791, 2010 Ga. LEXIS 47 (Ga. 2010).

Counsel's strategy eminently reasonable. — Because trial counsel's strategic decision to basically admit the conduct underlying the allegations against defendant and to argue that defendant's actions amounted at most to lesser-included offenses was eminently reasonable, the trial court did not err in denying defendant's claim of ineffective assistance of counsel. *Biggins v. State*, 299 Ga. App. 554, 683 S.E.2d 96 (2009).

Strategy to discuss defendant's jail time on prior charge. — Trial counsel was not ineffective by eliciting testimony from the defendant that the defendant met a confidential informant while in jail, by questioning the defendant about the circumstances surrounding defendant's arrest on a prior charge, and by asking the defendant when the defendant got out of jail on that charge because trial counsel testified that counsel made a strategic decision to ask questions pertaining to the defendant's stint in jail on the prior charge based upon representations the defendant made during their pre-trial meetings together, and trial counsel made the tactical decision to have the defendant testify that the defendant had once shared

a jail cell with the informant and had witnessed the informant hurt other inmates on several occasions and that any negative effects of explaining to the jury why the defendant had been in jail would be outweighed by the overall positive effects of the jail-related testimony on defendant's entrapment defense; trial counsel was not required to anticipate that the defendant would mislead counsel about the prior charge, and because the questions posed by counsel on direct examination were based upon the misleading information supplied by the defendant, any resulting prejudice was attributable to the defendant, not to the ineffectiveness of defendant's trial counsel. *Martinez v. State*, 303 Ga. App. 166, 692 S.E.2d 766 (2010).

Trial counsel's revealing that defendant had recently been released from prison on a separate offense did not constitute ineffective assistance of counsel in defendant's child molestation trial as it was a strategy used in an attempt to show that the child's parent fabricated the molestation incident in an effort to return the defendant to prison. *Bentley v. State*, 314 Ga. App. 599, 724 S.E.2d 890 (2012).

Reasonable strategy to not seek jury charge on accident. — Defendant, who was convicted of aggravated assault and aggravated battery, was not denied effective assistance of counsel because it was reasonable trial strategy to not seek a jury charge on accident, particularly as the facts did not warrant such an instruction, and to not object to admission of prior acts testimony, particularly as the overwhelming evidence of guilt made it unlikely that the evidence contributed to the verdict. *Arnold v. State*, 303 Ga. App. 825, 695 S.E.2d 299 (2010).

Strategy not to pursue medical defense. — Defendant could not prove that defendant received ineffective assistance because defendant's trial counsel made a reasonable strategic decision not to pursue a medical defense or present expert testimony on the issue; trial counsel made an informed decision not to pursue the medical defense through expert testimony based upon the representations made to counsel by the defendant over the course of several client interviews and in light of

counsel's assessment that a jury would be unlikely to view the defense as plausible, and the effectiveness of trial counsel's strategic decision to defend on the alternative ground that the defendant did not commit the alleged criminal acts was demonstrated by the fact that the jury acquitted the defendant of several of the charged offenses. *Coats v. State*, 303 Ga. App. 818, 695 S.E.2d 285 (2010).

Strategy to concede certain offenses. — Trial counsel did not place the defendant's character in issue by conceding the defendant's guilt of aggravated assault because the concession related to the facts alleged and crimes charged in the case, not to other transactions reflective of the defendant's character; given that numerous witnesses testified that the defendant had a bat on the night in question and struck the victim in the head with the bat while only one witness testified that the defendant took the victim's wallet out of victim's pocket, trial counsel's strategy of contesting only the armed robbery count was reasonable and not ineffective. *Taylor v. State*, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Strategy not to move for mistrial or object. — Defendant could not establish that defendant's trial counsel was ineffective for failing to object or move for a mistrial after the prosecutor cross-examined the defendant about whether the defendant had been previously arrested for driving under the influence or had been dishonorably discharged from the military because trial counsel's decision not to object or move for a mistrial was a reasonable trial strategy; defense counsel made the strategic decision to wait until closing argument to respond to the prosecutor's questions, and counsel's strategic decision was not patently unreasonable. *Boggs v. State*, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because trial counsel explained that counsel did not move for a mistrial as a matter of trial strategy since counsel did not believe that a mistrial was warranted and did not want to draw further attention to the objectionable facts; trial coun-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****F. Strategic Decisions (Cont'd)**

sel's strategy in that regard was not unreasonable. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Strategy on similar transaction evidence. — Trial counsel did not impugn the defendant's character during opening statement because counsel testified that counsel made the statement in anticipation of the state introducing similar transaction evidence; counsel's decision to address the problem of similar transaction testimony in counsel's opening statement was clearly strategic. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Strategy showing parent's hatred of child. — Defendant did not receive ineffective assistance of counsel when defendant's trial counsel failed to object to testimony by the victim's parent that placed the defendant's character in issue because counsel made a reasonable strategic decision not to object to the parent's passing reference to the defendant as "bad news" and the parent's testimony that the parent had seen the defendant "at the jail" where the parent worked; counsel wanted the jury to see that the parent hated the defendant and believed that the parent's testimony would show that the parent was simply biased against the defendant. *Jennings v. State*, 288 Ga. 120, 702 S.E.2d 151 (2010).

Strategy in aggravated assault with intent to rape charge. — Trial counsel did not render ineffective assistance by failing to obtain the victim's mobile telephone records because counsel's investigator contacted the defendant's mobile telephone provider to determine if the defendant and the victim had called each other on the night of the incident but was told that the relevant records were destroyed after six months; trial counsel testified that while counsel was aware from the beginning that the defendant claimed defendant's encounter with the victim was consensual, after several discussions on trial strategy in defendant's aggravated assault with intent to rape charge, counsel and the defendant agreed

to pursue a defense that focused on the victim's inability to positively identify the defendant as the victim's attacker. *Mattox v. State*, 305 Ga. App. 600, 699 S.E.2d 887 (2010).

Strategy implicating codefendants. — Trial court did not err in denying the defendant's motion for new trial on the basis of ineffective assistance of counsel because trial counsel's defense strategy of implicating the codefendants was not unreasonable, and counsel did not fail to present evidence as promised in counsel's opening statement; the jury heard at least a portion of the promised evidence, and the defendant could not show that there was a reasonable probability that the outcome of the trial would have been different had counsel opened differently. *Jackson v. State*, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

Strategy on polygraph and severance. — Trial counsel was not ineffective for entering into a stipulation with the state regarding the admissibility, accuracy, and voluntariness of a polygraph examination because stipulating to the admission of polygraph test results was a valid trial strategy, and there was evidence the ramifications were explained to the defendant; trial counsel discussed the polygraph examination with the defendant on multiple occasions, and trial counsel ultimately agreed that the defendant would submit to an examination because counsel found the defendant exceedingly credible. Furthermore, trial counsel was not ineffective for failing to file a motion to sever the defendant's case from that of a codefendant because trial counsel testified that counsel made the strategic decision not to move to sever the trials because counsel wanted to support the argument that polygraph examinations were unreliable by presenting evidence that the codefendant passed a polygraph examination even though more physical evidence linked the codefendant to the crime scene; an informed strategic decision concerning severance did not amount to ineffective assistance of counsel. *Harris v. State*, 308 Ga. App. 523, 707 S.E.2d 908 (2011).

Strategy for closing argument. — Defendant could not overcome the strong presumption that trial counsel rendered

effective assistance because trial counsel's closing argument was a trial strategy to convince the jury that the evidence the state proffered was insufficient to prove the crimes with which the defendant was charged; trial counsel's argument, aimed at requesting an acquittal on the charged offenses, was a reasonable trial strategy. *Daniels v. State*, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

Strategy on DNA evidence. — Trial counsel's decision to argue that DNA evidence were indicia of the victim's consensual relationship with the defendant rather than directly challenging the state's expert witness or deny it was the defendant's blood or saliva was an objectively reasonable trial strategy and, thus, did not support a finding that trial counsel rendered ineffective assistance. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

Strategy on video. — Defendant did not receive ineffective assistance of counsel as, contrary to defendant's claim, counsel reviewed a videotape of the crimes; the decision not to use the videotape was a matter of strategy and defendant failed to show that defendant was prejudiced by a failure to use the videotape. *Williams v. State*, 273 Ga. App. 213, 614 S.E.2d 834 (2005).

Defendant did not meet the burden under *Strickland* of showing that defense counsel's performance was deficient for pursuing the trial strategy of showing a video of the defendant's earlier arrest for driving under the influence because defense counsel testified that the theory of the case was to show through the video that the same two officers stopped the defendant both times and that the officers were targeting the defendant; counsel pursued a strategy that resulted in the defendant being acquitted of four of the six charges against the defendant. *Sledge v. State*, 312 Ga. App. 97, 717 S.E.2d 682 (2011).

Strategy on cross-examination. — Defendant did not show ineffective assistance of counsel based upon counsel's strategy choices regarding the scope of cross-examination of two witnesses. *Donald v. State*, 312 Ga. App. 222, 718 S.E.2d 81 (2011).

Switching trial strategy mid-course. — Defendant was unable to demonstrate that trial counsel rendered deficient performance by switching trial strategy based upon the evidentiary rulings of the trial court because trial counsel's strategic decisions were not so patently unreasonable that no competent attorney would have chosen those decisions. *Ledford v. State*, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

Strategy that did not involve presenting defense on agency. — Defendant's trial attorney was not deficient in failing to present a defense based on agency, in connection with the charge against the defendant of false statement or writing regarding a building permit application by defendant for homeowners, because the defendant failed to establish a reasonable probability that the outcome of the trial would have been different if the trial attorney had raised such a defense. *Wilson v. State*, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Strategy on recharge of jury. — Defendant's claim that trial counsel offered ineffective assistance for not objecting to the trial court's failure to recharge the jury after the jury requested written definitions of the charges lacked merit because the decision was based on counsel's strategic decision that such a request only made the jury more inclined to convict the defendant rather than acquit the defendant. *Lake v. State*, 293 Ga. 56, 743 S.E.2d 414 (2013).

Strategic decisions not impacting effectiveness. — Defendant failed to establish ineffective assistance based on trial counsel's admission in the opening statement to the jury that the defendant hit the victim, thereby preventing the defendant from arguing that another individual actually assaulted the victim; as the defendant's claim of ineffective assistance related to strategic matters outside of the trial record, defense counsel's theory of the case, trial counsel's testimony was required to evaluate the claim. However, the defendant's trial counsel was not called to testify at the hearing on the motion for new trial, and without trial counsel's testimony, trial counsel's actions were presumed strategic. *Walker v. State*, 298 Ga. App. 265, 679 S.E.2d 814 (2009).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****F. Strategic Decisions (Cont'd)**

Claim of ineffective assistance of counsel failed because the defendant made no showing that the defendant's text requests for the victim's mother to call the defendant as soon as possible harmed the defendant's case, and counsel's decision not to call an expert, after a pediatrician concluded that the victim's injuries could have been caused by CPR, was a reasonable, strategic decision. *Holloman v. State*, 293 Ga. 151, 744 S.E.2d 59 (2013).

Failure to follow same defense strategy as prior counsel. — Eliciting evidence of defendant's prior convictions from defendant on direct examination instead of risking having the information extracted on cross-examination was a reasonable strategy. *Wilson v. State*, 291 Ga. App. 69, 661 S.E.2d 221 (2008).

Because defendant had not proffered the necessary evidence, defendant had not shown prejudice from counsel's tactical decision not to except to a ruling on refreshing recollection with a police report. *Wilson v. State*, 291 Ga. App. 69, 661 S.E.2d 221 (2008).

With regard to defendant's conviction for armed robbery and other crimes, the trial court did not err in denying defendant's motion for new trial when the court found that defendant did not carry the burden of showing ineffective assistance based on defense counsel failing to object to the introduction into evidence of the guilty plea of the gunman/co-indictee and further failed to request a limiting instruction thereon as the evidence supported the trial court's findings that those decisions were strategic and not patently unreasonable. Trial counsel testified at the motion for a new trial hearing that the guilty plea of the gunman was important to the defense strategy of placing all the blame on the gunman as well as showing the jury that defendant would serve a lengthy sentence if the jury found the defendant guilty. *Sillah v. State*, 291 Ga. App. 848, 663 S.E.2d 274 (2008).

With regard to a defendant's convictions for malice murder and other crimes, the

defendant failed to demonstrate that trial counsel's decision to forego an insanity or delusional compulsion defense, instead of pursuing the defense as prior trial counsel had intended, was unreasonable as the evidence showed that the defendant and trial counsel collectively agreed that the success of raising such a defense was highly unlikely. Further, the fact that trial counsel would have pursued a different strategy than the defendant's prior counsel did not render trial counsel's strategy unreasonable. *Martinez v. State*, 284 Ga. 138, 663 S.E.2d 675 (2008).

With regard to the defendant's conviction for distributing cocaine, the defendant failed to establish that the defendant was rendered ineffective assistance of counsel based on defense counsel failing to object to the admission of a recorded conversation between the defendant and a confidential informant on Sixth Amendment/right to confrontation grounds as even if the recorded conversation was objectionable as a violation of the defendant's constitutional rights under the confrontation clause, trial counsel testified to various strategic reasons for keeping the confidential informant out of the courtroom at the hearing on the defendant's motion for a new trial. As such, since that strategy was not patently unreasonable, the trial court did not err in finding that trial counsel's actions in that regard fell within the broad range of reasonable professional conduct. *Beck v. State*, 292 Ga. App. 472, 665 S.E.2d 701 (2008), cert. denied, No. S08C1863, 2008 Ga. LEXIS 922 (Ga. 2008).

Counsel was not ineffective for not seeking to exclude or redact portions of a defendant's profanity-ridden recorded statement. Counsel's decision not to object to the statement's admissibility was clearly strategic as counsel believed that the statement fit into the alibi defense and because counsel thought the profanity made the statement a more powerful denial. *Smashum v. State*, 293 Ga. App. 41, 666 S.E.2d 549 (2008), cert. denied, 2008 Ga. LEXIS 952 (Ga. 2008).

Strategic decision not to call witness. — Defendant was not denied the effective assistance of counsel as counsel made diligent efforts to identify and locate

possible defense witnesses and made a strategic decision not to call some witnesses; further, defendant failed to show that defendant was prejudiced by counsel's failure to locate, interview, and subpoena defendant's female roommate. *Sharif v. State*, 272 Ga. App. 660, 613 S.E.2d 176 (2005).

Defendant failed to show that the trial counsel rendered ineffective assistance in a criminal trial, as counsel met with defendant 17 times, interviewed all of the witnesses that defendant provided names for except for one, and counsel had valid reasons for not calling each witness to the stand; a decision as to which witnesses to call was a matter of trial strategy. *Steverson v. State*, 276 Ga. App. 876, 625 S.E.2d 476 (2005).

Defendant's trial counsel did not provide ineffective assistance by failing to call as a witness at a Jackson-Denno hearing the attorney who witnessed the defendant's statement to police regarding a drive-by shooting; because the testimony of the witnessing attorney would likely have contradicted the defendant's claim to have been pressured by the witnessing attorney into making a statement, the trial counsel's decision not to call the witnessing attorney was a strategic one, and such decisions did not amount to ineffective assistance of counsel. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

A murder defendant did not show ineffective assistance of counsel; trial counsel chose not to call two eyewitnesses because counsel did not consider their testimony strong enough to justify the loss of the right to conclude closing argument, which was a well recognized trial tactic at the time. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

In a prosecution on three counts of aggravated stalking, because the defendant failed to show that trial counsel's strategic decisions in declining to subpoena certain witnesses amounted to ineffectiveness, and the evidence did not support a lesser-included offense instruction, the defendant's ineffective assistance of counsel claims failed. *Patterson v. State*, 284 Ga. App. 780, 645 S.E.2d 38 (2007).

Because trial counsel's strategic decision not to call a close family friend as a

witness, who could have rebutted the state's evidence that the defendant was controlling, was supported by testimony that the witness would not have added anything to the defense and might have diluted the defendant's voluntary manslaughter theory, counsel was not ineffective in failing have the witness testify. *Johnson v. State*, 282 Ga. 96, 646 S.E.2d 216 (2007).

Defendant did not show ineffective assistance of counsel since trial counsel had chosen for strategic reasons not to call two jail employees as witnesses, and the defendant's testimony about what the defendant thought the witnesses' testimony might have been was mere speculation and hearsay, which was inadequate to show prejudice. *Felder v. State*, 286 Ga. App. 271, 648 S.E.2d 753 (2007).

Strategy to not call witness. — Defendant did not receive ineffective assistance of counsel because counsel failed to subpoena two witnesses as the witnesses were present at trial and counsel and the defendant had decided that the witnesses would not be called because the information they would have provided had been elicited during the cross-examination of a state's witness; the failure to call the witnesses was a reasonable strategic decision that did not constitute deficient performance. *McKinney v. State*, 281 Ga. 92, 635 S.E.2d 153 (2006).

Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV in failing to call a potential witness who allegedly told an investigator that the victim did not appear to be hysterical on the day that the defendant committed numerous violent offenses against the victim; defense counsel interviewed the potential witness before trial, and the potential witness merely confirmed that the potential witness had given the defendant the rifle that the defendant used in an unsuccessful suicide attempt after the alleged criminal conduct at issue. *Martin v. State*, 281 Ga. App. 64, 635 S.E.2d 358 (2006).

Defendant's ineffective assistance of counsel claims lacked merit as the appeals court found that trial counsel's tactical decision not to call the defendant's brother and sister-in-law as witnesses was strate-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****F. Strategic Decisions (Cont'd)**

gic, and nothing in the record suggested that the defendant was denied a fair trial because trial counsel did not investigate the defendant's competency; hence, the trial court did not err in denying the defendant a new trial based on an ineffective assistance of counsel claim. *Scott v. State*, 281 Ga. App. 106, 635 S.E.2d 582 (2006).

Since the defendant asserted that the defendant was denied effective assistance of trial counsel in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 because trial counsel failed to call witnesses who gave testimony at the hearing on the defendant's motion for a new trial that contradicted testimony for the state with regard to the timing of the defendant's arrest, the argument failed; defense counsel did not call the witnesses as a matter of trial strategy after defense counsel interviewed the witnesses and determined that their testimony was cumulative and potentially harmful to the defendant. Furthermore, the defendant's assertion that the defendant was denied effective assistance of trial counsel based on trial counsel's failure to call witnesses who would have testified that the defendant told the owner of the vehicle where the vehicle could have been found after the defendant had allegedly stolen the vehicle, was not error as the witnesses' testimony would have been inadmissible hearsay under O.C.G.A. § 24-3-1. *Sexton v. State*, 268 Ga. App. 736, 603 S.E.2d 66 (2004).

Defendant's defense attorney did not provide ineffective assistance in the defendant's child molestation trial by failing to call witnesses for the defense because the attorney's decision was based on a strategic choice to preserve the right to the final closing argument under former O.C.G.A. § 17-8-71; in addition, the defendant failed to show prejudice by proffering the testimony of any witnesses who would have provided testimony that was favorable to the defendant and would have changed the outcome of the trial.

Wheat v. State, 282 Ga. App. 655, 639 S.E.2d 578 (2006).

In the defendant's convictions for armed robbery, kidnapping, and aggravated assault in connection with robbery of a fast food restaurant, the defendant failed to show that trial counsel was ineffective by failing to call three acquaintances as defense witnesses as two of the witnesses had informed trial counsel that the defendant had admitted to them that the defendant was involved in the crimes; thus, the defendant failed to show that trial counsel's strategy of not calling the witnesses (whose testimony would have been harmful) was patently unreasonable. *Holsey v. State*, 291 Ga. App. 216, 661 S.E.2d 621 (2008).

Strategy not to call another doctor as witness. — Defendant did not receive ineffective assistance of counsel as the trial counsel's decision not to call another doctor as a witness was a reasonable trial strategy and there was no showing of prejudice. *Revells v. State*, 283 Ga. App. 59, 640 S.E.2d 587 (2006).

Strategy regarding testimony of ex-spouse. — Defendant's drug convictions were appropriate because counsel's trial strategy did not amount to ineffective assistance of counsel. Trial counsel testified that counsel's actions were done as a part of trial strategy to discredit the testimony of defendant's ex-wife and to show that she had a self-serving reason to testify falsely and get a lesser sentence. *Carter v. State*, 308 Ga. App. 686, 708 S.E.2d 595 (2011), cert. denied, No. S11C1141, 2011 Ga. LEXIS 573 (Ga. 2011).

Strategy to use chlamydia as part of defense. — Trial counsel was not ineffective for failing to perfect the record and secure a final ruling after counsel moved in limine to exclude references to chlamydia because it was part of the defendant's trial strategy to convince the jury that the defendant could not have committed the charged acts because the victim had chlamydia and there was no evidence that the defendant had that sexually transmitted disease. *Walker v. State*, 322 Ga. App. 180, 744 S.E.2d 366 (2013).

Alleged failure to discuss trial strategy with defendant. — Trial coun-

sel was not ineffective for failing to adequately prepare for trial because although the defendant contended that counsel was unaware of defendant's preferred trial strategy since counsel only met with the defendant two times before trial, the trial court credited counsel's testimony and found that counsel did, in fact, discuss counsel's trial strategy with the defendant; the defendant did not further elaborate on how counsel was allegedly unprepared for trial. *Sheats v. State*, 305 Ga. App. 475, 699 S.E.2d 798 (2010).

Strategy on admission of time sheets. — Trial counsel was not ineffective for failing to object to the admission of several hundred pages of time sheets from employees because counsel testified that a substantive objection was not made because counsel believed that the time sheets were helpful and use of a reasonably informed trial strategy could not support a claim of ineffective assistance of counsel. *Brown v. State*, 321 Ga. App. 198, 739 S.E.2d 118 (2013).

Strategy to show defendant as psychologically defeated and traumatized. — Counsel was not ineffective for failing to advocate for the defendant to have makeup, a wig, and personal grooming tools to enable the defendant to look nicer at trial because it was a reasonable trial strategy for counsel to want to present the defendant in a way that made the defendant look like a psychologically defeated and traumatized young woman who had been victimized by an abusive and violent husband. *Schutt v. State*, 292 Ga. 625, 740 S.E.2d 163 (2013).

Strategy to preempt prosecutor's hard questions. — Trial counsel did not invade the province of the jury when asking the defendant on direct examination, "Do you expect the jury to believe that?". The decision to ask the question, to minimize the adverse effects on the defendant by preempting a question counsel expected the prosecution to ask, was a reasonable trial strategy. *Crumity v. State*, 321 Ga. App. 768, 743 S.E.2d 455 (2013).

G. Other Examples

Criminal Procedure Discovery Act constitutional. — Reciprocal discovery provisions of the Criminal Procedure Dis-

covery Act, O.C.G.A. § 17-16-1 et seq., do not violate the right to effective representation of counsel by denying the defendant the benefit of counsel's judgment of whether and when to reveal aspects of the case to the state. *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999).

Pretrial discovery provisions of the Criminal Procedure Discovery Act, O.C.G.A. § 17-16-1 et seq., do not implicate or infringe upon the confrontation clause which guarantees only the right to confront and cross-examine those individuals called to testify against a defendant at trial. *State v. Lucious*, 271 Ga. 361, 518 S.E.2d 677 (1999).

Discovery requirements of O.C.G.A. § 17-16-4, relating to the presentence hearing, did not violate a defendant's right to effective assistance of counsel; counsel may freely investigate for mitigating evidence, knowing that the identity of any potentially harmful witness resulting from that investigation need only be produced to the state in reciprocal discovery should the defense decide to call that witness at the presentence hearing. *Muhammad v. State*, 282 Ga. 247, 647 S.E.2d 560 (2007).

Interstate Agreement on Detainers. — Trial counsel was not ineffective for failing to offer evidence in support of a motion to dismiss as the appellate court held that the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20 et seq., was violated; there was no evidence that a different result would have ensued at trial had counsel introduced the detainer and the defendant's response to it. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, aff'd, 280 Ga. 222, 626 S.E.2d 500 (2006).

Child molestation cases. — Child molestation defendant's counsel was not ineffective because the counsel: (1) adequately investigated; (2) employed a recognized trial tactic of not calling expert and other witnesses to testify that a child's testimony was based on dreams or family background and not reality in order to preserve the final word in closing argument; and (3) was not shown to have engaged in performance that affected the outcome of the trial by not objecting to testimony under O.C.G.A. § 24-3-36 regarding the defendant's failure to respond

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

to the state's investigator, and under O.C.G.A. § 24-9-85(b), by not requesting a special instruction regarding the child's alleged false swearing. *Bruce v. State*, 268 Ga. App. 677, 603 S.E.2d 33 (2004).

In a child molestation case, defense counsel was not ineffective for not objecting to the prosecutor's statement in closing that the victims should not be "punished"; when the remark was taken in context, it was apparent that the prosecutor was addressing the lack of physical injury or eyewitnesses to corroborate the victims' testimony, and these comments did not impermissibly divert the jury from the evidence. *Cherry v. State*, 283 Ga. App. 700, 642 S.E.2d 369 (2007).

A defendant in a child molestation case had not shown ineffective assistance of counsel since a charge on good character was not required because the defendant had not put the defendant's good character into issue, the defendant had not shown prejudice from an isolated comment on the defendant's silence, and the defendant had not shown prejudice from counsel's failure to impeach the victim with a delinquency adjudication. *Kurtz v. State*, 287 Ga. App. 823, 652 S.E.2d 858 (2007), cert. denied, No. S08C0321, 2008 Ga. LEXIS 184 (Ga. 2008).

Trial counsel was not deficient in failing to introduce evidence that a physical examination of a child victim found no physical evidence of alleged sexual abuse. Trial counsel clearly made a tactical decision not to call the physician who examined the victim and, instead, elected to comment on the state's failure to provide physical evidence to support the molestation allegations. *Shaffer v. State*, 291 Ga. App. 783, 662 S.E.2d 864 (2008).

In a child molestation prosecution, the defendant contended that defendant's trial counsel was deficient in failing to attack the validity of the search warrant used to obtain a DNA sample as the supporting affidavit failed to disclose that the victims' outcry was made to their parent shortly after the parent lost primary cus-

tody of the parent's other child. This claim failed because even if this evidence had been included, the victim's statement to the affiant that the defendant fathered the victim's child was sufficient to support the warrant. Furthermore, defense counsel was not deficient in failing to object to testimony about the alleged physical abuse of the victims as counsel reasonably believed such an objection would be overruled, and planned to use this testimony to bolster the defense theory that the victims were not credible. *Farris v. State*, 293 Ga. App. 674, 667 S.E.2d 676 (2008).

Trial counsel's failure to subpoena a child's case file did not constitute ineffective assistance as the file regarding the child was confidential and not subject to direct subpoena by the defendant, and the defendant did not demonstrate that such action would have changed the outcome of the child molestation trial. Additionally, failure to impeach a victim's parent with the parent's status as an illegal alien also did not constitute ineffective assistance as there was no logical reason to believe that the parent's illegal alien status, known only later to police, motivated or shaded the parent's trial testimony against the defendant; indeed, the parent's illegal alien status would have been a motive for the parent not to report the crime against the child in the first place. *Pareja v. State*, 295 Ga. App. 871, 673 S.E.2d 343, aff'd, 286 Ga. 117, 686 S.E.2d 232 (2009).

In convictions of child molestation, aggravated child molestation, and aggravated sexual battery, defendant failed to establish ineffective assistance of trial counsel since the failure to object to certain testimony from a victim-witness advocate was legitimate trial strategy, the failure to object to similar transaction evidence was proper since this evidence was admissible, and the failure to object to certain closing argument statements would not have affected the trial's outcome under the circumstances. *Woods v. State*, 304 Ga. App. 403, 696 S.E.2d 411 (2010).

Trial counsel was not ineffective in failing to question the qualifications and credibility of the expert who took the child molestation victim's statement because the state's direct examination at trial

showed that the expert who took the victim's statement was well-qualified with 15 years' experience in assisting children and teenagers suffering from severe mental illness or trauma. *Robinson v. State*, 308 Ga. App. 45, 706 S.E.2d 577 (2011).

Trial counsel was not ineffective in failing to ask for a hearing on the admissibility of the child molestation victim's videotaped statement because counsel testified that counsel chose not to request a hearing under former O.C.G.A. § 24-3-16 (see now O.C.G.A. § 24-8-820) since counsel had never seen a victim's statement declared inadmissible, and counsel did not want the delay resulting from such a request to give the state additional time to prepare the state's case; trial counsel was under no obligation to invoke a client's legal right to a hearing designed to protect that client's interests if the invocation of that abstract right would, in counsel's professional judgment of the circumstances presented by a specific case, do actual harm to those interests. *Robinson v. State*, 308 Ga. App. 45, 706 S.E.2d 577 (2011).

Trial court's determination that a defendant's counsel was not ineffective for failing to object to a line of questioning regarding the witnesses' belief that the young victims were telling the truth was not clearly erroneous as counsel had pursued a reasonable trial strategy; the defense in the case, involving multiple sexual offenses committed by the defendant against young boys, was that very young children were susceptible to telling stories and misconstruing the facts. *Gregoire v. State*, 309 Ga. App. 309, 711 S.E.2d 306 (2011).

Defendant, in a child molestation case, failed to show ineffective assistance from trial counsel's decisions not to object to allowing the jury to see translations of notes written by the defendant to the victim and by not objecting to the admission of adult pornography found in the defendant's cell phone because the letters supported the defense counsel's strategy by showing that the victim had a motive to invent the abuse as a means of getting the defendant out of the life of the victim's parent and the adult pornography supported the defense counsel's strategy that

the defendant was only attracted to adults, and not children. *Medrano v. State*, 315 Ga. App. 880, 729 S.E.2d 37 (2012).

Trial counsel was not ineffective for failing to object to testimony that the defendant could have molested the victim's brother because the evidence included more than just the allegations made in the initial outcry; thus, the defendant failed to show a reasonable probability that the outcome of the trial would have been more favorable to the defendant had the testimony been excluded. *Henry v. State*, 316 Ga. App. 132, 729 S.E.2d 429 (2012).

Compelled attorney testimony. — Requiring defendant's attorney to testify against the defendant on a contested, material issue so diminishes the persuasive force of the attorney's advocacy on behalf of the defendant in the eyes of the jury that the defendant may be denied the defendant's right to effective assistance of counsel, and a subpoena which attempted such should have been quashed given an insufficient showing of need on behalf of the state. *Shelton v. State*, 206 Ga. App. 579, 426 S.E.2d 69 (1992).

When counsel blurs distinction between state and federal constitutional rights regarding ineffective counsel, and when such counsel makes no argument based separately on the Georgia Constitution but does primarily cite federal cases and state cases applying the federal constitution, the issue should be treated as predicated upon rights guaranteed by the United States Constitution. *Davenport v. State*, 172 Ga. App. 848, 325 S.E.2d 173 (1984).

Membership of bar in good standing is prima-facie proof of competency as attorney and that counsel's representation meets the requirements of due process. *Hill v. Balkcom*, 213 Ga. 58, 96 S.E.2d 589 (1957), commented on in 19 Ga. B.J. 519 (1957).

When a defendant is represented by employed counsel who is admitted to the bar of this state in good standing, a prima-facie case is made that the defendant was represented by a competent attorney. *Suits v. State*, 150 Ga. App. 285, 257 S.E.2d 306 (1979); *Williams v. State*,

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

153 Ga. App. 192, 264 S.E.2d 715 (1980); *Chapman v. State*, 154 Ga. App. 532, 268 S.E.2d 797 (1980).

Disbarment of attorney. — Trial counsel did not provide ineffective assistance of counsel because defendant failed to show that counsel was under the influence of drugs during counsel's representation or that there was any deficient performance due to counsel's addiction; defendant made an unsupported claim that counsel was subsequently disbarred but subsequent disbarment, in and of itself, did not provide a basis for presuming deficient performance. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

Administrative suspension of attorney. — An attorney does not render ineffective assistance of counsel under either the United States or Georgia Constitution when representing a criminal defendant while suspended from the practice of law for failure to comply with state bar administrative regulations. *Cornwell v. Dodd*, 270 Ga. 411, 509 S.E.2d 919 (1999).

Defendant did not show that defendant received ineffective assistance of counsel, despite the fact that defendant's counsel was under the state bar's administrative suspension at the time defendant was being tried, as the suspension was for failing to timely respond to an inquiry and did not show that counsel provided ineffective assistance in representing defendant; since defendant did not show any other evidence that defense counsel provided ineffective assistance, defendant's ineffective assistance of counsel claim had to fail. *Zinnamon v. State*, 261 Ga. App. 170, 582 S.E.2d 146 (2003).

Defense counsel was not ineffective for allowing co-counsel to give the closing argument; lack of experience alone could not constitute grounds for an ineffective assistance of counsel claim, and upon questioning by the trial court, the defendant expressly agreed that the defendant was "comfortable" with the decision to allow co-counsel to handle closing. *Cooper v. State*, 281 Ga. 760, 642 S.E.2d 817 (2007).

Counsel held in contempt. — Trial counsel was not ineffective because counsel was held in contempt; even if counsel did not perform to the best ability after the contempt proceeding, such did not mean counsel's performance fell to a level of ineffectiveness. *Sanders v. State*, 281 Ga. 36, 635 S.E.2d 772 (2006).

Retained counsel found effective. — Defendant failed to meet the burden of showing that retained counsel's performance was deficient and that the deficient performance prejudiced the defense because there was no reasonable probability that the outcome would have been different; trial counsel was death penalty certified in two states, spent eight years as a public defender before entering private practice, rendered reasonably effective services to defendant throughout the trial, and defendant presented no evidence that trial counsel's imminent new job as a judge hindered counsel's ability to provide reasonably effective counsel or prejudiced defendant's case. *Maskivish v. State*, 276 Ga. App. 701, 624 S.E.2d 160 (2005).

Effective counsel established. — Motion for a new trial was properly denied because defense counsel was not ineffective, because counsel was well-prepared, filed pretrial motions, thoroughly cross-examined each witness, preserved counsel's objections, and successfully excluded hearsay testimony and physical evidence, it was counsel's practice to advise counsel's clients of the meaning of trial as a recidivist, of the possible sentences, and of the risks of going to trial, and counsel obtained an acquittal on the greater charge of possession of cocaine with intent to distribute. *Allen v. State*, 272 Ga. App. 23, 611 S.E.2d 697 (2005).

Trial counsel did not provide ineffective assistance of counsel because: (1) defendant did not identify any missing witness or any evidence that was not timely discovered; (2) counsel was not required to spend a certain amount of time with defendant; (3) defendant failed to show prejudice arising out of defendant's mother's difficulty in contacting counsel; and (4) defendant failed to show how impeaching a victim would have altered the outcome of the trial. *Harris v. State*, 279 Ga. 304, 612 S.E.2d 789 (2005).

Appeals court rejected defendant's claims that trial counsel was ineffective: (1) for failing to move to sever the trial from a codefendant's; (2) for failing to call as a witness a certain individual who would have provided evidence that was crucial to the defense; and (3) because counsel was ill-prepared for trial, as the overwhelming evidence of guilt would not have changed the outcome of the trial; thus, defendant failed to prove that the defendant was prejudiced by these allegations. *Jenkins v. State*, 279 Ga. App. 897, 633 S.E.2d 61 (2006).

Because the court of appeals found no reasonable possibility that the result of the defendant's trial would have been different if trial counsel had successfully objected to the evidence that the victim was being hidden, that the victim's grandmother had been indicted for lying, or by failing to object when the victim's foster mother bolstered the victim's credibility, the court rejected the defendant's ineffective assistance of counsel claims. *Payne v. State*, 290 Ga. App. 589, 660 S.E.2d 405 (2008).

Evidence supported a conclusion that the defendant failed to show deficient performance related to the amount of time trial counsel spent consulting with the defendant because counsel testified that counsel met with the defendant multiple times during the course of the case, showed the defendant materials obtained through discovery, and discussed with the defendant medical records, how to respond to the state's allegations, and whether the defendant would testify at trial. *Jackson v. State*, 310 Ga. App. 476, 713 S.E.2d 679 (2011).

Because the defendant made no showing that the defendant's wife lacked authority to consent to a search of the marital residence, because trial attorney's strategic decisions not to pursue a defense or to request a jury poll were not patently unreasonable, and because the defendant's claims were not waived by appellate counsel, the defendant failed to show that the defendant was entitled to a new trial based on counsels' alleged ineffectiveness. *Davis v. State*, 311 Ga. App. 699, 716 S.E.2d 710 (2011).

Claim of ineffective assistance of coun-

sel failed because overwhelming evidence of the defendant's guilt was presented at trial and, while the defendant contended that prejudice should have been presumed because trial counsel's actions amounted to a constructive denial of counsel, the record did not show an entire failure of counsel to meaningfully test the prosecution's case. The record demonstrated that trial counsel attempted to hold the prosecution to the prosecution's heavy burden of proof beyond a reasonable doubt, and counsel, who had spent a significant amount of time preparing for trial, made numerous objections to testimony and evidence introduced through the prosecutor's direct examinations of the state's witnesses. *Wade v. State*, 315 Ga. App. 668, 727 S.E.2d 275 (2012).

Defendant's claim of ineffective assistance of counsel failed because counsel could not be ineffective for failing to object to testimony that did not affect the outcome of the trial, nor was counsel deficient in eliciting an arresting officer's testimony that the officer had heard over the police radio that the defendant was armed with a gun and prepared to use the gun, as the question was designed to show that the officer was being overly dramatic, which it did and was not a patently unreasonable tactic. *Westbrook v. State*, 291 Ga. 60, 727 S.E.2d 473 (2012).

Claim of ineffective assistance of counsel failed because trial counsel understood the significance of gunpowder travel testimony, but chose not to concentrate on it because counsel did not think that the distance between the defendant and the victim was significant, and the evidence showed that the defendant intentionally grabbed the pistol and fired the pistol, creating a foreseeable risk of death that was inherently dangerous. *Harris v. State*, 291 Ga. 175, 728 S.E.2d 178 (2012).

Defendant's counsel withholding mitigating evidence. — Death sentence based on O.C.G.A. §§ 17-10-30(b)(2), (b)(4), (b)(7) and 17-10-35(c)(1), (c)(3) aggravators for malice murder was supported by sufficient evidence, not the result of ineffective counsel or an improperly selected jury, and not disproportionate to other depraved, wantonly vile, and tortuous murders. Defendant's counsel's with-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

holding of alleged mitigating evidence (by presenting it to the trial court under seal) so that the state could not use that evidence against defendant in the event of a new trial could not be used to assess whether counsel was ineffective for withholding it. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Failure to investigate and present mitigating evidence in death penalty.

— In a death penalty case, a habeas court properly found that trial counsel was deficient in investigating and presenting mitigating evidence regarding an inmate's childhood abuse and neglect and the inmate's history of substance abuse and depression. The inmate suffered prejudice because the evidence that should have been presented, showing that the inmate's history of abuse and neglect had led to the inmate's major depression and the inmate's early exposure to alcohol and drugs, would have greatly undermined the state's argument that the inmate had freely chosen a life of addiction. *Hall v. McPherson*, 284 Ga. 219, 663 S.E.2d 659 (2008).

Counsel's acknowledgment that without continuance representation ineffective. — Counsel's own statement in a written motion for a continuance that, without the continuance, counsel's representation would be ineffective, did not equate to a finding that counsel was ineffective at trial; furthermore, trial counsel was not ineffective in failing to call any witnesses in defendant's defense, especially because counsel believed those potential witnesses would not have helped the defense, counsel wished to preserve the right to opening and closing argument, and the witnesses' testimony could be suspect due to their relationship to defendant. *Sims v. State*, 278 Ga. 587, 604 S.E.2d 799 (2004).

Admission that attorney "could have done a better job." — Defendant's motion for a new trial was properly denied

as the trial counsel did not provide ineffective assistance even though the trial counsel admitted to the defendant's mother that the trial counsel "could have done a better job" at trial; the trial counsel's post-conviction musings about how the trial counsel could have improved the trial counsel's performance did not constitute ineffective assistance as a claim of ineffective assistance of counsel was judged by whether the trial counsel rendered reasonably effective assistance, not by a standard of errorless counsel or by hindsight. *Lawson v. State*, 280 Ga. App. 870, 635 S.E.2d 259 (2006).

Chronic presumption of prejudice did not apply to determine whether a malice murder, death sentenced defendant was prejudiced by counsel's representation (based upon defendant's argument that the counsel's representation broke down by counsel admitting the defendant had knifed the victim's two children) since counsel remained a vigorous advocate of the defendant's case throughout the guilt-innocence phase closing argument. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Counsel was not ineffective for focusing on death penalty phase of malice murder trial in view of overwhelming evidence against a defendant in the guilt-innocence phase and the defendant's failure, until the last minute, to tell the counsel what exact events took place the day of the crime. *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (2004), cert. denied, 543 U.S. 1058, 125 S. Ct. 870, 160 L. Ed. 2d 784 (2005).

Conflict of interest. — Defendant's appointed counsel represented defendant in the same court in which the appointed counsel was a full time law clerk; therefore, an actual conflict of interest existed warranting reversal of defendant's convictions. *Sallie v. State*, 269 Ga. 446, 499 S.E.2d 897 (1998).

Denial of defense counsel's motion to withdraw, made because another attorney in counsel's office represented an uncooperative witness in another matter a month prior to defendant's trial, did not violate defendant's right to representation that

was free from conflicts of interest since the uncooperative witness did not testify at defendant's trial and there was no evidence suggesting that trial counsel was in possession of any information about the witness or the witness's previous prosecution. *Porter v. State*, 278 Ga. 694, 606 S.E.2d 240 (2004).

When defense counsel had counsel's client meet with counsel for a codefendant, and defense counsel was subsequently placed on the codefendant's witness list, defendant did not show that there was an impermissible conflict of interest constituting ineffective assistance because defendant did not show that defense counsel actively represented conflicting interests and that an actual conflict of interest adversely affected defense counsel's performance. *Parker v. State*, 274 Ga. App. 347, 617 S.E.2d 625 (2005).

Inmate who pled guilty to malice murder and aggravated assault and was serving a sentence of life plus years was entitled to habeas corpus relief because counsel who represented defendant at a guilty plea was simultaneously representing the district attorney, creating an actual conflict of interest and, given the enormity of the penalty the inmate faced, the conflict was impermissible. *Howerton v. Danenberg*, 279 Ga. 861, 621 S.E.2d 738 (2005).

Defense counsel was not operating under a conflict of interest based on the fact that the prosecutor in defendants' case had earlier tried defense counsel for murder, which trial resulted in an acquittal. *Allen v. State*, 278 Ga. App. 292, 628 S.E.2d 717 (2006).

Defendant did not show that the defendant's defense attorney provided ineffective assistance in a child molestation trial because of a conflict of interest arising from the attorney's representation of the defendant in divorce proceedings; the defendant voiced no objection to the alleged conflict before the trial, did not show that the attorney had an actual conflict of interest because the attorney was likely to be a necessary witness at trial, and did not show that any such actual conflict of interest adversely affected the attorney's performance. *Wheat v. State*, 282 Ga. App. 655, 639 S.E.2d 578 (2006).

Defendant's ineffective assistance of counsel claim lacked merit as the defendant failed to show that trial counsel's actions, in which counsel also represented the codefendant who was the passenger in the vehicle the defendant was driving, prejudiced the defense; further, counsel's actions did not slight the defense of one defendant for another, the principles contained in charges on mere presence and equal access were adequate, counsel was prepared for trial, and the prosecutor's closing argument statements were not prejudicial so as to warrant an objection. *Garvin v. State*, 283 Ga. App. 242, 641 S.E.2d 176 (2006).

An inmate had been denied effective assistance of counsel under the Sixth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIV based on an actual conflict of interest because both trial and appellate counsel did not diligently pursue a jury array issue based on an agreement that the public defender's office had with superior court judges, despite their belief that the issue was a strong one. The attorneys' duties to their employer, the public defender's office, directly conflicted with their duties of loyalty and zealous advocacy to their client under Ga. St. Bar R. 4-102(d):1.7, and the conflict significantly affected the representation the inmate received. *Edwards v. Lewis*, 283 Ga. 345, 658 S.E.2d 116 (2008).

Trial court erred in granting a new trial based on ineffective assistance of counsel due to counsel's prior employment in a public defender's office where another attorney had briefly represented the state's key witness against the defendant because the defendant failed to show how the conflict of interest compromised the attorney's representation of the defendant. *State v. Abernathy*, 289 Ga. 603, 715 S.E.2d 48 (2011).

Record belied any assertion that trial counsel had any divided loyalties between the defendant and a man who had been a suspect in the murder and testified as a state's witness at trial or that counsel represented the man in any way during the defendant's trial because counsel actually targeted the man as one of the people other than the defendant who had actually committed the murder. *Wheeler*

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

v. State, 290 Ga. 817, 725 S.E.2d 580 (2012).

Conflict of interest by attorney must be actual rather than merely speculative to support relief and not every conceivable conflict is so egregious as to amount to a violation of U.S. Const., amend. 6; even joint representation of codefendants need not be a per se constitutional violation. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), vacated on other grounds, *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

Pending disciplinary action and subsequent surrender of license. — Trial counsel was not ineffective per se due to the fact that there was a pending disciplinary action against counsel at the time of trial or due to the subsequent surrender of counsel's license to practice law. *Simmons v. State*, 291 Ga. 705, 733 S.E.2d 280 (2012).

Effect of jurors seeing defendant in handcuffs and shackles. — Defense counsel did not provide ineffective assistance of counsel in failing to take action when some jurors allegedly saw defendant in handcuffs and shackles as defendant failed to show that any juror actually saw defendant or that it tainted the outcome of the trial. *Stevenson v. State*, 272 Ga. App. 335, 612 S.E.2d 521 (2005).

Transfer of ineffective assistance of counsel claim improper. — Trial court's order denying defendant's extraordinary motion for new trial/habeas petition was a nullity and void under O.C.G.A. § 9-12-16, and the appellate court could not transfer defendant's case to the Georgia Supreme Court to consider the grant of a certificate of probable cause under O.C.G.A. § 9-14-52(b), even though the Georgia Supreme Court had exclusive jurisdiction over habeas cases, as the trial court was without subject matter jurisdiction to entertain defendant's habeas claim upon a transfer from a habeas court with instructions to determine whether trial

counsel was ineffective; however, as defendant's habeas claims had not been addressed by a court of competent jurisdiction, the appellate court remanded the matter to the habeas court for resolution of defendant's habeas claims of ineffective assistance of counsel, with the final order subject to the appellate procedures outlined in O.C.G.A. § 9-14-52. *Herrington v. State*, 265 Ga. App. 454, 594 S.E.2d 682 (2004).

Remand ordered for evidentiary hearing on effectiveness. — Defendant's case was remanded for an evidentiary hearing on defendant's ineffective assistance of counsel claims as it was not clear when defendant took over defendant's own representation and defendant's appeal might have been defendant's first opportunity to raise defendant's ineffective assistance of counsel claims, and as defendant's claims could not be resolved by examining the appellate record. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Because defendant's ineffective assistance of counsel claim was not properly raised before the trial court, the case was remanded for an evidentiary hearing. *Rosser v. State*, 276 Ga. App. 261, 623 S.E.2d 142 (2005).

Because it could not be determined from the record whether defendant could satisfy the Strickland test with respect to trial counsel's failure to ask the jurors if they knew any of the parties, the case was remanded for an evidentiary hearing; during the state's case, the bailiff brought to the court's attention that one of the juror's knew one of the police officers who testified. *Kidd v. State*, 277 Ga. App. 29, 625 S.E.2d 440 (2005).

As the claims of ineffective counsel, primarily in the area of preparation, had not been addressed by the trial court, further factual development by that court was required; therefore, the Court of Appeals remanded the matter with directions that if prejudicial ineffective assistance was found, the defendant was to be granted a new trial. *Pinkston v. State*, 277 Ga. App. 432, 626 S.E.2d 626 (2006).

Denial of a defendant's motion for a new trial was vacated and the case was remanded to the trial court to determine if

counsel advised the defendant that the defendant could withdraw the defendant's guilty pleas if the defendant was dissatisfied with the defendant's sentence as long as the defendant did so before the written entry of sentence; if counsel so advised the defendant, the advice fell below an objective standard of reasonableness for ineffective assistance of counsel purposes. *McCroskey v. State*, 280 Ga. App. 638, 634 S.E.2d 824 (2006).

Defendant's ineffective assistance of counsel claim under Ga. Const. 1983, Art. I, Sec. I, Para. XIV was remanded for trial court consideration because the issue was raised for the first time on appeal and the claims were not the subject of a motion for a new trial. *Acey v. State*, 281 Ga. App. 197, 635 S.E.2d 814 (2006).

Because: (1) the defendant raised a colorable claim of ineffective assistance of trial counsel in a motion for a new trial based on counsel's failure to locate and present evidence of specific acts of violence by the alleged victim against third persons; (2) trial counsel's statement as to unsuccessfully attempting to locate these witnesses did not negate the possibility that a failure to do so constituted deficient performance; and (3) the defendant raised the ineffective assistance claim at the earliest practicable opportunity, albeit on appeal, the defendant asserted a colorable claim of ineffective assistance that required an evidentiary hearing on remand for its resolution. *Portilla v. State*, 285 Ga. App. 401, 646 S.E.2d 277 (2007).

Issue not developed. — Trial court did not err in denying defendant's motion for an out-of-time appeal; the claim that the trial counsel rendered ineffective assistance in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV and U.S. Const., amend. 6 could not be resolved on appeal by reference to the record on appeal, especially since the issue had not been developed in a post-plea hearing. *Thompson v. State*, 275 Ga. App. 566, 621 S.E.2d 475 (2005).

Habeas court properly denied habeas petition based on ineffective assistance of trial counsel when although it was error to rule against the appellant on the ground that the appellant, who had pled guilty to drug possession charges, had

expressed satisfaction with trial counsel at a plea hearing, habeas court had also ruled against appellant on the ground that it did not find that appellant's testimony regarding attorney's performance was credible. *Jackson v. State*, 283 Ga. 462, 660 S.E.2d 525 (2008).

Defense counsel was not ineffective for failing to call a psychologist to testify on behalf of the defendant because any attempt to do so would have been denied; at the hearing on the defendant's motion for a new trial, the trial court indicated that the trial court would not have allowed the psychologist to testify because facts needed to support the psychologist's opinion were never placed into the record. *Kirkland v. State*, 292 Ga. App. 73, 663 S.E.2d 408 (2008).

Counsel ineffective but defendant failed to show prejudice. — In a felony murder trial, the prosecutor's statement concerning the defendant's failure to call police about the victim's stabbing was an improper comment on the defendant's silence or failure to come forward, and defense counsel was deficient in failing to object. But given the weight of the evidence against the defendant, the defendant failed to show that, absent counsel's deficient performance, there was a reasonable probability the outcome of the trial would have been different. *Lampley v. State*, 284 Ga. 37, 663 S.E.2d 184 (2008).

While trial counsel's introduction into evidence of a prejudicial police report and failure to seek a limiting instruction on the report's use constituted deficient performance, the defendant's ineffective assistance claim failed because the defendant could not show prejudice in light of the overwhelming evidence against the defendant. *Berry v. State*, 318 Ga. App. 806, 734 S.E.2d 768 (2012).

Although trial counsel was deficient in failing to object to the state's introduction of the defendant's statement, which were part of the defendant's inadmissible videotaped confession, the error did not entitle the defendant to relief because the evidence was overwhelming and the defendant would not have had a better chance at trial if the trial court had excluded the videotaped statements. *Fuller v. State*, 320 Ga. App. 620, 740 S.E.2d 346 (2013).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

Counsel not ineffective in representation of minor. — Trial counsel's failure to seek a Jackson-Denno hearing to suppress the defendant's statement to the police did not amount to ineffective assistance because after detailing the numerous factors considered, the trial court found that if a Jackson-Denno hearing had been held, the defendant's statements would have been found admissible, notwithstanding that the defendant was a minor. *Cuvas v. State*, 306 Ga. App. 679, 703 S.E.2d 116 (2010).

Ineffective counsel not established.

— See *White v. State*, 216 Ga. App. 583, 455 S.E.2d 117 (1995); *Frazier v. State*, 263 Ga. App. 12, 587 S.E.2d 173 (2003); *Smart v. State*, 277 Ga. 111, 587 S.E.2d 6 (2003); *Bravo v. State*, 269 Ga. App. 242, 603 S.E.2d 669 (2004); *Hayes v. State*, 279 Ga. 642, 619 S.E.2d 628 (2005); *Ford v. State*, 272 Ga. App. 798, 613 S.E.2d 234 (2005); *Seabolt v. State*, 279 Ga. 518, 616 S.E.2d 448 (2005); *Callahan v. State*, 280 Ga. App. 323, 634 S.E.2d 102 (2006).

Trial court's determination that defendant did not receive ineffective assistance of counsel was not clearly erroneous, as defendant did not show anything defendant's trial counsel did or failed to do that was objectionable or that would have changed the outcome of defendant's case. *Dorsey v. State*, 261 Ga. App. 181, 582 S.E.2d 158 (2003).

Defendant was not denied effective assistance of counsel at a trial for rape and aggravated sodomy because there was no basis to request a continuance or disallowance of a colposcope printout, which showed the victim's anal bruising, based on the state's failure to produce the printout before trial because: (1) defendant already had the assistant's examination report, which mentioned the picture; (2) defendant's counsel was permitted to interview the assistant before the assistant's testimony; (3) the day of the trial was the first time that the prosecutor saw the picture; (4) there was no bad faith by the state; and (5) the printout was cumu-

lative of other testimony. Furthermore, defendant's counsel was not ineffective for failing to notify defendant of the added sodomy charge because defendant, who had a prior rape conviction, was already facing a mandatory life without parole sentence upon conviction of rape, regardless of the sodomy charge. *McMorris v. State*, 263 Ga. App. 630, 588 S.E.2d 817 (2003).

When the trial court credited trial counsel's testimony that counsel was prepared for trial, and heard that counsel reviewed the police reports, spoke with most of the state's witnesses, reviewed statements from the remainder of the state's witnesses, visited the scene on two occasions, and met with the defendant for a significant period just before trial to prepare the defendant for trial and for testifying, such factual finding was not clearly erroneous; thus, counsel was not ineffective. *Williams v. State*, 277 Ga. 368, 589 S.E.2d 563 (2003).

Supreme Court found no merit in defendant's ineffective assistance of counsel claim, as a review of the transcript of the hearing on defendant's motion for new trial revealed that trial counsel met and communicated with defendant numerous times in the months before trial and consulted with defendant on all possible defenses; defendant failed to present any evidence of how further cross-examination of witnesses or the submission of additional photographs of the crime scene would have been necessary or beneficial to the defense. *Jackson v. State*, 277 Ga. 592, 592 S.E.2d 834 (2004).

Because trial counsel met with defendant five to ten times before trial and defendant's other claims of ineffective assistance of counsel were speculative, defendant failed to establish that the alleged ineffectiveness prejudiced defendant's defense; consequently, the trial court properly denied defendant's motion for a new trial. *Vanholtan v. State*, 271 Ga. App. 782, 610 S.E.2d 555 (2005).

On appeal from two child molestation convictions, the defendant was properly denied a new trial, because the admission of privileged testimony was not erroneous, and trial counsel was not ineffective by: (a) ignoring a consent order barring the

state from introducing any written or oral admissions or statements the defendant made before and after a polygraph examination; (b) failing to assert the attorney-client privilege with respect to a polygraph expert's testimony; and (c) failing to adequately prepare a second polygraph expert who testified for the defense at trial; in fact; (1) counsel neither ignored the consent order nor performed deficiently when stipulating to the admission of the polygraph results; and (2) even assuming that counsel was deficient in failing to consult the defendant regarding the attorney-client privilege, the defendant failed to show a reasonable probability that the result would have been different in the absence of the second expert's cumulative testimony. *Adesida v. State*, 280 Ga. App. 764, 634 S.E.2d 880 (2006).

Even if a defendant had not waived a claim that the defendant's trial counsel provided ineffective assistance during the defendant's trial for armed robbery and other crimes by failing to procure transcripts of a Jackson-Denno hearing by failing to support the claim with citations to authority, no ineffective assistance was shown; the defendant did not suggest how the transcript could have been used to impeach the testimony of accomplices, and the transcript was not part of the record because it was not proffered at the motion for new trial. *Metoyer v. State*, 282 Ga. App. 810, 640 S.E.2d 345 (2006).

Despite the defendant's numerous allegations of ineffective assistance of counsel, specifically, counsel's: (1) failure to call two witnesses and to request a continuance in order to secure the presence of the witnesses; (2) failure to call for a recess to secure certified copies of the defendant's drug convictions; (3) failure to request a jury charge on impeachment of a witness; and (4) failure to object to portions of the prosecutor's closing argument, the contentions were rejected on appeal, as the defendant failed to show that the outcome of the trial would have been different but for counsel's alleged inactions. *Hartley v. State*, 283 Ga. App. 388, 641 S.E.2d 607 (2007).

Given the overwhelming evidence of the defendant's guilt with respect to an aggravated assault charge, and because no rea-

sonable probability existed that the outcome of the trial with respect to that charge would have been different had the jury not been presented evidence of the temporary protective order, and the result would not have changed even if trial counsel had stipulated to the existence of the temporary protective order to avoid its presentment to the jury, trial counsel did not provide ineffective assistance of counsel in defending the charge. *Ford v. State*, 283 Ga. App. 460, 641 S.E.2d 671 (2007).

When each alleged deficiency of trial counsel either was completely without any factual basis or involved counsel's failure to object to clearly admissible evidence or proper trial procedure, and when the alleged deficiencies in some instances were also attributable to reasonable trial strategy, there were no errors that could be considered in a cumulative prejudice analysis. *Waits v. State*, 282 Ga. 1, 644 S.E.2d 127 (2007).

Because the defendant failed to show the ineffective assistance of counsel because trial counsel was poorly prepared, failed to object to the form of the jury verdict, and did not make certain arguments during the pre-sentence hearing, and failed to indicate how any of these alleged errors could have affected the outcome of the trial, the defendant failed to establish the ineffective assistance of counsel on these grounds. *McCoy v. State*, 285 Ga. App. 246, 645 S.E.2d 728 (2007).

Counsel's strategic decisions made during trial, and failure to make meritless objections failed to support the defendant's allegations that counsel was ineffective. *Johnson v. State*, 284 Ga. App. 724, 644 S.E.2d 544 (2007), cert. denied, 2007 Ga. LEXIS 538 (Ga. 2007).

The Court of Appeals of Georgia rejected the defendant's ineffective assistance of counsel claim, based on counsel's alleged failure to communicate, as no reasonable probability existed, nor did the defendant offer any, that the outcome of the trial would have been different absent counsel's alleged deficient performance; moreover, to the extent that the defendant's testimony contradicted that offered by trial counsel, the trial court, at the hearing on the motion for new trial, and not the appeals court, determined witness

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

credibility and resolved any conflicts in the testimony. *Chambers v. State*, 284 Ga. App. 400, 643 S.E.2d 871 (2007).

The trial court did not err in denying the defendant's amended motion for a new trial based on trial counsel's alleged ineffective assistance, as the evidence failed to show that counsel's trial strategy was unreasonable, the defendant failed to show prejudice by counsel's actions, and the defendant failed to preserve some of the challenges to counsel's actions for appellate review. *Phillips v. State*, 284 Ga. App. 224, 644 S.E.2d 153 (2007).

Defendant's ineffective assistance of counsel claims lacked merit, given that: (1) similar transaction testimony was cumulative of other testimony previously offered, admitted for the proper purpose of showing a prior difficulty between the defendant and one of the victims, and could have shown defendant's motive, intent, and bent of mind; and (2) the alleged improper character evidence was admissible to explain why the victims and their parents did not immediately report the matter to police. *Head v. State*, 285 Ga. App. 471, 646 S.E.2d 699 (2007).

Based on the transcript of the guilty plea hearing and the testimony by defense counsel at the hearing, the trial court was authorized to reject the defendant's claims that counsel's performance was deficient, that counsel was not prepared to try the case, and that counsel forced the defendant to enter a guilty plea. *Moore v. State*, 286 Ga. App. 99, 648 S.E.2d 451 (2007).

Defendant did not show ineffective assistance of counsel since, even if counsel's failure to attempt to exclude certain evidence was deficient, the defendant did not show that harm resulted; counsel was not ineffective for failing to object to admissible evidence that the defendant was hiding in a closet at the time of the defendant's arrest, for failing to request an alibi charge when the evidence did not show the impossibility of the defendant's presence at the crime scene, and the defendant did not show how trial counsel's failure to

introduce prior allegations of sexual abuse by the victim rendered trial counsel's performance deficient. *Foster v. State*, 286 Ga. App. 250, 649 S.E.2d 322 (2007), cert. dismissed, 2007 Ga. LEXIS 875 (Ga. 2007).

The defendant's claims of ineffective assistance of counsel were either waived or lacked merit; nowhere in a motion for new trial or in the hearing thereon had the defendant mentioned defense counsel's failure to object to a handgun, the evidence belied the defendant's assertion that defense counsel had given the defendant an insufficient explanation of a recidivist notice, and a certain charge the defendant claimed should have been requested would have been inappropriate in light of the evidence. *Winfrey v. State*, 286 Ga. App. 450, 649 S.E.2d 561 (2007).

Defendants' ineffective assistance of counsel claims failed since although the defendants claimed that counsel was ineffective for failing to rebut testimony that a driver's death could not have been prevented by a seat belt, defendants had not shown that such rebuttal evidence existed; counsel was also not ineffective for failing to seek a directed verdict of acquittal because the evidence was sufficient to support the defendants' convictions, the defendants were not prejudiced by counsel's failure to request a charge on proximate cause because there was no evidence that the driver's death could have been avoided by a seat belt, defendants by not questioning counsel's reasons for not requesting certain charges had not overcome the presumption that counsel acted reasonably, no curative need had arisen to give a charge on one defendant's right not to testify, and a Jackson-Denno hearing was not required because incriminating statements made by one defendant were not made during police interrogation, but to a nurse treating that defendant at a hospital. *Mitchell v. State*, 282 Ga. 416, 651 S.E.2d 49 (2007).

Ineffective assistance of counsel claims regarding the defendant's initial post-trial counsel's performance lacked merit, as counsel was neither professionally deficient nor prejudicial because: (1) the defendant waived any right to be present at the two juror interviews; (2) no deficiency

could result from counsel's failure to raise meritless objections; and (3) the trial court specifically found that the defendant adequately understood the nature of the charges, and comprehended the proceedings, despite being under the influence of prescribed anti-depressants, and was capable of aiding the defense. *Hampton v. State*, 282 Ga. 490, 651 S.E.2d 698 (2007).

A defendant failed to establish ineffective assistance of counsel; counsel's failure to object to hearsay testimony about a statement by a non-testifying witness was not ineffective assistance because the statement's admission was harmless error, the failure to object to hearsay testimony as to venue was not ineffective assistance because admissible evidence established venue, and the failure to make a chain of custody objection was not ineffective assistance because the objection would have been fruitless. *White v. State*, 283 Ga. 566, 662 S.E.2d 131 (2008).

A defendant had not shown that trial counsel was ineffective since the defendant had not identified any motion, defense, or evidence that counsel failed to present and had failed to show any deficiencies in counsel's knowledge of the crime scene that affected the outcome of the trial; the defendant had not cited any evidence that could have been used to impeach witnesses or suggested any questions that could have been asked and had not shown prejudice from counsel's failure to seek a continuance based on the absence of a prosecution witness. *Cail v. State*, 287 Ga. App. 547, 652 S.E.2d 190 (2007).

Having failed to demonstrate a reasonable likelihood that the outcome of defendant's trial would have been different had defendant testified, defendant had not established ineffective assistance of counsel. Defendant claimed at a motion for new trial hearing that defendant's spouse and stepchild had lied at defendant's trial, but did not allege any specific lie; furthermore, the record confirmed that the jurors were adequately charged that defendant was denying all charges and that witness credibility was a question for them to decide. *Brown v. State*, 288 Ga. App. 671, 655 S.E.2d 287 (2007).

Defendant had not shown ineffective assistance of counsel because it was not unreasonable for counsel to allow defendant's statement to come into evidence, as it allowed counsel to place defendant's version of events before the jury without subjecting defendant to cross-examination; further, chain of custody objection would not have been meritorious, it was not improper for an officer to come to the defendant's house to investigate information received from an anonymous tip, it was highly probable that erroneous testimony did not contribute to the verdict, and defendant had not shown how further cross-examination of a certain witness would have produced a different result. *Felton v. State*, 283 Ga. 242, 657 S.E.2d 850 (2008).

Because an officer's testimony that the defendant was driving under the influence did not impermissibly invade the jury's province and because there was no reasonable probability that the language of a charge would confuse or mislead the jury, trial counsel was not ineffective for failing to object to the testimony and to the charge; furthermore, given the evidence against the defendant, there was no reasonable probability that the outcome of the trial would have been different had trial counsel objected to hypothetical questions posed to the defendant's character witness. *Karafiat v. State*, 290 Ga. App. 15, 658 S.E.2d 801 (2008).

Defendant did not show ineffective assistance of counsel when, on a motion for a change of venue, the defendant had not shown how live evidence or a citizen survey could have accomplished any more than the introduction in evidence of existing pretrial publicity or voir dire, and counsel's failure to prepare the defendant for testimony before the date of trial was not deficient performance because the defendant did not indicate until the morning of trial that the defendant wished to testify, the defendant had not proffered evidence as to what a more thorough investigation would have uncovered, and Ga. Unif. Super. Ct. R. 31.3 did not entitle a defendant to evidentiary hearing with live witnesses to determine the admissibility of similar transaction evidence. *Harvey v. State*, 284 Ga. 8, 660 S.E.2d 528 (2008).

A defendant who claimed that defense

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

counsel failed to discuss “important issues” with the defendant, but who did not identify the issues in the defendant’s brief or testify at the new trial hearing about what might have been discussed, did not show ineffective assistance of counsel. Furthermore, counsel was not ineffective for failing to make objections that would have been fruitless. *Judkins v. State*, 282 Ga. 580, 652 S.E.2d 537 (2007).

A defendant in a burglary trial did not show ineffective assistance of counsel. A crowbar was admissible, and counsel’s objection to the crowbar’s admission would have been overruled; a nonresponsive answer by an officer that there was a warrant out for the defendant did not in itself place the defendant’s character into issue; and not requesting a lesser included charge on criminal trespass was a reasonable trial strategy as it would have been inconsistent with counsel’s trial theory that the defendant had been at the victim’s house to investigate suspicious noises, a lawful purpose. *Rudnitskas v. State*, 291 Ga. App. 685, 662 S.E.2d 729 (2008).

There was no merit to a defendant’s ineffective assistance of counsel claims. A motion to suppress incriminating letters would have been meritless because the defendant’s friend willingly handed the letters over to police and the letters were not discovered as a result of an illegal search; counsel did not have a witness testify because counsel did not believe that the witness was credible; and given the fact that the defendant would have been subject to extensive and potentially damaging cross-examination about the letters had the defendant testified, counsel was not deficient in advising the defendant not to testify and the defendant had not been prejudiced by not testifying. *Lockheart v. State*, 284 Ga. 78, 663 S.E.2d 213 (2008).

Trial court properly denied the defendant’s motion to withdraw a guilty plea when the defendant claimed that trial counsel was ineffective by misinforming

the defendant that the sentence would run concurrently with any imposed by Tennessee for a parole violation and that the sentence would be served in Tennessee. The trial court was entitled to give credit to testimony from trial counsel and documents indicating that the defendant’s Tennessee sentence was indeed running concurrently with the Georgia sentence; it was also entitled to credit trial counsel’s testimony that counsel had informed the defendant that the sentence would be served in Georgia unless Tennessee authorities extradited the defendant to Tennessee and that counsel had made no guarantees that they would do so. *Maples v. State*, 293 Ga. App. 232, 666 S.E.2d 609 (2008).

Defendant did not show prejudice from trial counsel’s failure to ensure transcription of a similar transaction hearing. The defendant did not show that the hearing transcript was necessary to resolve any issue on appeal; any error with respect to the admission of the similar transaction evidence could be resolved on the basis of the record at trial. *Robinson v. State*, 293 Ga. App. 238, 666 S.E.2d 615 (2008).

Defense counsel was not deficient for failing to object to an officer’s testimony that while violently resisting arrest, the defendant repeatedly screamed, “I’m not going back to jail,” as evidence of these statements demonstrated the defendant’s intent to commit the crimes of obstructing and hindering law enforcement officers, and were not rendered inadmissible merely because the statements incidentally put the defendant’s character at issue. *Bubrick v. State*, 293 Ga. App. 502, 667 S.E.2d 666 (2008).

Defendant did not show ineffective assistance of counsel when there was no evidence that recusal of the trial judge was warranted and there was no evidentiary support for the defendant’s claim that trial counsel did not adequately involve the defendant in the pretrial and trial proceedings. Furthermore, the defendant did not show how the alleged deficiencies would have affected the outcome of the trial. *Allen v. State*, 284 Ga. 310, 667 S.E.2d 54 (2008).

Defendant did not show that counsel was ineffective as the trial court found

that if a witness that counsel failed to locate testified, the testimony would not have been helpful in light of the witness's demeanor and credibility problems; counsel made a good faith effort to find another witness but had limited information about the witness; counsel's failure to timely notify the state of a witness's testimony was not prejudicial because the testimony would not have been helpful to the defendant and would not have been admissible at trial; and counsel was not ineffective for requesting charges on both accident and self-defense because both were warranted. *Hudson v. State*, 284 Ga. 595, 669 S.E.2d 94 (2008).

Since both the defendant and the ex-wife testified that they had a phone conversation on the day of the stalking and burglary incident, but disagreed as to what was said in the conversation, and the defendant's cell phone records would not have reflected the substance of the conversation, the admission of the records would have had no impact on the issue of credibility, and the failure of defense counsel to obtain the phone records did not amount to ineffective assistance. *Bray v. State*, 294 Ga. App. 562, 669 S.E.2d 509 (2008).

Trial counsel was not ineffective for failing to conduct a more extensive cross-examination of a codefendant as counsel testified that counsel did not consider the codefendant to be a believable witness, the weight of the evidence was clearly against the codefendant, and counsel's strategy was to try to keep the defendant in the background and avoid responsibility for the crimes. *Freeman v. State*, 284 Ga. 830, 672 S.E.2d 644 (2009).

Defendant's ineffective assistance of counsel claim based on counsel's failure to strike a juror and to make certain objections failed. The juror stated that the juror did not think the juror would be biased against the defendant and would try to base the juror's decision solely on the evidence; incriminating statements by the defendant were admissible as an exception to the hearsay rule as admissions against interest; a physician who testified that the victim's demeanor was consistent with that of a sexual assault victim was not bolstering the victim's testimony; even

if trial counsel erred in failing to object to the prosecutor's statement that trial counsel should make the defendant show the defendant's teeth, no prejudice was shown given counsel's rebuttal in closing and the significant evidence of guilt; and the prosecutor was not offering the prosecutor's personal belief about the veracity of an eyewitness and the victim, but instead was arguing that based on the facts and reasonable inferences drawn therefrom, the jury should conclude that those witnesses were telling the truth. *Brown v. State*, 293 Ga. App. 564, 667 S.E.2d 410 (2008).

There was no ineffectiveness of the defendant's trial counsel for failing to object to questions posed to a codefendant and for failing to object to the prosecutor's closing argument as the testimony and comments by the prosecutor did not suggest to the jury that the defendant was unable to produce an alibi witness; further, the questions were proper, as were the prosecutor's remarks. *Hung v. State*, 284 Ga. 796, 671 S.E.2d 811 (2009).

Defendant, who sought to withdraw a guilty plea, failed to show that counsel was ineffective for failing to introduce at a Jackson-Denno hearing evidence of the defendant's mental health evaluations; thus, the defendant's motion to withdraw the plea was properly denied. The evaluations were not yet available at the time of the hearing, and neither addressed the issue of the defendant's competence at the time the defendant gave the incriminating statement. *Robertson v. State*, 297 Ga. App. 228, 676 S.E.2d 871 (2009), cert. denied, No. S09C1300, 2009 Ga. LEXIS 406 (Ga. 2009).

There was no showing that the defendant's counsel was ineffective at the defendant's criminal trial as counsel sought bifurcation of a felony murder charge, and seeking severance of a firearm possession charge was not warranted because it was the underlying felony for the felony murder charge. Additionally, counsel's failure to seek a limiting instruction in regard to the defendant's prior conviction did not constitute deficient performance since there was no showing that the outcome of the trial would have been different but for the deficiency. *Varner v. State*, 285 Ga. 300, 676 S.E.2d 189 (2009).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

Trial court did not clearly err in rejecting the defendant's claim that trial counsel rendered ineffective assistance by failing to locate, interview, and secure a witness's presence at trial because the trial court was authorized to conclude from trial counsel's testimony that the defendant rejected the defendant's offer to hire an investigator and that counsel made reasonable efforts to locate the witness and to establish an alibi defense; moreover, based on the inconsistencies in the statements of the defendant and family members regarding the alibi, and the credibility issues regarding the alibi witness, counsel made a reasonable strategic decision to withdraw the alibi defense. *Ransom v. State*, 297 Ga. App. 902, 678 S.E.2d 574 (2009).

There was no showing of ineffective assistance in counsel's failure to pursue a justification defense pursuant to O.C.G.A. § 16-3-21(a) because, although the defendant claimed that the defendant shot the victim to protect the defendant's father, inter alia, the facts did not show that the father was in imminent danger, and the victim's threat against the father was made 30 minutes before the fatal shooting; at the time of the shooting, both men had fought in the street outside the father's home, the father was inside the home and not with them, and the victim was running away from the defendant. Even if the victim, who may have been carrying a knife, was going towards the father's house, the victim was shot before reaching the front yard. *Carter v. State*, 285 Ga. 565, 678 S.E.2d 909 (2009).

Although the defendant claimed that defense counsel failed to adequately investigate the victim's prior difficulties or bad acts and failed to investigate whether any toxicology reports relating to the victim would have bolstered the defendant's self-defense claim, because the defendant failed to specify what evidence counsel could have presented that would have changed the result of the trial, the defendant failed to establish that defense coun-

sel's actions were deficient; in any event, because of the overwhelming evidence of guilt, the defendant would have been unable to show that, but for this claimed deficient performance, the jury would have reached a different verdict. *Buggle v. State*, 299 Ga. App. 515, 683 S.E.2d 85 (2009).

Trial counsel's deficient performance in failing to object to a jury charge was not prejudicial because the trial court admitted having erred and went on to conclude that the error was harmless in light of the overwhelming evidence of the defendant's guilt. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial counsel did not perform deficiently by failing to object to the trial court's instruction on possession of a firearm by a convicted felon when the defendant was charged with use of a firearm by a convicted felon because there was no need for counsel to object to the charge since the district attorney immediately advised the trial court of the error, and the jury was recalled and given instructions with regard to the crime as charged. *Higginbotham v. State*, 287 Ga. 187, 695 S.E.2d 210 (2010).

Trial counsel was not ineffective for failing to request a jury charge on immunity granted to a witness because the transcript revealed that the witness was questioned regarding the grant of immunity and was thoroughly cross-examined regarding the witness's motives for testifying; that questioning and the general jury instructions on witness credibility that were given were sufficient to apprise the jury of any negative inferences the jury could draw from the immunity arrangement involving this witness. *Dockery v. State*, 287 Ga. 275, 695 S.E.2d 599 (2010).

Trial counsel did not "open the door" to bad character evidence by stating that the evidence would show that the victim previously stole the defendant's cash and marijuana because evidence concerning the victim's transaction with the defendant and the defendant's subsequent suspicion that the victim stole the defendant's marijuana and money was admissible as evidence of prior difficulties between the two and was relevant to show

the defendant's motives. *Taylor v. State*, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Defendant failed to establish ineffective assistance of trial counsel because assuming that trial counsel's failure to obtain and review the actual recording of the defendant's statement to the police constituted deficient performance, the defendant did not show that the defendant was prejudiced thereby; trial counsel testified that counsel cross-examined the officer who took the defendant's statement based on notes from counsel's discussions with the defendant, counsel's investigator, the officer's report, and the officer's direct testimony. *Cuvas v. State*, 306 Ga. App. 679, 703 S.E.2d 116 (2010).

Trial counsel was not ineffective for failing to object when the trial court denied the jury's request for a transcript of the testimony given by a victim because the trial court was authorized to deny the jury's request; the jury did not specify any portion of the victim's testimony that the jury wanted to rehear but rather asked for a copy of all of the victim's testimony, and the record did not reflect that there was a serious disagreement as to the substance of the victim's testimony or that the testimony had been misstated during the course of trial. *Boatright v. State*, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Defendant failed to show that the defendant was prejudiced due to trial counsel's failure to review the redacted version of a recording of the defendant's police interview and to object to the recording because the defendant did not show a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's unprofessional errors, the result of the proceeding would have been different; although the defendant argued that a reference concerning "illegal use of prescription drugs" was prejudicial character evidence, no mention was made in the interview of whether the defendant had been prescribed the drug or was consuming the drug illegally. *Eskew v. State*, 309 Ga. App. 44, 709 S.E.2d 893 (2011).

Because the trial court did not abuse the court's discretion in refusing to grant the defendant a continuance due to the untimeliness of the state's witness list,

and because any error was harmless, the defendant could not succeed on the claim that the defendant's right to effective trial counsel was violated thereby; the defendant's claim did not require application of a presumption of prejudice, which was applicable only in extremely narrow circumstances. *Norris v. State*, 289 Ga. 154, 709 S.E.2d 792 (2011).

Defendant's trial counsel was not ineffective for requesting the pattern jury instruction that included a witness's degree of certainty as a factor the jury could consider in assessing the reliability of a witness's identification testimony because the defendant failed to show that the defendant was prejudiced by the request, given the other evidence linking the defendant to the crimes, including the defendant's possession of a victim's cell phone and a revolver matching the description of the one used in all three robberies. *Willis v. State*, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Because there was no error in the trial court's instruction to the jury, trial counsel was not ineffective for failing to object. *Holland v. State*, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Trial counsel's failure to seek admission of a detective's notes reflecting that the defendant was scared of the victim under the rule of completeness did not support a finding of ineffective assistance of counsel because the defendant could not show that such was professionally deficient or prejudicial. *Payne v. State*, 289 Ga. 691, 715 S.E.2d 104 (2011).

Defendant's contention that defense counsel was ineffective for failing to preserve objections for appellate review by renewing all objections at the end of trial asserted an issue that was not the law in Georgia; having made a timely and proper objection, counsel is not required to renew counsel's objections at the close of the case to preserve the issues for appellate review. *Sledge v. State*, 312 Ga. App. 97, 717 S.E.2d 682 (2011).

Defendant failed to show that trial counsel was ineffective by failing to assert that the state's statutory and constitutional provisions requiring the service of mandatory minimum sentences before

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

consideration for parole regardless of age constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution because any consideration for Eighth Amendment purposes of incomplete brain maturation due solely to age was inappropriate since the defendant was 20 years old at the time the defendant committed the crime and was sentenced to a term of years rather than death. *Gandy v. State*, 290 Ga. 166, 718 S.E.2d 287 (2011).

Defendant failed to show that trial counsel was ineffective by not arguing the rule of completeness, former O.C.G.A. § 24-3-38 (see now O.C.G.A. § 24-8-822), as a means to get the defendant's entire post-stabbing statement into evidence because there were discrepancies between the defendant's trial testimony and the account of a witness regarding a statement the defendant allegedly made on the night of the stabbing; therefore, an acquittal would not likely have resulted had the jury heard the witness's testimony in its entirety. *Carruth v. State*, 290 Ga. 342, 721 S.E.2d 80 (2012).

Defendant did not receive ineffective assistance of counsel due to counsel's consent to bond conditions because although counsel testified at the new trial hearing, the defendant did not question counsel as to whether counsel actually consented to the bond conditions; the defendant did not show a reasonable likelihood that without counsel's consent the bond conditions would have been less onerous. *Sevostiyanova v. State*, 313 Ga. App. 729, 722 S.E.2d 333 (2012), cert. denied, No. S12C0968, 2012 Ga. LEXIS 612 (Ga. 2012).

Defendant was not constructively denied counsel due to the strained relationship with the defendant's appointed attorney because trial counsel subjected the prosecution's case to meaningful adversarial testing, including cross-examining the state's witnesses, moving for a directed verdict, and making a closing argument on defendant's behalf.

Calloway v. State, 313 Ga. App. 708, 722 S.E.2d 422 (2012).

Trial counsel was not ineffective for failing to bring errors in the jury charges to the trial court's attention because the complained of jury charges were proper, and trial counsel's conduct fell well within the broad range of reasonable professional conduct; there is no reasonable likelihood of a different outcome had trial counsel raised the arguments the defendant asserted counsel should have raised. *Davis v. State*, 290 Ga. 757, 725 S.E.2d 280 (2012).

Counsel was not ineffective for introducing in evidence the defendant's videotaped statement to police without redacting portions after the defendant invoked the right to counsel and asked God to have mercy on the defendant's soul, as it did not amount to an improper comment on the right to remain silent, but showed invocation of the right to counsel after giving a lengthy statement. *Martin v. State*, 290 Ga. 901, 725 S.E.2d 313 (2012).

Trial court did not err in denying defendant's motion for a new trial because counsel's practice of not requesting a transcription of voir dire or opening and closing arguments was within the broad range of professional conduct afforded to trial counsel in a non-death penalty case. *Dunlap v. State*, 291 Ga. 51, 727 S.E.2d 468 (2012).

Defense counsel was not ineffective in stipulating to negative scientific test results because the test results were not inconsistent with the defendant's defense. *Chance v. State*, 291 Ga. 241, 728 S.E.2d 635 (2012).

Defendant, who was convicted of statutory rape, failed to show ineffective assistance of counsel because of defense counsel's failure to assert that the door had been opened to evidence of the victim's deceit regarding the victim's age as counsel testified that counsel did not hear or see any evidence that opened the door regarding the victim's deceit about the victim's age and that counsel found many of the questions to be helpful to the defense strategy of showing the victim was the one who pursued the defendant. Also, the transcript showed that the state did not introduce any direct evidence to open

the door about the victim's deceit regarding the victim's age. *Baker v. State*, 316 Ga. App. 122, 728 S.E.2d 767 (2012).

Trial counsel was not ineffective by failing to introduce evidence of the age difference between the defendant and the accomplice as the defendant had not shown that there was a reasonable likelihood that but for trial counsel's failure to elicit additional, non-specific evidence regarding the age disparity between the defendant and the accomplice, the outcome of the trial would have been different. Trial counsel revealed at the motion for new trial hearing that the jury should have been able to observe at trial the obvious age disparity between the two. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial counsel was not ineffective by failing to object to hearsay testimony provided by the defendant's accomplice as the hearsay was only cumulative of the accomplice's own admissible testimony describing the defendant as having shot the victim in the back of the head and that the defendant gave money to the accomplice shortly after the murder. The admission of cumulative hearsay evidence was error, and the defendant could not show that, but for trial counsel's failure to object to such evidence, the outcome of the trial would have been different. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial counsel's failure to produce evidence of the layout of the defendant's home did not constitute ineffective assistance as the defense theory was that the accomplice was fully responsible for the crimes and that the defendant was not even present at the time of the murder. Moreover, the defendant could not make a showing of prejudice as the layout of the home would not have refuted the accomplice's testimony. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial counsel was not ineffective in failing to present evidence regarding the origin of the blanket in which the victim's body was wrapped to refute the testimony of the defendant's accomplice that the blanket had been taken from the laundry bin at the defendant's home as trial counsel did, in fact, elicit testimony confirming the lack of any forensic evidence connect-

ing the defendant to the murder. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial counsel was not ineffective in failing to present a police photograph showing the absence of computer equipment in the defendant's bedroom to refute the testimony of the defendant's accomplice that the victim was in the defendant's bedroom looking at computer merchandise while the defendant pulled out a gun to shoot the victim. Since the defendant did not make a showing that computer equipment was not contained in a part of the defendant's bedroom that was not depicted in the picture, the defendant could not demonstrate that there was a reasonable probability that the outcome of the trial would have been different had trial counsel taken the suggested course. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Trial court did not err in finding that the defendant failed to establish an ineffectiveness claim because counsel recognized the need for interpreters and secured the interpreters to communicate with the defendant during their meetings and throughout the court proceedings; the defendant had ample opportunity to inform counsel or the trial court of any problems with the interpreters but did not do so. *Cruz v. State*, 315 Ga. App. 843, 729 S.E.2d 9 (2012).

Trial counsel's objections to similar transaction evidence were sufficient to raise the issue of whether the evidence showed a propensity for violence regardless of whether counsel used the word "propensity"; trial counsel was not ineffective for failing to make a meritless objection; trial counsel excepted to the trial court's denial of a motion for mistrial and thus preserved the issue for review; trial counsel was not deficient for failing to object to the state's cross-examination of the defendant because the state was permitted to ask the defendant about a similar transaction; counsel's asking a witness whether the witness was a legal alien was a matter of trial strategy; and the defendant had not shown that counsel could have challenged the validity of a guilty plea used to enhance the defendant's sentence. *Dunham v. State*, 315 Ga. App. 901, 729 S.E.2d 45 (2012).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

Counsel testified that counsel failed to make certain objections during opening and closing and in regard to witness bolstering for strategic reasons and that counsel decided after extensive discussion not to call the defendant as a witness because counsel believed the potential downside was overwhelming. *Rawls v. State*, 315 Ga. App. 891, 730 S.E.2d 1 (2012).

Defendant could not establish that the defendant's attorney was deficient for failing to object to the testimony by a certified real estate and tax appraiser because the testimony by the witness regarding building permits was not opinion testimony, but was factual testimony about how structural engineering reports and architectural plans figured into the building permitting process and about the inspections required in connection with a building permit obtained with such documents. The defendant did not demonstrate that the witness rendered any opinion regarding the building permit in the defendants' case. *Wilson v. State*, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

Defendant's counsel was not ineffective for failing to object to the trial court's jury instructions on similar transaction evidence that was admitted, although the trial court made a slip of the tongue during the instructions, as correct comprehensive limiting instructions were given to the jury during the trial; accordingly, any error was harmless. *Boynton v. State*, 317 Ga. App. 446, 730 S.E.2d 738 (2012), cert. denied, No. S13C0017, 2013 Ga. LEXIS 88 (Ga. 2013).

Trial counsel rendered ineffective assistance of counsel by failing to object to a probation officer's testimony as to the identity of the perpetrator because the testimony of the probation officer was not based on any distinctive observation about the defendant and the error was not harmless since the other evidence tending to identify the defendant as the perpetrator was limited to the brief testimony of the law enforcement officer, a recording of

a jail house telephone call in which the defendant spoke to the defendant's roommate about how the defendant's roommate had "pulled one," and the similarities between the defendant's shoes and those worn by the perpetrator. However, no scientific evidence definitively linked the defendant to the crimes. *Owens v. State*, 317 Ga. App. 821, 733 S.E.2d 16 (2012).

Claim that trial counsel was ineffective for failing to renew the defendant's motion for mistrial, failing to conduct a proper examination of the victim in support of the defendant's motion for mistrial, and failing to request a limiting jury instruction contemporaneously with the admission of testimony regarding prior difficulties between the defendant and the victim failed, as the defendant could not show prejudice from any of the claimed deficiencies. *Hernandez v. State*, 317 Ga. App. 845, 733 S.E.2d 30 (2012).

Claim of ineffective assistance of counsel failed, as counsel strategically decided not to object to the prosecutor's misstatement of testimony and instead comment on the misrepresented statement when given the next opportunity and there were no insufficiencies in the affidavit supporting the search warrant to justify the filing of a motion to suppress. *Lopez-Jimenez v. State*, 317 Ga. App. 868, 733 S.E.2d 42 (2012).

Trial counsel did not render ineffective assistance by failing to object to alleged prosecutorial misconduct, the prosecutors questioning of the defendant upon the defendant's post-arrest silence, as any objection would have been overruled, since the defendant opened the door to that line of questioning, and counsel could not be ineffective for failing to make a meritless objection. *Doyle v. State*, 291 Ga. 729, 733 S.E.2d 290 (2012).

Trial counsel was not ineffective for failing to object to the prosecutor's statement's about the victims' credibility, because the prosecutor did not improperly bolster the victim's credibility when the prosecutor asked the victim if the victim was telling the truth each time the victim recounted the rape and why the victim did not immediately call police, as the questions came after defense counsel at-

tempted to impeach the victim's credibility. *Jones v. State*, 318 Ga. App. 342, 733 S.E.2d 400 (2012).

Claim of ineffective assistance of counsel failed as counsel presented mitigation witnesses and conducted a reasonable investigation as to mitigating circumstances to present at sentencing; counsel was not ineffective for failing to develop and present evidence of the victim's methamphetamine use at the time of the crimes to explain the victim's behavior, because the only evidence of such use was from two to three days prior to the incident, and thus, would have been irrelevant and inadmissible; counsel was not ineffective for failing to present the testimony of the victim's girlfriend regarding a recent altercation between the victim and the victim's cousin, as the girlfriend testified at the motion for a new trial that no such fight occurred, only a scuffle in which the victim was not hit. *Barrett v. State*, 292 Ga. 160, 733 S.E.2d 304 (2012).

As the defendant had decided to turn himself in and had already revealed to a law enforcement officer that the defendant had killed the victim, claiming self defense, and that the defendant had attempted to conceal the body, trial counsel's decision to permit the defendant to cooperate in the interrogations and searches did not amount to ineffective assistance of counsel. *Woods v. State*, 291 Ga. 804, 733 S.E.2d 730 (2012).

Defendant's claim that trial counsel was ineffective for failing to convey a plea offer failed, because an informal offer was discussed with the defendant, who rejected the possibility. *Brown v. State*, 291 Ga. 892, 734 S.E.2d 23 (2012).

Defendant failed to show deficient performance on the part of defense counsel as defense counsel testified that defense counsel correctly advised the defendant that the defendant would not be eligible for parole until the defendant served 30 years of the life sentence and did not tell the defendant that the defendant could withdraw the plea at any time, testimony which the trial court credited. *Arnold v. State*, 292 Ga. 95, 734 S.E.2d 382 (2012).

Trial counsel was not ineffective for failing to object to relevant and admissible evidence, failing to object to testimony

that was supported by the evidence, or failing to make a meritless motion to exclude evidence. *Thomas v. State*, 318 Ga. App. 849, 734 S.E.2d 823 (2012).

Trial counsel's decision not to recall the victim to the stand to discuss the victim's provocative behavior did not amount to ineffective assistance of counsel but was a strategic decision so as to ensure that counsel did not violate the former Rape Shield Statute, former O.C.G.A. § 24-2-3 (see now O.C.G.A. § 24-4-412). *Whorton v. State*, 318 Ga. App. 885, 735 S.E.2d 7 (2012).

Defendant's claim of ineffective assistance of counsel based on the failure to object to an officer's testimony that the officer believed a rape had occurred failed because the defendant could not prove the outcome would have otherwise been different given the overwhelming evidence against the defendant. *Osei-Owusu v. State*, 319 Ga. App. 33, 735 S.E.2d 75 (2012).

While trial counsel testified that the failure to object or move for mistrial when an officer testified that the defendant and an accomplice were arrested for, inter alia, being a convicted felon with a weapon was not part of counsel's strategy, the reference was passing and equivocal and the defendant could not establish it placed the defendant's character in evidence, nor was the defendant charged with that offense. *Toro v. State*, 319 Ga. App. 39, 735 S.E.2d 80 (2012).

Trial counsel's failure to convince the trial court to admit statements about the involvement of others and failure to make objection to the admission of a recorded statement did not amount to ineffective assistance because the arguments and objections sought were meritless. *Bradley v. State*, 292 Ga. 607, 740 S.E.2d 100 (2013).

Defendant failed to prove that trial counsel was ineffective for failing to give timely notice to the state of a surprise witness who was precluded from testifying because the defendant failed to present testimony at the hearing on the motion for a new trial as to what the witness would have testified to. *Jones v. State*, 292 Ga. 593, 740 S.E.2d 147 (2013).

Trial counsel was not ineffective for failing to offer a "timeline" to show that

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

the defendant's girlfriend delayed taking the victim to the hospital because the girlfriend never provided exact times in her testimony and nothing indicated that any delay in seeking medical treatment contributed to the victim's death. *Jones v. State*, 292 Ga. 593, 740 S.E.2d 147 (2013).

Even assuming counsel's failure to serve a detective with a subpoena and inability to admit evidence of the detective's report and interview fell below prevailing professional norms, no reasonable probability existed that the jury would have returned a verdict of not guilty as evidence covering the same issues the defendant sought to cover with the detective was admitted. *Goodwin v. State*, 320 Ga. App. 224, 739 S.E.2d 712 (2013).

Defense counsel was not ineffective for failing to object to statements that have previously been held to be within the bounds of possible argument, for failing to object to statements the prosecution used to argue motive, or for failing to object to the prosecutor's statement which urged the jury to draw inferences that an alibi witness lied from the circumstances. *Wright v. State*, 319 Ga. App. 723, 738 S.E.2d 310 (2013).

Trial counsel's failure to elicit testimony that an officer retrieved a shotgun from the victim's house did not prejudice the defense because the victim testified that the victim had a shotgun and the jury could not have reasonably believed there was no shotgun; thus, the defendant was unable to show that the jury's weighing of evidence of the defendant's self-defense claim would have resulted in a different outcome. *Williams v. State*, 319 Ga. App. 827, 738 S.E.2d 637 (2013).

Defense counsel was not ineffective for failing to move to redact the portion of the autopsy report that said the manner of death was homicide because it was undisputed that the victim was killed by someone and the ultimate issue for the jury was whether the defendant was the killer. *Young v. State*, 292 Ga. 443, 738 S.E.2d 575 (2013).

Trial counsel was not ineffective for failing to object to a reference by a witness to an email sent by a deceased ex-employee that was consistent with an email sent by an employee alerting general counsel to the defendant's improper acts at work because the brief reference was cumulative of other evidence. *Brown v. State*, 321 Ga. App. 198, 739 S.E.2d 118 (2013).

Defense counsel could not have been ineffective for failing to demand the trial court extend use immunity to a defense witness who invoked the Fifth Amendment right to remain silent as there was not current Georgia authority for such action. *Ward v. State*, 292 Ga. 637, 740 S.E.2d 112 (2013).

Trial counsel was not ineffective for failing to object to the investigator's statement at trial that the investigator took out a warrant against the defendant for burglary in addition to the charges in the case, given that the statement was brief and five witnesses identified the defendant as the assailant in the subject incidents. *Riley v. State*, 319 Ga. App. 823, 738 S.E.2d 659 (2013).

Defendant failed to establish that trial counsel's decision to question a witness about changes in the defendant's appearance rather than object to the state's evidence on that point was a decision that no reasonable trial counsel would make under the circumstances of the case; to the contrary, counsel's attempts to explain the defendant's appearance through the questioning of witnesses suggested that counsel made a strategic decision about how to handle the state's evidence about the defendant's appearance. *Bufford v. State*, 320 Ga. App. 123, 739 S.E.2d 421 (2013).

Defendant's claim of ineffective assistance of counsel failed because the defendant failed to show either professional deficiencies by counsel or prejudice in regard to the defendant's complaints about a jury instruction on "no duty to retreat," the alleged criminal history of a witness, and the detective's alleged bolstering of a witness's testimony, claims for which the Georgia Supreme Court found no support. *Hoffler v. State*, 292 Ga. 537, 739 S.E.2d 362 (2013).

Defendant failed to prove that trial

counsel was ineffective for failing to object that a juror who indicated that the juror was “not totally impartial” was allowed to remain seated with the panel and questioned concerning bias in the presence of the remaining qualified jurors as there was no evidence that any of the remaining jurors were somehow affected by the questioning. Furthermore, trial counsel was not ineffective for failing to object to the admission of evidence that was cumulative of other unchallenged evidence. *Maurer v. State*, 320 Ga. App. 585, 740 S.E.2d 318 (2013).

Defense counsel was not ineffective for failing to secure a ruling on an objection to the victim’s in-court identification of the defendant as looking like the person the victim saw walking with the victim’s nephew just before the victim returned and found the house burglarized because the victim clarified the response, confirming that the defendant was the person walking with the nephew and, thus, any additional arguments would have been futile. *Williams v. State*, 320 Ga. App. 831, 740 S.E.2d 766 (2013).

Defense counsel was not ineffective for failing to object to an investigator’s testimony regarding a DNA analysis tying the defendant to a prior offense because, despite the fact that the investigator was not one who performed the DNA analysis, the investigator did not testify as to the results; the investigator’s testimony was limited to facts of which the investigator had personal knowledge and the defendant was linked to the prior offense through a certified copy of the prior conviction. *Williams v. State*, 320 Ga. App. 831, 740 S.E.2d 766 (2013).

Even assuming counsel’s failure to object to testimony that a photo lineup had been made up of photos of persons who had been arrested constituted deficient performance, the defendant failed to show prejudice because there was other testimony of the defendant’s bad character admitted without objection. *Thornton v. State*, 292 Ga. 796, 741 S.E.2d 641 (2013).

Claim of ineffective assistance of counsel failed because cell phone records and a 9-1-1 call log were cumulative of other testimony and, thus, the defendant was not prejudiced by counsel’s failure to ob-

ject to their admission; the prejudicial effect of a misstatement in counsel’s opening statement was mitigated by the trial court charging the jury that opening statements were not evidence; counsel was not ineffective for failing to make a meritless object to the admission of a witness’s prior consistent statement, admissible because the witness’s veracity was placed at issue; and the failure to request a charge on self-defense did not amount to ineffective assistance when the evidence did not support such a charge and it would have been inconsistent with the defense theory. *Williams v. State*, 292 Ga. 844, 742 S.E.2d 445 (2013).

Trial counsel was not ineffective for failing to object to the state’s failure to comply with Ga. Unif. Super. Ct. R. 31.1 and 31.3 as the detective’s testimony regarding the fact that the defendant, an accomplice, and the victim were suspected of murdering the victim’s husband, was admissible as relevant to the defendant’s motive to kill the victim. Furthermore, trial counsel was not ineffective for inadvertently opening the door to the state’s question about the defendant’s silence in trial counsel’s attempt to highlight the accomplice’s behavior of giving multiple versions of an event in an effort to point fingers at everyone except the accomplice personally. *Goodman v. State*, 293 Ga. 80, 742 S.E.2d 719 (2013).

Defendant’s claims of ineffective assistance of counsel failed as, inter alia, counsel was not ineffective for failing to object to an agent’s testimony that the agent’s investigation led the agent to believe that the defendant killed the victim as the defendant did not inquire into the reason for such failure and failed to overcome the presumption that counsel’s actions fell within the broad range of reasonable professional conduct. Nor was counsel ineffective for failing to object to the district attorney’s opening statement, closing argument, or other alleged misconduct as the jury was instructed that the opening statement was not evidence, the prosecutor drew reasonable inferences from the evidence in closing argument, and any factual issues were for the jury. *Hall v. State*, 292 Ga. 701, 743 S.E.2d 6 (2013).

Trial counsel was not ineffective for

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

failing to investigate and present evidence that the victim's father had used corporal punishment on the victim in the past when the victim misbehaved and that the perceived threat of such punishment could have established a motive for the victim to fabricate the initial outcry because there was evidence authorizing the jury to find that the victim had motive to lie to avoid getting into trouble. *Carstaffin v. State*, 323 Ga. App. 354, 743 S.E.2d 605 (2013).

Defendant failed to show that trial counsel was ineffective for failing to move to suppress the photographic lineup because there was no evidence concerning how the lineup was impermissibly suggestive; the array presented photographs of six males of the same race with similar complexions, hairstyles, and facial hair, and the investigator who prepared the lineup testified that the photographs did not exactly match the defendant's height, weight, and age, but contained individuals who looked "very similar." *Harris v. State*, 322 Ga. App. 87, 744 S.E.2d 82 (2013).

Defendants' claims of ineffective assistance of counsel failed because the first defendant failed to point to any evidence or defenses that could have been presented had counsel devoted more time to the first defendant and/or the preparation of the case, and the failure to object to or move to suppress admissible evidence would have been futile. *Betancourt v. State*, 322 Ga. App. 201, 744 S.E.2d 419 (2013).

Ineffective assistance of counsel claim lacked merit as the defendant failed to show prejudice as a result of trial counsel's failure to object, on hearsay and confrontation grounds, to a detective's testimony that two of the victim's rings were found in the defendant's pants because the testimony was cumulative of other evidence that the rings were found among the defendant's belongings, nor could the defendant show prejudice from counsel's failure to move for a mistrial when a

detective testified that the victim found a second gun in the laundry room as there was no reasonable probability that but for counsel's failure to object the outcome would have been different. *Rudison v. State*, 322 Ga. App. 248, 744 S.E.2d 444 (2013).

Claim of ineffective assistance failed because the defendant failed to prove that the outcome would have been different if counsel had moved to redact from the indictment a charge that the defendant violated the Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. § 16-14-1 et seq., though a pattern of criminal activity in furtherance of a pimping enterprise, and testimony regarding events leading up to the arrest of the defendant and another allowed counsel to argue that the weapon did not belong to the defendant but to the other individual. *Holmes v. State*, 293 Ga. 229, 744 S.E.2d 701 (2013).

Assuming that trial counsel was deficient for not moving to redact a recording to omit the investigating officer's reference to the attorney's letter which indicated that the defendant briefly fondled the victim, the defendant nevertheless failed to carry the burden of establishing prejudice necessary for an ineffective assistance of counsel claim given the defendant's own trial testimony that the defendant touched the victim's bottom and the victim's testimony about the incident. *Graves v. State*, 322 Ga. App. 373, 745 S.E.2d 296 (2013).

Trial counsel was not ineffective for failing to object to a properly admitted exhibit or failing to request a continuance after discovering the four boxes of documents as there was no discovery violation. *Raymond v. State*, 322 Ga. App. 404, 745 S.E.2d 689 (2013).

Although the defendant contended that trial counsel was ineffective for failing to properly investigate the defendant's mental health and adequately prepare the defendant to testify at trial in light of the defendant's mental condition, at the motion for new trial hearing, trial counsel testified that counsel had no concerns about the defendant's mental health. Moreover, the defendant presented no evidence at the new trial hearing that men-

tal illness might have been an issue to be further explored by trial counsel and, thus, counsel was not ineffective for failing to investigate the issue further. *Russell v. State*, 322 Ga. App. 553, 745 S.E.2d 774 (2013).

Trial counsel's failure to object to the trial court's statement to defendant that "the State offered you an extremely good deal to plea bargain this case out" did not amount to ineffective assistance of counsel as the record showed that the statement was made within the context of the defendant's request to fire counsel and proceed pro se, not within the context of a plea hearing. *Russell v. State*, 322 Ga. App. 553, 745 S.E.2d 774 (2013).

Acquittal on serious offenses meant no ineffective assistance. — Trial counsel was not ineffective in failing to investigate a detective's note regarding the statement of the county medical examiner that the gunshot wound to the victim's head was consistent with the victim being shot while the victim was on the victim's knees. The defendant could not demonstrate prejudice as the defendant was acquitted on the charges of murder and felony murder. *Lee v. State*, 316 Ga. App. 227, 728 S.E.2d 847 (2012).

Failure to visit defendant in jail not ineffective assistance. — Trial counsel was not ineffective based on counsel's failure to come to a jail to confer with a defendant in jail after the defendant's bond was revoked mid-trial; counsel had conferred with the defendant numerous times and was in constant touch with the defendant before the bond was revoked, counsel filed numerous pretrial motions, and counsel obtained acquittals for the defendant on two of the eight charges originally alleged in an indictment. *Branton v. State*, 292 Ga. App. 104, 663 S.E.2d 414 (2008), cert. denied, No. S08C1771, 2008 Ga. LEXIS 873 (Ga. 2008).

Counsel meeting with defendant ten to twelve times. — Defendant presented no information to show a reasonable probability that the outcome of the trial would have been different had counsel acted otherwise because by the defendant's own admission, the defendant met with trial counsel "just about as much as

anybody would want to meet with their attorney," or perhaps ten or twelve times prior to trial; trial counsel testified that counsel went over the evidence with the defendant numerous times and discussed strategy and that the defendant relied on counsel's advice and decided not to testify. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Deprivation of fundamental right when accused "virtually unrepresented." — If appointed attorneys are so ignorant, negligent, or unfaithful that the accused was virtually unrepresented, or did not in any real or substantial sense have the aid of counsel, defendant would be deprived of a fundamental constitutional right, and if convicted might successfully complain that defendant had been denied due process of law. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873 (1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

If counsel for the defendant in a criminal case, whether appointed by the court or of the defendant's selection, was so negligent or unfaithful in the trial of the case that the defendant was virtually unrepresented, or if the defendant did not in any real or substantial sense have the aid of counsel, this amounts to deprivation of a fundamental constitutional right, and the defendant under such circumstances may complain that the defendant has been denied due process of law. *Jones v. Balkcom*, 210 Ga. 262, 79 S.E.2d 1 (1953), cert. denied, 347 U.S. 956, 74 S. Ct. 682, 98 L. Ed. 1101 (1954).

Pro se claims preserved. — Because it appeared from the record that the defendant, pro se, attempted to raise various ineffective assistance of counsel claims enumerating instances of alleged misconduct at the earliest opportunity, even though trial counsel filed a notice of appeal, the defendant was not foreclosed from raising those claims in a later motion for a new trial. *Thomas v. State*, 282 Ga. App. 1, 637 S.E.2d 502 (2006).

Pro se defendant cannot raise ineffective assistance claim as to issues arising during trial. — Because the defendant proceeded pro se at trial, the defendant could not raise an ineffective

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

assistance of counsel claim with regard to issues that arose during trial. *Fields v. State*, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

Burden on defendant to show virtual unrepresentation to sustain contention of denial of benefit of counsel.

— The burden is on the defendant to sustain the defendant's contention that the defendant was denied the benefit of counsel; in order to sustain such contention, it is incumbent upon the defendant to show that the defendant was virtually unrepresented. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

After conviction of a capital offense, defendant sought release by writ of habeas corpus, alleging that attorneys appointed to defend the defendant were so ignorant, inexperienced, or grossly lacking in appreciation of their responsibility as to amount to virtually no representation, and that consequently the defendant was deprived of the benefit of counsel as guaranteed by the state and federal Constitutions, the evidence introduced by the parties respectively, without objection, demanded the finding that the applicant was not denied the benefit of counsel, as contended, and that certain evidence rejected would not have authorized a different result. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Defendant did not receive ineffective assistance of counsel as: (1) the defendant waived any claims of ineffective assistance of trial counsel that were not raised in the defendant's motion for a new trial; (2) the defendant did not call trial counsel at the motion for new trial hearing and the defendant did not produce the phone records counsel did not obtain to show that they would have been relevant or helpful to the defendant's case; and (3) the trial court did not err in finding that the defendant failed to overcome the presumption of effectiveness. *Smith v. State*,

282 Ga. App. 339, 638 S.E.2d 791 (2006).

Benefit of counsel guarantees do not contemplate infallibility. — In the conduct of a trial, broad latitude of advice, direction, and policy in the interest of the client is essentially vested in counsel. Counsel often waive apparently important points in the bona fide belief that, on the whole, greater advantage will be gained indirectly than might have been gained directly by insisting on them, and such a waiver either express or implied would ordinarily not tend to show incompetency. No lawyer is infallible, and the constitutional guarantees of the benefit of counsel, and of due process, do not contemplate such infallibility. *Wilcoxon v. Aldredge*, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Absence of prejudice. — Although trial counsel could have further impeached codefendants with certified copies of their felony convictions, any such deficiency in counsel's performance could not have prejudiced defendant because the jury was already aware of the disreputable character of these witnesses by virtue of their own testimony on the stand. *Ross v. State*, 231 Ga. App. 793, 499 S.E.2d 642 (1998).

Defendant's claims of ineffective assistance of counsel, alleging a failure to request a mistrial or curative instructions when defendant's sister testified as to defendant's character, a failure to object to testimony of an officer who had an arrest warrant for defendant and allegedly testified on the ultimate issue in the case, and a failure to object to improper statements by the prosecutor during closing arguments failed since the defendant failed to show prejudice as a result of any of the alleged errors made by trial counsel. *Fulton v. State*, 278 Ga. 58, 597 S.E.2d 396 (2004).

When, in defendant's murder trial, defense counsel did not raise a continuing witness objection at trial when a photographic lineup with signed witness statements on the back identifying defendant and an admonition sheet were allowed to go to the jury room, ineffective assistance of counsel was not shown because there was no prejudice as the witnesses were

friends of defendant who identified defendant at trial, so the trial would not have had a different result, absent this error. *Zellars v. State*, 278 Ga. 481, 604 S.E.2d 147 (2004).

When, in defendant's murder trial, defense counsel did not object to counts in the indictment as to which the statute of limitations had expired, ineffective assistance of counsel was not shown because there was no prejudice as these counts were later dismissed, except they were allowed to serve as underlying felonies for a felony murder charge, and it was proper to allow felonies as to which the statute of limitations had expired to be used in this manner, and the evidence used to prove these felonies was admissible to prove those crimes as to which a statute of limitations had not expired. *Zellars v. State*, 278 Ga. 481, 604 S.E.2d 147 (2004).

Defendant failed to show prejudice for purposes of defendant's ineffective assistance of counsel claim for trial counsel's failure to tender medical records relating to defendant's gunshot wound as defendant failed to indicate what portion of the medical records supported defendant's claim that the medical records showed that defendant was in a defensive posture. *Mills v. State*, 273 Ga. App. 699, 615 S.E.2d 824 (2005).

Defendant failed to show prejudice for purposes of an ineffective assistance of counsel claim in the failure of counsel to subpoena defendant's brother. *Brooks v. State*, 273 Ga. App. 691, 615 S.E.2d 829 (2005), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Counsel was not ineffective for failing to object to the state's initial comment in closing argument about the defendant's previous arrests and in not filing a motion to suppress evidence found in a search of defendant's house; there was no prejudice given the overwhelming evidence of guilt. *Moye v. State*, 277 Ga. App. 262, 626 S.E.2d 234 (2006).

With regard to a defendant's convictions for malice murder and other crimes, the trial court properly denied the defendant's motion for a new trial with regard to the assertions by the defendant that the defendant received ineffective assistance of

counsel because the defendant failed to show that but for trial counsel's alleged failure to put greater emphasis on certain telephone cell phone record anomalies, the outcome of the defendant's trial would have been different. *Culmer v. State*, 282 Ga. 330, 647 S.E.2d 30 (2007).

Defendant did not establish ineffective assistance of counsel based on defense counsel's failing to object to an expert's testimony that in the expert's opinion, the victim had not confused sexual acts by the victim's mother with the sexual acts that the defendant was alleged to have committed; even if a reasonable juror could have interpreted the expert's testimony as an impermissible affirmation of the victim's credibility, the limiting instruction and jury charge made it clear that the jury need not accept any opinions provided by the expert, and thus it was not reasonable to conclude that but for the inclusion of this testimony, the result of the trial would have been different. *Brooks v. State*, 286 Ga. App. 209, 648 S.E.2d 724 (2007).

Trial counsel was not ineffective as: (1) the defendant failed to support an assertion that trial counsel was ineffective in failing to listen to an audiotape of the defendant's second interview with the Georgia Bureau of Investigation prior to trial; (2) counsel's off-hand comment as to hindsight was insufficient to support an inference of deficient performance; and (3) the defendant failed to show that prejudice resulted from counsel's alleged deficiency. *Sturgis v. State*, 282 Ga. 88, 646 S.E.2d 233 (2007).

Even if trial counsel was ineffective for failing to challenge the jury array on the basis that the array was tainted by the comments of a juror who was excused after stating that the juror thought the defendant was "guilty in 2003," when the crimes occurred, there was no prejudice because the juror's opinion was based solely on media reports, not on any personal knowledge of the defendant; since a prospective juror's comments did not link a defendant with criminal activity, or characterize the defendant as a criminal, the entire jury panel did not have to be excused. *Edwards v. State*, 282 Ga. 259, 646 S.E.2d 663 (2007).

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

A defendant's ineffective assistance claim failed; even if trial counsel were ineffective for failing to interview witnesses, the defendant did not show how any witness's testimony would have changed if trial counsel interviewed the witness such that the interviewing would have affected the outcome of the trial. *Ojemuyiwa v. State*, 285 Ga. App. 617, 647 S.E.2d 598 (2007).

Even if trial counsel was deficient in failing to pursue a defense related to the defendant's mental status, the defendant failed to present evidence showing that the defense was available to the defendant; as a result, the defendant failed to show that a reasonable probability existed that the outcome would have been different but for any deficient performance of trial counsel in failing to pursue a mental health defense. *Garza v. State*, 285 Ga. App. 902, 648 S.E.2d 84 (2007), vacated, in part, 300 Ga. App. 352, 685 S.E.2d 366 (2009).

A DUI defendant who claimed that counsel was ineffective for not obtaining a complete computer-aided dispatch report had not shown that the result would have been different with the report and thus had not shown prejudice; even if an officer had an illegal basis for stopping the defendant, attempting to flee was a separate crime that essentially purged the taint of the otherwise allegedly illegal stop. *Francis v. State*, 287 Ga. App. 428, 651 S.E.2d 779 (2007).

The defendant had not shown prejudice by trial counsel's failure to object to the "level of certainty" language in a charge, which had been disapproved of after the defendant's trial; the language was harmless because the identification testimony did not directly implicate the defendant and because other evidence tied the defendant to the robbery in question. *Rabie v. State*, 286 Ga. App. 684, 649 S.E.2d 868 (2007), cert. denied, 2008 Ga. LEXIS 96 (Ga. 2008).

Because there was significant evidence refuting the defendant's claim of

self-defense, the defendant had not shown prejudice even if trial counsel was deficient for failing to object to the prosecutor's comment on the defendant's silence, for failing to object to the prosecutor's comment in opening about the evidence the defendant was anticipated to present at trial, and for failing to object to an alleged "golden rule" argument. *Jackson v. State*, 282 Ga. 494, 651 S.E.2d 702 (2007).

Because any deficiency in counsel's failure to object to an investigator's testimony regarding the hearsay statements of an informant did not prejudice the defendant's defense, the jury was likely to deduce that the defendant was on parole from the fact that a parole officer initiated a search, and pretermittting whether the defendant's response to the investigator's request to search constituted "pre-arrest silence," no deficiency existed in counsel's reasonable strategic decision that the evidence was consistent with the defense, the defendant's ineffective assistance of counsel claims lacked merit. *Cauley v. State*, 287 Ga. App. 701, 652 S.E.2d 586 (2007).

Because a felony murder conviction merged with a malice murder conviction, the defendant had not shown prejudice from trial counsel's failure to object to the felony murder jury charge; furthermore, defendant had not shown prejudice by the making of a statement that was not introduced at trial. *John v. State*, 282 Ga. 792, 653 S.E.2d 435 (2007).

Defendant argued that defense counsel was ineffective in cross-examining a state's witness and in failing to call a witness to undermine the testimony of the state's witness. The defendant failed to show prejudice; as eyewitnesses testified that the defendant ordered an aggravated assault on the victim and assisted in murdering the victim, any deficiencies of counsel were unlikely to have affected the verdict. *Wilcox v. State*, 284 Ga. 414, 667 S.E.2d 603 (2008).

Trial court did not err in rejecting the defendant's claim that trial counsel was ineffective for failing to seek to exclude the victim's in-court identification of the defendant as tainted by a previous identification because given the overwhelming evidence of the defendant's guilt, the de-

fendant could not show a reasonable probability that the jury would have had a reasonable doubt respecting the defendant's guilt had the victim's identifications of the defendant been excluded; in the report to the police, the victim described the victim's car, which had been stolen, and the defendant, and when officers approached the car, the defendant immediately exited the vehicle and attempted to flee on foot. *Jackson v. State*, 309 Ga. App. 24, 709 S.E.2d 44 (2011).

Defendant did not receive ineffective assistance of counsel due to trial counsel's failure to object when a witness testified that the defendant spent time with an alleged gang because there was no prejudice in light of the overwhelming evidence of the defendant's guilt; several other eyewitnesses testified that the defendant shot the victim, and the defendant failed to show that but for counsel's failure to object, the outcome of the trial would have been any different. *Kitchens v. State*, 289 Ga. 242, 710 S.E.2d 551 (2011).

Defendant did not receive ineffective assistance of counsel due to trial counsel's failure to object to an officer's characterizations of the defendant as a person who was "just violent" and had "a problem with sex" because even if an objection should have been made, the defendant could not show prejudice; given the defendant's admission regarding the defendant's violent temper and dissatisfaction with sex, as well as the significant evidence implicating the defendant in the crimes, the defendant could not demonstrate any likelihood that the outcome of the trial would have been different. *Dunson v. State*, 309 Ga. App. 484, 711 S.E.2d 53 (2011), cert. dismissed, 2015 Ga. LEXIS 580 (Ga. 2015).

Defendant failed to show ineffective assistance of counsel from the defendant's trial counsel having failed to object to the verdict form because even if the trial counsel had made a meritorious objection, there was no reasonable probability of a different outcome in the trial. *Darville v. State*, 289 Ga. 698, 715 S.E.2d 110 (2011).

Defendant could not meet the burden of demonstrating prejudice from trial counsel's request for an erroneous charge because the evidence presented against the defendant was strong; although trial

counsel should not have requested a charge on prior consistent statements, the defendant could not demonstrate a reasonable probability that the outcome of the trial would have been different in the absence of the charge. Furthermore, defendant could not demonstrate prejudice from trial counsel's request for a witness credibility charge that allowed the jury to consider a witness's intelligence as one of several factors in assessing credibility because even assuming that the better practice was to omit intelligence as one of the factors in the credibility charge, the inclusion of credibility was not reversible error. *Bellamy v. State*, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

Ineffective assistance in DUI cases.

— Although defense counsel in a DUI case under O.C.G.A. § 40-6-391(a)(1) was ineffective in tendering a report into evidence that contained the otherwise inadmissible numerical result of an alco-sensor test, the defendant was not prejudiced; the evidence of guilt, including the fact that the defendant was passed out behind the wheel in a left turn lane with the car in gear, the fact that the defendant had to be roused from sleep and was disoriented, the defendant's admission to drinking, and the defendant's failing a field sobriety test, was overwhelming. *Hopkins v. State*, 283 Ga. App. 654, 642 S.E.2d 356 (2007).

Assuming that defense counsel was deficient for not having knowledge of the contents of the defendant's cell phone records, the defendant could not show the required prejudice in light of the overwhelming evidence establishing the defendant's guilt. *Swanson v. State*, 282 Ga. 39, 644 S.E.2d 845 (2007).

When the defendant merely claimed that had trial counsel provided effective assistance, "the result of the proceeding would have been different," the defendant had not shown prejudice from the allegedly ineffective assistance. *Jackson v. State*, 284 Ga. App. 619, 644 S.E.2d 491 (2007), cert. denied, No. S07C1169, 2007 Ga. LEXIS 521 (Ga. 2007).

Because trial counsel was adequately prepared for trial, effectively engaged in plea negotiations, made timely objections, properly handled the defense, was not required to make meritless objections,

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel** (Cont'd)**G. Other Examples** (Cont'd)

and the defendant ultimately failed to show a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different, counsel was found to not be ineffective; thus, the defendant was not entitled to a new trial. *Garrett v. State*, 285 Ga. App. 282, 645 S.E.2d 718 (2007).

The defendant could not prevail on an ineffective assistance of counsel claim since the defendant had not shown how additional communications with the defendant or interviews of additional witnesses would have changed the outcome of the trial; the trial court would have been authorized not to give a certain charge even if it had been requested, the defendant had not shown harm resulting from trial counsel's failure to have a similar transaction hearing and voir dire reported, and trial counsel was not ineffective for failing to make meritless objections. *Williams v. State*, 285 Ga. App. 190, 645 S.E.2d 676 (2007).

Because a transcript of the hearing on the defendant's motion for new trial was not included in the record on appeal, and absent any other proffer of the additional testimony and evidence that the alleged favorable witnesses would have testified to, the defendant could not show a reasonable probability that the outcome of the trial would have been different had trial counsel subpoenaed the witnesses; hence, the defendant's ineffective assistance of counsel claim failed. *Dukes v. State*, 285 Ga. App. 172, 645 S.E.2d 664 (2007).

When, after examining the record and transcript in their totality and measuring the strength of the evidence against the defendant's allegations of ineffectiveness, the Court of Appeals failed to find any reasonable probability that the outcome of the trial would have been different, and in particular, noted that not only did the original DNA results show that the defendant committed the rape of the victim, but that a second test, conducted at the defendant's request, also showed that the rape was committed by the defendant or an

identical twin, the defendant's ineffective assistance of counsel claim lacked merit. *Arnold v. State*, 284 Ga. App. 598, 645 S.E.2d 68 (2007).

Absent any prejudice from counsel's alleged ineffectiveness for failing to object to the state's introduction of hearsay and evidence of prior abuse committed by the defendant against the victim and the victim's mother, and for counsel's failure to move for a mistrial, the defendant's ineffective assistance of counsel claim lacked merit. *Johnson v. State*, 281 Ga. 770, 642 S.E.2d 827 (2007).

Effective assistance in involuntary intoxication defense case. — The defendant's trial counsel was not ineffective, as counsel's investigation of the defendant's involuntary intoxication defense was reasonable, even though it failed to lead to an expert competent to testify as to the defendant's intoxication and potential effects of combining alcohol with a substance marketed as an over-the-counter "performance supplement." *Knox v. State*, 290 Ga. App. 49, 658 S.E.2d 819 (2008).

Failure to impeach police officer. — Defendant's trial counsel did not provide ineffective assistance by failing to impeach a police officer as to whether the defendant was given Miranda warnings before making a voluntary statement regarding a drive-by shooting; even if the failure to impeach the officer was deficient performance, the defendant could have shown no reasonable probability that the result of the trial was affected because the defendant's statement was nearly identical to a statement given by another person, and even if the jury had lessened its reliance on the defendant's statement based on impeachment of the officer, it would likely have reached the same conclusion based on the identical statement delivered by the other person. *Hill v. State*, 282 Ga. App. 743, 639 S.E.2d 637 (2006).

While the defendant waived any objection to the admission of similar transaction evidence without first requiring the state to present witness testimony at the hearing; and despite the fact that the trial court did not make the Williams findings on the record, no harmful error resulted from the admission of similar transaction

evidence since the state's evidence at the out-of-court hearing was sufficient for the trial court to conclude that each of the Williams requirements was satisfied. Thus, counsel could not be deemed ineffective in failing to object to the admission of the similar transaction evidence. *Hinton v. State*, 290 Ga. App. 479, 659 S.E.2d 841 (2008).

Failure to object to bolstering. — Defendant failed to prove that trial counsel was ineffective for failing to object to an investigator's testimony allegedly bolstering testimony of the defendant's girlfriend because there were several reasons a reasonably lawyer might not have objected, including not wanting to signal to the jury that defense counsel was worried about the testimony. *Jones v. State*, 292 Ga. 593, 740 S.E.2d 147 (2013).

Failure to impeach victim. — Trial counsel was not ineffective for failing to impeach the victim with felony convictions under former O.C.G.A. § 24-9-84.1 (see now O.C.G.A. § 24-6-609) because the defendant did not show that, but for counsel's failure to introduce the victim's earlier convictions, there was a reasonable probability that the outcome of the trial would have been different; the victim was referred to as "not trustworthy" and "a thief" during the trial, and the victim's conviction for burglary was admitted and referenced repeatedly during the trial. *Askew v. State*, 310 Ga. App. 746, 713 S.E.2d 925 (2011).

Failure to object to admission of testimony strategic. — Trial counsel's decision not to object to the admission of testimony that the defendant was known as "kingpin" or "king of the strip" in order to use the drug culture surrounding the case to the defendant's advantage was clearly strategic. *Hargrove v. State*, 291 Ga. 879, 734 S.E.2d 34 (2012).

Failure to comply with discovery. — In a defendant's malice murder trial, a failure by the defendant's trial counsel to comply with reciprocal discovery procedures that resulted in a trial court ruling precluding the defendant from impeaching a witness by introducing certified copies of the felony convictions of the witness did not constitute ineffective assistance of counsel; although the failure had to be

considered deficient performance, it produced no prejudice because evidence of the criminal history of the witness was introduced by other means and the jury was instructed on the law of impeachment. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Failure to translate voir dire proceedings. — Pretermittting whether trial counsel was deficient by failing to ensure that the defendant understood the voir dire proceedings by providing for proper translation, the defendant did not point to any specific harm due to the defendant's alleged failure to understand the voir dire proceedings; therefore, the trial court did not clearly err in concluding that the defendant failed to show prejudice. It was undisputed that the defendant was present during voir dire, and the fact that the defendant may have "missed" some portion of the colloquy between counsel and 24 potential jurors did not compromise the right to be present on a constitutional scale. *Pineda v. State*, 297 Ga. App. 888, 678 S.E.2d 587 (2009).

Striking of jurors. — Trial counsel did not perform deficiently by failing to move to strike certain jurors for cause, despite expressing concerns about the jurors, because the record reflected that trial counsel, in fact, moved to strike the jurors in question and noted the trial court's denial of the strikes for the record. *Jimmerson v. State*, 289 Ga. 364, 711 S.E.2d 660 (2011).

Alleged lack of understanding of the law. — No ineffectiveness of counsel was shown in a defendant's malice murder trial by three instances of asserted errors by the defendant's trial counsel which the defendant contended resulted from the trial counsel's lack of understanding of the law; the defendant did not show that the trial counsel's alleged failure to object to the admission of certain evidence, to make a proper challenge to the jury venire, or to follow proper procedure in obtaining funds for an investigator had any negative impact on the defense, and therefore the defendant failed to show that but for the deficient performance of the trial counsel, the outcome of the trial would have been different. *Green v. State*, 281 Ga. 322, 638 S.E.2d 288 (2006).

Daughter's recantation of accusations. — Because the defendant failed to

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel** (Cont'd)**G. Other Examples** (Cont'd)

carry the burden of demonstrating that trial counsel's performance during the plea stage was deficient, and that counsel's deficient performance prejudiced the defendant's defense; since the general allegations made were directly contradicted by counsel's testimony, the defendant's ineffective assistance of counsel claims were rejected. *Schlau v. State*, 282 Ga. App. 460, 638 S.E.2d 895 (2006), cert. denied, 2007 Ga. LEXIS 147 (Ga. 2007).

Dismissal of a juror. — Because there was nothing in the record to rebut the presumption that trial counsel had legitimate reasons for the strategic decisions made during the trial, specifically relating to concerns regarding a juror's dismissal, the state's examination of the victim's mother, the refreshment of the state's witness's recollection, and closing argument, a motion for a new trial was properly denied on these grounds. *Hunter v. State*, 282 Ga. App. 355, 638 S.E.2d 804 (2006).

Failure to demand Jackson-Denno hearing. — Appeals court rejected the defendant's ineffective assistance of counsel claims regarding the admission of a tape-recorded statement and claim that trial counsel should have demanded a Jackson-Denno hearing or a hearing to determine the admissibility of a similar transaction, as: (1) proper *res gestae* evidence could be admitted without having to follow the rules regarding prior similar transactions; (2) assuming that trial counsel should have demanded a Jackson-Denno hearing, the defendant failed to show how a hearing would have altered the outcome of the trial; and (3) at a hearing on the motion for a new trial, the defendant failed to introduce any evidence whatsoever to suggest that the statement made was involuntary. *White v. State*, 282 Ga. App. 286, 638 S.E.2d 426 (2006).

Failure to present battered person syndrome defense. — During a defendant's trial for being a party to rape and other offenses arising out of the repeated rapes of the defendant's 11-year-old child,

the defendant's motion for a new trial on the ground that the defendant received ineffective assistance of counsel was properly denied because the defendant did not show that but for the failure of trial counsel to present a battered person defense, the outcome of the trial might have been different; the defendant failed to provide trial counsel with information indicating a possibility that the defendant suffered from that syndrome, and even if such information had been provided, the trial court might not have allowed the defense because it was a defense of justification and the defendant denied knowing about the rapes. *Johnson v. State*, 283 Ga. App. 99, 640 S.E.2d 644 (2006).

Failure to have dependent submit to psychosexual exam. — Defendant did not show that the defendant's defense attorney provided ineffective assistance in the defendant's child molestation trial by failing to have the defendant submit to a psychosexual examination before trial, to review the victim's school and medical records for impeaching evidence, or to have an expert review the victim's videotaped statement to police; the defendant failed to meet the burden of showing prejudice resulting from the alleged admissions by proffering any evidence to show that the exams and reviews would have elicited any admissible evidence that would have changed the outcome of the trial. *Wheat v. State*, 282 Ga. App. 655, 639 S.E.2d 578 (2006).

Request for bench trial and examination of competency. — Trial court did not err in denying the defendant a new trial on grounds that trial counsel was ineffective, specifically as to issues of the defendant's competency to stand trial and getting the defendant to agree to a bench trial, as: (1) the record showed that defense counsel adequately pursued the competency issue, filed pre-trial discovery motions, obtained an order for defendant's mental evaluation, hired a forensic psychologist to evaluate the defendant's competency, presented and examined witnesses, cross-examined the state's witnesses, and made a closing argument; (2) even if the court were to assume that trial counsel's failure to interview the various doctors constituted deficient perfor-

mance, the defendant failed to show any prejudice resulting therefrom; and (3) the defendant failed to show that trial counsel was deficient regarding the decision to pursue a bench trial rather than a jury trial, given that the trial court found that the defendant agreed that the case should be submitted to the court on stipulated facts, rather than to the jury. *Wafford v. State*, 283 Ga. App. 154, 640 S.E.2d 727 (2007).

Appeal on effective counsel issue held wasteful of resources. — When the issue of whether a parent was denied the effective assistance of counsel in a termination of parental rights proceeding could be decided from the record on appeal, a remand to the trial court for a ruling on this issue would be wasteful of judicial and legal resources and would serve no useful purpose. In the Interest of E.G., 284 Ga. App. 524, 644 S.E.2d 339 (2007).

Ineffective counsel established. — Petitioner's appellate counsel was ineffective by: (1) allowing thirty-three months to pass without making any attempt to obtain a hearing on a motion for new trial; (2) losing the petitioner's case file; and (3) failing to ask that the motion for new trial hearing be transcribed, which resulted in an insufficient record to support a potentially meritorious appellate claim. *White v. Smith*, 281 Ga. 271, 637 S.E.2d 686 (2006).

The trial court did not abuse its discretion in granting the defendant a new trial based on the ineffective assistance of trial counsel, as: (1) counsel's pretrial investigation was deficient; (2) counsel made no effort to investigate or to obtain the criminal records of the state's similar transaction witness before trial, and did not ask for more time or a continuance upon learning that the defendant did not have the records; (3) the defendant pointed out that the jury had doubts about the victim's testimony based on their verdict of guilt to sexual battery, as a lesser-included offense of child molestation, the crime the defendant was charged with committing; (4) there was evidence that the victim had reason to lie; (5) the charged incident was not reported until after the defendant's wife hired a divorce lawyer, who then

arranged the first interview between the victim and investigators; and (6) given that the evidence against the defendant was not overwhelming, this impeachment evidence was particularly crucial. *State v. Lamb*, 287 Ga. App. 389, 651 S.E.2d 504 (2007), overruled on other grounds, *O'Neal v. State*, 285 Ga. 361, 677 S.E.2d 90 (2009).

Claim of ineffective assistance of counsel not deemed waived. — A defendant waived a claim that trial counsel was ineffective for failing to submit a written jury charge regarding sympathy for the victim; although appellate counsel raised the issue of ineffectiveness in an amended motion for new trial, this claim had been expressly withdrawn when the motion was heard, and thus the defendant waived the issue on appeal. *Jones v. State*, 285 Ga. App. 48, 645 S.E.2d 569 (2007).

Parental rights termination. — Parent did not receive ineffective assistance of counsel in a termination of parental rights proceeding as: (1) the counsel's failure to call an employer of the parent as a witness was reasonable since the employer had been disbarred for child molestation; (2) in the absence of a showing how the attorney's actions in conducting discovery compromised the parent's representation, there was no error in the juvenile court's finding that the parent had adequate access to counsel; and (3) claims as to the counsel's failure to properly follow up on the issue of relative placement and to argue for a continuance were without merit. In the Interest of C.M., 282 Ga. App. 502, 639 S.E.2d 323 (2006).

Trial counsel was not ineffective for failing to object and move for a mistrial during closing argument when the prosecutor said that the jury had an opportunity to define what was acceptable in the community; read in context, the prosecutor appropriately urged the jury to speak on behalf of the community and rid the community of robbers and murderers. Furthermore, counsel was not ineffective because the defendant did not testify, as the evidence showed that counsel and the defendant discussed whether the defendant should testify, that counsel informed the defendant that the decision was the defendant's to make, and that the defen-

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

dant decided not to testify. *Gibson v. State*, 283 Ga. 377, 659 S.E.2d 372 (2008).

Counsel's error in phrasing question to defendant. — Defense counsel erred by asking if the defendant previously had been “charged” with a crime instead of asking whether the defendant had been “convicted,” which allowed the state to impeach the negative answer with evidence that the defendant had previously been charged with failure to yield to a police car. As the defendant was able to explain at trial that the defendant did not think the question pertained to a traffic violation, and the trial court found that there was no reasonable likelihood that such testimony affected the outcome of the trial, the trial court did not err in not granting the defendant a new trial. *Taylor v. State*, 293 Ga. App. 551, 667 S.E.2d 405 (2008).

Failure to object to use of single interpreter. — There was no ineffectiveness of the defendant's trial counsel for failing to seek separate interpreters for the defendant and a codefendant during their criminal trial as there was no showing that the defendant's rights were impinged by the use of a single interpreter. *Hung v. State*, 284 Ga. 796, 671 S.E.2d 811 (2009).

Failure to invoke rule of sequestration. — Failure of trial counsel to invoke the rule of witness sequestration did not in itself constitute deficient performance, and as the defendant did not show that any prosecution witness was influenced by the testimony of any other witness, the defendant did not show any prejudice as a result of counsel's failure to invoke the rule. *Bihlear v. State*, 295 Ga. App. 486, 672 S.E.2d 459 (2009).

Trial counsel was not ineffective for failing to request a jury charge on the violation of the rule of sequestration because there was no violation of the rule; even assuming that trial counsel's failure to request such a charge constituted deficient performance, the defendant could not demonstrate prejudice in light of the

overwhelming evidence substantiating the defendant's guilt. *Dockery v. State*, 287 Ga. 275, 695 S.E.2d 599 (2010).

Defendant failed to show that the defendant suffered any prejudice as a result of the defendant's trial counsel's failure to object to the presence of a police officer, who was the chief investigator in the case, in the courtroom because the trial court was within the court's discretion to permit the officer to remain in the courtroom and in not requiring that the officer be the first witness called to the stand, and the defendant did not show that the officer's testimony was influenced by the testimony of any other witness; merely failing to object to an investigator's presence, or to the order of the state's witnesses, does not constitute deficient performance. *Andrews v. State*, 307 Ga. App. 557, 705 S.E.2d 319 (2011).

Defendant failed to establish that trial counsel rendered ineffective assistance by failing to move for a mistrial regarding a violation of the rule of sequestration because there was no evidence as to which witnesses violated the rule and whether the witnesses actually testified or spoke about the witnesses' testimony; the defendant did not show that the outcome of the trial would have been different if counsel called an expert to assist the jury in understanding eyewitness identifications. *Glass v. State*, 289 Ga. 542, 712 S.E.2d 851 (2011).

Defendant did not show prejudice due to trial counsel's failure to invoke the rule of sequestration because the jury was informed of the earlier presence of the victim's father in the courtroom, defense counsel thoroughly cross-examined the father, and the trial court properly instructed the jurors on their role in resolving conflicts in the evidence and in determining the credibility of witnesses, the weight of the evidence, and whether a witness was impeached; thus, the jury was able to gauge the father's credibility and make a determination as to the weight, if any, the father would give to the father's testimony. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Any deficiency by trial counsel in failing to request the trial court to invoke the rule of sequestration was not the cause of any

alleged prejudice to the defense because the state had not identified the victim's father as a witness until the parties had presented their opening statements, and, thus, the father would not have been required to stay out of the courtroom even if defense counsel had invoked the rule of sequestration at the beginning of trial. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Trial counsel was not ineffective for failing to invoke the rule of sequestration at the beginning of the trial because the defendant failed to show any harm that resulted from the admission of the testimony of the victim's father; the evidence presented by both the state and the defense showed that the father's testimony about what happened did not conflict with the defendant's claim. *Pennington v. State*, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Failing to request transcription of misdemeanor trial. — Defendant failed to show counsel was ineffective for not asking that a misdemeanor trial be transcribed. There was testimony that counsel did not request a transcript because the defendant never asked that one be made and counsel did not believe the defendant could pay for the transcript, and that counsel believed the defendant's right to appeal would be preserved by the statutory substitute for a transcript. *Bagley v. State*, 298 Ga. App. 513, 680 S.E.2d 565 (2009).

Failure to challenge statute. — Because the defendant's constitutional challenges to O.C.G.A. § 16-13-31(b) were not supported by the evidence, defendant's trial counsel's performance was not deficient for failing to challenge the constitutionality of the heroin trafficking statute, and since the defendant's claims regarding the constitutionality of the heroin trafficking statute would have failed, the defendant was not prejudiced by defendant's trial counsel's decision not to raise the claims; no evidence was presented that the substance contained in the corner tie that the defendant sold to an undercover officer as heroin contained "infinitesimal and unusable amounts of heroin," heroin was a Schedule I controlled substance, O.C.G.A. § 16-13-25(2)(J), and the Gen-

eral Assembly's different treatment of heroin from other drugs was rationally related to the promotion of a legitimate state objective. *Thomas v. State*, 306 Ga. App. 279, 701 S.E.2d 895 (2010).

Failure to put defendant on stand. — Trial counsel was not ineffective for failing to put the defendant on the stand as the defendant confirmed that it was the defendant's decision not to testify. *Goodwin v. State*, 320 Ga. App. 224, 739 S.E.2d 712 (2013).

Trial counsel did not render ineffective assistance by failing to call the defendant to testify because the defendant made the decision not to testify with a complete understanding of the defendant's rights, and trial counsel testified that counsel advised the defendant that it was up to the defendant whether to testify and that counsel advised against given the defendant's prior felony convictions and belief that the testimony the defendant wished to present was, to a certain extent, contrary to the defense theory. *Thornton v. State*, 292 Ga. 796, 741 S.E.2d 641 (2013).

Failure to object to failure to define word. — Trial counsel was not ineffective for failing to object to the trial court's failure to define the word "theft" as part of the burglary and armed robbery charges as the work was not a technical work of art, but rather a work of general broad connotation and, thus, it was unlikely that the jury was not able to understand the use of the word theft. *Holder v. State*, 319 Ga. App. 239, 736 S.E.2d 449 (2012).

Opening door to admission of past transactions. — Trial counsel was not ineffective for opening the door to allow the state to introduce evidence of a defendant's past juvenile adjudication for child molestation as: (1) trial counsel was aware of the defendant's juvenile adjudication prior to the trial and made a strategic decision to call a witness to testify regarding the defendant's good character; (2) the witness consistently testified that the witness knew nothing about such an incident; (3) in light of the witness's lack of knowledge and the state's failure to introduce a certified copy of the prior juvenile adjudication, trial counsel successfully objected to the state making any mention of the prior adjudication during its closing

Benefit of Counsel (Cont'd)**5. Effective Assistance of****Counsel (Cont'd)****G. Other Examples (Cont'd)**

argument, and the trial court gave a special limiting instruction to ensure that the jury would not consider any impeachment evidence in making its determination. *Redman v. State*, 281 Ga. App. 605, 636 S.E.2d 680 (2006).

Failure to show bank account balances. — Defense counsel was not ineffective under Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to subpoena the victim's bank records to show that the victim had a balance of more than \$100 in the victim's bank account in order to support the defendant's claim that the victim gave the defendant the victim's bank card for the defendant to withdraw \$100 to pay for sex and that the defendant could have merely withdrawn money from the automated teller machine rather than rob the victim; the defendant did not request a hearing on the motion for a new trial alleging ineffective assistance and did not submit an affidavit from trial counsel, and the defendant, therefore, did not make an affirmative showing that the purported deficiencies in the defendant's trial counsel's representation were indicative of ineffectiveness and were not examples of a conscious and deliberate trial strategy. *Carswell-Danso v. State*, 281 Ga. App. 576, 636 S.E.2d 735 (2006).

6. Critical Stages

Accused's right to counsel includes benefit of counsel at all critical stages of case. — The right of a person accused of a felony to the aid of counsel at all critical stages of criminal proceedings, before trial, and to prosecute an appeal provided by state law, is fundamental and must be protected by the state. *Roach v. State*, 111 Ga. App. 114, 140 S.E.2d 919 (1965), cert. denied, 385 U.S. 935, 87 S. Ct. 297, 17 L. Ed. 2d 215 (1966).

Accused's right to counsel includes benefit of counsel at all critical stages of case and sufficiently prior to the trial for adequate preparation. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973).

Critical stage in criminal prosecution defined. — The assistance of counsel is one of the essentials of due process; but the accused is entitled to this assistance only at critical stages in a criminal prosecution. A critical stage in a criminal prosecution is one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way. *Ballard v. Smith*, 225 Ga. 416, 169 S.E.2d 329 (1969).

Defendant's Sixth Amendment right to counsel attached at defendant's initial appearance, because it was uncontested that defendant asserted that right at defendant's initial appearance, and because the state conceded that defendant did not subsequently initiate further interrogation; thus, defendant's act of requesting an attorney during the initial appearance made defendant's subsequent statement inadmissible at trial, and the trial court erred in denying defendant suppression of the statement. *O'Kelley v. State*, 278 Ga. 564, 604 S.E.2d 509 (2004).

To the extent that *Ross v. State*, 254 Ga. 22, 26-27(3)(b), 326 S.E. 2d 194 (1985) held that a first appearance, or initial appearance hearing, did not constitute an adversary judicial proceeding that triggered the attachment of the Sixth Amendment right to counsel, it was overruled. *O'Kelley v. State*, 278 Ga. 564, 604 S.E.2d 509 (2004).

Defendant has a right to have counsel with defendant at every stage during trial of case. *Leverette v. State*, 104 Ga. App. 743, 122 S.E.2d 745 (1961).

Right to benefit of counsel is not restricted to trial itself. — It does include the right to advice of counsel as to whether the accused should plead guilty and certainly this right exists once an indictment charging a felony has been returned. *Fair v. Balkcom*, 216 Ga. 721, 119 S.E.2d 691 (1961).

Guarantee of counsel of U.S. Const., amend. 6 has been extended to earlier stages of criminal proceedings when a guilty plea might be entered. *McBryar v. McElroy*, 510 F. Supp. 706 (N.D. Ga. 1981).

Critical stage doctrine requires counsel at arraignment stage. —

There is no question that the right of a person accused of a felony to the aid of counsel at all critical stages of proceedings designed to bring the person to trial is fundamental and must be protected by the state under our system of government. This doctrine requires counsel at least at the stage of arraignment in noncapital cases as well as in capital felony cases. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Generally, preindictment lineup does not trigger right to counsel. *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729, later appeal, 239 Ga. 693, 238 S.E.2d 376 (1977), cert. denied, 434 U.S. 1073, 98 S. Ct. 1260, 55 L. Ed. 2d 778, rehearing denied, 435 U.S. 962, 98 S. Ct. 1595, 55 L. Ed. 2d 812 (1978).

Defendant, who had been charged with crimes against a first victim, but who had not been charged with crimes committed on second and third victims, did not have any right to counsel at a lineup at which the defendant was identified by the second and third victims. *Ferguson v. State*, 211 Ga. App. 218, 438 S.E.2d 682 (1993).

Denial of right to conduct lineup in absence of counsel for accused. — It is a denial of the constitutional right of representation by counsel to conduct a lineup in the absence of counsel for the accused, but nothing requires the reversal of a criminal case because there was a lineup conducted without counsel for the accused when the evidence shows that the in-court identification had an independent origin. *Carmichael v. State*, 228 Ga. 834, 188 S.E.2d 495 (1972).

Preindictment photographic identification does not require presence of counsel; there is no established constitutional right to counsel at an out-of-court photographic identification when the defendant is not present. *Carter v. State*, 157 Ga. App. 445, 278 S.E.2d 93 (1981).

Commitment hearing not inherently critical stage. — The commitment hearing, for the purpose of determining whether there is probable cause to believe the accused guilty of the crime charged and bind the accused over for indictment by the grand jury, is not inherently a critical stage of a criminal proceeding.

Moore v. State, 113 Ga. App. 738, 149 S.E.2d 492 (1966), cert. denied, 385 U.S. 1028, 87 S. Ct. 757, 17 L. Ed. 2d 676 (1967).

Breath testing is not critical stage. — Motion filed by a defendant to exclude the results of a breath test under the Georgia Implied Consent Law in the defendant's prosecution for driving under the influence under O.C.G.A. § 40-6-391 was properly denied because the defendant was not entitled to the advice of counsel before deciding whether to submit to the test; the right to counsel under U.S. Const., amend. 6 and Ga. Const. 1983, Art. I, Sec. I, Para. XIV did not come into play until the proceedings had reached a critical stage, and the breath test was not such a stage because it did not signal the beginning of a formal adversary hearing and because a lawyer could add little to the warnings required from the officer administering the test by O.C.G.A. § 40-6-392(a)(4). *Rackoff v. State*, 281 Ga. 306, 637 S.E.2d 706 (2006).

Error for court to recharge jury in absence of defense counsel. — Under the circumstances, the court erred in recharging the jury in the absence of the sole attorney for the defendant, on trial for murder since counsel was easily accessible in that counsel was on the courthouse grounds, and neither counsel nor the defendant waived counsel's presence. *Carter v. State*, 190 Ga. 534, 9 S.E.2d 747 (1940).

Sentencing is critical stage of criminal proceeding at which defendant is entitled to effective assistance of counsel, effective assistance at this stage requires zealous, and not merely perfunctory or pro forma, representation. *Blake v. Zant*, 513 F. Supp. 772 (S.D. Ga. 1981), rev'd on other grounds, 718 F.2d 979 (11th Cir. 1983), vacated on other grounds, *Burger v. Zant*, 467 U.S. 1212, 104 S. Ct. 2652, 81 L. Ed. 2d 360 (1984).

Re-sentencing. — A defendant's re-sentencing without court-appointed counsel to represent the defendant was affirmed as the trial court was simply instructed to merge the defendant's armed robbery conviction into the defendant's felony murder conviction; as the trial court had no discretion in the matter and

Benefit of Counsel (Cont'd)**6. Critical Stages (Cont'd)**

its re-sentencing of the defendant was a ministerial act, the re-sentencing was proper. *Robertson v. State*, 280 Ga. 885, 635 S.E.2d 138 (2006).

Right to counsel at hearings on motion to withdraw a guilty plea. — The trial court held a hearing on defendant's motion to withdraw a guilty plea, but did not appoint an attorney to represent defendant or inform defendant of the right to counsel; thus, defendant's constitutional right to counsel during the plea proceedings was denied. *Kennedy v. State*, 267 Ga. App. 314, 599 S.E.2d 290 (2004).

Lack of counsel after death sentence is imposed deprives accused of the accused's vital constitutional right to counsel and renders the accused's trial and sentence void. *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964).

Right to counsel during interrogation. — Denial of defendant's suppression motion as to defendant's videotaped statement was proper as the statement was ambiguous as to whether defendant invoked defendant's right to counsel and after the disputed invocation of defendant's right to counsel, defendant agreed to answer questions; the trial court's interpretation of the disputed statement was not clearly erroneous, and even if the admission of the videotaped statement was in error, it would not warrant reversal because the statement was cumulative of other evidence. *Christopher v. State*, 262 Ga. App. 257, 585 S.E.2d 107 (2003).

Based on the totality of the circumstances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-820), not coerced or received as a result of promises made, and not subject to exclusion due to improper methods used by the police, the trial court did not err in admitting the confession; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. *Swain v. State*, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

Absence of defense counsel at motion in limine. — Defendant's constitutional right to be present at trial was not violated when defense counsel was not at a pretrial hearing on the state's motion in limine because there was no substantial relationship between the defendant's presence and the defendant's opportunity to defend. *Campbell v. State*, 292 Ga. 766, 740 S.E.2d 115 (2013).

7. Waiver

Defendant in criminal case has constitutional right to have benefit of counsel, but the defendant can waive this right. *Gatlin v. State*, 17 Ga. App. 406, 87 S.E. 151 (1915).

A defendant may waive the privilege and benefit of counsel guaranteed by this paragraph. *Henderson v. State*, 207 Ga. 206, 60 S.E.2d 345 (1950).

Death penalty defendant was improperly denied defendant's constitutional right to self-representation when the trial court properly found defendant was mentally competent to waive defendant's right to counsel, but, instead of determining if defendant knowingly and intelligently waived defendant's right to counsel, questioned defendant about defendant's knowledge of death penalty law, which was irrelevant to defendant's ability to waive defendant's right to counsel, and the record showed defendant had a sound general knowledge of the charges against defendant and the trial process, understood the dangers of self-representation that were explained to defendant, and knew the benefit counsel could provide. *Lamar v. State*, 278 Ga. 150, 598 S.E.2d 488 (2004).

Constitutional guarantees of counsel of choice may be waived by action or declaration. — When the defendant, in answer to a query from the court, states that the defendant has no counsel, and in answer to another question from the court replies that the defendant is ready for trial, and makes no request for counsel to be appointed to defend the defendant, but, on the contrary, actively enters into the case as the defendant's own lawyer, agreeing upon a jury, cross-examining the witnesses, and making defendant's own statement to the jury, the defendant

waives defendant's right to be represented by counsel. *Elam v. Rowland*, 194 Ga. 58, 20 S.E.2d 572 (1942).

Waiver must be made knowingly and intelligently. — An accused may waive the right to counsel, provided that the accused is capable of doing so and it appears that the accused did so knowingly and intelligently. *Brown v. State*, 122 Ga. App. 570, 177 S.E.2d 801 (1970).

The record must disclose that the defendant voluntarily, knowingly, and intelligently waived counsel and in doing so the defendant must be advised of the defendant's right to counsel, if the defendant cannot afford counsel, and the consequences of the defendant's refusal to accept counsel. *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980); *Miller v. State*, 156 Ga. App. 469, 274 S.E.2d 818 (1980).

Defendant's waiver of defendant's right to counsel was found to be inadequate since the state did not meet the state's heavy burden of showing that defendant made a knowing, voluntary, free, and intelligent decision to represent oneself in the defendant's trial for aggravated assault and false imprisonment; although the trial court engaged the defendant in a colloquy about self-representation, there was no showing that the defendant was made aware of the dangers of self-representation in that the defendant's defense was confused and convoluted and the defendant was unfamiliar with the evidentiary rules, which limited the defendant's ability to defend oneself. *Banks v. State*, 260 Ga. App. 515, 580 S.E.2d 308 (2003).

Defendant contended that the defendant was wrongly convicted of four traffic misdemeanors because the trial court forced the defendant to trial without counsel, the trial court's affidavit regarding its usual procedure in dealing with defendants who refused appointed counsel did not meet the state's burden to show that the defendant made a knowing and intelligent decision to proceed pro se after being warned of the risks inherent in that choice; accordingly, a new trial was required. *Jones v. State*, 260 Ga. App. 251, 581 S.E.2d 315 (2003).

Court must ascertain awareness of accused of right to counsel. — Since

the trial court merely ascertained that appellant was going to be self represented but it did not ascertain that appellant was aware of the right to counsel, there has not been an intelligent and knowing waiver of the right to counsel. *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

Voluntary waiver found. — Because defendant was carefully and thoroughly instructed on two different occasions regarding the right to counsel, the risks and dangers of self-representation, and other rights, defendant voluntarily waived the right to counsel. *Sharp v. State*, 275 Ga. App. 487, 621 S.E.2d 508 (2005).

When after the defendant requested an attorney, the defendant initiated further discussions with police, was re-apprised of the Miranda rights in full, and signed a written waiver prior to giving a statement, the taint of a prior Edwards violation with regard to two earlier statements was overcome and the last statement was properly admitted into evidence; furthermore, the trial court had considered conflicting expert testimony in conjunction with other evidence of the defendant's intelligence and had concluded that the defendant understood the defendant's rights and the consequences of waiving them. *Height v. State*, 281 Ga. 727, 642 S.E.2d 812 (2007).

Defendant signed a Miranda waiver, but later invoked the right to counsel. As there was no evidence the defendant made any additional statements to the officer thereafter, or that the officer interrogated the defendant after the latter invoked the right to counsel, statements the defendant made before invoking that right were properly admitted. *Grant-Farley v. State*, 292 Ga. App. 293, 664 S.E.2d 302 (2008).

As the trial court cautioned the defendant at great length about the dangers of self-representation, but the defendant nevertheless insisted on proceeding pro se, the record established that the defendant knowingly and intelligently waived the right to be represented by counsel. *Hill v. State*, 298 Ga. App. 677, 680 S.E.2d 702 (2009).

Trial court properly allowed the defendant to waive the defendant's right to counsel and represent oneself at trial be-

Benefit of Counsel (Cont'd)**7. Waiver** (Cont'd)

cause the court cautioned the defendant at great length about the dangers of self-representation, and the defendant nevertheless insisted upon self representation; the trial court, through the court's two colloquies on two separate days prior to the commencement of trial, established that the defendant made a knowing, voluntary, and intelligent waiver of defendant's right to counsel. *Davis v. State*, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

Trial court did not err in finding that the defendant knowingly, voluntarily, and intelligently waived the defendant's right to have a lawyer represent the defendant at trial because the record authorized the trial court to conclude that the defendant's expression of dissatisfaction with the defendant's third lawyer on the day of trial was a dilatory tactic that was the functional equivalent of a knowing and voluntary waiver of appointed counsel, and after the defendant indicated the defendant's desire to proceed pro se, the extensive colloquy between the defendant and the trial court established that the defendant made a knowing and intelligent waiver of the defendant's right to counsel; the defendant did not explain how the knowledge that the defendant could face lesser punishment than the defendant believed would have made the defendant less inclined to waive counsel and the record demonstrated that the defendant was aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver. *Walker v. State*, 288 Ga. 174, 702 S.E.2d 415 (2010).

Defendant knowingly and voluntarily waived the right to counsel as the trial court repeatedly informed the defendant of the dangers of self-representation, noting that the defendant did not know the court rules and procedures, and advised the defendant of the nature of the charges and the possible punishment that the defendant faced upon conviction. *Pardon v. State*, 322 Ga. App. 393, 745 S.E.2d 658 (2013).

Waiver of rights found. — To the extent defendant's complaint to the trial

court reflected defendant's intent to invoke defendant's right to testify, the defendant asserted this right too late, regardless of the defendant's dissatisfaction with defense counsel's performance. To permit the defendant to reopen the evidence after closing arguments and after the State of Georgia had released all of the state's witnesses would have detrimentally affected the fairness and legitimacy of the trial. *Smith v. State*, 306 Ga. App. 693, 703 S.E.2d 329 (2010).

Facts and circumstances of case affect intelligent waiver determination. — The determination as to an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding the case. *Johnson v. State*, 139 Ga. App. 829, 229 S.E.2d 772 (1976).

Since the defendant was a man of some age, regularly employed, and of sufficient awareness of the relevant circumstances and likely consequences of defendant's acts, the defendant knowingly and intelligently waived defendant's right to counsel considering defendant's experience, background, and conduct. *Thomas v. State*, 244 Ga. 608, 261 S.E.2d 389 (1979).

A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

Accused must be furnished necessary information upon which to make decision. — It must be affirmatively shown that the court furnished the accused with the necessary information upon which the accused could make a voluntary, knowing, and intelligent decision regarding the right to counsel. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973).

To be valid, waiver of the right to counsel must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges, and circumstances in mitigation thereof, and all other facts essential to a broad under-

standing of the matter. *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

Right cannot be waived unless offer of counsel made. — To indigent defendants, counsel must be provided by the state unless the defendant understandably, intelligently, and competently waives the right; the right cannot be waived unless an offer of counsel has been made. *Blake v. State*, 109 Ga. App. 636, 137 S.E.2d 49, cert. denied, 379 U.S. 924, 85 S. Ct. 281, 13 L. Ed. 2d 337 (1964).

Determination of waiver should appear on record. — While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record. *Butler v. State*, 198 Ga. App. 217, 401 S.E.2d 43 (1990), cert. denied, 198 Ga. App. 897, 401 S.E.2d 43 (1991).

When the record reflected only defendant's request for an attorney or silence, there was not an adequate waiver of the right to counsel. *Butler v. State*, 198 Ga. App. 217, 401 S.E.2d 43 (1990), cert. denied, 198 Ga. App. 897, 401 S.E.2d 43 (1991).

Because the state failed to satisfy its burden showing that defendant waived defendant's constitutional right to counsel, defendant's conviction and sentence for leaving the scene of an accident were vacated and remanded for an evidentiary hearing. *Dempsey v. State*, 267 Ga. App. 661, 600 S.E.2d 735 (2004).

Presumption is against waiver of benefit of counsel, which must be done voluntarily, knowingly, and intelligently. *Rose v. State*, 128 Ga. App. 370, 196 S.E.2d 683 (1973).

The presumption is against waiver, and it is the responsibility of the court, when the accused is without counsel, to clearly determine whether there has been a proper waiver. The trial judge must investigate as long and as thoroughly as the circumstances of the case before the court demand. *Rogers v. State*, 156 Ga. App. 466, 274 S.E.2d 815 (1980).

Right to counsel is not compulsory right. — While the constitutional right to have the benefit of counsel is a valuable and sacred one, and one that should never

be denied or abridged, it is not a compulsory right. *Fortson v. State*, 96 Ga. App. 350, 100 S.E.2d 129 (1957).

Appellant's actions did not constitute waiver of counsel since the appellant's retained attorney entered a plea of not guilty on the appellant's behalf at the appellant's arraignment and when at time of trial the appellant's attorney was permitted to withdraw as counsel, with the appellant then informing the court that the appellant wanted to get an attorney. *Miller v. State*, 156 Ga. App. 469, 274 S.E.2d 818 (1980).

Claim of ineffective assistance of counsel not waived. — Defendant did not waive an ineffective assistance of counsel claim by failing to raise it below as appellate counsel became involved in the case after trial counsel filed the notice of appeal and the issue was raised at the earliest practicable moment. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, aff'd, 280 Ga. 222, 626 S.E.2d 500 (2006).

The question of a voluntary and knowing waiver of the right of a juvenile to counsel depends on the totality of the circumstances. *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983) (burden of showing understanding waiver met).

There are several factors to be considered among the totality of the circumstances in determining whether a juvenile's waiver of counsel was made knowingly, and voluntarily: (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge and the nature of the accused's rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends, or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogations; (7) length of interrogations; (8) whether vel non the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extrajudicial statement at a later date. *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983) (burden of showing understanding waiver met).

Benefit of Counsel (Cont'd)**7. Waiver (Cont'd)**

Allowing defendant to proceed pro se after three detailed warnings not abuse of discretion, as those detailed warnings were not required for the defendant to have made a knowing and intelligent waiver, but were still given, the defendant signed a detailed waiver, and the defendant waived the presence of standby counsel, *Bush v. State*, 268 Ga. App. 200, 601 S.E.2d 511 (2004).

The state has a heavy burden in showing that a juvenile did understand and waive the juvenile's rights. *Howe v. State*, 250 Ga. 811, 301 S.E.2d 280 (1983) (burden of showing understanding waiver met).

Effective waiver of counsel. — See *Callahan v. State*, 175 Ga. App. 303, 333 S.E.2d 179 (1985).

Trial court did not err in denying defendant's requests for counsel and for a continuance so that defendant could obtain counsel, made on the day of trial, as: (1) defendant was repeatedly advised of defendant's right to counsel and of the dangers of self-representation, and a public defender was repeatedly offered, appointed, and rejected; (2) despite the trial court's clear warnings and statement of its intention to have defendant proceed on the date of the trial with or without representation, defendant appeared on the morning of the trial without representation; (3) at defendant's request, a public defender was asked to serve as standby counsel at trial, but defendant refused to allow the public defender to assist the defendant; and (4) defendant's uncooperative and dilatory conduct was the functional equivalent of a knowing and voluntary waiver of appointed counsel. *Sims v. State*, 265 Ga. App. 476, 594 S.E.2d 693 (2004).

There was no requirement that Miranda warnings be given by a certified translator, and so long as the accused understood the explanation of rights, an imperfect translation did not rule out a valid waiver; since the record showed that the city marshal who acted as a translator was called upon regularly to serve as a translator by various law enforcement

agencies, and the defendant pointed to no error in the translation, the defendant failed to demonstrate prejudice, and the trial court was authorized to conclude that the defendant knowingly and voluntarily waived the constitutional right to remain silent and the right to counsel. *Delacruz v. State*, 280 Ga. 392, 627 S.E.2d 579 (2006).

In an armed robbery case, the defendant was properly allowed to waive counsel, when the defendant was advised of the charges, the possible penalties, and all the rights; as defendant was a college graduate and former police officer, who had testified as an officer and conducted another legal matter, any difficulties arising from the defendant's request, mid-trial, that standby counsel represent the defendant, were created by the defendant and were not reversible error. *Joyner v. State*, 278 Ga. App. 60, 628 S.E.2d 186 (2006).

Right to counsel was knowingly and voluntarily waived, as evidenced by a signed rights waiver form stating a full understanding of: (1) the nature of the charges and the maximum punishment, including the possibility of a jail sentence; (2) the right to appointed counsel if necessary; and (3) the ramifications of proceeding pro se; further, the defendant swore under penalty of perjury that these statements were true. *Frasard v. State*, 278 Ga. App. 352, 629 S.E.2d 53 (2006).

A defendant's videotaped statement was properly admitted into evidence after a detective advised the defendant of the right to an attorney and repeatedly asked the defendant if the defendant wanted an attorney before the defendant ultimately rejected the right to counsel. *Swanson v. State*, 282 Ga. 39, 644 S.E.2d 845 (2007).

Because the record showed that the defendant reinitiated further communication with police and made a knowing and intelligent waiver of any right to counsel previously invoked, the record did not support the defendant's claim that the investigators' accommodation of the defendant's request to speak to the defendant's wife in some way undermined the *Edward v. Arizona*, 451 U.S. 477 (1981) rule by prompting the defendant's request to reinitiate contact with the police. *Rivera v. State*, 282 Ga. 355, 647 S.E.2d 70 (2007).

No waiver established. — State failed to prove a valid waiver of the right to counsel, and a trial court erred in allowing the defendant to proceed pro se since the trial court never informed the defendant of the dangers of proceeding without counsel; appointed stand-by counsel sat through the trial with the defendant, but provided no assistance during the trial, and, before trial, potentially made things worse by failing to voir dire any potential jurors and by failing to object to the defendant being visibly handcuffed and shackled during the trial or even to request a curative instruction that the restraints should not have been considered evidence of defendant's guilt, so there was no reason to conclude that the conviction was independent of the defendant's decision for self representation. *Davis v. State*, 279 Ga. App. 628, 631 S.E.2d 815 (2006).

Because the record showed that the defendant never unequivocally asserted a right to self-representation, the trial court did not err in refusing to allow the defendant to dismiss trial counsel; thus, the trial court properly denied the defendant a new trial. *Pulliam v. State*, 287 Ga. App. 717, 653 S.E.2d 65 (2007), cert. denied, 2008 Ga. LEXIS 159 (Ga. 2008).

When the defendant, who previously waived the right to counsel, appeared for trial and requested court-appointed counsel, the trial court erred in denying the request without any discussion with the defendant to ensure that the defendant fully appreciated both the nature and the consequences of the right that the defendant relinquished and the repercussions of such a waiver. These findings were necessary to effect a valid waiver. *Watkins v. State*, 291 Ga. App. 343, 662 S.E.2d 544 (2008).

State did not show that the defendant made a knowing and intelligent waiver of the right to counsel. There was no evidence that the defendant was adequately informed of the nature of the charges, the possible punishments the defendant faced, the dangers of proceeding pro se, and other circumstances that might affect the defendant's ability to adequately represent the defendant's own self; furthermore, the absence of a trial transcript

prevented any consideration of whether the failure to obtain a knowing and voluntary waiver was harmless. *Cook v. State*, 297 Ga. App. 701, 678 S.E.2d 160 (2009).

Initiation of conversation by defendant. — A defendant knowingly and intelligently waived the defendant's right to counsel in speaking to an investigator and to an assistant district attorney (ADA) outside the presence of the defendant's attorney. The defendant initiated these conversations and insisted on talking after being reminded by the investigator and the ADA that they could not discuss the case in the absence of the defendant's attorney. *Davis v. State*, 281 Ga. 871, 644 S.E.2d 113 (2007).

Trial court did not err in failing to suppress a statement the defendant made to the police because the statement was made during the course of a subsequent interview that the defendant initiated and was admissible; the defendant contacted the case detective and requested a meeting, the detective met with the defendant and again advised the defendant of the defendant's right to counsel, and the defendant waived the defendant's right to counsel and made an incriminating statement. *Haynes v. State*, 287 Ga. 202, 695 S.E.2d 219 (2010).

Trial court did not err by admitting the defendant's custodial statement to a police detective because after the defendant invoked the right to counsel, the detective ceased the interrogation and was returning the defendant to jail when the defendant told the detective that the defendant would tell the detective what the detective wanted to know and then gave an incriminating statement upon returning to the room where the interrogation was conducted. *Anthony v. State*, 315 Ga. App. 701, 727 S.E.2d 528 (2012).

Appellant's actions constituted waiver of counsel. — See *Singleton v. State*, 176 Ga. App. 733, 337 S.E.2d 350 (1985).

Ineffective assistance of counsel claim was waived on appeal because defendant failed to raise the issue in the trial court in defendant's motion to withdraw defendant's guilty plea; thus, defendant's failure to do so amounted to waiver barring appellate consideration of the is-

Benefit of Counsel (Cont'd)**7. Waiver** (Cont'd)

sue. *Sheffield v. State*, 270 Ga. App. 576, 607 S.E.2d 205 (2004).

Habeas court erred in granting the defendant a new trial on the ground that the defendant received ineffective assistance of counsel on appeal since the defendant was not afforded defendant's constitutional right to conflict-free appellate representation because the habeas court improperly relied on the theory that the defendant would lose defendant's right to raise the issue of ineffective assistance of trial counsel if it were not raised prior to defendant's direct appeal; when the defendant is represented by trial counsel through completion of the appellate process, the failure to raise the issue of ineffective assistance of trial counsel prior to the direct appeal does not constitute a waiver of the ability to raise the claim since the defendant is able to raise the claim in a habeas proceeding. *Williams v. Moody*, 287 Ga. 665, 697 S.E.2d 199 (2010).

Defendant's claim that trial counsel was ineffective when counsel failed to request that the jury panel be qualified again after the interview of new witnesses was waived because the issue was not raised either in the motion for new trial as amended or at the hearing thereon by appellate counsel, who had been appointed following the defendant's conviction. *Norris v. State*, 289 Ga. 154, 709 S.E.2d 792 (2011).

Impact of illness of counsel. — Defendant did not receive ineffective assistance of trial counsel when counsel allowed the defendant's first scheduled trial to be canceled in the defendant's absence because the defendant did not show that the outcome of the defendant's trial would have been different if the defendant had been present that morning to hear that counsel was too ill to proceed. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Failure to request instruction on defense. — Defendant was not entitled to a new trial due to ineffective assistance of counsel as defendant waived any claim of ineffective assistance based on the failure

to request an instruction on the defense of justified use of force in self-defense as defendant was represented by new counsel on appeal and the alleged error was not raised in the motion for a new trial. *Mayfield v. State*, 276 Ga. App. 544, 623 S.E.2d 725 (2005).

Request for counsel mid-trial after requesting self representation. — Although the trial court erred by initially stating, during the course of the lengthy colloquy over self-representation, that once the defendant chose to represent oneself, the defendant could not change the defendant's mind mid-trial, the misstatement did not require the reversal of the defendant's conviction because no harm resulted; during the trial, the defendant did in fact change the defendant's mind and requested counsel, and the trial court granted the request. *Davis v. State*, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

Self-representation did not violate right to counsel. — Trial court did not err in imposing a sentence of life imprisonment without parole because the record did not support the defendant's assertion that the conviction was obtained in violation of the defendant's constitutional right to counsel; the state offered evidence that the defendant's prior case was tried before a jury, that the defendant exercised the constitutional right to self-representation, and that appointed standby counsel was available to assist the defendant at trial. *Willis v. State*, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

8. Appeals

Indigent has right to appointed counsel to assist the indigent on direct appeal. *Roberts v. Caldwell*, 230 Ga. 223, 196 S.E.2d 444 (1973).

Out-of-time appeal. — Because trial counsel withdrew from representing the defendant without fulfilling the duty to fully inform the defendant of the relevant appeal rights, and the record failed to show whether the defendant was indigent or whether counsel informed the defendant of the right to appointed counsel, an order denying the defendant's motion for an out-of-time appeal was reversed and the case was remanded; if the defendant

was found to be indigent, and the court failed to fully advise the defendant of the relevant appellate rights, an out-of-time appeal was authorized. *Hill v. State*, 285 Ga. App. 310, 645 S.E.2d 758 (2007).

The trial court abused its discretion in denying the defendant an out-of-time appeal without a hearing, which alleged that both the defendant's trial and appellate counsel were ineffective, as: (1) no case law or rules of court required that a motion for out-of-time appeal be verified or accompanied by an affidavit, as the trial judge seemingly required, in order to be granted a hearing on the matter; and (2) given the lack of contrary evidence in the record, the trial judge failed to make a judicial inquiry into whether the defendant was responsible for the failure to pursue a timely direct appeal. *Ray v. State*, 287 Ga. App. 492, 652 S.E.2d 165 (2007).

Request for appointment of appellate counsel not always necessary. — An individual desiring an appeal need not, once a responsible state authority knows of the desire to appeal and knows of the status of indigency, specifically request appointment of appellate counsel. *Roberts v. Caldwell*, 230 Ga. 223, 196 S.E.2d 444 (1973).

Appellate decision without benefit of counsel to indigent violates rights. — When the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel in a state criminal case, there has been a discrimination between the rich and the poor which violates U.S. Const., amend. 14. *Chenoweth v. Smith*, 225 Ga. 572, 170 S.E.2d 235 (1969).

The failure to grant an indigent defendant seeking initial review of defendant's conviction the services of an advocate violates petitioner's rights to fair procedure and equality under U.S. amend. 14. *Chenoweth v. Smith*, 225 Ga. 572, 170 S.E.2d 235 (1969).

Decision of counsel not to appeal motion not denial of right. — Decision of counsel not to appeal from denial of motion for new trial contrary to instruction of defendant held not a denial of right to counsel. *Givens v. Dutton*, 222 Ga. 756, 152 S.E.2d 358 (1966).

Sentence is not necessarily void when counsel declines to appeal case for one convicted of crime though requested by one's client to do so. *Balkcom v. Roberts*, 221 Ga. 339, 144 S.E.2d 524 (1965).

Withdrawal by counsel in light of frivolous appeal. — If counsel finds case for appeal to be wholly frivolous, after a conscientious examination of it, counsel should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed for the indigent to raise any points that the indigent chooses; the court — not counsel — then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. *Bolick v. State*, 127 Ga. App. 542, 194 S.E.2d 302 (1972).

Self-representation during appeal not ineffective. — Trial court's denial of defendant's motion to allow an out-of-time appeal without conducting an evidentiary appeal was not an abuse of discretion as defendant explained to the trial court that defendant decided, as a matter of strategy, to file a pro se motion in arrest of judgment under O.C.G.A. § 17-9-61 rather than an immediate direct appeal; there was no need to inquire further into whether defendant received ineffective assistance of counsel in failing to file an immediate direct appeal. *Smith v. State*, 263 Ga. App. 414, 587 S.E.2d 787 (2003).

Evidentiary hearing required for ineffective assistance. — Because the trial court's order denying the defendant's motion for an out-of-time appeal failed to make a specific finding as to whether the right to appeal was lost as a result of the ineffectiveness of counsel or by the defendant's own conduct, that order was vacated, and the matter was remanded with directions that the trial court enter findings. *Wright v. State*, 282 Ga. App. 582, 639 S.E.2d 563 (2006).

Defendant not entitled to appointment of counsel to prosecute motion to vacate void and illegal sentence. — Trial court did not err in failing to appoint counsel to prosecute the defendant's mo-

Benefit of Counsel (Cont'd)**8. Appeals** (Cont'd)

tion to vacate a void and illegal sentence because the defendant did not file a motion to withdraw the guilty plea which, if timely, would have triggered the right to appointed counsel; an indigent defendant who has filed a motion to vacate void sentences is not entitled to counsel to pursue either the motion or an appeal from the denial thereof. *Pierce v. State*, 289 Ga. 893, 717 S.E.2d 202 (2011).

Defendant not entitled to appointment of counsel to prosecute motion for out-of-time appeal. — Trial court did not err in failing to appoint counsel to prosecute the defendant's motion for out-of-time appeal because the defendant did not file a motion to withdraw the guilty plea which, if timely, would have triggered the right to appointed counsel; because a motion for an out-of-time appeal cannot be construed as part of a criminal defendant's first appeal of right, a defendant is not entitled to the assistance of appointed counsel. *Pierce v. State*, 289 Ga. 893, 717 S.E.2d 202 (2011).

Ineffectiveness argument cannot be expanded on appeal. — Defendant was attempting to expand the original allegation of ineffectiveness on appeal when the defendant argued that trial counsel was ineffective in failing to object to the testimony of a police detective regarding the victim's truthfulness because in the defendant's motion for new trial, the defendant asserted only that counsel was ineffective in failing to object to the prosecutor's questioning of the detective concerning whether the victim was truthful when the victim gave an initial statement to and identified the defendant; the defendant could not expand the assertion in the trial court to include other statements by the victim or any questions directed to detectives concerning those later statements. *Gaither v. State*, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

9. Habeas Corpus Proceedings

Constitutions do not require appointment of counsel for habeas cor-

pus petitioners. — An application for the writ of habeas corpus is not a criminal proceeding, and neither the Constitution of the United States nor the Georgia Constitution requires the appointment of counsel for the petitioner. *Moore v. Caldwell*, 229 Ga. 132, 189 S.E.2d 396 (1972); *Wyatt v. Caldwell*, 229 Ga. 597, 193 S.E.2d 607 (1972); *Grace v. Caldwell*, 231 Ga. 407, 202 S.E.2d 49 (1973); *Moye v. Hopper*, 234 Ga. 230, 214 S.E.2d 920 (1975); *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

No right to counsel in habeas corpus proceeding. — A habeas corpus proceeding is not such a criminal proceeding as comes within the constitutional guarantee of the right to representation by counsel. *Croker v. Smith*, 225 Ga. 529, 169 S.E.2d 787 (1969); *Hatton v. Smith*, 228 Ga. 378, 185 S.E.2d 388 (1971), cert. denied, 407 U.S. 921, 92 S. Ct. 2466, 32 L. Ed. 2d 807 (1972); *Dixon v. Caldwell*, 228 Ga. 658, 187 S.E.2d 292 (1972); *Wayman v. Caldwell*, 229 Ga. 2, 189 S.E.2d 74 (1972); *Nolley v. Caldwell*, 229 Ga. 441, 192 S.E.2d 151 (1972); *Smith v. Ault*, 230 Ga. 433, 197 S.E.2d 348 (1973).

Georgia is not constitutionally required to provide counsel in death penalty habeas proceedings in order to ensure the fundamental fairness of Georgia's death penalty procedures and meaningful access to the courts. *Gibson v. Turpin*, 270 Ga. 855, 513 S.E.2d 186 (1999), cert. denied, 528 U.S. 946, 120 S. Ct. 363, 145 L. Ed. 2d 284 (1999).

Meaningful access to courts does not require providing funds or appointing counsel to indigent habeas petitioners. *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461 (1980).

The state is not required to pay a petitioner's expenses in habeas corpus proceedings. *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461 (1980).

Denial of counsel is ground for issuance of writ. — The deprivation of counsel is such a fundamental and radical error that it operates to render the trial illegal and void. Denial of the benefit of counsel constitutes a ground for the issuance of a writ of habeas corpus. *Wilcoxon v. Aldredge*, 192 Ga. 634, 15 S.E.2d 873

(1941), later appeal, 193 Ga. 661, 19 S.E.2d 499, cert. denied, 317 U.S. 626, 63 S. Ct. 36, 87 L. Ed. 506 (1942).

Ineffective assistance of counsel claim. — Habeas court's order denying an inmate's verified petition, which asserted that trial counsel rendered ineffective assistance, was reversed as the allegations contained in the petition served as sufficient evidence to support the inmate's claim that counsel failed to file a notice of appeal after being instructed by the inmate to do so. *Rolland v. Martin*, 281 Ga. 190, 637 S.E.2d 23 (2006).

Because the defendant: (1) failed to show prejudice by trial counsel's failure to call certain witnesses at trial; (2) failed to raise allegations of ineffectiveness regarding the state's grant of immunity to a witness and regarding the admission of an audiotape; and (3) abandoned any error regarding the admission of a videotape of the crime scene, the defendant failed to show that trial counsel was ineffective. *McNeal v. State*, 281 Ga. 427, 637 S.E.2d 375 (2006).

Because a traffic stop was lawful, defendant lacked standing to challenge a search of the car, evidentiary inconsistencies were attributable to defendant's equivocal comments, and defendant failed to show that the uncalled witnesses' testimonies would have created a reasonable probability of a different outcome at trial, defendant failed to show that counsel was ineffective. *Howren v. State*, 271 Ga. App. 55, 608 S.E.2d 653 (2004), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Habeas court erred by concluding that there is a reasonable probability that the murder defendant's trial counsel's deficiencies changed the outcome of the defendant's trial and, therefore, erred by granting relief based on defendant's ineffective assistance of trial counsel claim. *Humphrey v. Riley*, 291 Ga. 534, 731 S.E.2d 740 (2012).

Defendant is precluded from maintaining another petition for habeas corpus on same ground as earlier petition by virtue of judgment that facts alleged in prior petition did not disclose a violation of the defendant's right to be represented by counsel. *Williams v. Law-*

rence, 193 Ga. 381, 18 S.E.2d 463, cert. denied, 315 U.S. 816, 62 S. Ct. 905, 86 L. Ed. 1214 (1942).

Burden on petitioner to prove denial of benefit of counsel. — In habeas corpus proceeding, the burden was upon the petitioner to establish by proof defendant's ground of attack that defendant was denied the benefit of counsel, and it was not error to deny defendant's release on this ground. *Plocar v. Foster*, 211 Ga. 153, 84 S.E.2d 360 (1954), cert. denied, 349 U.S. 962, 75 S. Ct. 893, 99 L. Ed. 1284 (1955).

Burden on petitioner to demonstrate that petitioner was unaware of disadvantages to be encountered by lack of counsel. *Taylor v. Hopper*, 596 F.2d 1284 (5th Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

Habeas corpus petitioner who was sentenced to death was entitled to a new sentencing trial because the petitioner received ineffective assistance of counsel in the sentencing phase of the petitioner's trial when the petitioner's counsel did not present available mitigation evidence from expert and lay witnesses or pursue other such evidence that was available through the exercise of reasonable diligence. *Head v. Thomason*, 276 Ga. 434, 578 S.E.2d 426, cert. denied, 540 U.S. 957, 124 S. Ct. 409, 157 L. Ed. 2d 294 (2003).

List of Witnesses

Second clause of this paragraph entitles defendant to list of witnesses on whose testimony charge is founded. *Palmer v. State*, 23 Ga. App. 84, 97 S.E. 460 (1918).

Ga. Const. 1983, Art. I, Sec. I, Para. XIV does not require the state to provide a list of trial witnesses, but only a list of witnesses on whose testimony the charge was based. *Park v. State*, 230 Ga. App. 274, 495 S.E.2d 886 (1998).

Right to have list of witnesses applies to misdemeanor cases as well as felonies. *Gordon v. State*, 102 Ga. 673, 29 S.E. 444 (1897).

List of witnesses must be furnished on demand. *Hyatt v. State*, 134 Ga. App. 703, 215 S.E.2d 698 (1975).

List of Witnesses (Cont'd)

Requirement to furnish list of witnesses. — This paragraph requires that every person charged with crime shall on demand made previously to arraignment be furnished with a list of the state's witnesses. *Huffaker v. State*, 119 Ga. App. 742, 168 S.E.2d 895 (1969).

Before the provisions of this paragraph become operative it is imperative that defendant make a demand for a copy of a list of witnesses, before arraignment, upon the district attorney or an assistant district attorney. *Page v. State*, 237 Ga. 20, 227 S.E.2d 8 (1976); *Thomas v. State*, 139 Ga. App. 467, 228 S.E.2d 604 (1976).

The right guaranteed by this paragraph to be furnished, on demand, with a list of witnesses on whose testimony the charge against the accused is founded, is the right, on demand, to be furnished by the district attorney's office, prior to arraignment, with the list of witnesses who will testify for the state on the trial. *Sutton v. State*, 237 Ga. 423, 228 S.E.2d 820 (1976).

Failure to include coindictee's name on witness list was not reversible error since the defendant was notified a month before trial that the state was dropping charges against the coindictee in exchange for the coindictee's testimony against the defendant. *Mize v. State*, 269 Ga. 646, 501 S.E.2d 219 (1998), cert. denied, 525 U.S. 1078, 119 S. Ct. 817, 142 L. Ed. 2d 676 (1999).

Defendant's failure to specifically request addresses and phone numbers in defendant's demand for a list of witnesses justified rejection of defendant's motion to exclude a witness. *Willet v. State*, 223 Ga. App. 866, 479 S.E.2d 132 (1996).

There is no right in accused to have list of witnesses who will testify on trial prior to preliminary hearing. *Sutton v. State*, 237 Ga. 423, 228 S.E.2d 820 (1976).

Demand for list of witnesses prior to arraignment is for discovery; after arraignment it is to prevent surprise. *Rutledge v. State*, 152 Ga. App. 755, 264 S.E.2d 244 (1979).

Defendant is to be given opportunity to interview witnesses against

defendant prior to trial. — The purpose of the law with reference to the list of witnesses and copy of the indictment is that the defendant shall not be confronted at trial with witnesses against the defendant, that is, witnesses whom the defendant has not had the opportunity to interview prior to trial. *Bisard v. State*, 158 Ga. App. 62, 279 S.E.2d 310 (1981).

List of those who appeared before grand jury is sufficient. — The constitutional requirement that the district attorney furnish the accused with a list "of the witnesses on whose testimony the charge against him was founded" is fully met if the names of those who appeared before the grand jury are supplied. *Manning v. State*, 123 Ga. App. 844, 182 S.E.2d 690 (1971).

If the names of two persons who did, in fact, testify before the grand jury were not on the list of "witnesses appearing before the grand jury," but an inspection of the indictment and the list of witnesses thereon discloses that the names of these witnesses were included, the requirement that the accused be furnished with a list "of the witnesses on whose testimony the charge against him was founded" is met. *Manning v. State*, 123 Ga. App. 844, 182 S.E.2d 690 (1971).

No requirement that state furnish list of witnesses to be used at trial. — The solicitor general (now district attorney) is under no obligation to disclose to the defendant witnesses, other than those provided in a list pursuant to this paragraph, whom the solicitor general might see fit to call during the progress of the trial. *Williams v. State*, 42 Ga. App. 225, 155 S.E. 511 (1930).

The Constitution of this state requires the solicitor general (now district attorney), on demand therefor, to furnish the accused with a list of the witnesses on whose testimony the charge against the accused was founded but the law does not require the solicitor general (now district attorney) to furnish the accused with a list of all the witnesses the solicitor general expects to use on the trial. *Britten v. State*, 221 Ga. 97, 143 S.E.2d 176 (1965), cert. denied, 384 U.S. 1014, 86 S. Ct. 1944, 16 L. Ed. 2d 1035 (1966).

Even though a witness's name was not on the state's witness list, the

state's formal disclosure of the witness as the confidential informant six weeks prior to trial, combined with: (i) the summary of the witness's testimony found in the search warrant affidavit given to defendant; (ii) defendant's admitted knowledge of the witness's identity prior to the formal disclosure; (iii) defendant's own pre-trial reference to the witness's as a material witness; and (iv) defendant's attempts to interview the witness prior to trial, fulfilled the purpose of the witness list rule. *McLarty v. State*, 238 Ga. App. 27, 516 S.E.2d 818 (1999).

No requirement that persons whose names appear on accusation or indictment must testify at trial. — There is no requirement either in the Constitution or the statutes that those persons whose names appear on an accusation or indictment as witnesses must testify on the trial of the accused. *Bonds v. State*, 232 Ga. 694, 208 S.E.2d 561 (1974).

When witness's name in indictment, defendant cannot claim surprise. — When a witness's name is contained in the indictment, a defendant cannot validly contend that the defendant had been surprised or unable to interview the witness in question through lack of knowledge of such witness. *Garvin v. State*, 144 Ga. App. 396, 240 S.E.2d 925 (1977).

State cannot deny defendant's counsel access to material witness. — The state has no more right to deny defendant's counsel access to a witness material to the defense than it would have to secrete the witness to prevent the defendant's using the witness, or to deny the defendant the right to process to compel the attendance of a witness, and the defendant cannot be required to call a person to the stand as the defendant's own witness without knowing in advance what the witness's testimony will be. *Wilson v. State*, 93 Ga. App. 229, 91 S.E.2d 201 (1956).

While the court has a discretionary power to order the state to permit counsel for the accused to interview a witness in its custody, when an application for such an interview is made in good faith it should ordinarily be granted, particularly in a capital case. *Wilson v. State*, 93 Ga.

App. 229, 91 S.E.2d 201 (1956).

Witness cannot be compelled to submit to interview by accused before trial. — Accused and the accused's counsel have the right to interview witnesses before the trial; and the state has no right to deny them access to a witness material to the defense, but a witness cannot be compelled to submit to such interview. *Rutledge v. State*, 245 Ga. 768, 267 S.E.2d 199 (1980).

Defendant may waive being furnished with copy of indictment or accusation and list of witnesses. *Henderson v. State*, 207 Ga. 206, 60 S.E.2d 345 (1950), commented on in 13 Ga. B.J. 230 (1950).

Witness whose name not on list not rendered incompetent. — Even when the defendant is furnished with a list of witnesses, another witness, whose name was not on the list, is not rendered incompetent to testify on the trial. *Inman v. State*, 72 Ga. 269 (1884); *Williams v. State*, 42 Ga. App. 225, 155 S.E. 511 (1930).

It was not error for the trial court, in a murder prosecution, to permit two named witnesses to testify in the trial of the case over objection of defendants, even though their names did not appear on the indictment at the time the case was called for trial, and they did not testify before the grand jury and their names were not on the demand furnished by the prosecuting attorney to the defendant. *Evans v. State*, 210 Ga. 375, 80 S.E.2d 157 (1954).

Furnishing name of witness after voir dire. — It was error to allow the testimony of a witness who was not named on the original witness list but, rather, included on an updated list given to defendant after voir dire. *Bentley v. State*, 210 Ga. App. 862, 438 S.E.2d 110 (1993).

Court does not err in allowing witness whose name was not on witness list to testify solely for purpose of rebuttal. *Hudgins v. State*, 153 Ga. App. 603, 266 S.E.2d 284 (1980).

Calling an unlisted witness in a criminal trial in rebuttal is not error. *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

The trial court does not err in allowing the state to call a witness in rebuttal

List of Witnesses (Cont'd)

whose name does not appear on the list of witnesses furnished to the defendant if the defendant is allowed a continuance so as to afford the defendant the opportunity to question the witness prior to the witness taking the stand. *Pope v. State*, 168 Ga. App. 846, 310 S.E.2d 575 (1983).

Nonappearance of witness before grand jury not ground for abatement of indictment. — Where defendant demanded a copy of the indictment and list of witnesses on whose testimony the indictment was founded, and was by agreement of counsel furnished the original indictment on which appeared a list of witnesses, it was not ground for abatement of the indictment or for excluding evidence of a witness whose name appeared on the indictment, that such witness did not in fact appear before the grand jury and give testimony on which the indictment was founded; nor was the admission of pertinent testimony of the witness ground for declaring a mistrial. *Harris v. State*, 190 Ga. 258, 9 S.E.2d 183 (1940).

When defendant fails to demand list of witnesses, state may use witness whose name had not been furnished to defendant. *Prather v. State*, 223 Ga. 721, 157 S.E.2d 734 (1967).

No prejudice for Brady violation. — Defendant failed to prove the prejudice prong of the defendant's Brady claim as the defendant merely speculated that an expert might have been able to show that the defendant was not traveling at 60-70 miles per hour in a stolen vehicle; such speculation did not establish a reasonable probability that the outcome of the trial would have been different if the defendant had been provided with a copy of a videotape of a police officer's high-speed chase of the stolen vehicle before trial. *Ferguson v. State*, 280 Ga. 893, 635 S.E.2d 144 (2006).

Compulsory Process

Defendant has right to compulsory process to obtain witness. — The Constitution provides that the defendant shall have compulsory process to obtain the testimony of defendant's own witnesses,

but does not guarantee more than ordinary diligence on the part of the officers, or that they shall serve a witness who conceals oneself. *Roberts v. State*, 94 Ga. 66, 21 S.E. 132 (1894); *Smith v. State*, 118 Ga. 61, 44 S.E. 817 (1903); *Gilmore v. State*, 154 Ga. App. 429, 268 S.E.2d 693 (1980).

When subpoena was given to the sheriff for service, but was not served, ostensibly because the sheriff was not paid a fee, the defendant had a right to compulsory process to obtain the witness. *Harpe v. State*, 134 Ga. App. 493, 214 S.E.2d 738 (1975).

The mere fact that a defendant may not have moved for the disclosure of an informant's identity under the authority of *Brady v. Maryland*, 373 U.S. 83 (1963) did not amount to a waiver of the constitutional right to insist on the presence and testimony of a known and identified witness who was in the custody of the state. *Gilbert v. State*, 212 Ga. App. 308, 441 S.E.2d 785 (1994).

Right to process relates only to issuance. — The right to compulsory process does not amount to a guarantee by the state that the witness requested by a defendant will in fact appear at trial, but only relates to the issuance of the process. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, *Davenport v. State*, 289 Ga. 399, 711 S.E.2d 699 (2011).

Court should order service of process against witness in prison. *Roberts v. State*, 72 Ga. 673 (1884).

No requirement that court subpoena petitioner's witnesses for habeas corpus proceeding. — A habeas corpus proceeding is not a criminal prosecution and the law does not require the court to subpoena witnesses at the request of the petitioner for habeas corpus. *Johnson v. Smith*, 227 Ga. 611, 182 S.E.2d 101 (1971).

Right not violated when subpoenas issued. — Defendant's claim that the right to compulsory process was circumvented when the trial court granted the state's motion to quash subpoenas issued to a judge, a probation officer, and a drug-court coordinator failed, because the subpoenas were issued and served on the witnesses who, in fact, appeared and

whose testimony was proffered outside the presence of the jury. *Poole v. State*, 291 Ga. 848, 734 S.E.2d 1 (2012).

New trial must be ordered if right to compulsory process abridged. — The trial court erred in making a determination that a prospective witness was incompetent to testify based on ex parte statements made by the administrator of the institution where the prospective witness was confined. This error is not harmless beyond a reasonable doubt; if it is determined that the witness was competent, defendant's right to compulsory process was abridged and a new trial must be ordered. *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530 (1981).

No requirement that public bear expense of bringing witnesses into court. — This paragraph does not contemplate that the public shall bear the expense of bringing witnesses into court, because the residents of other counties can be examined by depositions (oral examination or written interrogatories) if the defendant so desires. *Neal v. Smith*, 226 Ga. 96, 172 S.E.2d 684 (1970); *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972).

Continuance granted to enable counsel to secure witnesses. *McArver v. State*, 114 Ga. 514, 40 S.E. 779 (1902).

Continuance granted when defendant has used diligence to procure attendance of absent witness. — Regardless of the provisions of former Code 1933, § 81-1410 (see now O.C.G.A. § 17-8-25), a continuance or postponement should be granted until the court can produce a witness whose testimony on behalf of the defendant was material, if, in addition, it was made to appear that the defendant had used all the diligence within the defendant's power and all the means at the defendant's command to procure the attendance of the absent witness, and that the witness was within the power of the court's subpoena. *Murphy v. State*, 132 Ga. App. 654, 209 S.E.2d 101 (1974).

A continuance requested by the defendant in order to obtain the presence at trial of a material witness is properly denied if the defendant has not been diligent in attempting to procure the atten-

dance of the absent witness. *Burney v. State*, 244 Ga. 33, 257 S.E.2d 543, cert. denied, 444 U.S. 970, 100 S. Ct. 463, 62 L. Ed. 2d 385 (1979).

Trial court did not err in failing to grant a continuance because of the absence of unserved witnesses for the defense since subpoenas were not delivered to sheriff for service until late afternoon of the first day of retrial and since no attempt was made to show what testimony of the two absent resident witnesses would have added to the appellant's defense. *Shaw v. State*, 163 Ga. App. 615, 294 S.E.2d 676 (1982), rev'd on other grounds, 251 Ga. 109, 303 S.E.2d 448 (1983).

No benefit from right of compulsory process when witnesses beyond jurisdiction of courts. — This paragraph provides that every defendant in a criminal case shall have compulsory process to obtain the testimony of defendant's own witnesses, but such provision is of no benefit when the witnesses reside beyond the jurisdiction of the courts of this state. *Hughes v. State*, 228 Ga. 593, 187 S.E.2d 135 (1972); *Shaw v. State*, 163 Ga. App. 615, 294 S.E.2d 676 (1982), rev'd on other grounds, 251 Ga. 109, 303 S.E.2d 448 (1983).

Neither the Georgia nor the United States Constitution obligates the state to compel the attendance of witnesses who cannot be located within its jurisdiction. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, *Davenport v. State*, 289 Ga. 399, 711 S.E.2d 699 (2011).

A party requesting the presence of an out-of-state witness does not have an absolute right to obtain the witness. *Mafnas v. State*, 149 Ga. App. 286, 254 S.E.2d 409 (1979), overruled on other grounds, *Davenport v. State*, 289 Ga. 399, 711 S.E.2d 699 (2011).

Out-of-state corporation. — Court of Appeals erred when the court concluded that a request under the former Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, O.C.G.A. § 24-10-90 et seq. (see now O.C.G.A. § 24-13-90), that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be ac-

Compulsory Process (Cont'd)

accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. *Yearly v. State*, 289 Ga. 394, 711 S.E.2d 694 (2011).

Full faith and credit given to out-of-state order. — Trial court did not err by requiring defendant to proceed to trial without the source code and other requested information because it had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information from the manufacturer located in Kentucky, set the case with enough time to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required defendant to proceed to trial. *Phillips v. State*, 324 Ga. App. 728, 751 S.E.2d 526 (2013).

Timeliness of subpoena. — Trial court did not err in failing to enforce defendant's subpoenas because they were not served more than 24 hours prior to trial. *Byron v. State*, 229 Ga. App. 795, 495 S.E.2d 123 (1998).

Right to Confrontation**1. In General**

Essential purpose of confrontation is cross-examination. *Denson v. State*, 150 Ga. 618, 104 S.E. 780 (1920), appeal dismissed, 258 U.S. 608, 42 S. Ct. 316, 66 L. Ed. 788 (1922).

Juvenile court, at juvenile's delinquency hearing, did not err in admitting testimony about what the victim told the officer during a pre-hearing identification of the juvenile, as such hearsay testimony was admissible pursuant to the White exception which required only that the declarant testify and be available for cross-examination; that exception did require that the declarant corroborate the

identification or actually be cross-examined about it, and since the statements to the officer met those requirements, the officer's testimony was admissible, especially since the juvenile's confrontation clause rights were not violated. *In the Interest of L.J.P.*, 277 Ga. 135, 587 S.E.2d 15 (2003).

In a juvenile proceeding, incriminatory statements from a non-testifying accomplice were inadmissible as a matter of constitutional law unless the accomplice testified and was subject to cross-examination. *In the Interest of A.D.*, 282 Ga. App. 586, 639 S.E.2d 556 (2006).

Codefendant's confession not properly admitted, but error was harmless. — Trial court erred in admitting the confession the first defendant gave to police after the first defendant had been arrested and read the Miranda rights, as the confession implicated the first defendant and the second defendant in an armed robbery, the first defendant did not testify at trial, and the second defendant thus could not cross-examine the first defendant regarding the statement; however, admission of the confession was harmless error given the other evidence of the second defendant's involvement in the robbery. *Bennett v. State*, 266 Ga. App. 502, 597 S.E.2d 565 (2004).

Non-testifying codefendant's admission properly admitted. — Defendant's right to confrontation was not violated by the admission of the statement of defendant's non-testifying codefendant that, when the codefendant received the murder weapon, it had four bullets in it, and when the codefendant got it back it had two bullets in it, because the jury was instructed that the statement was admitted only against the codefendant, references to defendant in the statement were redacted, and the statement incriminated defendant only when linked with other evidence. *Burns v. State*, 280 Ga. 24, 622 S.E.2d 352 (2005).

Admission of incriminating statements made by the defendant's co-conspirator to an informant, to the effect that the defendant agreed to sell methamphetamine to the informant, and arranging details of the transaction, did not violate the confrontation clause, despite the fact that the

co-conspirator did not appear at trial and was not available for cross-examination, because the statements were made during the pendency of the criminal project, the co-conspirator was not asserting past facts and had personal knowledge of the identities and roles of the participants, the possibility that the statements were founded on faulty memory was decidedly remote, in that the referenced occurrences were taking place almost simultaneously with the statements, and, believing that the co-conspirator was setting up a lucrative drug deal with a sympathetic customer, the co-conspirator had no reason to lie about the defendant's involvement in the crime. *Bowden v. State*, 279 Ga. App. 173, 630 S.E.2d 792 (2006).

Right of confrontation is fundamental principle. — The basis of this paragraph is the fundamental principle that in a criminal prosecution the testimony of the witnesses shall be taken before the court, so that at the time they give the testimony they will be sworn and will be subject to cross-examination, the scrutiny of the court, and confrontation by the accused. These basics are necessary because a statement which is offered in evidence to prove the truth of the matters stated, but which was not made by the author when a witness before the court at the trial in which it is offered, is hearsay. *Becton v. State*, 134 Ga. App. 100, 213 S.E.2d 195 (1975).

Right paramount to policy of protecting juvenile offenders. — The right of confrontation is paramount to the state's policy of protecting a juvenile offender. *Hamilton v. State*, 185 Ga. App. 536, 365 S.E.2d 120 (1987), cert. denied, 185 Ga. App. 910, 365 S.E.2d 120 (1988).

Defendant's right of confrontation of witnesses was violated when the defendant was not allowed to cross examine the prosecuting witness with regard to the witness's prior juvenile adjudications, as evidence of the juvenile's record was necessary to establish the juvenile's motive, interest and bias. *Hamilton v. State*, 185 Ga. App. 536, 365 S.E.2d 120 (1987), cert. denied, 185 Ga. App. 910, 365 S.E.2d 120 (1988).

No violation of right to confrontation. — Defendant's right to confrontation

was not violated because the transporting officer did not testify at trial and the state made no attempt during trial to admit any out-of-court statements the transporting officer may have made. *Lafavor v. State*, 334 Ga. App. 125, 778 S.E.2d 377 (2015).

Defendant not denied right to cross-examine witnesses. — When defense counsel attempted to cross-examine the state's witnesses as to whether certain accusations or traffic citations which had been admitted in evidence contained a driving under the influence charge, and when each time the state successfully objected that the exhibits themselves would be the highest and best evidence, the defendant was not denied due process, equal protection, or the defendant's right to cross-examine witnesses. *Ferrell v. State*, 149 Ga. App. 405, 254 S.E.2d 404 (1979).

Defendant's cross-examination of an arresting officer was not unduly restricted when the defendant was not allowed to ask the officer at trial if the officer's testimony at a suppression hearing satisfied the requirements for establishing the admissibility of the fruits of a pat-down search, as that legal determination was the province of the court, had previously been addressed by the court, and was not an issue for the jury. *Mohamed v. State*, 276 Ga. 706, 583 S.E.2d 9 (2003).

Admission of codefendant's statement to fellow prisoners referring to a robbery and a shooting by "one of the guys" did not violate defendant's federal or state rights to confront witnesses and did not mandate that defendant be tried separately as the statement did not inculcate defendant. *Sampson v. State*, 279 Ga. 8, 608 S.E.2d 621 (2005).

When the trial court, in a criminal case, employed a certain procedure to be used in cross-examining an officer about the officer's police report, defendant's right to cross-examine the officer was not unduly infringed, as counsel was allowed to cross-examine the officer about the report, which contained an error potentially harmful to a codefendant, without improperly admitting the erroneous information, yet with no undue infringement upon defendant's right to cross-examine the officer, and defense counsel agreed to

Right to Confrontation (Cont'd)**1. In General (Cont'd)**

the procedure. *Parker v. State*, 274 Ga. App. 347, 617 S.E.2d 625 (2005).

Defendant's claim that defense counsel was ineffective in failing to request that the defendant's trial be severed from the codefendant's trial because the admission into evidence of the codefendant's recorded statement, which implicated the defendant, violated the Sixth Amendment right to confront the codefendant, failed because first, the codefendant testified before the jury and was subject to cross-examination, so the admission of the codefendant's statement was not, in fact, a Bruton violation, and, second, the codefendant's incriminating statement was made shortly after the crimes occurred, was made prior to arrest, and was a non-custodial statement to an acquaintance rather than police officers, so it was more properly characterized as an admissible declaration of a co-conspirator, rather than a confession; further, the defendant's trial counsel provided several strategic reasons for choosing not to request a motion to sever, which did not form the basis for an ineffectiveness claim. *Williams v. State*, 280 Ga. 539, 630 S.E.2d 410 (2006).

Because hearsay testimony was cumulative of other properly admitted evidence, its admission, even if erroneous, was harmless; thus, defendant's contention of a Crawford violation lacked merit. *Buttram v. State*, 280 Ga. 595, 631 S.E.2d 642 (2006).

During the defendant's murder trial, the trial court properly did not abuse the court's discretion to impose reasonable limits on cross-examination without cutting off all inquiry into the appropriate subject of whether the witness had any belief that the witness would personally benefit from testifying for the state because such cross-examination carried with it the potential for confusing the jury on marginally relevant testimony. *Nwakanma v. State*, 296 Ga. 493, 768 S.E.2d 503 (2015).

Blood test results in defendant's medical records were not testimonial. — In the defendant's vehicular ho-

micide prosecution, the admission of testimony regarding the defendant's blood-test results contained in the defendant's medical records did not violate the Confrontation Clause; the medical records were not testimonial in nature because the circumstances surrounding their creation objectively indicated that the records were prepared with a primary purpose of facilitating the defendant's medical care after the defendant was struck by the same vehicle that killed the victim. *Hartzler v. State*, 332 Ga. App. 674, 774 S.E.2d 738 (2015).

Audiotape of 9-1-1 calls non-testimonial. — Because the record supported the trial court's determination that the primary purpose common to both of the victim's 9-1-1 calls was to seek assistance in the course of a situation involving immediate danger to the victim, and because the trial court properly redacted those portions of the calls arguably involving the victim's narration of past events and the assessment of the defendant's character, the trial court did not err when the court concluded that the 9-1-1 calls were non-testimonial for purposes of the Confrontation Clause. *Owens v. State*, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Trial court's order granting a defendant's motion to exclude the victim's 911 call was vacated because the trial court should not have made the determination that the victim's statements were testimonial in nature without listening to the actual recording of the call and relying instead on the transcript. *State v. Gunn*, 333 Ga. App. 893, 777 S.E.2d 722 (2015).

No right to cross examine defendant's translator. — With regard to various drug-related convictions, defendant's Sixth Amendment right to confrontation was not violated by the trial court refusing to allow defendant to cross-examine defendant's Spanish translator after defendant's tape-recorded statement was played before the jury and defendant asserted that certain statements were translated incorrectly as, under the language conduit rule, the translator's statements were defendant's own and, therefore, defendant had no right to, in essence, confront defendant. *Hernandez v. State*, 291 Ga. App. 562, 662 S.E.2d 325 (2008), cert.

denied, No. S08C1631, 2008 Ga. LEXIS 763 (Ga. 2008).

Failure of defendant to advise of problems with interpreters. — Trial court did not err in finding that the defendant failed to meet the defendant's burden of showing that the performance of the defendant's attorneys was deficient because the defendant's counsel recognized the need for interpreters and secured the interpreters; the defendant, who spoke only Spanish, had ample opportunity to inform counsel or the trial court of any problems with the interpreters, and the fact that the defendant did not do so hampered the defendant in meeting the defendant's burden to show that counsel's performance in securing interpreters to assist the defendant was inadequate. *Pineda v. State*, 288 Ga. 612, 706 S.E.2d 407 (2011).

Codefendant's confession properly admitted even though codefendant did not testify at trial. — In defendant's trial on charges alleging that defendant and two codefendants robbed and killed a person in 1986, the trial court did not violate defendant's rights under the confrontation clause by admitting statements which defendant's codefendants made, even though the codefendants did not testify, because those statements were properly redacted before they were admitted and the jury was properly instructed on their use. *Ingram v. State*, 277 Ga. 46, 586 S.E.2d 221 (2003).

Right limited if witness is not "against" defendant. — Although defendant had a right to confront the witnesses against defendant, defendant was not denied that right when a witness at the scene of the crimes that resulted in one person being shot to death and the witness being injured initially refused to testify, then stated on cross-examination that defendant was not involved in the crimes and was not even present, as the witness was not a witness "against" defendant. *Allison v. State*, 259 Ga. App. 775, 577 S.E.2d 845 (2003).

Failure to interview witness. — In a child molestation prosecution, fact that counsel did not interview the parent of a similar transaction victim was not deficient performance, as the witness refused

to give a statement or take a polygraph test before trial, claiming such acts might incriminate the parent. *Estes v. State*, 279 Ga. App. 394, 631 S.E.2d 438 (2006).

Defendant was convicted of violating a protective order by driving within 100 yards of the defendant's ex-spouse and child, honking the defendant's horn and yelling at the ex-spouse. As the jury likely credited the ex-spouse's testimony that the defendant drove within five yards of the ex-spouse and child, any failure by trial counsel to have adequately interviewed a witness who testified that the house the defendant was visiting was 9,375 feet away from the ex-spouse's home did not prejudice the defendant. *Bee v. State*, 294 Ga. App. 199, 670 S.E.2d 114 (2008).

Defendant failed to establish that the defendant suffered prejudice due to defense counsel's failure to interview the defendant's co-indictees prior to trial because the defendant made no attempt to detail what information could have been revealed pre-trial if counsel interviewed the co-indictees and how such information would have been helpful to the defendant's defense; defense counsel thoroughly cross-examined both co-indictees and impeached one of the co-indictees with the co-indictee's various prior inconsistent statements to police investigators. *Moore v. State*, 288 Ga. 187, 702 S.E.2d 176 (2010).

Failure to interview detective who would be witness in trial. — Trial counsel's failure to personally interview a detective before trial did not fall below an objective standard of reasonableness as counsel saw no need to interview the detective because counsel had obtained and reviewed the detective's detailed written report, and counsel considered the witness to be only of secondary importance. *Lewis v. State*, 297 Ga. App. 517, 677 S.E.2d 723 (2009).

No deprivation for court to refuse to require state to identify and produce informant. — A trial court's refusal to require the state to identify and produce an informant does not wrongfully deprive a defendant of defendant's right to cross-examine witnesses, when the defendant makes no showing of, and does not in

Right to Confrontation (Cont'd)**1. In General (Cont'd)**

any way call in issue, any favorability or materiality of the informant's testimony to the defense. *Bennett v. State*, 153 Ga. App. 21, 264 S.E.2d 516 (1980).

State is not required to subpoena and put on stand person not listed on accusation or indictment, and it does not abridge the defendant's right of confrontation and cross-examination for the court to refuse to require the state to summon one not relied on by the state to make out its case before the jury as a witness. *Bonds v. State*, 232 Ga. 694, 208 S.E.2d 561 (1974).

Denial of inquiry into pending charges. — Trial court's refusal to permit cross examination of victim-witness' pending criminal charges was an abuse of discretion and reversible error when the defendant was clearly entitled to inquire of any possible desire on the witness's part to influence their disposition by assisting the state in the prosecution. *Hurston v. State*, 206 Ga. App. 570, 426 S.E.2d 196 (1992).

"Indicia of reliability" determine whether statement presented to jury. — In cases involving a defendant's Sixth Amendment right to confrontation, the focus of concern is to insure that there are "indicia of reliability" which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant, and to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct. 472, 62 L. Ed. 2d 391 (1979).

"Indicia of reliability" specified. — Those "indicia of reliability" which have been viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant are that the statement was nonnarrative; that the declarant is shown by the evidence to know whereof the declarant speaks; that the witness is not apt to be proceeding on faulty recollection;

and that the circumstances show that declarant had no apparent reason to lie to the witness. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct. 472, 62 L. Ed. 2d 391 (1979).

Non-testifying victim's statements were pertinent to medical treatment.

— With regard to a defendant's trial and conviction for aggravated sodomy and simple battery involving the sexual assault of an inmate upon an inmate, the trial court did not violate the defendant's rights under the Confrontation Clause by admitting the statements made by the victim to the physician and the nurse who treated the victim for the injuries received because the statements were admissible under former O.C.G.A. § 24-3-4 (see now O.C.G.A. § 24-8-803), the medical diagnosis or treatment exception, and did not fall within any class of testimonial statement. In particular, no objective witness would reasonably conclude that the statements were made under such circumstances that the statement would be available for use at a later trial. *Mitchell v. State*, 289 Ga. App. 55, 656 S.E.2d 145 (2007), cert. dismissed, No. S08C0770, 2008 Ga. LEXIS 499 (Ga. 2008).

Confrontation rights were violated, but admission of hearsay evidence was harmless, given the overwhelming evidence of the defendant's guilt, the fact that the victim's taped account of the argument between the defendant and the defendant's wife was cumulative to, and corroborative of, the defendant's own testimony, and as the erroneously admitted hearsay evidence did not contribute to the verdict. *Delgado v. State*, 287 Ga. App. 273, 651 S.E.2d 201 (2007).

Confrontation rights not violated despite admission of hearsay. — When three of the "indicia of reliability" were present and since the incriminating statements were made during the concealment stage of the conspiracy, the admission of hearsay testimony concerning the individual's statements incriminating the individual and the defendant was authorized by former Code 1933, § 38-306 (see now O.C.G.A. § 24-3-5), and did not violate the defendant's confrontation rights under

the state and federal Constitutions. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct. 472, 62 L. Ed. 2d 391 (1979).

When a witness visited a coconspirator (the witness's uncle) with the defendant in jail and when the coconspirator gave the witness a message written down on a pad which read "don't identify him" (allegedly referring to the defendant), the written message and testimony were admissible and did not violate the defendant's confrontation rights. *Mooney v. State*, 243 Ga. 373, 254 S.E.2d 337, cert. denied, 444 U.S. 886, 100 S. Ct. 179, 62 L. Ed. 2d 116, rehearing denied, 444 U.S. 975, 100 S. Ct. 472, 62 L. Ed. 2d 391 (1979).

When the defendant was convicted of burglary and theft by taking after defendant's admission that after the burglary defendant and a codefendant drove off in the stolen car, and the codefendant used the stolen cash and the firearms to purchase crack cocaine, the trial court's failure to instruct the jury that certain statements made by the codefendant, which implicated defendant in the burglary were non-probative hearsay was a harmless error, as there was little question that the defendant was involved in the crimes. *Goins v. State*, 259 Ga. App. 739, 578 S.E.2d 308 (2003).

Trial court did not err in admitting two statements the victim made regarding defendant's kidnapping of the victim, pursuant to the *res gestae* exception to the hearsay rule, as the victim was still under the influence of defendant's criminal act, and the state and federal courts have previously determined that admission of *res gestae* evidence did not violate a defendant's right to confront defendant's accuser. *White v. State*, 265 Ga. App. 117, 592 S.E.2d 905 (2004).

A recorded police interview of a man that was incarcerated with the defendant shortly before the murder for which the defendant was convicted, wherein the man relayed that the defendant indicated wanting to get even with the neighbor on the floor below, was properly admitted into evidence at the defendant's trial despite posing a Crawford violation, because

the man's statement may have raised one possible motive for the defendant to have killed the victim but it was not necessary to prove a motive to establish either malice murder or felony murder, for which the defendant was on trial. *Humphrey v. State*, 281 Ga. 596, 642 S.E.2d 23 (2007).

With regard to defendant's trial and conviction for child molestation, the trial court did not err by allowing the admission of the victim's hearsay statements as defense counsel had subpoenaed the victim and announced that defense counsel intended to call the victim as a trial witness; although the victim ultimately was not called to testify, the record established that the victim was present and available for cross-examination, and therefore, there was no *Crawford v. Washington*, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), violation presented in the case. *Williams v. State*, 290 Ga. App. 841, 660 S.E.2d 740 (2008).

The admission of an informant's testimony regarding knowledge of the defendant's participation in the victim's murder did not amount to inadmissible hearsay and did not violate the Confrontation Clause, as the hearsay was cumulative of admissible evidence adduced at trial and, in light of the overwhelming evidence of the defendant's guilt, there was no reasonable possibility that the confrontation violation contributed to the guilty verdict. *Warren v. State*, 283 Ga. 42, 656 S.E.2d 803 (2008).

Trial court properly denied the defendant's motion for a new trial and upheld the defendant's conviction for child molestation because even if the trial court erred by admitting the child victim's recorded interview and her statements to the police investigator, the forensic interviewer, her mother, and a relative, any such error was harmless beyond a reasonable doubt because the evidence against the defendant was so overwhelming and cumulative in the nature of the testimony of the emergency room physician, the defendant's written statement and recorded confession, and the defendant's admissions to others; plus, the child victim's recantations were also admitted into evidence. *Welch v. State*, 318 Ga. App. 202, 733 S.E.2d 482 (2012).

Right to Confrontation (Cont'd)
1. In General (Cont'd)

Confrontation rights were violated.

— Trial court erred in admitting, at trial, a pretrial statement made by the defendant's father to an investigator, as the defendant was not afforded a meaningful opportunity to cross-examine the father regarding the statement during a bond hearing, and the reasonable doubt standard and the significant risk standard could not be equated, given that determining whether a specific crime was committed reached different issues than determining the possibility of future bad conduct by the defendant. *Dickson v. State*, 281 Ga. App. 539, 636 S.E.2d 721 (2006).

Trial court's refusal to permit the defendant to cross-examine the prosecutor at a hearing on the defendant's plea of double jeopardy amounted to legal error, as such not only amounted to a violation of the defendant's right to confrontation, but also foreclosed the opportunity for the defendant to prove whether the prosecutor intended to goad the defendant into moving for a mistrial. *Wright v. State*, 284 Ga. App. 169, 643 S.E.2d 538 (2007).

Because the victim was unavailable at trial, having died since the alleged burglary, and had not been subject to cross-examination by the defendant, upon the state's concession that admission of the victim's identification of the defendant at the scene was harmful, the defendant's burglary conviction was reversed. *Davis v. State*, 289 Ga. App. 526, 657 S.E.2d 609 (2008).

Despite sufficient evidence existing to support the defendant's conviction for trafficking in cocaine, the conviction was reversed because the trial court violated the defendant's right to confrontation by admitting the out-of-court statements of a confidential informant that the informant purchased crack cocaine from the defendant, which was arguably the only direct or non-circumstantial evidence that the defendant was involved in the illegal drug activity occurring at the residence. *Freeman v. State*, 329 Ga. App. 429, 765 S.E.2d 631 (2014).

Admission of hearsay evidence not harmless error. — Because the evidence

against the defendant was not overwhelming, admission of the officer's testimony that the witness told the officer that defendant sold the witness drugs was hearsay which violated defendant's right to a fair trial and was therefore not harmless error. *Welch v. State*, 231 Ga. App. 74, 498 S.E.2d 555 (1998).

Limit to cross-examination. — Trial court did not err when it limited the cross-examination of one detective concerning the other detective's interview with defendant about how the other detective formed opinions and impressions regarding the other detective's theory regarding how defendant's spouse was killed, as defendant's Sixth Amendment right to cross-examine the detective was not abridged by the limitation since defendant was trying to ask about matters that were beyond the detective's knowledge. *Rowe v. State*, 276 Ga. 800, 582 S.E.2d 119 (2003).

No abuse of discretion resulted from the admission of testimony from the investigating officer, the child victim's mother, and the child victim's sister, about the alleged child molestation committed by the juvenile, as: (1) the child was available to testify; (2) cross-examination of the child victim in the judge's chambers was attempted, but proved unsuccessful; and (3) the judge ruled that no further purpose would be served by having the child examined in the open courtroom. In the Interest of S.S., 281 Ga. App. 781, 637 S.E.2d 151 (2006).

The trial court did not improperly limit a drug defendant's right to a thorough and sifting cross-examination; the defendant had been able to question an undercover officer extensively regarding the officer's recollection of the incident, several other arrests, and inaccuracies in police reports before the trial court eventually restricted the defendant's questioning about reports in other cases, which were only marginally relevant to the charge filed against the defendant. *Holloway v. State*, 283 Ga. App. 823, 643 S.E.2d 286 (2007).

In a prosecution for aggravated sodomy, aggravated child molestation, and child molestation, the trial court abused its discretion in excluding evidence about the child victim's demeanor during the time of

the reported abuse, and in sustaining the state's vague objection to defense counsel's cross-examination without any explanation, as the sought-after evidence could have been relevant to support the defense that the victim was influenced by the child's other grandmother into making accusations against the defendant and could have provided the only available evidence as to whether or how the other grandmother might have influenced the child's relations with the defendant. *Slade v. State*, No. A07A0734, 2007 Ga. App. LEXIS 792 (July 9, 2007).

With regard to a defendant's trial and ultimate conviction on charges of malice murder, armed robbery, and possession of a firearm during the commission of a felony, the trial court did not abuse its discretion in limiting the scope of the defendant's cross-examination of the testifying victims regarding the immigration status of the victims; the immigration status of the victims was not an issue relevant to the matter being tried, namely whether the defendant committed the crimes charged. *Junior v. State*, 282 Ga. 689, 653 S.E.2d 481 (2007).

The trial court properly refused to allow a defendant who claimed that the defendant had unknowingly transported drugs to cross-examine the state's expert about the mandatory minimum sentence for cocaine trafficking in order to show that a dealer would have the incentive to have an innocent person transport drugs. Allowing such evidence was improper when there was a hypothetical wrongdoer who was not identified, not charged with a crime, not testifying, and not subject to cross-examination, and who had not made a deal with the state. *Perkins v. State*, 288 Ga. App. 802, 655 S.E.2d 677 (2007).

Defendant had not been denied right to thorough and sifting cross-examination when trial court sustained state's objection to a question of a car salesperson when the salesperson had already testified twice that the defendant had not driven a car on a certain day when the defendant asked the salesperson whether defendant had never driven the car; defense counsel had not offered to rephrase the question or explain to the trial court what counsel was trying to ascertain, and

the defendant had not shown that the limitation of the line of questioning was harmful. *Head v. State*, 290 Ga. App. 823, 660 S.E.2d 871 (2008).

The trial court did not abuse its discretion by refusing to allow any cross-examination of an investigator as to that part of the defendant's custodial statement in which the defendant identified a codefendant as the individual to whom the defendant rented a panel van used as a methamphetamine lab. Inasmuch as the defendant did not testify, the admission of the defendant's custodial statement implicating the codefendant was barred by *Bruton*. *Boone v. State*, 293 Ga. App. 654, 667 S.E.2d 880 (2008).

Because defendant waived an objection to the trial court's ruling on the scope of defendant's cross-examination of a witness by failing to object, and because a juror stated that the juror could be fair and impartial when hearing the case, the trial court did not abuse the court's discretion in denying defendant's motion for a new trial. *Pinckney v. State*, 285 Ga. 458, 678 S.E.2d 480 (2009).

Breath test printouts as business records. — There was adequate foundation to admit printouts of test results from defendant's breath test as business records under O.C.G.A. § 24-3-14(b), in that it was in the regular course of the trooper's business to perform such a test, and these printouts were the result of one of those tests conducted in the regular course of the trooper's duties; consequently, there was no violation of defendant's right of confrontation. *Sisson v. State*, 232 Ga. App. 61, 499 S.E.2d 422 (1998).

Telephone records as business records and counsel's objection without merit. — Although the defendant claimed that the defendant's trial counsel was ineffective in permitting the admission of certain phone records, trial counsel did object to admission of the records, but the trial court overruled the objection; the evidence showed that the records were maintained in computer storage as business records, the trial court therefore did not err in admitting the records under the business records exception to the hearsay rule, and the defendant thus failed to

Right to Confrontation (Cont'd)**1. In General (Cont'd)**

demonstrate deficient performance. In any event, the evidence of the defendant's guilt was overwhelming, there was no reasonable probability the outcome would have been more favorable had counsel done the things the defendant claimed that counsel should have, and no prejudice was shown. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

Witness in view of defendant. — When a defendant complained that the trial court did not allow the defendant to sit where the defendant could view witnesses against the defendant as they were testifying, it was error to hold that the defendant's right to confrontation did not require that the defendant be able to see witnesses as they testified. *Richardson v. State*, 276 Ga. 639, 581 S.E.2d 528 (2003).

Child victim testifying with back to defendant. — Testimony by a six-year-old victim who was allowed to testify facing the jury with the victim back to defendant so that the defendant could not look the victim in the eye did not violate the defendant's constitutional right to confront witnesses against the defendant since defendant had the opportunity to, and did, thoroughly cross-examine the witness. *Atwell v. State*, 204 Ga. App. 187, 419 S.E.2d 77 (1992).

Evidence of absent witness at former trial is admissible. *Hunter v. State*, 147 Ga. 823, 95 S.E. 668 (1918).

Testimony of witness from former trial admissible when opportunity to cross-examine afforded defendant. — The testimony of a witness who was examined on a former trial of a criminal charge when the opportunity of cross-examination was afforded is admissible in evidence on a subsequent trial of the same defendant upon the same charge, upon proof that the witness was removed from the state or is otherwise inaccessible. *Burns v. State*, 191 Ga. 60, 11 S.E.2d 350 (1940).

Admission of emergency room records without person completing records. — Admission of hospital records that indicated the defendant presented to

the emergency room intoxicated and needed to be cleared to go to jail did not violate the defendant's confrontation rights without the one responsible for completing the forms testifying because the Supreme Court of Georgia has specifically held that medical records created for treatment purposes are not testimonial; thus, the trial court properly admitted the records under O.C.G.A. § 24-8-803(6). *Samuels v. State*, 335 Ga. App. 819, No. A15A1804, 2016 Ga. App. LEXIS 93 (2016).

Admission of "testimonial" statements was harmless error. — In defendant's prosecution for murdering defendant's former girlfriend, if the girlfriend's statements to a police officer who investigated a domestic dispute between the victim and defendant were "testimonial," the admission of those statements was harmless error because they were cumulative of other properly admitted evidence and they did not go to the core issue in the case. *Williams v. State*, 279 Ga. 731, 620 S.E.2d 816 (2005).

To the extent that evidence contested by defendant consisted of out-of-court statements that the victim made to officers during investigations of complaints made by the victim, it was inadmissible hearsay; however, a Crawford violation was harmless when the hearsay was cumulative of other admissible evidence, and since there was such additional admissible evidence, including the testimony of friends recounting what the victim said about the difficulties with the defendant, which statements were admissible under the necessity exception, any error was harmless. *Chapman v. State*, 280 Ga. 560, 629 S.E.2d 220 (2006).

While the Supreme Court of Georgia agreed with the defendant that the use of hearsay testimony denied the defendant's right to confrontation, that error was harmless in light of the fact that the hearsay was cumulative of testimony already supplied by three other witnesses. *Lynch v. State*, 280 Ga. 887, 635 S.E.2d 140 (2006).

Because the state's evidence in support of its charges was overwhelming, even if the trial court erred in permitting a witness to testify regarding statements made

to the witness by the victim, the error was harmless. Thus, no violation of the defendant's confrontation rights occurred. *Debro v. State*, 282 Ga. 880, 655 S.E.2d 804 (2008).

Statements not testimonial. — Because a hearsay statement made by the defendant's late brother to the defendant's husband about the defendant's conduct and statements made immediately after the shooting at issue was not testimonial in nature, it did not implicate the confrontation clause of the federal and state constitution. *Holton v. State*, 280 Ga. 843, 632 S.E.2d 90 (2006).

Admission of statements that the victim made to a police investigator regarding the victim's fear of the defendant on the day that the victim was murdered did not violate the defendant's right to confrontation because the statements were not testimonial since the victim was not reporting a crime to the police officer or building a case against the defendant, the victim was merely seeking advice from a knowledgeable friend, who happened to be a police officer. *Breedlove v. State*, 291 Ga. 249, 728 S.E.2d 643 (2012).

Introduction of confession of codefendant who was never offered as witness denies to other codefendant constitutional right to confrontation. *Sewell v. State*, 153 Ga. App. 177, 264 S.E.2d 708 (1980).

Admission of co-indictee's refusal to testify was harmless error. — With regard to defendant's trial for felony murder and other crimes, trial court did not commit reversible error by holding co-indictee in contempt for refusing to testify after invoking the Fifth Amendment and then recalling the jurors and informing them that co-indictee had pled guilty to various offenses, refused to cooperate with state despite an offer of immunity, and that co-indictee had been held in contempt for that refusal. *Hendricks v. State*, 283 Ga. 470, 660 S.E.2d 365 (2008).

Codefendant's confession is admissible if codefendant testifies at trial. — The rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), that admission of a codefendant's confession violates the confrontation clause despite omitting

instructions, is inapplicable if the codefendant, the declarant, testified at trial and was available for cross-examination. *Fain v. State*, 165 Ga. App. 188, 300 S.E.2d 197 (1983).

Bruton violation when neither defendant testified. — In a joint trial when neither defendant testified, the second defendant was entitled to a new trial based on the admission of the first defendant's statement against the second defendant because a Bruton violation occurred and the only evidence directly identifying the second defendant as one of the men at the victim's door in a shooting incident was the first defendant's statement. *Meadows v. State*, 264 Ga. App. 160, 590 S.E.2d 173 (2003).

Bruton violation not shown. — Bruton objection was properly overruled as codefendant's statement that the codefendant would check with defendant regarding the victim's participation was part of the *res gestae*, rather than a confession or statement. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Defendant's custodial statements that the defendant was not present and that the defendant had an alibi did not inculcate the codefendants. It followed that the trial court did not abuse the court's discretion in denying motions for mistrial on Bruton grounds. *Metz v. State*, 284 Ga. 614, 669 S.E.2d 121 (2008), overruled on other grounds, *State v. Kelly*, 290 Ga. 29, 718 S.E.2d 232 (2011).

No Crawford violation. — In a delinquency proceeding on a charge of child molestation, even assuming that a police officer's statements were wrongly admitted, that testimony was merely cumulative of other properly admitted testimony presented by both the child's mother and the child's sister, and the admission did not require reversal of the court's adjudicatory findings. In the Interest of *S.S.*, 281 Ga. App. 781, 637 S.E.2d 151 (2006).

In defendant's convictions on one count of simple assault and two counts of battery, trial court properly determined that audioteape of 9-1-1 call made by the victim was nontestimonial in nature as the caller advised that the caller had been hit, had a swollen face, was experiencing serious

Right to Confrontation (Cont'd)**1. In General (Cont'd)**

bleeding and the call was made with such immediacy after the attack that, upon the officer's arrival, the caller was scared and crying, and blood was running down the caller's chin, shirt, and pants; thus, trial court properly found that the call was nontestimonial in nature in that it was made to seek assistance in a situation involving immediate danger. *Thompson v. State*, 291 Ga. App. 355, 662 S.E.2d 135 (2008).

Hearsay statement of defendant's former spouse properly admitted. — Admission of a Georgia Bureau of Investigation agent's testimony regarding a statement by the defendant's former spouse implicating the defendant in a killing did not violate the defendant's right of confrontation, where the former spouse remarried the defendant before refusing to testify at the defendant's trial, and there was a "necessity" that the finder of fact be acquainted with the statement of the only eyewitness to the homicide. *Higgs v. State*, 256 Ga. 606, 351 S.E.2d 448 (1987).

Admission of hearsay under res gestae exception did not violate defendant's right of confrontation. — In a speeding and eluding prosecution, under the res gestae exception to the former hearsay rule, former O.C.G.A. § 24-3-3 (see now O.C.G.A. § 24-8-803), an officer was properly allowed to testify that a bystander had asked the officer whether the officer was searching for a blue sports car and then pointed to a direction. Since no testimonial statement was involved, the defendant's rights to confrontation as interpreted by *Crawford v. Washington*, 541 U.S. 36 (2004), were not violated. *Segel v. State*, 293 Ga. App. 506, 667 S.E.2d 670 (2008).

Ex parte affidavits are inadmissible. — Upon the trial of a criminal case upon the issue of guilty or not guilty, ex parte affidavits are not admissible either for or against the accused. *Becton v. State*, 134 Ga. App. 100, 213 S.E.2d 195 (1975).

Right of confrontation not denied by state's use of affidavits on motions

for new trial. — The use of affidavits by the state on motions for new trials in criminal cases does not deny the accused the right to be confronted by the witnesses. *Perry v. State*, 117 Ga. 719, 45 S.E. 77 (1903).

Examination limited to officer's reports about incident. — Trial court did not err in limiting the defendant's cross-examination of a police officer to reports relevant to the incident where the defendant was arrested as the defendant did not have a right to challenge other reports not related to the incident since the defendant's right to confront under the Confrontation Clause was not unlimited. *Mai v. State*, 259 Ga. App. 471, 577 S.E.2d 288 (2003).

Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish; a trial court properly limited cross-examination of the victim of an armed robbery and a battery to whether the victim possessed or was under the influence of illegal drugs at the time of the incident, and disallowed questions to the victim about drug sales, since whether the victim had sold drugs was irrelevant. *Daniel v. State*, 271 Ga. App. 539, 610 S.E.2d 90 (2005).

Restrictions on right to cross-examination. — Although it is better that cross-examination should be too free than too restricted, this right to a thorough and sifting cross-examination must be tempered and restricted so as not to infringe on privileged areas or wander into the realm of irrelevant testimony. *Eades v. State*, 232 Ga. 735, 208 S.E.2d 791 (1974).

Defendant opens door to videotape testimony. — Trial court's admission of part of a videotape involving defendant's interview with detective who was unavailable at trial, which the trial court earlier had said it would exclude, was not an abuse of discretion and did not violate defendant's right to confrontation; the trial court admitted it because defense counsel "opened the door" to its admission by asking about it on direct examination, and any error in admitting it was harmless because the detective's comments

about a theory that the wife might have committed suicide were favorable to defendant and any inference that defendant shot the defendant's spouse was supported by other evidence. *Rowe v. State*, 276 Ga. 800, 582 S.E.2d 119 (2003).

Waiver of constitutional confrontation rights in guilty plea. — Because the transcript of proceedings and trial counsel's affidavit did not show that defendant was advised that a guilty plea would waive the privilege against self-incrimination and the right to confrontation, the trial court erred in denying defendant's habeas corpus petition. *Green v. State*, 279 Ga. 687, 620 S.E.2d 788 (2005).

Habeas court's finding that a petitioner's guilty pleas were validly entered was reversed as the waiver forms signed by the petitioner and reviewed with the petitioner by the petitioner's attorneys addressed only the right to be tried by a jury; the waiver forms did not advise the petitioner that the petitioner was waiving the petitioner's right against self-incrimination and the petitioner's confrontation right. *Beckworth v. State*, 281 Ga. 41, 635 S.E.2d 769 (2006).

Testimony on deals with witnesses. — Defendant was denied the constitutional right to confrontation when a case agent was allowed to state that no deal had been reached with a confidential informant without being cross-examined; however, the error was not reversible because no prejudice was shown when the confidential informant testified at trial and was thoroughly cross-examined concerning the motives for testifying against the defendant and since no evidence was presented regarding a deal with the confidential informant. *Garrison v. State*, 260 Ga. App. 788, 581 S.E.2d 357 (2003).

In termination of parental rights case, no harm from alleged violation of confrontation rights. — Termination of a father's parental rights was affirmed in a case in which the father alleged that the father's confrontation rights were violated when the father had to cross-examine a mother over the telephone. *In the Interest of M.H.W.*, 275 Ga. App. 586, 621 S.E.2d 779 (2005).

Admission of codefendant's statement harmless error. — Trial court did

not violate defendant's constitutional right to confront witnesses in a case in which the trial court did not sever defendant's trial from that of defendant's two codefendants and the statement of a codefendant who did not testify at trial that defendant had ordered the codefendant to "finish off" the one man, as defendant did not show clear prejudice and that defendant's due process rights were violated by admission of the statement; however, even assuming that admission of the statement was error, the error was at most harmless, especially because of the overwhelming evidence against defendant. *Mason v. State*, 279 Ga. 636, 619 S.E.2d 621 (2005).

2. Right to be Present

This paragraph includes implied right of accused to be present at all stages of trial. *Chance v. State*, 156 Ga. 428, 119 S.E. 303 (1923).

Right to confront, see, and hear. — The defendant has not only the right to be confronted with witnesses, but the defendant has also the right to be present, and see and hear all the proceedings which are had against the defendant on the trial before the court. *Bagwell v. State*, 129 Ga. 170, 58 S.E. 650 (1907).

Defendant must be present when court takes any action materially affecting the defendant's case. *Andrews v. State*, 196 Ga. 84, 26 S.E.2d 263, cert. denied, 320 U.S. 780, 64 S. Ct. 87, 88 L. Ed. 468 (1943), overruled on other grounds, *Fraday v. State*, 212 Ga. 84, 90 S.E.2d 664 (1955).

The right to be present, including presence by counsel, may be waived. *Martin v. State*, 51 Ga. 567 (1874); *Brown v. State*, 151 Ga. 497, 107 S.E. 536 (1921).

It is well settled that in the trial of a criminal case, whether a felony or a misdemeanor, the accused has the right to be present, in person and by the accused's attorney, during every stage of the trial from the arraignment to the verdict, and this right cannot be lost except by a clear and distinct waiver thereof by the accused. *Jones v. State*, 57 Ga. App. 344, 195 S.E. 316 (1938).

Rights waived when accused absents oneself from trial. — Confrontation rights are personal to the accused and

Right to Confrontation (Cont'd)**2. Right to be Present (Cont'd)**

are waived when the accused is free on bail and voluntarily absents oneself from the trial. *Byrd v. Ricketts*, 233 Ga. 779, 213 S.E.2d 610, cert. denied, 422 U.S. 1011, 95 S. Ct. 2636, 45 L. Ed. 2d 675 (1975).

Defendant may waive defendant's right to confrontation by voluntarily absenting oneself from the proceedings after the trial begins. The trial begins when jeopardy attaches. *Pollard v. State*, 175 Ga. App. 269, 333 S.E.2d 152 (1985).

A defendant waives the right of confrontation if the defendant is voluntarily absent from trial after jeopardy attaches, which occurs immediately once the jury is selected and sworn. *Manus v. State*, 180 Ga. App. 658, 350 S.E.2d 41 (1986).

Trial court did not abuse the court's discretion by denying a defendant's motion for a new trial based on the defendant vomiting in front of the jury during voir dire when the trial was commenced after a two day delay that was granted to the defendant after indicating an illness prevented the defendant's presence at trial. The trial court properly found that the alleged ill defendant waived the right to be present by repeatedly delaying the start of trial with the malingering conduct and by failing to object when defense counsel, in the defendant's presence, specifically requested that the trial court remove the defendant from the courtroom before bringing the jury panel back. *Smith v. State*, 284 Ga. 599, 669 S.E.2d 98 (2008).

Because the trial court's determination of the restitution amount was authorized by O.C.G.A. § 17-14-7(b) and did not unlawfully enhance a defendant's sentence, the defendant did not have a substantive right to have the restitution hearing held within a certain time; defendant waived the rights to be present and to confrontation by voluntarily choosing not to attend the hearing. *Williams v. State*, 311 Ga. App. 152, 715 S.E.2d 440 (2011), cert. denied, 2012 Ga. LEXIS 69 (Ga. 2012).

Waiver of right by disruptive behavior. — When the defendant continued with disruptive, vocal outbursts after

twice being removed from the trial court during jury selection, the third and final removal of the defendant for the remainder of the jury selection process was not error because the defendant failed to heed the trial court's warnings for self control and, thereby, waived the defendant's right to be present during jury selection. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

Not guilty plea entered when defendant absent. — When the defendant is voluntarily absent, the trial court may direct that a plea of not guilty be entered and proceed with the trial. *Croy v. State*, 168 Ga. App. 241, 308 S.E.2d 568 (1983).

Right to be present during note exchange with jury. — Defendant's right to be present was not violated when two notes from the jurors were delivered in the defendant's absence as the allegedly improper communications were not prejudicial to defendant; one response dealt with a jury charge, which was not a critical stage of the trial, and the second was a denial of access to transcripts to the jury and an exhortation to rely upon their recollection of the evidence, which was harmless; a bailiff did not improperly relay information to the jurors; rather, the bailiff only relayed the information that was expressly authorized by the trial court. *Ford v. State*, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Right to be present at bench trial. — Defendant's right to be present was not violated due to the defendant's absence from 13 bench conferences as 12 conferences involved only legal arguments regarding objections and trial procedure, the defendant's absence from which did not violate the right to be present, and the defendant waived the right at the remaining conference by failing to voice any objection to the defendant's absence, either directly or through counsel. *Heywood v. State*, 292 Ga. 771, 743 S.E.2d 12 (2013).

Bench conferences outside of defendant's presence. — Trial court did not err in holding two bench conferences outside of the defendant's presence because the discussions at those conferences did not implicate the defendant's constitutional right to be present at critical stages of the proceedings and merely concerned

matters of courtroom logistics. *Tolbert v. State*, 321 Ga. App. 637, 742 S.E.2d 152 (2013).

Jury may be instructed during voluntary absence of counsel, when accused was in court. *Barton v. State*, 67 Ga. 653, 44 Am. R. 743 (1881); *Lyons v. State*, 7 Ga. App. 50, 66 S.E. 149 (1909).

Although the trial judge went to the jury room to answer questions regarding the verdict form and the prosecutor and defense counsel were present but defendant was not, such action was not innocuous, but defendant did not object or seek to have counsel object, although defendant was fully aware of the matter; thus, defendant waived the issue of whether defendant was denied the right to be present at all critical stages of the trial. *Fuller v. State*, 277 Ga. 505, 591 S.E.2d 782 (2004).

Improper bailiff-juror communication. — Defendant waived a claim based on a bailiff's improper response to a juror's question as the defendant did not move for a mistrial or object to the trial court's subsequent remarks to the jury; further, it was not an abuse of discretion for the trial court to fail to grant a mistrial as the improper communication was placed on the record and remedial instructions were given before the jury's deliberations, which rebutted the presumption of prejudice. The remedial instructions did not have a chilling effect on the deliberations. *Lawson v. State*, 280 Ga. App. 870, 635 S.E.2d 259 (2006).

New trial when proceedings concluded in absence of defendant's counsel. — Trial court erred in receiving the verdict in the absence of the defendant's counsel, the defendant being present. *Brown v. State*, 151 Ga. 497, 107 S.E. 536 (1921).

It appears that when the jury returned, the sole counsel for the defendant was in a room in the courthouse adjacent to the

courtroom, and that the verdict was received and published, the defendant sentenced, and the jury discharged, in counsel's absence, while counsel had no specific permission to be out of the courtroom, but no effort was made to locate counsel, nor were any other steps to protect the defendant's rights taken, the defendant and defense counsel did not waive the right to have counsel present, and a new trial should be granted. *Duke v. State*, 104 Ga. App. 494, 122 S.E.2d 127 (1961).

New trial when no waiver of right to poll jury. — The right of counsel to be present and to poll the jury upon the return of the verdict is a material right, and in the absence of a waiver by the defendant or defendant's counsel, or at least of the implied waiver resulting from voluntarily being absent in such manner as not to be easily located, a new trial should be granted. *Duke v. State*, 104 Ga. App. 494, 122 S.E.2d 127 (1961).

Right to be present does not extend to post-verdict procedures. — The general right of one accused of a felony to be present during the course of one's trial does not extend to post-verdict procedures such as a motion for new trial, at which only questions of law, not questions of fact, are determined. *Dobbs v. State*, 245 Ga. 208, 264 S.E.2d 18 (1980).

Resentencing in absence of defendant not violation of constitutional rights. — The order of a trial judge fixing a new date for the execution of the sentence after the original date has passed is not void because the defendant is involuntarily absent and has not waived or authorized anyone else to waive defendant's right to be present at the time and place of resentencing, and the passage of such order is not violative of the plaintiff's rights under the several provisions of the state and federal Constitutions. *McBurnett v. Balkcom*, 207 Ga. 452, 62 S.E.2d 180 (1950).

OPINIONS OF THE ATTORNEY GENERAL

Right to appointed counsel not limited to capital offenses. — Under this paragraph, if the defendant is indigent, the court will appoint counsel to represent the defendant without charge; this right

has never been limited to capital cases. 1954-56 Op. Att'y Gen. p. 133.

Distinction made between application of guarantees to offenses. — There is a clear distinction between of-

fenses against the "laws of the state" directly enacted by the legislature and offenses against the ordinances of the city, respecting the method of prosecution and punishing offenders against the same; these words should be given their ordinary signification; and when thus inter-

preted, the safeguards thereby guaranteed applied to persons charged with violation of one of the criminal statutes designed to protect the public at large, and not to offenders against the ordinances of a town or city. 1967 Op. Att'y Gen. No. 67-412.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 258 et seq., 373 et seq.

Am. Jur. Proof of Facts. — Reliability of Polygraph Examination, 14 POF2d 1.

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C.J.S. — 22 C.J.S., Criminal Law, § 391 et seq. 22A C.J.S., Criminal Law, §§ 634, 636 663, 693, 734. 23 C.J.S., Criminal Law, §§ 1310, 1311, 1321, 1322, 1351, 1352.

ALR. — Discharge of accused under a limitation statute as a bar to a subsequent prosecution for the same offense, 3 ALR 519.

Right of defendant in criminal case to conduct defense in person, 17 ALR 266; 77 ALR2d 1233.

Incompetency, negligence, illness or the like of counsel as ground for new trial or reversal in criminal case, 24 ALR 1025; 64 ALR 436.

Constitutional guaranty of right to appear by counsel as applicable to misdemeanor case, 42 ALR 1157.

Remedy for delay in bringing accused to trial or to retrial after reversal, 58 ALR 1510.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 82 ALR 345; 116 ALR 209; 132 ALR 91; 139 ALR 673.

Brevity of time between assignment of counsel and trial as affecting question whether accused is denied right to assistance of counsel, 84 ALR 544.

Constitutionality of statute permitting state to take or use in evidence depositions in criminal case, 90 ALR 377.

Presence of accused during view by jury, 90 ALR 597.

Brief voluntary absence of defendant from court room during trial of criminal case as ground of error, 100 ALR 478.

Effect of unauthorized amendment of criminal information or indictment, 101 ALR 1254.

Revival of judgment by constructive service of process upon nonresident, as affected by due process and full faith and credit clauses, 144 ALR 403.

Relief in habeas corpus for violation of accused's right to assistance of counsel, 146 ALR 369.

Duty of court when appointing counsel for defendant to name attorney other than one employed by, or appointed for, a codefendant, 148 ALR 183.

Plea of guilty without advice of counsel, 149 ALR 1403.

Exclusion of public during criminal trial, 156 ALR 265; 48 ALR2d 1436.

Right to aid of counsel in application or hearing for habeas corpus, 162 ALR 922.

Effect of, and remedies for, exclusion of eligible class of persons from jury list in civil case, 166 ALR 1422.

Duty in instructing jury in criminal prosecution to explain and define offense charged, 169 ALR 315.

Duty to advise accused as to right to assistance of counsel, 3 ALR2d 1003.

Absence of accused during making of tests or experiments as affecting admissibility of testimony concerning them, 17 ALR2d 1078.

Absence of counsel for accused at time of sentence as requiring vacation thereof or other relief, 20 ALR2d 1240.

Absence of accused at return of verdict in felony case, 23 ALR2d 456.

Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination, 45 ALR2d 1354.

Exclusion of public during criminal trial, 48 ALR2d 1436.

Accused's right to poll of jury, 49 ALR2d 619.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal, 55 ALR2d 1072.

Right to an appointment of counsel in juvenile court proceedings, 60 ALR2d 691.

Counsel's right in civil case to argue law or to read lawbooks to the jury, 66 ALR2d 9.

Power to try, in his absence, one charged with misdemeanor, 68 ALR2d 638.

Counsel's right, in consulting with accused as client, to be accompanied by psychiatrist, psychologist, hypnotist, or similar practitioner, 72 ALR2d 1120.

Incompetency of counsel chosen by accused as affecting validity of conviction, 74 ALR2d 1390; 2 ALR4th 27; 2 ALR4th 807; 26 ALR Fed. 218.

Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like, 75 ALR2d 762.

Right of defendant in criminal case to conduct defense in person, or to participate with counsel, 77 ALR2d 1233.

Propriety of criminal trial of one under influence of drugs or intoxicants at time of trial, 83 ALR2d 1067.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law, 85 ALR2d 1111; 23 ALR4th 955.

Right to counsel in insanity or incompetency adjudication proceedings, 87 ALR2d 950.

Calling accused's counsel as a prosecution witness as improper deprivation of right to counsel, 88 ALR2d 796.

Admissibility of confession, admission, or incriminatory statement of accused as affected by fact that it was made after indictment and in the absence of counsel, 90 ALR2d 732.

Constitutionally protected right of indigent accused to appointment of counsel in state court prosecution, 93 ALR2d 747.

Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof, 97 ALR2d 549.

Accused's right to assistance of counsel at or prior to arraignment, 5 ALR3d 1269.

Scope and extent and remedy or sanctions for infringement of accused's right to communicate with his attorney, 5 ALR3d 1360.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 ALR3d 181.

Accused's right to interview witness held in public custody, 14 ALR3d 652.

Enforceability of transaction entered into pursuant to referral sales arrangement, 14 ALR3d 1420.

Power of court to make or permit amendment of indictment with respect to allegations as to property, objects, or instruments, other than money, 15 ALR3d 1357.

Power of court to make or permit amendment of indictment, 17 ALR3d 1181.

Power of court to make or permit amendment of indictment with respect to allegations as to prior convictions, 17 ALR3d 1265.

Power of court to make or permit amendment of indictment with respect to allegations as to nature of activity, happening, or circumstances, 17 ALR3d 1285.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 ALR3d 1321.

Accused's right to inspection of minutes of state grand jury, 20 ALR3d 7.

Right of attorney appointed by court for indigent accused to, and court's power to award, compensation by public, in absence of statute or court rule, 21 ALR3d 819.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under *Miranda v. Arizona*, 25 ALR3d 1076.

Right to assistance by counsel in administrative proceedings, 33 ALR3d 229.

Circumstances giving rise to conflict of interest between or among criminal codefendants precluding representation by same counsel, 34 ALR3d 470.

Applicability, in proceedings under statutes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Right of indigent defendant in criminal case to aid of state by appointment of investigator or expert, 34 ALR3d 1256; 71 ALR4th 638; 72 ALR4th 874; 74 ALR4th 388; 81 ALR4th 259; 85 ALR4th 19.

Permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case, 37 ALR3d 238.

Right to assistance of counsel at proceedings to revoke probation, 44 ALR3d 306.

Censorship of convicted prisoners' "legal" mail, 47 ALR3d 1150.

Censorship of convicted prisoners' "non-legal" mail, 47 ALR3d 1192.

Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like, 50 ALR3d 8.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice, 50 ALR3d 760.

Right to counsel in contempt proceedings, 52 ALR3d 1002.

Admissibility of videotape film in evidence in criminal trial, 60 ALR3d 333; 41 ALR4th 812; 41 ALR4th 877.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance, 73 ALR3d 725.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245.

Right of defendants in prosecution for criminal conspiracy to separate trials, 82 ALR3d 366.

Restricting public access to judicial records of state courts, 84 ALR3d 598.

Right of clergyman appearing in court as professional attorney to be in clerical garb, 84 ALR3d 1143.

Right to cross-examine witness as to his place of residence, 85 ALR3d 541.

Sufficiency of courtroom facilities as affecting rights of accused, 85 ALR3d 918.

Propriety and prejudicial effect of permitting nonparty to be seated at counsel table, 87 ALR3d 238.

Disruptive conduct of accused in presence of jury as ground for mistrial or discharge of jury, 89 ALR3d 960.

Propriety and prejudicial effect of gagging, shackling, or otherwise physically restraining accused during course of state criminal trial, 90 ALR3d 17.

Interference with defense counsel's pre-trial interrogation of witnesses, 90 ALR3d 1231.

Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege, 92 ALR3d 1138.

Admissibility, as against interest, in criminal case of declaration of commission of criminal act, 92 ALR3d 1164.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 ALR3d 852.

Validity and efficacy of accused's waiver of unanimous verdict, 97 ALR3d 1253.

Accused's right to represent himself in state criminal proceedings — modern state cases, 98 ALR3d 13.

Validity, construction, and application of interstate agreement on detainers, 98 ALR3d 160.

Right to cross-examine prosecuting witness as to his pending or contemplated civil action against accused for damages arising out of same transaction, 98 ALR3d 1060.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client, 2 ALR4th 27.

Waiver or estoppel in incompetent legal representation cases, 2 ALR4th 807.

Right of accused in criminal prosecution to presence of counsel at court-appointed or court-approved psychiatric examination, 3 ALR4th 910.

Adequacy of defense counsel's representation of criminal client regarding speedy trial and related matters, 6 ALR4th 1208.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters, 7 ALR4th 180.

Conviction by court-martial as proper subject of cross-examination for impeachment purposes, 7 ALR4th 468.

Waiver, after not guilty plea, of jury trial in felony case, 9 ALR4th 661.

Adequacy of defense counsel's representation of criminal client regarding guilty pleas, 10 ALR4th 8.

Right of indigent criminal defendant to polygraph test at public expense, 11 ALR4th 733.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues, 12 ALR4th 318.

Adequacy of defense counsel's representation of criminal client regarding post-plea remedies, 13 ALR4th 533.

Adequacy of defense counsel's representation of criminal client regarding prior convictions, 14 ALR4th 227.

Adequacy of defense counsel's representation of criminal client regarding appellate and post-conviction remedies, 15 ALR4th 582.

Court's witnesses (other than expert) in state criminal prosecution, 16 ALR4th 352.

Denial of, or interference with, accused's right to have attorney initially contact accused, 18 ALR4th 669.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 ALR4th 1196.

Denial of accused's request for initial contact with attorney — drunk driving cases, 18 ALR4th 705.

Denial of accused's request for initial contact with attorney — cases involving offenses other than drunk driving, 18 ALR4th 743.

Conditions interfering with accused's view of witness as violation of right of confrontation, 19 ALR4th 1286.

Waiver of right to counsel by insistence upon speedy trial in state criminal case, 19 ALR4th 1299.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 ALR4th 157.

Validity and efficacy of minor's waiver of right to counsel — modern cases, 25 ALR4th 1072.

Necessity and content of instructions to jury respecting reasons for or inferences from accused's absence from state criminal trial, 31 ALR4th 676.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases, 33 ALR4th 429.

Admissibility or use in criminal trial of testimony given at preliminary proceeding by witness not available at trial, 38 ALR4th 378.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information, 39 ALR4th 899.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 ALR4th 395.

Drunk driving: Motorist's right to private sobriety test, 45 ALR4th 11.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 ALR4th 1170.

Closed-circuit television witness examination, 61 ALR4th 1155.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of guilty plea — state cases, 65 ALR4th 719.

Exclusion of public from state criminal trial by conducting trial or part thereof at other than regular place or time, 70 ALR4th 632.

Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 ALR4th 638.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 ALR4th 1102.

What constitutes assertion of right to counsel following Miranda warnings — state cases, 83 ALR4th 443.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 ALR4th 19.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant, 86 ALR4th 698.

Ineffective, assistance of counsel: compulsion, duress, necessity, or "hostage syndrome" defense, 8 ALR5th 713.

What persons or entities may assert or waive corporation's attorney-client privilege — modern cases, 28 ALR5th 1.

Right to appointment of counsel in contempt proceedings, 32 ALR5th 31.

Right of accused to have evidence or

court proceedings interpreted, because accused or other participant in proceedings is not proficient in the language used, 32 ALR5th 149.

Duty of prosecutor to present exculpatory evidence to state grand jury, 49 ALR5th 639.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 ALR5th 423.

Adequacy of defense counsel's representation of criminal client — issues of mental matters concerning persons, other than counsel's client, who are involved in criminal case, 80 ALR5th 55.

Right of indigent defendant in state criminal prosecution to *ex parte* in camera hearing on request for state-funded expert witness, 83 ALR5th 541.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving — cases focusing on presence of inculpatory evidence other than statements by accused and cases focusing on absence of particular inculpatory evidence, 90 ALR5th 225.

Adequacy of defense counsel's representation of criminal client-conduct at trial regarding issues of insanity, 95 ALR5th 125.

Denial of, or interference with, accused's right to have attorney initially contact accused, 96 ALR5th 327.

Validity and efficacy of minor's waiver of right to counsel — cases decided since application of *Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), 101 ALR5th 351.

Denial of accused's request for initial contact with attorney — drunk driving cases, 109 ALR5th 611.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Motions and objections during trial and matters other than pretrial motions, 117 ALR5th 513.

Denial of accused's request for initial contact with attorney in cases involving offenses other than drunk driving — Cases focusing on presence of inculpatory statements, 124 ALR5th 1.

Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel—federal cases, 53 ALR Fed. 140.

Ineffective assistance of counsel: misrepresentation, or failure to advise, of immigration consequences of waiver of jury trial, 103 ALR Fed. 867.

Right of enemy combatant to counsel, 184 ALR Fed. 527.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense — state cases, 43 ALR6th 475.

What constitutes "custodial interrogation" within rule of requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — At border or functional equivalent of border, 68 ALR6th 607.

Criminal defendant's right to electronic recordation of interrogations and confessions, 69 ALR6th 579.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where no warrant involved, 71 ALR6th 1.

Propriety and prejudicial effect of requiring defendant to wear stun belt or shock belt during course of state criminal trial, 71 ALR6th 625.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Suppression motions where warrant was involved, 72 ALR6th 1.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — Underlying homicide and assault offenses, 72 ALR6th 437.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — Pretrial motions — Motions other than for suppression, 73 ALR6th 1.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — Underlying drug offenses, 73 ALR6th 49.

Reverse-Franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — Underlying sexual offenses, 74 ALR6th 69.

Construction and application by state courts of Supreme Court's ruling in *Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), that defense counsel has obligation to advise defendant that entering guilty plea could result in deportation, 74 ALR6th 373.

Construction and application of constitutional rule of *Miranda* — Supreme Court Cases, 17 ALR Fed. 2d 465.

Claims of ineffective assistance of counsel in death penalty proceedings — United States Supreme Court cases, 31 ALR Fed. 2d 1.

Construction and application of Sixth

Amendment right to counsel — Supreme Court cases, 33 ALR Fed. 2d 1.

Adequacy of defense counsel's representation of criminal client regarding entrapment defense — Federal cases, 42 ALR Fed. 2d 145.

Ineffective assistance of counsel in removal proceedings — Legal basis of entitlement to representation and requisites to establish prima facie case of ineffectiveness, 58 ALR Fed. 2d 363.

Ineffective assistance of counsel in removal proceedings — Particular omissions or failures, 60 ALR Fed. 2d 59.

Paragraph XV. Habeas corpus.

The writ of habeas corpus shall not be suspended unless, in case of rebellion or invasion, the public safety may require it.

1976 Constitution. — Art. I, Sec. I, Para. XII.

Cross references. — Habeas corpus, U.S. Const., art. I, sec. IX, cl. 2 and T. 9, C. 14. Effect of technical defects in habeas proceedings, § 17-7-34. Proceedings in fugitive cases, § 17-13-30. Payment of fees from prisoner's inmate account upon filing of habeas corpus petition, § 42-12-7.1.

Law reviews. — For article, "Interstate Extradition and State Sovereignty," see 1 Mercer L. Rev. 147 (1950). For article, "Personal Rights, Property Rights and Due Process: A Comparison of Constitutional Protection in the Georgia Supreme

Court and the United States Supreme Court," see 9 Mercer L. Rev. 253 (1958). For article discussing Georgia's habeas corpus statutes in light of federal courts' requirements of exhaustion of state remedies prior to entertaining a habeas petition, see 9 Ga. St. B.J. 29 (1972). For article discussing history of post-conviction habeas corpus relief in Georgia, see 12 Ga. L. Rev. 249 (1978). For article, "The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus," see 41 Emory L.J. 515 (1992).

JUDICIAL DECISIONS

Remedy provided by state law. — The remedy by application for the writ of habeas corpus to the state courts is provided by state law. *Porch v. Cagle*, 199 F.2d 865 (5th Cir. 1952).

Motion to file out-of-time appeal. — Construing the defendant's request for an out-of-time appeal from a 1995 resentencing on various convictions as one seeking habeas corpus relief, and in light of the language in O.C.G.A. § 9-14-43, the trial court's order denying the defendant relief on jurisdictional grounds was reversed, and the matter was remanded for the trial court to consider the defendant's motion as one for a writ of habeas corpus. *Anderson v. State*, 284 Ga. App. 776, 645 S.E.2d 362 (2007).

son v. State, 284 Ga. App. 776, 645 S.E.2d 362 (2007).

Given that the defendant had no right to file a direct appeal from a guilty plea that was evident from the record, a motion for an out-of-time appeal, which alleged ineffective assistance of counsel, was properly denied, and counsel could not be deemed ineffective for failing to inform the defendant of the right to appeal; thus, the defendant's only remedy was by habeas corpus. *Barlow v. State*, 282 Ga. 232, 647 S.E.2d 46 (2007).

Prerequisite for relief from allegedly void sentence. — The trial court properly dismissed the defendant's motion

to correct an allegedly void felony sentence, as the sentence was authorized by the law in existence at the time of the defendant's statutory rape convictions, and the defendant failed to seek withdrawal of the guilty pleas which led to the withdrawal as a prerequisite to challenge the sentence imposed; thus, any further relief had to be sought through a petition for habeas corpus. *McClendon v. State*, 287 Ga. App. 515, 651 S.E.2d 820 (2007), cert. denied, 2008 Ga. LEXIS 174 (Ga. 2008).

Pre-trial speedy trial demand could not be made via habeas petition. — Because the issue of whether a defendant's prosecution was barred pursuant to O.C.G.A. § 17-7-170 was a statutory defense which could be raised in the pending criminal action, and the claim was not relevant to the validity of any pre-trial detention, the habeas court properly dismissed the defendant's pre-trial habeas petition without an evidentiary hearing. *Mungin v. St. Lawrence*, 281 Ga. 671, 641 S.E.2d 541 (2007).

Failure to disclose Brady information. — Defendant did not have to show that defendant would have been acquitted if defendant had been able to obtain the Brady information; defendant simply had to show, and did show, that the state's evidentiary suppression undermined confidence in the outcome of the trial. *Schofield v. Palmer*, 279 Ga. 848, 621 S.E.2d 726 (2005).

Failure to disclose Brady information about confidential informant. — Convicted capital murder defendant's habeas corpus petition was granted, conviction was reversed, and a new trial was ordered because defendant prevailed on a Brady claim that the state failed to disclose that it had paid a confidential informant money for information that led to the defendant's conviction; the payment of money was exculpatory since it indicated that the informant could be impeached with a motive to lie. *Schofield v. Palmer*, 279 Ga. 848, 621 S.E.2d 726 (2005).

The procedural limitations of O.C.G.A. § 40-13-33(a) and (b) neither suspend the writ of habeas corpus, nor cause a court to dismiss an action for habeas without consideration of the equi-

ties presented. Rather, the statute provides that in a narrowly defined class of cases—those in which a petitioner who is not in custody seeks habeas relief from a misdemeanor traffic conviction—the petition for habeas corpus must be filed within 180 days of conviction. As such, it imposes a permissible procedural restriction on a limited group of cases. *Earp v. Boylan*, 260 Ga. 112, 390 S.E.2d 577 (1990).

Habeas court's order denying an inmate's verified petition, which asserted that trial counsel rendered ineffective assistance, was reversed, as the allegations contained in the petition served as sufficient evidence to support the inmate's claim that counsel failed to file a notice of appeal after being instructed by the inmate to do so. *Rolland v. Martin*, 281 Ga. 190, 637 S.E.2d 23 (2006).

Habeas complaint properly dismissed. — The trial court properly dismissed an inmate's petition for a writ of habeas corpus for failing to state a claim upon which relief could be granted, based on a finding that such was prematurely filed in that no governor's warrant had been issued or served from the seeking state at the time the petition was filed and, the inmate had only been arrested for Georgia offenses; moreover, to the extent that the inmate might have been seeking to challenge an arrest without a warrant pursuant to O.C.G.A. § 17-13-34, insufficient facts were pled which supported such a claim. *Powell v. Brown*, 281 Ga. 609, 641 S.E.2d 519 (2007).

Appointment of counsel for habeas corpus petitioner not required. — Since habeas corpus is not a criminal proceeding, neither U.S. Const., amend. 6 nor the Georgia Constitution requires the appointment of counsel for a habeas corpus petitioner. *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Defendant has no right to receive or spend state funds for appointment of experts or investigators in habeas corpus proceedings, even in death penalty cases. *Spencer v. Hopper*, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 885, 100 S. Ct. 178, 62 L. Ed. 2d 116 (1979).

Standard of evidence on mental retardation. — Trial court erred in order-

ing a jury trial on the limited issue of defendant's mental retardation in defendant's habeas corpus petition, pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XV, based on the preponderance of the evidence standard after defendant was convicted of murder and sentenced to death, as the appropriate standard if the issue were raised at trial would have been beyond a reasonable doubt; further, the habeas petition was based on a miscarriage of justice standard, as the issue was found to have been waived at trial. *Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613 (2003).

Ineffective assistance of counsel claim. — Defendant's ineffective assistance of counsel claim was waived as defendant's original post-conviction counsel moved for a new trial, but did not raise an ineffective assistance of trial counsel claim; defendant's claim that defendant's original post-conviction counsel was deficient in failing to raise an ineffective assistance claim below had to be addressed in a habeas corpus proceeding. *Mullins v. State*, 267 Ga. App. 393, 599 S.E.2d 340 (2004).

In a warden's appeal, the grant of habeas corpus relief to an inmate based on ineffective assistance of counsel was upheld as the kidnapping charges in the two counties charged against the inmate were for the same offense and being advised by defense counsel to plead guilty in one county to avoid prosecution in the other was erroneous since double jeopardy would have barred any additional prosecution. *Upton v. Johnson*, 282 Ga. 600, 652 S.E.2d 516 (2007).

Habeas court did not err in granting the appellee's petition for writ of habeas corpus because there was no error in the habeas court's finding of an actual conflict of interest that adversely affected plea counsel's performance since the fact that the codefendant alone was paying counsel's fees created a strong incentive for counsel to prioritize the codefendant's interests in the matter over the appellee's interest, and counsel not only failed to pursue an alternative defense theory on behalf of the appellee, counsel failed even to recognize the possibility that one could exist; even though the appellee and the codefendant pursued a unified defense in

that their accounts of the incident were consistent, the record reflected that the appellee was the less culpable of the two in the crime, as it appeared that the appellee's participation was limited to the role of a passive witness who happened to be driving when the codefendant initiated the brief, apparently unpremeditated interaction with the victim. *State v. Mamedov*, 288 Ga. 858, 708 S.E.2d 279 (2011).

Habeas court correctly concluded that ineffective assistance of trial counsel could not be used to excuse the procedural default of the petitioner's claim that the petitioner was mentally incompetent during trial because the information that trial counsel then had available to them, including the information that trial counsel unreasonably failed to obtain, would not have led constitutionally effective counsel to pursue a claim of incompetence to stand trial and would not be reasonably probable to have resulted in a finding that the petitioner was incompetent had such a plea been pursued; the petitioner failed to prove that trial counsel rendered ineffective assistance regarding the petitioner's competence to stand trial because trial counsel withdrew the petitioner's plea of incompetence only after satisfying themselves that counsel was able to communicate effectively with the petitioner, and the trial court had an extensive opportunity to observe the petitioner in pre-trial and trial proceedings and to interact directly with the petitioner, and the court did not see sufficient indications of incompetence to pursue further evaluation. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Habeas court's order denying the petitioner's claim that the petitioner was entitled to a new sentencing trial was reversed and the petitioner's death sentence was vacated because trial counsel performed deficiently by failing to sufficiently develop mitigating evidence from non-experts, and there was a reasonable probability that the jury would have reached a different outcome in the sentencing phase of the petitioner's trial if the additional evidence habeas counsel obtained had been presented at trial; trial counsel failed to fully investigate whether

the petitioner had suffered one or more brain injuries prior to the petitioner's crimes, and unduly limiting their interviews of the petitioner's family and friends to an unreasonably narrow range of persons, and there was additional evidence from non-experts concerning the petitioner's traumatic childhood and the petitioner's change in behavior and apparent mental distress following two head injuries. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Dismissal without hearing proper. — Dismissal of an inmate's habeas petition without a hearing was proper as the petition failed to state any viable claim for pre-conviction habeas corpus relief since: (1) the inmate was not entitled to appointed counsel in the habeas corpus proceeding; (2) the habeas court was not required to make a determination of the inmate's mental state as it was an issue to be addressed in the context of the criminal prosecution; and (3) the inmate did not seek issuance of the writ on the ground that the inmate had tendered proper bail in connection with the inmate's then-pending prosecution on the criminal charge. *Britt v. Conway*, 281 Ga. 189, 637 S.E.2d 43 (2006).

Habeas court's transfer of ineffective assistance of counsel claim to trial court improper. — Trial court's order denying defendant's extraordinary motion for new trial/habeas petition was a nullity and void under O.C.G.A. § 9-12-16, and the appellate court could not transfer defendant's case to the Georgia Supreme Court to consider the grant of a certificate of probable cause under O.C.G.A. § 9-14-52(b), even though the Georgia Supreme Court had exclusive jurisdiction over habeas cases, as the trial court was without subject matter jurisdiction to entertain defendant's habeas claim upon a transfer from a habeas court with instructions to determine whether trial counsel was ineffective; however, as defendant's habeas claims had not been addressed by a court of competent jurisdiction, the appellate court remanded the matter to the habeas court for resolution of defendant's habeas claims of ineffective assistance of counsel, with the final order subject to the appellate procedures out-

lined in O.C.G.A. § 9-14-52. *Herrington v. State*, 265 Ga. App. 454, 594 S.E.2d 682 (2004).

Opportunity to respond. — State's submission of a proposed order, which included a final adjudication of a jury array issue, was erroneously granted by the habeas court without affording an inmate an opportunity to respond, as it was fundamentally unfair for the court to decide that the inmate was not entitled to habeas relief without allowing a meaningful opportunity to respond. *Edwards v. Lewis*, 280 Ga. 441, 629 S.E.2d 248 (2006).

Procedural bars not found. — Defendant's habeas corpus petition based upon failure to obtain Brady information was not procedurally barred since defendant tried to obtain that information from the state but was not able to obtain it until discovery in conjunction with the habeas corpus hearings. *Schofield v. Palmer*, 279 Ga. 848, 621 S.E.2d 726 (2005).

An inmate's Brady claim within a petition for habeas corpus, based upon the state's failure to produce for the defense audiotapes containing exculpatory witness statements and the inmate's own statement to police during investigation of the crimes, was not procedurally defaulted because the inmate showed cause and prejudice to excuse the default. *Walker v. Johnson*, 282 Ga. 168, 646 S.E.2d 44 (2007).

Defendant's petition for habeas corpus was improperly denied on the basis of procedural default as the trial court improperly failed to appoint counsel to represent the defendant on appeal after a motion for new trial was denied as the trial court was aware of the defendant's desire to appeal and the defendant's indigency; the defendant was prejudiced as the defendant's notice of appeal filed pro se was untimely. *Davis v. Frazier*, 285 Ga. 16, 673 S.E.2d 215 (2009).

Motion to withdraw guilty plea could not be construed as habeas corpus petition as it was filed in the county in which the defendant was convicted, rather than against the warden in the county in which the defendant was incarcerated. *Curry v. State*, 274 Ga. App. 19, 616 S.E.2d 225 (2005).

Habeas relief properly granted. — Because the record failed to contain some

affirmative evidence that either the trial court or trial counsel entered into a colloquy with an inmate and explained the inmate's Boykin rights, but merely provided the state's speculation that trial counsel might have possibly discussed the inmate's Boykin rights based on counsel's act of signing the plea agreement, that record failed to show that the inmate's plea was knowingly, voluntarily, and intelligently made and supported the grant of habeas relief. *State v. Hemdani*, 282 Ga. 511, 651 S.E.2d 734 (2007).

Order granting habeas relief was improper. — Order granting an inmate a new trial, finding that an inmate's appellate counsel was ineffective in pursuing the direct appeal, and that the issues the inmate raised, specifically related to an alleged impermissibly suggestive identification and to the jury verdict, were not procedurally barred or waived, was reversed, as the habeas court: (1) lost jurisdiction to amend its order once a notice of appeal was filed; and (2) applied the incorrect legal standards in finding the prejudice necessary to excuse procedural default, requiring remand for the court to determine whether any actual prejudice existed. *Upton v. Jones*, 280 Ga. 895, 635 S.E.2d 112 (2006).

Because the state's suppression of exculpatory statements in violation of Brady was more than sufficient to place the outcome of an inmate's trial in doubt, amounting to a denial of the inmate's Fourteenth Amendment due process rights, and the state's failure to produce the inmate's own statement provided the state with the opportunity to argue strenuously and virtually without contradiction that the inmate did not tell police about any alibi witness, but simply fabricated the defense prior to trial, the violation made the state's case much stronger than the full facts would have suggested, and based on such suppression, the trial did not produce a verdict worthy of confidence; hence, the inmate was properly granted habeas relief. *Walker v. Johnson*, 282 Ga. 168, 646 S.E.2d 44 (2007).

Denial of relief held proper. — Trial court properly rejected a pre-trial detainee's petition for habeas relief on grounds that the detainee's constitutional right to

confront witnesses was abridged when a detective investigating the charges was permitted to give hearsay testimony at the detainee's preliminary hearing, as the detainee's constitutional right to confrontation applied only to trials, and not to a preliminary hearing, and that hearing involved a more limited scope of determining whether probable cause existed to hold an accused for trial. *Gresham v. Edwards*, 281 Ga. 881, 644 S.E.2d 122 (2007).

While the first of two notice of appeals from an order denying a detainee habeas relief did not invoke the appellate court's jurisdiction, as the denial of a motion for reconsideration of a final judgment was not subject to direct appeal, a second timely notice did not afford the detainee any relief as the failure to hold a preliminary commitment hearing following indictment was not erroneous. *Ferguson v. Freeman*, 282 Ga. 180, 646 S.E.2d 65 (2007).

A pre-trial petition for a writ of habeas corpus filed by a jail inmate was properly denied as both the trial court and the habeas court correctly held that the inmate was entitled to have bail set on only the charge set forth in the arrest warrant, and not the other six charges handed down in the grand jury's subsequently issued indictment. *Bryant v. Vowell*, 282 Ga. 437, 651 S.E.2d 77 (2007).

Georgia habeas court did not err by not examining a probable cause determination by a Washington magistrate because extradition documents were facially valid, a defendant had four felony charges pending in Washington, the defendant was the same person named in the extradition documents, and the defendant was a fugitive from Washington authorities; there was sufficient prima facie evidence to show that the defendant was a fugitive from justice. *Smith v. State*, 284 Ga. 356, 667 S.E.2d 95 (2008).

An appellant was not entitled to a writ of habeas corpus after serving four 12-month sentences of probation for four counts of public indecency under O.C.G.A. § 16-6-8 related to an incident in which the appellant began to masturbate while alongside a school bus as the appellant failed to show adverse collateral conse-

quences as the appellant only made a bald claim that being sentenced on four counts of public indecency, as opposed to one, created more difficulty in finding employment; based on the plea agreement, the merger of the charges was expressly rejected by the appellant in order to effectuate the negotiated pleas to a misdemeanor. *Turner v. State*, 284 Ga. 494, 668 S.E.2d 692 (2008).

Habeas court did not err by relying on the waiver of rights form the petitioner signed because there was clear evidence beyond the mere execution of a waiver form that proved that the petitioner had been apprised of the Boykin rights; the guilty plea hearing transcript affirmatively reflected that the trial court entered into a colloquy with the petitioner to ensure that the petitioner read and fully understood the waiver of rights agreement, which the petitioner signed, and the signed “certificate of lawyer” at the conclusion of the waiver of rights form, together with the petitioner’s own acknowledgment at the guilty plea hearing, served to prove that trial counsel actually went over the waiver of rights form with the petitioner and the information that the form contained. *Brown v. State*, 290 Ga. 50, 718 S.E.2d 1 (2011).

Grant of new appeal improper. — Since the petitioner’s conviction had already been reviewed on direct appeal, the habeas corpus court erred in ordering a new appeal, as the proper remedy would have been to order a new trial; consequently, remand was ordered for the entry

of an order granting a new trial. *White v. Smith*, 281 Ga. 271, 637 S.E.2d 686 (2006).

Challenge to enhanced sentence based on allegedly defective indictment. — Defendant could not challenge a sentence for family violence battery on appeal, claiming that the sentence was erroneously enhanced from a misdemeanor to a felony under O.C.G.A. § 16-5-23.1(f)(2) based on a previous conviction arising from a guilty plea to the same offense that was based on a defective indictment because since the defendant failed to challenge the indictment at the time the defendant pleaded guilty, the proper remedy was a motion in arrest of judgment under O.C.G.A. § 17-9-61(b) or habeas corpus. *Grogan v. State*, 297 Ga. App. 251, 676 S.E.2d 764 (2009).

Mental incompetence. — O.C.G.A. § 17-10-60 et seq. is the exclusive procedure for raising a mentally incompetent challenge after sentencing, O.C.G.A. § 17-10-62, and creates a rebuttable presumption against re-litigation of a finding of competency instead of applying the stricter habeas procedural default standard, O.C.G.A. § 17-10-69; accordingly, this issue should not arise in habeas proceedings in Georgia. *Perkins v. Hall*, 288 Ga. 810, 708 S.E.2d 335 (2011).

Cited in *Perry Dev. Corp. v. Colonial Contracting Co.*, 231 Ga. 666, 203 S.E.2d 475 (1974); *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975); *Sutton v. Sanders*, 283 Ga. 28, 656 S.E.2d 796 (2008); *Taylor v. Williams*, 528 F.3d 847 (11th Cir. 2008).

OPINIONS OF THE ATTORNEY GENERAL

Execution might deprive defendant of constitutional right. — To execute a defendant upon conviction and sentence of one court while the defendant has pending an appeal in the Supreme Court of Geor-

gia from a writ of habeas corpus from another trial court might deprive the defendant of the constitutional right to the writ of habeas corpus. 1960-61 Op. Att’y Gen. p. 354.

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Habeas Corpus, § 1 et seq.

C.J.S. — 39 C.J.S., Habeas Corpus, § 1 et seq.

Paragraph XVI. Self-incrimination.

No person shall be compelled to give testimony tending in any manner to be self-incriminating.

1976 Constitution. — Art. I, Sec. I, Para. XIII.

Cross references. — Due process of law and just compensation, U.S. Const., amend. 5, and § 38-2-411. Juvenile delinquency proceedings, § 15-11-31. Voluntary testimony of defendant, §§ 17-7-28 and 24-5-506. Admissibility in evidence of confessions and admissions, § 24-8-824 et seq. Freedom from self-incrimination in trial discovery, § 24-5-505. Certain situations in which incriminating testimony may be compelled, §§ 34-8-253, 46-2-55, and 46-2-93. Use of evidence of driver's refusal to submit to chemical test for alcohol or drugs in blood, § 40-6-392.

Law reviews. — For article, "Personal Rights, Property Rights and Due Process: A Comparison of Constitutional Protection in the Georgia Supreme Court and the United States Supreme Court," see 9 Mercer L. Rev. 253 (1958). For article discussing admissibility of illegally obtained evidence as violative of right not to incriminate self and advocating a state exclusionary rule, see 11 Ga. L. Rev. 105 (1976). For article surveying developments in Georgia juvenile court practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 167 (1981). For article, "The Georgia Bill of Rights: Dead or Alive?," see 34 Emory L.J. 341 (1985). For article, "Court Ordered Surgery to Retrieve Evidence in Georgia in Light of the Supreme Court Decision in Winston v. Lee," see 37 Mercer L. Rev. 1005 (1986). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For annual survey of death penalty decisions, see 57 Mercer L. Rev. 139 (2005).

For note, "Criminal Discovery: The Use of Notices to Produce," see 30 Mercer L. Rev. 331 (1978). For note on the Georgia right against self-incrimination, see 15 Ga. L. Rev. 1104 (1981).

For comment on Allbright v. State, 92 Ga. App. 251, 88 S.E.2d 468 (1955), holding that the admission of photographs in which defendants were ordered to pose was error as photographs were taken in violation of the self-incrimination clause of the Georgia Constitution, see 18 Ga. B.J. 344 (1956). For comment on Thomas v. State, 213 Ga. 237, 98 S.E.2d 548 (1957), holding that since defendant did not object to being placed in his car for the purposes of identification, it was not error to allow testimony concerning the incriminating act and no constitutional right was violated, see 20 Ga. B.J. 384 (1958). For comment discussing privilege against self-incrimination involved when accused is forced to speak so as to identify voice, in light of Aaron v. State, 122 So. 360 (Ala. 1960), see 24 Ga. B.J. 125 (1961). For comment criticizing Aldrich v. State, 220 Ga. 132, 137 S.E.2d 463 (1964), applying privilege against self-incrimination to driver who refuses to drive his truck onto weighing scales, see 16 Mercer L. Rev. 315 (1964). For comment on Smith v. State, 225 Ga. 328, 168 S.E.2d 587 (1969), see 6 Ga. St. B.J. 294 (1970). For comment, "The Tacit Admission Rule: Unreliable and Unconstitutional — A Doctrine Ripe for Abandonment," see 14 Ga. L. Rev. 27 (1979). For comment on Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- RIGHT AGAINST SELF-INCRIMINATION
- CLAIM OF PRIVILEGE
- WAIVER OF PRIVILEGE
- IMMUNITY FROM PROSECUTION

EVIDENCE

1. IN GENERAL
2. ADMISSIBLE
3. INADMISSIBLE
4. VOLUNTARINESS

General Consideration

Former O.C.G.A. § 24-4-60 (see now O.C.G.A. § 35-3-160) constitutional. — Prisoners' claim that former O.C.G.A. § 24-4-60 (see now O.C.G.A. § 35-3-160) was unconstitutional because the statute forced them to submit self incriminatory evidence in violation of the Fifth Amendment of the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Para. XVI, failed because DNA samples were not testimonial in nature. *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003).

Defendant not subjected to custodial interrogation. — Defendant's claim that the statements defendant made to an officer as to defendant's intent to buy drugs and ownership of the jacket defendant was wearing, which contained a digital scale, should have been excluded as defendant had not been advised of defendant's Miranda rights was rejected. Miranda was inapplicable as defendant was not in custody since: (1) defendant was being questioned pursuant to a developing crime scene investigation; (2) a reasonable person in defendant's position would not have believed that the person was in custody as defendant's accomplice was the target of the investigation; and (3) defendant was allowed to leave the scene. *Lewis v. State*, 268 Ga. App. 547, 602 S.E.2d 278 (2004).

Miranda warnings required before custodial interrogation. — Questioning an inmate, whether by peace officers or prison officials, when the purpose of the interrogation relates to a suspected crime for which criminal prosecution might ensue, is a custodial hearing, and requires a Miranda warning in order to render any statements made therein admissible in a subsequent hearing. *Grant v. State*, 154 Ga. App. 758, 270 S.E.2d 42 (1980).

A disciplinary hearing while incarcerated in a state correctional institution is a custodial hearing which requires an ap-

propriate warning of the right against self-incrimination before any statements made are admissible against the speaker in a subsequent criminal proceeding for those same criminal acts (in the absence of waiver). *Grant v. State*, 154 Ga. App. 758, 270 S.E.2d 42 (1980).

Time when Miranda warnings required. — Defendant who voluntarily accompanied police to a sheriff's office where the defendant was interviewed, who was not under arrest and not restrained, and who began telling the officers what the defendant had "heard" when it became apparent that the defendant knew too much about the crime only needed to have Miranda warnings at that point. *Wilson v. State*, 208 Ga. App. 812, 432 S.E.2d 211 (1993).

Factors for determining whether defendant in custody. — Trial court erred in suppressing a defendant's pre-Miranda statements based on the court's findings that police had probable cause to arrest and that defendant was the focus of the investigation as these considerations were irrelevant for determining whether the defendant was "in custody" for Miranda purposes. The proper inquiry was how a reasonable person in the defendant's position would have perceived the situation. *State v. Folsom*, 285 Ga. 11, 673 S.E.2d 210 (2009).

Inadequate invocation of self-incrimination privilege. — Because defendant's statement that defendant should not talk in the absence of "real talk" was insufficient to trigger the interrogating agent's duty to cease questioning, the trial court did not err in admitting defendant's later statements to the police. *Barnes v. State*, 287 Ga. 423, 696 S.E.2d 629 (2010).

Warnings not required at nonaccusatory, on-the-scene investigation. — Miranda warnings are not required when a person responds to an officer's initial inquiry at an on-the-scene investigation which has not become accusatory. *Collins*

v. State, 154 Ga. App. 651, 269 S.E.2d 509 (1980).

Interrogation must cease when individual unequivocally asks for attorney. United States v. Webb, 633 F.2d 1140 (5th Cir. 1981).

Privilege applies to attorney being investigated by disciplinary authorities of bar. — An attorney whose professional activities are under investigation by the disciplinary authorities of the State Bar of Georgia is entitled to the protection of the constitutional safeguards of the federal and state Constitutions against self-incrimination. Wilson v. State Bar, 225 Ga. 343, 168 S.E.2d 584, cert. denied, 396 U.S. 957, 90 S. Ct. 429, 24 L. Ed. 2d 421 (1969).

Judge cannot call defendant as witness at hearing. — Although a defendant has the right to testify at the defendant's Jackson-Denno hearing, the trial judge cannot call the defendant as a witness. Shepherd v. State, 236 Ga. 787, 225 S.E.2d 312 (1976).

Immunity promised when party compelled to answer incriminating questions. — This paragraph is not violated by an act compelling a party to answer incriminating questions, provided it guarantees immunity from a criminal proceeding. White v. Crane, 62 Ga. 399 (1879).

Comments on pre-trial silence. — Prosecutor's two improper comments on defendant's pre-trial silence were not reversible error as the trial court took corrective measures after the first comment and defendant failed to request a curative instruction or a mistrial after the second comment. Lewis v. State, 279 Ga. 69, 608 S.E.2d 602, cert. denied, 546 U.S. 987, 126 S. Ct. 571, 163 L. Ed. 2d 478 (2005).

In a prosecution for shoplifting, the trial court properly denied defendant's motion for a mistrial after the state improperly commented on the right to remain silent, as the error was harmless, given the overwhelming evidence of guilt, eyewitness testimony, and videotaped evidence of the crime, and the prosecutor's compliance with an instruction to not make any further comment on defendant's silence. Ekanger v. State, 279 Ga. App. 421, 631 S.E.2d 459 (2006).

During a defendant's trial for aggravated child molestation and related charges, even if a police officer was properly allowed to testify about the defendant's refusal to discuss or deny the allegations against the defendant, it was error to permit questioning of the defendant on the subject; the error was not harmless and the defendant's convictions required reversal because the prosecution deliberately and repeatedly placed the evidence before the jury, the defendant denied having sexual relations with the victim, numerous witnesses testified for the defense, and the victim gave conflicting testimony. Maynard v. State, 282 Ga. App. 598, 639 S.E.2d 389 (2006).

In a case in which ineffective assistance of counsel was claimed due to counsel's failure to object to a comment in the prosecutor's closing argument that the defendant could have given the defendant's version of the facts of a domestic dispute to the police, the appellate court improperly relied on exclusions to comments on a defendant's silence in Morrison v. State, 554 S.E.2d 190 (2001); the court overruled Morrison based on the bright-line rule in Mallory v. State, 409 S.E.2d 839 (1991), that, with reference to former O.C.G.A. § 24-3-36 (see now O.C.G.A. § 24-8-801), that comment upon a defendant's silence or failure to come forward was far more prejudicial than probative. Reynolds v. State, 285 Ga. 70, 673 S.E.2d 854 (2009).

No prejudice from improper comment on silence. — Denial of a motion for a mistrial was proper given the trial court's prompt, detailed curative instruction to the jury; it was unlikely that the defendant was prejudiced by the prosecutor's improper comment on defendant's silence. Ford v. State, 274 Ga. App. 695, 617 S.E.2d 262 (2005).

Denial of a motion for a mistrial was proper as there was only one reference to the defendant's election not to make a statement to the police, the prosecutor did not solicit the reference, and the prosecutor neither mentioned the defendant's silence nor sought to draw any prejudicial inferences from it; there was no focus on the defendant's silence sufficient to constitute prejudicial error. Haggins v. State, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

General Consideration (Cont'd)

In a defendant's trial for armed robbery and related offenses, a police officer's comment on the defendant's refusal to make a statement was harmless error because no prejudice resulted; the officer's inadvertent remark was stopped mid-sentence, the trial court instructed the jury to completely disregard the remark, and the state made no subsequent references to the defendant's silence and drew no prejudicial inferences from it. *Wright v. State*, 282 Ga. App. 649, 639 S.E.2d 581 (2006).

Accused may not be placed in incriminating circumstances for identification. — For the purposes of identification, the accused may not be taken and placed within the framework of the scene of the crime, there for identification within the coordinating, incriminating circumstances of the scene. *Meriwether v. State*, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

Forced participation in lineup after illegal arrest does not contravene rights. *Meriwether v. State*, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

No violation of rights by confession of defendant when not under arrest or in custody. — When the defendant was not under arrest or in custody at the time of the confession and no police or other law enforcement personnel were present, the defendant's constitutional rights could not have been violated. *Gaston v. State*, 153 Ga. App. 538, 265 S.E.2d 866 (1980).

Because of the absence or dissipation of coercion once a suspect is released from custody, subsequent confessions obtained from even police initiated interrogations are admissible without violating the suspect's Fifth Amendment rights if there has been an intervening break in custody. *Wilson v. State*, 264 Ga. 287, 444 S.E.2d 306, cert. denied, 513 U.S. 988, 115 S. Ct. 486, 130 L. Ed. 2d 398 (1994).

Invoking right to refuse independent psychiatric evaluation bars claim of insanity. — Defendant may invoke the defendant's privilege against self-incrimination, refuse to submit to an examination by an independent expert, and thereby forego the right to present

expert testimony on the issue of insanity. *Strickland v. State*, 257 Ga. 230, 357 S.E.2d 85 (1987).

Finding of no custodial interrogation not clearly erroneous. — Trial court's finding that defendant was not restrained to the degree associated with formal arrest was not clearly erroneous because: (1) defendant met with two plain clothes officers and defendant's high school principal in the principal's office; (2) defendant appeared to understand the officers and personally identified defendant as one of the people photographed using stolen credit cards after defendant was shown the photographs; (3) the officers' manner was conversational and defendant did not appear frightened; (4) defendant was not in handcuffs, defendant had not been told that defendant was not free to go or under arrest, and defendant was never threatened or promised anything; and (5) defendant never asked to terminate the meeting, defendant never objected to the questioning, and defendant agreed to accompany the officers to the police department for further questioning. *Dillard v. State*, 272 Ga. App. 523, 612 S.E.2d 804 (2005).

Trial court did not err when the court ruled that the defendant was not in custody when the defendant made statements during the execution of a search warrant of the defendant's home, and thus Miranda warnings were not required when an officer and an investigator testified that the defendant was not under formal arrest during the execution of the search warrant, the defendant moved about the defendant's home without restriction, made and received telephone calls without restraint, and was free to leave the property. *Quedens v. State*, 280 Ga. 355, 629 S.E.2d 197 (2006).

Defendant was not in custody for purposes of Miranda because the defendant agreed to accompany officers to the police station, did not appear to be under the influence of alcohol or drugs, was told the defendant was free to leave, but agreed to remain at the station, was made comfortable, and was not denied access to a telephone. *Bell v. State*, 280 Ga. 562, 629 S.E.2d 213 (2006).

Requiring defense counsel to produce copies of videotape not an act of

incrimination. — Trial court's reproduction of missing videotape exhibits for appeal was proper because, inter alia, contrary to the defendant's claim, requiring defense counsel to turn over counsel's copy of the tapes was not an act of incrimination against the defendant, but rather was an effort to allow the defendant to complete the record in the defendant's own appeal. *Hughes v. State*, 298 Ga. App. 113, 679 S.E.2d 121 (2009).

Scar, voluntarily exhibited, can be examined by doctor on cross-examination. *Gordon v. State*, 68 Ga. 814 (1882).

Scope of cross-examination is limited to matters opened by direct examination. *Bishop v. Bishop*, 157 Ga. 408, 121 S.E. 305 (1924).

When a defendant voluntarily testifies to matters on direct examination, a defendant can be cross-examined, and required to give a physical demonstration, concerning the matters to which the defendant testified to on direct examination. *Scott v. State*, 270 Ga. 93, 507 S.E.2d 728 (1998).

Cited in *Sheppard v. State*, 68 Ga. App. 127, 22 S.E.2d 347 (1942); *Emmett v. State*, 195 Ga. 517, 25 S.E.2d 9 (1943); *Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259 (1944); *Shepherd v. State*, 203 Ga. 635, 47 S.E.2d 860 (1948); *McKay v. Balkcom*, 203 Ga. 790, 48 S.E.2d 453 (1948); *Notis v. State*, 84 Ga. App. 199, 65 S.E.2d 622 (1951); *Allbright v. State*, 92 Ga. App. 251, 88 S.E.2d 468 (1955); *Walther v. Walther*, 219 Ga. 644, 135 S.E.2d 401 (1964); *Bass v. Bass*, 222 Ga. 378, 149 S.E.2d 818 (1966); *Hackney v. State*, 223 Ga. 802, 158 S.E.2d 239 (1967); *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967); *Sark v. State*, 118 Ga. App. 529, 164 S.E.2d 266 (1968); *Hunsinger v. State*, 225 Ga. 426, 169 S.E.2d 286 (1969); *Townsend v. Northcutt*, 121 Ga. App. 230, 173 S.E.2d 470 (1970); *Mallin v. Mallin*, 226 Ga. 628, 176 S.E.2d 709 (1970); *Fryer v. Stynchcombe*, 228 Ga. 576, 186 S.E.2d 885 (1972); *Master v. Savannah Sur. Assocs.*, 148 Ga. App. 678, 252 S.E.2d 186 (1979); *Thompson v. State*, 150 Ga. App. 567, 258 S.E.2d 180 (1979); *Henderson v. State*, 153 Ga. App. 801, 266 S.E.2d 522 (1980); *Baker v. State*, 162 Ga. App. 606, 292 S.E.2d 451 (1982); *State v. Lampl*, 296

Ga. 892, 770 S.E.2d 629 (2015).

Right Against Self-Incrimination

Protection from being compelled to furnish evidence against self. — A defendant cannot be compelled to personally incriminate oneself by acts or words. *Day v. State*, 63 Ga. 667 (1879).

The constitutional guaranty protects one from being compelled to furnish evidence against oneself, either in the form of oral confessions or incriminating admissions of an involuntary character, or of doing an act against one's will which is incriminating in its nature. *Smith v. State*, 17 Ga. App. 693, 88 S.E. 42 (1916); *Aldrich v. State*, 220 Ga. 132, 137 S.E.2d 463 (1964); *Walter v. State*, 131 Ga. App. 667, 206 S.E.2d 662, appeal dismissed, 233 Ga. 10, 209 S.E.2d 605 (1974).

The essential element in the provision of the bill of rights against self-incrimination is that no one shall be compelled to give evidence tending to incriminate that person personally. *State v. J.T.*, 155 Ga. App. 812, 273 S.E.2d 214 (1980).

Applicability of privilege. — The constitutional privileges against self-incrimination are applicable to post-arrest, pretrial police interrogation as well as to the trial itself, i.e., the accused cannot be compelled to testify at trial. *Howard v. State*, 237 Ga. 471, 228 S.E.2d 860 (1976).

Defendant in a criminal case, an attorney who was the sole shareholder of a professional corporation, was properly held in civil contempt for not producing a noncompetition agreement between the corporation and a former employee. The agreement was a corporate document, and the defendant had been subpoenaed to produce the document as a corporate agent; thus, the defendant could not assert the defendant's personal right against self-incrimination and the small size of the corporation was immaterial. *Thompson v. State*, 294 Ga. App. 363, 670 S.E.2d 152 (2008).

Criminal Procedure Discovery Act. — The requirement of O.C.G.A. § 17-16-4, part of the Criminal Procedure Discovery Act, that a defendant disclose any mitigating evidence the defendant

Right Against Self-Incrimination (Cont'd)

intended to introduce in the presentence hearing did not violate the defendant's privilege against self-incrimination; statements of witnesses a defendant intends to call to testify are not personal to the defendant, and although the disclosure of the list of witnesses a defendant intends to call is personal to the defendant, a trial court can exercise its discretion to specify the time, place, and manner of making the discovery and to enter such orders as seem just under the circumstances when self-incrimination concerns arise, such as a protective order or a continuance pending the completion of the guilt/innocence phase of the trial. *Muhammad v. State*, 282 Ga. 247, 647 S.E.2d 560 (2007).

Implied consent warnings administered to motorists suspected of driving under the influence need not inform them of their privilege against self-incrimination. *Heller v. State*, 234 Ga. App. 630, 507 S.E.2d 518 (1998).

Statements voluntary. — Statements the defendant made at the scene and the station during an interview were admissible because the defendant received and waived Miranda warnings before making the incriminating statements, and the defendant's interrogators testified that the interrogators made no threats or promises and did not coerce the defendant in any way. *Simmons v. State*, 291 Ga. 664, 732 S.E.2d 65 (2012).

Extent of protection afforded by provision. — The protection is not limited to cases where the question or answer has a direct tendency to incriminate the defendant, or to expose the defendant to a penalty or forfeiture, but the defendant is protected from answering any question which may form a link in the chain by which such cases are to be established. *Simpson v. Simpson*, 233 Ga. 17, 209 S.E.2d 611 (1974).

Unlawful to compel person under suspicion to produce evidence upon which the person could be convicted. *Walter v. State*, 131 Ga. App. 667, 206 S.E.2d 662, appeal dismissed, 233 Ga. 10, 209 S.E.2d 605 (1974).

Prosecutor's reference to defendant's right to have psychiatrist not

testify was not a violation of defendant's right against self-incrimination. *Willett v. State*, 223 Ga. App. 866, 479 S.E.2d 132 (1996).

Testimony that was an improper comment on a defendant's silence or failure to come forward was an impropriety but did not automatically require reversal. *Bruce v. State*, 268 Ga. App. 677, 603 S.E.2d 33 (2004).

Because an agent's improper reference during testimony to the defendant's invocation of the right to remain silent was made gratuitously and not in response to a specific question, because the state did not highlight the statement for the jury or suggest any inference that could be drawn from the defendant's invocation, and, because after several more questions, the trial court removed the jury from the courtroom, but no further reference was made to the improper statement, it was unlikely that the statement had an impact on the verdict; the evidence was strong, when juxtaposed with the likely impact of the statement, and, thus, the improper statement was harmless beyond a reasonable doubt. *Kania v. State*, 280 Ga. App. 356, 634 S.E.2d 146 (2006).

An officer's vague, nonresponsive comment, in response to defense counsel's interrogation, that the defendant had invoked the defendant's right to remain silent did not merit reversal as defense counsel had quickly moved past the comment and the state had not drawn attention to the comment or encouraged the jury to infer guilt from the defendant's silence. *Lenon v. State*, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Conviction for driving under the influence was affirmed because the prosecutor did not manifestly intend to comment on the defendant's failure to testify and the nature of the statement by the prosecutor was not such that the jury would naturally and necessarily have taken the statement to be such a comment. Moreover, even assuming that the statement was an improper comment on the defendant's failure to testify, considering that the comment did not appear intentionally designed to or likely to urge any negative inference, the context in which the comment was made, and the strength of the

evidence against the defendant, any error was harmless beyond a reasonable doubt. *Schenck v. State*, 307 Ga. App. 890, 706 S.E.2d 218 (2011).

Provision construed to limit state from forcing individual to present “evidence, oral or real.” — While the language of the Fifth Amendment in the United States Constitution has long been construed to be limited to “testimony,” the language of this paragraph has been construed to limit the state from forcing the individual to present “evidence, oral or real.” *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

An accused cannot be compelled to produce evidence, oral or real, regardless of whether or not it is “testimonial.” *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

Impermissible to compel accused to perform act resulting in production of incriminating evidence. — Although evidence may be compulsorily adduced from an accused, it is constitutionally impermissible to compel an accused to perform an act which results in the production of incriminating evidence. The distinction is between forcing an accused to do an act against the accused’s will and requiring an accused to submit to an act; the latter “takes evidence from the defendant” and is constitutionally acceptable, the former compels the defendant, in essence, to give evidence which violates an individual’s right against self incrimination. *State v. Armstead*, 152 Ga. App. 56, 262 S.E.2d 233 (1979).

Impermissible to compel handwriting exemplar. — To compel a handwriting exemplar is to compel the defendant to do an act, not to submit to an act. *State v. Armstead*, 152 Ga. App. 56, 262 S.E.2d 233 (1979).

Requiring suspect to give voice exemplar for identification purposes does not violate privilege against self-incrimination. *Davis v. State*, 158 Ga. App. 549, 281 S.E.2d 305 (1981).

Rights violated when defendant forced to produce evidence against the defendant’s will. — When a police officer compels a defendant to produce, against the will of the defendant, illegal lottery tickets by threat and by placing

the officer’s hand on a pistol, the method of forcing the defendant to produce this evidence violates the defendant’s constitutional rights, in that it compels the defendant to produce evidence to incriminate oneself. *Grant v. State*, 85 Ga. App. 610, 69 S.E.2d 889 (1952).

Against public policy to call accused before grand jury. — The grand jury has no lawful right to call the accused before it while considering the bill of indictment against the accused, and swear or question the accused regarding such charge. It is against the public policy of this state. *Jenkins v. State*, 65 Ga. App. 16, 14 S.E.2d 594 (1941).

Self-incrimination would result from use of notice to produce. — When the state, through resort to the notice to produce, in effect seeks to reseize property and redvest the defendant of custody and possession by retaining it and using it as evidence in a criminal proceeding, the state may not use a notice to produce to accomplish this end. Unconstitutional self-incrimination would be the result of compliance with the state’s notice. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

When use of notice to produce prohibited. — The state may not, by using a notice to produce pursuant to former Code 1933, §§ 38-801 and 38-802 and Ga. L. 1966, p. 502, § 2 (see now O.C.G.A. §§ 24-10-26 and 24-10-29), attempt to secure indirectly the same disposition of the property which would have obtained in accordance with former Code 1933, § 79A-828 (see now O.C.G.A. § 16-13-49) had the state’s libel for condemnation been successful. *Johnson v. State*, 156 Ga. App. 496, 274 S.E.2d 837 (1980).

No violation of rights by removal of bullet. — Constitutional rights of defendant were not violated by the state in requiring the removal of a bullet from the defendant’s body. *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972), cert. dismissed, 410 U.S. 975, 93 S. Ct. 1454, 35 L. Ed. 2d 709 (1973).

“Testimony” means all types of evidence. *Aldrich v. State*, 220 Ga. 132, 137 S.E.2d 463 (1964), commented on in 16 Mercer L. Rev. 315 (1964).

Codefendant cannot be compelled to testify. — The defendant is not un-

Right Against Self-Incrimination (Cont'd)

fairly deprived of favorable testimony when the trial court, at the state's suggestion, advises an unrepresented codefendant of the co-defendant's constitutional rights as a witness and, after the trial court advises the co-defendant of the co-defendant's rights and appoints counsel for the co-defendant, the co-defendant chooses not to testify. Neither the trial court, the state, nor a codefendant can compel another codefendant to testify in favor of a calling codefendant, for to do so violates constitutional protections. *In re J.S.S.*, 168 Ga. App. 340, 308 S.E.2d 855 (1983).

No need to advise defendant of rights when defendant did not testify. — Since defendant did not testify and was not cross-examined, there was no harm in the trial court's failure to advise the defendant of the defendant's right not to be compelled to testify under oath. *Coonce v. State*, 171 Ga. App. 20, 318 S.E.2d 763 (1984).

Debtor bears burden to establish privilege to fieri facias interrogatories. — When interrogatories in fieri facias do not constitute or evidence extensive questioning as to the judgment debtor's financial affairs which would tend, as a matter of law, to incriminate the debtor, work a forfeiture of the debtor's estate, or bring disgrace or infamy upon the debtor or the debtor's family, but are clearly within the ambit of O.C.G.A. § 9-11-69, the burden is on the debtor to state the general reason for the debtor's refusal to answer and to specifically establish that a real danger of incrimination exists with respect to each question. *Petty v. Chrysler Credit Corp.*, 169 Ga. App. 418, 312 S.E.2d 874 (1984).

No blanket privilege in civil case. — There was no blanket right to refuse to answer questions in civil proceedings based on the self-incrimination privilege and when there was no transcript of the hearing at which the trial court made the court's finding that the privilege was not implicated, the appellate court presumed that evidence supported the trial court's finding and order compelling discovery;

further, the trial court's order compelling an employee and the husband to produce financial documents such as checks, account statements, and tax returns in a civil proceeding did not violate the self-incrimination privilege. *Dempsey v. Kaminski Jewelry, Inc.*, 278 Ga. App. 814, 630 S.E.2d 77 (2006).

Driver could not assert right against self-incrimination to suppress results of field sobriety test since the driver was not a person "charged in a criminal proceeding" at the time the test was given, the driver was not in police custody at that time, and no force or threat of penalty was used against the driver. *Montgomery v. State*, 174 Ga. App. 95, 329 S.E.2d 166 (1985).

In a prosecution for driving under the influence, evidence of a field sobriety test should not have been excluded when the defendant was not in custody at the time the test was administered. *State v. Leviner*, 213 Ga. App. 99, 443 S.E.2d 688 (1994).

There was no violation of the defendant's right against self-incrimination because the defendant was not in custody at the time field sobriety tests were administered. *State v. Sumlin*, 224 Ga. App. 205, 480 S.E.2d 260 (1997).

Defendant was not in custody nor compelled by force or threats to perform roadside sobriety tests in violation of the defendant's rights against self-incrimination. *Sisson v. State*, 232 Ga. App. 61, 499 S.E.2d 422 (1998).

No violation of right by requiring defendant to strip to waist and be photographed. — Requiring a defendant to strip to the defendant's waist and be photographed neither compelled the defendant to be a witness nor compelled the defendant to give testimony tending in any manner to be self-incriminating. *Ingram v. State*, 253 Ga. 622, 323 S.E.2d 801 (1984), cert. denied, 473 U.S. 911, 105 S. Ct. 3538, 87 L. Ed. 2d 661 (1985).

Requiring suspect to verbalize specified words for identification purposes, whether or not the words used are the same as those allegedly used during the commission of the offense, does not violate an accused's privilege against self-incrimination accorded the accused

by the United States Constitution and the state's statutes and Constitution. *Clark v. State*, 166 Ga. App. 366, 304 S.E.2d 494 (1983).

Defendant does not have right to refuse to speak at a post-indictment lineup. *Jenkins v. State*, 167 Ga. App. 840, 308 S.E.2d 14 (1983).

No violation by taking of blood sample. — The compelled taking of a blood sample does not violate a defendant's constitutional privilege against self-incrimination. *Welch v. State*, 254 Ga. 603, 331 S.E.2d 573 (1985).

No violation by taking of blood and urine samples. — Admitting the results of blood and urine analysis into evidence in the defendant's felony murder trial did not violate U.S. Const., amend. V, Ga. Const. 1983, Art. I, Sec. I, Para. XVI, or former O.C.G.A. § 24-9-20(a) (see now O.C.G.A. § 24-5-506) because the removal of a substance from the body through a minor intrusion did not cause the defendant to be a witness against oneself within the meaning of the Fifth Amendment and similar provisions of Georgia law. *Bowling v. State*, 289 Ga. 881, 717 S.E.2d 190 (2011).

Obtaining of blood, hair, and saliva samples from an accused represent "minor intrusions" which do not cause the person to be a witness against themselves within the meaning of the constitution. *Calloway v. State*, 199 Ga. App. 272, 404 S.E.2d 811 (1991).

Use of body excrement. — The use of a substance naturally excreted by the human body does not violate a defendant's right against self-incrimination under the Georgia Constitution. *Green v. State*, 260 Ga. 625, 398 S.E.2d 360 (1990), cert. denied, 500 U.S. 935, 111 S. Ct. 2059, 114 L. Ed. 2d 464 (1991); *State v. Leviner*, 213 Ga. App. 99, 443 S.E.2d 688 (1994).

The use of a substance naturally excreted by the human body does not violate a DUI suspect's constitutional rights, and therefore there is no requirement that one be informed of one's right against self-incrimination. *Nawrocki v. State*, 235 Ga. App. 416, 510 S.E.2d 301 (1998).

No violation of right by admission of blood test refusal. — The admission of a refusal to submit to blood-alcohol

chemical test does not violate the constitutional right against self-incrimination. *Wessels v. State*, 169 Ga. App. 246, 312 S.E.2d 361 (1983).

Taking of dental impressions, dental photographs, and a dental examination of the accused did not violate the provision against incrimination because there was no surgical foray into the body of the accused which would require the additional precaution of an evidentiary hearing before a superior court to assure safe medical procedures, and to extend the Constitution so far would prohibit reasonable police practices, such as the taking of fingerprints, to which the taking of dental impressions is analogous. *State v. Thornton*, 253 Ga. 524, 322 S.E.2d 711 (1984).

The fact-finder's consideration of the accused's demeanor in reaction to the testimony of others, even when the accused does not take the stand, does not violate the Fifth Amendment to the United States Constitution or Ga. Const. 1983, Art. I, Sec. I, Para. XVI. In re *M.E.H.*, 180 Ga. App. 591, 349 S.E.2d 814 (1986).

Prosecutor's statement that only two people knew what went on in the room where an assault occurred, the victim and defendant, did not violate defendant's rights against self-incrimination. *Neal v. State*, 198 Ga. App. 518, 402 S.E.2d 114 (1991).

Prosecutor's comment about the defense's failure to rebut state's evidence was not an improper comment on the defendant's failure to testify. *Lenon v. State*, 290 Ga. App. 626, 660 S.E.2d 16 (2008).

Incrimination prerequisite determination not satisfied. — Attorney who delivered an anonymous campaign contribution on behalf of a client in violation of O.C.G.A. § 21-5-30(e) was improperly held in contempt for failing to disclose the client's name to the State Ethics Commission; the attorney invoked the self-incrimination privilege, and the trial court found the attorney in contempt without first determining whether the commission's proposed questions might have been incriminating. *Begner v. State Ethics Comm'n*, 250 Ga. App. 327, 552 S.E.2d 431 (2001).

Right Against**Self-Incrimination (Cont'd)**

Right to remain silent. — Defendant invoked the right to remain silent and the state police investigator's questions that got defendant to talk about the shooting violated defendant's Fifth Amendment rights because they were not routine booking questions exempt under Miranda's right to remain silent provision; thus, the inculpatory statements made by defendant had to be suppressed. *State v. Nash*, 279 Ga. 646, 619 S.E.2d 684 (2005).

Defendant's suppression motion was properly denied as to the statements the defendant gave the police before the defendant was given the defendant's Miranda warnings as, although the defendant was in custody as the defendant was approached at gunpoint, handcuffed, and placed on the ground while guarded by three police officers even before the defendant was advised that the defendant was under arrest, the defendant was not subjected to interrogation as the officers asked the defendant's father, not the defendant, about the missing truck, and their questions to the father were not reasonably likely to elicit any response from the defendant. *Waters v. State*, 281 Ga. 119, 636 S.E.2d 538 (2006).

Improper comment on defendant's silence required new trial. — Because the trial court erroneously commented on the defendant's refusal to make a post-arrest statement to police, and the error, absent a curative instruction, was not harmless or the result of inadvertence, the defendant's robbery by sudden snatching conviction was reversed; thus, the trial court erred in denying the defendant a new trial on those grounds. *Wright v. State*, 287 Ga. App. 593, 651 S.E.2d 852 (2007).

Not in custody. — Defendant's motion to suppress two statements the defendant made to the police were properly denied as the defendant was not in custody when the defendant made the statements; the defendant's motion to suppress a third statement was properly denied as the defendant was read the defendant's Miranda rights before the defendant made the statement. *Durham v. State*, 281 Ga. 208, 636 S.E.2d 513 (2006).

As the defendants voluntarily went to the police station, were not under formal arrest at any time during their interviews, and were told before the interview that the defendants were free to leave, a reasonable person in the defendants' situation would not have felt so restrained as to equate to a formal arrest. Therefore, the failure to give the defendants Miranda warnings did not require suppression of the defendants' statements. *Carter v. State*, 285 Ga. 394, 677 S.E.2d 71 (2009).

Defendant driven to hospital by police not in custody and Miranda not required. — Since the defendant was not under formal arrest or any restraint when an officer questioned the defendant in the defendant's hotel room and drove the defendant to a hospital, Miranda warnings were not required. That the defendant was the focus of a murder investigation did not require the officer to give Miranda warnings; the relevant inquiry was whether a reasonable person in the defendant's situation would have perceived that the person was in custody. *Timmreck v. State*, 285 Ga. 39, 673 S.E.2d 198 (2009).

Jury instructions. — When during deliberations a juror sent a note asking for an answer from defendant about why defendant was on the burglary victim's property on the morning of the burglary, the failure to recharge the jury that defendant was not required to testify and that the jury should not make any adverse inferences against the defendant for not testifying did not violate defendant's right against self-incrimination since neither the jury nor defendant requested such a recharge. *Lovelace v. State*, 262 Ga. App. 690, 586 S.E.2d 386 (2003).

No violation in asking defendant to stand at juror's request. — Trial court did not err by complying with a juror's request that the defendant briefly stand before the jury before the jury watched a video of a drug transaction a second time. *Butler v. State*, 277 Ga. App. 57, 625 S.E.2d 458 (2005).

Claim of Privilege

Questioning must come when witness invokes privilege. — When a witness testifies under oath that the witness's answer to any question asked of the

witness would incriminate the witness and comes within the constitutional immunities guaranteed to the witness, the court can demand no further testimony of the fact. *Interstate Life & Accident Ins. Co. v. Wilmont*, 123 Ga. App. 337, 180 S.E.2d 913 (1971).

Trial court did not engage in the required analysis for a witness asserting a Fifth Amendment privilege, but merely declared that answering the questions concerning knowledge of the court's order regarding removing a child from a father's home would not incriminate the witness; at a minimum, such knowledge would establish a link in the chain of evidence needed to prove the witness was in contempt of that order and the trial court's finding of contempt based on the witness's refusal to answer the question was improper. *In re Tidwell*, 279 Ga. App. 734, 632 S.E.2d 690 (2006).

When co-defendants claimed privilege, motion for continuance properly denied. — At the time of the defendant's trial, defendant's potential witnesses' appeals were pending and their counsel informed the defendant that, if called as witnesses, they would assert their privilege against self-incrimination; therefore, the defendant could not satisfy the requirement of showing that the witnesses would be available at the next term of court and, thus, the trial court did not abuse the court's discretion by denying the defendant's motion for a continuance under O.C.G.A. § 17-8-25. *Pope v. State*, 266 Ga. App. 658, 598 S.E.2d 48 (2004).

Party's invocation of privilege must be honored. — A questioned party's invocation of the party's constitutional privilege to be free from compulsion to testify against the party must be honored. *Eason v. Berger & Co.*, 153 Ga. App. 126, 264 S.E.2d 579 (1980).

Privilege is personal and cannot be claimed for benefit of another. — Joint principals to a crime as accomplices are competent witnesses against each other, and while the one sought to be used as a witness has the right to claim the protection afforded by this paragraph, this constitutional guaranty is a personal privilege belonging to the witness and cannot be claimed for the witness for the benefit

of another party. *Dye v. State*, 77 Ga. App. 517, 48 S.E.2d 742 (1948).

Witness must but accused need not claim privilege when before grand jury. — If the person testifying before a general grand jury is a mere witness, the person must claim the privilege on the ground that the person's answers will incriminate; whereas, if the person be in fact the party proceeded against, the person cannot be subpoenaed and sworn, even though the person claims no privilege. *Jenkins v. State*, 65 Ga. App. 16, 14 S.E.2d 594 (1941).

No presumption of guilt because accused does not deny charges. — It has long been Georgia law that an accused who is taken into custody cannot be presumed to acknowledge guilt just because the accused does not deny the charges. *Emmett v. State*, 243 Ga. 550, 255 S.E.2d 23 (1979).

Prosecution may not use claim of privilege against defendant. — Evidence as to silence on the part of the defendant at the time of the defendant's arrest should be excluded when objected to, for the defendant is entitled to remain silent, and the prosecution may not use against the defendant the fact that the defendant stood or claimed the defendant's privilege. *Kitchens v. State*, 150 Ga. App. 707, 258 S.E.2d 544 (1979).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial due to a fire investigator's comments on defendant's exercise of defendant's right to remain silent as the motion was initially made before any such testimony was given, and, while in the second instance the investigator did improperly comment on the exercise of defendant's right, the trial court properly gave the jurors a curative instruction and specifically asked them whether they could disregard the testimony. *George v. State*, 263 Ga. App. 541, 588 S.E.2d 312 (2003).

Evidence of defendant's post-arrest silence admitted in error harmless. — In a prosecution for battery and aggravated assault, defense counsel's failure to object to a police officer's single gratuitous reference to the defendant's post-arrest silence was not reversible error because, in view of the strong evidence of the de-

Claim of Privilege (Cont'd)

defendant's guilt, this error was unlikely to have affected the outcome of the trial. *Crawford v. State*, 294 Ga. App. 711, 670 S.E.2d 185 (2008).

Waiver of Privilege

Privilege against self incrimination can be waived in praesenti. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

Witness may voluntarily answer questions. — A witness, fully apprised of the witness's rights, under this paragraph, may voluntarily answer questions tending to degrade or incriminate the witness. *Gravett v. State*, 74 Ga. 191 (1884); *Wilburn v. State*, 141 Ga. 510, 81 S.E. 444 (1914).

Defendant initiated discussions. — Statements made while the defendant was in jail were admissible because it was clear that the defendant initiated the conversation in question, and persisted in talking to the investigator after the investigator reminded defendant that the investigator could not discuss the case in the absence of defense counsel. *Quedens v. State*, 280 Ga. 355, 629 S.E.2d 197 (2006).

Harmless error in admitting voluntary statement. — Even if it was error to admit defendant's pre-Miranda custodial statement that was both voluntary and not incriminating, even though it appeared to have been made in response to a police officer's statement which was a psychological ploy designed to elicit an incriminating response, the error was harmless. *Brown v. State*, 273 Ga. App. 577, 615 S.E.2d 628 (2005).

Complete waiver of privilege when defendant testifies voluntarily. — A defendant in a criminal case who voluntarily testifies in the defendant's own behalf waives completely the defendant's privilege under the Fifth Amendment and this paragraph. Furthermore, when a defendant voluntarily takes the stand in the defendant's own behalf and testifies as to the defendant's guilt or innocence as to a particular offense, the defendant's waiver is not partial; having once cast aside the cloak of immunity, the defendant may not resume it at will, whenever cross-examination may be inconvenient or embar-

rassing. *Leonard v. State*, 146 Ga. App. 439, 246 S.E.2d 450 (1978).

Allowing a codefendant to give testimony regarding the substance of defendant's prior testimony at a probation revocation hearing, after defendant elected not to take the stand at trial, did not violate the defendant's privilege against self-incrimination, since defendant waived the privilege by testifying voluntarily on the defendant's behalf at the prior hearing. *Bobbitt v. State*, 215 Ga. App. 131, 449 S.E.2d 674 (1994).

Age and education as factors in capacity to waive rights. — The mere fact that the defendant was 21 years old with a sixth grade education does not lead to the conclusion that the defendant was incapable of knowingly, voluntarily, and intelligently waiving the defendant's constitutional rights. *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980).

Under Georgia statutes, those who have reached the age of 17 are no longer considered juveniles by Georgia's criminal justice system. Therefore, for purposes of *Miranda*, statements made by a person who is at least 17 years old are admissible if made voluntarily, without being induced by the hope of benefit or coerced by threats. *Garlington v. State*, 268 Ga. App. 264, 601 S.E.2d 793 (2004).

Juvenile waiver-of-rights form. — The trial court did not err in finding that a defendant made a knowing and intelligent waiver of the defendant's federal and state constitutional rights prior to giving a statement to police because a juvenile waiver-of-rights form was read in its entirety to, and signed by, the defendant and the defendant's parent, and neither the defendant nor the defendant's parent ever invoked the defendant's right to remain silent or asked that the questioning cease. *Norris v. State*, 282 Ga. 430, 651 S.E.2d 40 (2007).

Advisement of charges not relevant. — Failure to advise a defendant as to the crimes about which the defendant was to be questioned before a *Miranda* waiver was irrelevant to whether the waiver was knowing and voluntary. *Rivera v. State*, 279 Ga. App. 1, 630 S.E.2d 152 (2006).

Privilege against self incrimination can be voluntarily waived by property settlement agreement as to future income tax returns and financial information covering future financial events unknown at the time of entering into the contract. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

Express notice or reference to waiver not required. — When a person represented by counsel enters into a property settlement agreement which has the necessary effect of waiving a constitutional right, express notice of or reference to such waiver is not required. *Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980).

Waiver not invalidated by presence of attorney hired by mother. — Waiver of Miranda rights was not invalid due to police officers' failure to tell a defendant that an attorney hired by the defendant's mother had arrived at the station, because the attorney, without having consulted the defendant, was not empowered to invoke the defendant's personal rights. *Bell v. State*, 280 Ga. 562, 629 S.E.2d 213 (2006).

Waiver at former trial is immaterial. *Georgia R.R. & Banking Co. v. Lybrend*, 99 Ga. 421, 27 S.E. 794 (1896).

Failure to base objection on self-incrimination claim waived the claim. — In a prosecution against a defendant for aggravated assault and other charges arising out of a road rage incident, the defendant waived a claim that a subpoena directing the production of the defendant's gun violated the defendant's rights against self-incrimination; when the defendant raised the claim in a motion to quash the subpoena, the trial court reserved ruling on the argument, and when the defendant objected to the admission of the gun into evidence, the defendant limited the grounds of the objection to a claim that the chain of custody had not been proven and did not raise the objection that the defendant's self-incrimination rights were being violated. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Trial judge was authorized to accept the interrogating officers' testimony and to find that the defendant's statement to police was voluntary and in accordance

with Ga. Const. 1983, Art. I, Sec. I, Para. XVI; although the defendant claimed that the defendant's statement to police was not voluntary due to various factors, the trial court was authorized to credit police testimony indicating that the defendant voluntarily waived the defendant's Miranda rights. *Carswell-Danso v. State*, 281 Ga. App. 576, 636 S.E.2d 735 (2006).

Defendant's trial counsel did not provide ineffective assistance in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XIV for failing to file a motion to exclude the introduction of the defendant's videotaped statement admitting to having sex with the victim and for failing to move to exclude or object to evidence of a prior molestation; there was no basis for such a motion, as the defendant's videotape showed the defendant being advised of and waiving the defendant's Miranda rights under Ga. Const. 1983, Art. I, Sec. I, Para. XIV, and the evidence of the prior molestation was admissible at trial and no compliance with Ga. Unif. Super. Ct. R. 31.3 governing similar transactions was required. *Hutchens v. State*, 281 Ga. App. 610, 636 S.E.2d 773 (2006), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Statements made prior to waiver. — Admission of voluntary statements, freely given, prior to a waiver was harmless error, if error at all, given the other cumulative evidence of guilt. *Jackson v. State*, 274 Ga. App. 26, 619 S.E.2d 294 (2005).

Defendant's refusal to sign Miranda waiver form was not an invocation of the right to remain silent or to counsel. *Hunter v. State*, 273 Ga. App. 52, 614 S.E.2d 179 (2005).

Waiver not invalidated by failure to inform of all charges. — Fact that an officer failed to give a Miranda warning that specifically notified the defendant that the defendant was going to be questioned about an armed robbery, instead of just outstanding bad check charges, did not render the defendant's ensuing statement inadmissible. *Hill v. State*, 279 Ga. App. 402, 631 S.E.2d 446 (2006).

Defendant waived defendant's claim that defendant's statement was not voluntary and that defendant was not properly advised of defendant's

Waiver of Privilege (Cont'd)

Miranda rights as defendant failed to induce a ruling on the issue, even though defendant had filed a motion for a Jackson-Denno hearing and a motion in limine to exclude defendant's statement, and argued the issue during the hearing on defendant's motion to suppress. *Bond v. State*, 271 Ga. App. 849, 610 S.E.2d 609 (2005).

Waiver of constitutional rights in guilty plea. — Because the transcript of proceedings and trial counsel's affidavit did not show that defendant was advised that a guilty plea would waive the privilege against self-incrimination and the right to confrontation, the trial court erred in denying defendant's habeas corpus petition. *Green v. State*, 279 Ga. 687, 620 S.E.2d 788 (2005).

Habeas court's finding that a petitioner's guilty pleas were validly entered was reversed as the waiver forms signed by the petitioner and reviewed with the petitioner by the petitioner's attorneys addressed only the right to be tried by a jury; the waiver forms did not advise the petitioner that the petitioner was waiving the petitioner's right against self-incrimination and the petitioner's confrontation right. *Beckworth v. State*, 281 Ga. 41, 635 S.E.2d 769 (2006).

Waiver held to have been knowing and voluntary. — A trial court did not err in ruling that a defendant's statements were made following a knowing and voluntary waiver of the right against self-incrimination: the 15-year-old defendant (1) stated that the defendant wanted to speak to an officer the morning after the defendant had refused to talk to police after being given Miranda warnings; (2) was given Miranda warnings again after indicating a willingness to talk, and did not request the presence of a relative or an attorney; and (3) had received no threats or promises from the attending officer. *Nelson v. State*, 289 Ga. App. 326, 657 S.E.2d 263 (2008).

Evidence supported the trial court's finding that a defendant waived the defendant's right to counsel and that the defendant's statements to a detective were made voluntarily; thus, the statements

were properly admitted into evidence. After the defendant said that the defendant wanted a lawyer, the defendant said that the defendant would tell the detective what happened if the defendant could speak to the defendant's family; after speaking with family members, the defendant was again advised of the defendant's rights and waived those rights; and after again asking to speak to police the next day, the defendant was again advised of the defendant's rights and waived those rights. *Holmes v. State*, 284 Ga. 330, 667 S.E.2d 71 (2008).

Trial court did not err in admitting a defendant's custodial statement into evidence, although the defendant argued that the defendant was illiterate and was awoken at 3 A.M. to give a statement, because the interviewing officer read the defendant the defendant's rights; the defendant appeared to understand those rights; the defendant complained of no physical injury or ailment; the police removed the defendant's handcuffs, permitting the defendant to use the restroom, and offered the defendant water; and the defendant did not appear groggy or non-responsive after napping. *Billingsley v. State*, 294 Ga. App. 661, 669 S.E.2d 699 (2008).

Admission of a defendant's inculpatory statement during the defendant's armed robbery trial was not an abuse of discretion based on the fact that the defendant had completed the ninth grade, the fact that the defendant acknowledged the seriousness of the crime the defendant was charged with, and the fact that the defendant also acknowledged that the defendant understood the defendant's right to counsel and the right to remain silent; the totality of the circumstances indicated that the sixteen years and nine months old defendant, gave the statement voluntarily after a knowing and intelligent waiver of the defendant's rights. *Killings v. State*, 296 Ga. App. 869, 676 S.E.2d 31 (2009).

Trial court did not err in concluding that the defendant made a knowing and voluntary waiver of the defendant's Miranda rights, despite the testimony of the defendant's expert witness to the contrary, because: (1) the detective who inter-

viewed the defendant testified that the defendant said that the defendant was not under the influence of alcohol or drugs; (2) the detective had experience in dealing with people under the influence of alcohol or drugs; (3) the detective saw no evidence that the defendant was under the influence of alcohol or drugs; (4) the defendant had no difficulty speaking or communicating; (5) the detective read the defendant the defendant's Miranda rights; and (6) the defendant said that the defendant understood each of the rights. *Watkins v. State*, 289 Ga. 359, 711 S.E.2d 655 (2011).

Revocation of waiver of right to counsel during interrogation. — Defendant signed a Miranda waiver, later invoked the right to counsel, and still later, told another officer the defendant wanted to talk. As the defendant was re-Mirandized and re-signed the waiver of rights form, and the interviewing officer testified the officer neither made promises to the defendant nor coerced the defendant to give a statement, the defendant's confession to armed robbery was properly admitted into evidence. *Grant-Farley v. State*, 292 Ga. App. 293, 664 S.E.2d 302 (2008).

Immunity from Prosecution

No common-law transactional immunity exists in Georgia in the sense of the protection of a witness who gives up a valuable right. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

Criminal contempt conviction reversed. — Defendant's criminal contempt conviction was reversed as the trial court relied on another court's ex parte immunity grant in ordering defendant to testify and neither court made a finding that defendant's testimony was "necessary to the public interest" as required by O.C.G.A. § 24-9-28; the state had to grant a valid immunity as broad in scope as the privilege it replaced and show the applicability of that state immunity to the witness. *In re Long*, 276 Ga. App. 306, 623 S.E.2d 181 (2005).

Limitation on promise to forego prosecution. — A promise to forego prosecution must be limited to prosecution as to specific crimes or transactions. *State v.*

Hanson, 249 Ga. 739, 295 S.E.2d 297 (1982).

Matters to be specified in promise to forego prosecution. — A valid promise to forego prosecution based on prosecutorial discretion rather than on O.C.G.A. § 24-9-28 must, first, contain a description of the crimes or transactions in regard to which an individual is excused from prosecution, and, secondly, the prosecutor must obtain court approval of an agreement to forego prosecution. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

Immunity not available when no constitutional right forfeited. — When defendant neither engaged in a plea bargain nor was compelled to testify but apparently gave information in exchange for dismissal of charges against the defendant and a promise of the prosecutor not to prosecute the defendant for any crimes committed prior to September, 1980, the defendant gave up no constitutional right, and was not entitled to immunity for purpose of constitutional protection. *State v. Hanson*, 249 Ga. 739, 295 S.E.2d 297 (1982).

Evidence

1. In General

Incriminating statement is not direct evidence of guilt. — A statement which does not confess guilt, though incriminating in nature, is an admission only. As such, it is not direct evidence of guilt, but only circumstantial evidence tending to prove the offense when considered with other evidence and may be used to justify a conviction. *Thompson v. State*, 151 Ga. App. 128, 258 S.E.2d 776 (1979).

Defendant's demand for counsel does not bar voluntary statements if defendant spontaneously incriminates the defendant after questioning has ceased. *United States v. Webb*, 633 F.2d 1140 (5th Cir. 1981).

Defendant not required to testify. — Refusal to permit defendant to introduce evidence of a victim's violent acts against third persons during the state's case was not tantamount to mandating that defendant testify, despite evidence that: (1) the victim pinned defendant against a wall;

Evidence (Cont'd)**1. In General (Cont'd)**

(2) defendant ran into a house screaming that defendant had been robbed and reported the robbery to the police; (3) defendant had fresh cuts or bruises on the neck; and (4) defendant reported to police that defendant had shot at someone as defendant tried to fend off a robber; it did not necessarily follow that defendant honestly sought self defense when firing a gun at the victim, given evidence that the victim turned away or ran from the defendant before the shooting and that the victim was shot in the back from at least two and one-half feet away. *Nelloms v. State*, 273 Ga. App. 448, 615 S.E.2d 153 (2005).

2. Admissible

Admissibility of evidence obtained from receiver of accused. — The introduction of documentary evidence obtained from a receiver of the property and assets of one accused of a crime, by the process of subpoena duces tecum, although such evidence may be incriminatory in its nature and tend to convict the accused of a crime, is not violative of this paragraph. *Rawlings v. State*, 163 Ga. 406, 136 S.E. 448 (1926).

Evidence voluntarily given to police is admissible. — The bloody sweater and shoes of a defendant who is charged with robbery by intimidation, when voluntarily given to the officer, are admissible, and the defendant cannot complain of being compelled to testify against the defendant. *Moton v. State*, 225 Ga. 401, 169 S.E.2d 320 (1969).

Because the defendant's spontaneous outburst was voluntarily made and not the product of police interrogation, the evidence was not subject to a hearsay exception, Miranda warnings were not required, and the statement was admissible. *Tennyson v. State*, 282 Ga. 92, 646 S.E.2d 219 (2007).

Based on the totality of the circumstances and the undisputed evidence, because the defendant's confession to a police detective was voluntary and admissible under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-824), not coerced or received as a result of

promises made, and not subject to exclusion due to improper methods used by the police, the trial court did not err in admitting the confession; further, exclusion of the confession was not required based on a violation of the defendant's right to counsel. *Swain v. State*, 285 Ga. App. 550, 647 S.E.2d 88 (2007).

Because the evidence sufficiently showed that the defendant made a rational and intelligent choice to waive the rights outlined under Miranda and speak with police detectives on two separate and distinct occasions, the trial court did not err in denying a motion to suppress those statements. *Starks v. State*, 283 Ga. 164, 656 S.E.2d 518 (2008).

When the defendant asked the reason for the arrest, an officer said, child molestation; the defendant voluntarily responded that the defendant did not think the defendant had touched the child anymore. As the officer's answer had not been reasonably likely to elicit an incriminating response from the defendant, there was sufficient evidence that the defendant's statement was voluntary, not the result of interrogation, to admit the statement despite the lack of Miranda warnings. *Terry v. State*, 293 Ga. App. 455, 667 S.E.2d 109 (2008).

Defendant's state rights against self-incrimination were not violated because the defendant was required to turn over the defendant's clothes to the police for inspection since the defendant did not perform any act against the defendant's will to incriminate the defendant, but surrendered the clothing when asked to do so. *Simpson v. State*, 289 Ga. 685, 715 S.E.2d 142 (2011).

Pat-down was not "custody," so the defendant was not in custody when, immediately after a pat-down, the defendant made an incriminating statement in response to an officer's question, and thus, Miranda warnings were not required. *Montgomery v. State*, 279 Ga. App. 419, 631 S.E.2d 717 (2006).

Because the record indicated that the defendant was not being interrogated and was not in custody at the time two pretrial statements to a police sergeant were made, and a statement to a crimes against children detective was voluntarily given

and involved general and routine booking protocol, those statements were properly admitted. *Ellis v. State*, 283 Ga. App. 808, 642 S.E.2d 869 (2007).

Field sobriety tests. — Miranda played no part in the admissibility of field sobriety test results, notwithstanding the definition of arrest contained in O.C.G.A. § 17-4-1, as the defendant was not under arrest for constitutional purposes when the defendant failed to show any restraints comparable to those associated with formal arrest, the defendant's statement that the defendant knew the officer was going to "take her in" demonstrated defendant's apprehension, not the fact of an arrest, the defendant was not informed that the defendant's detention would not be temporary, and the defendant's performance on the field sobriety tests did not support a claim that the defendant was exposed to custodial interrogation at the scene. *Evans v. State*, 267 Ga. App. 706, 600 S.E.2d 671 (2004).

Defendant's suppression motion was properly denied as an officer was not required to give defendant Miranda warnings before administering field sobriety tests as the officer did not make any statement that would cause a reasonable person to believe that the person was under arrest and not temporarily detained during an investigation. *Moody v. State*, 273 Ga. App. 670, 615 S.E.2d 803 (2005).

Trial court did not err in denying the defendant's motion for a new trial on grounds that a refusal to submit to voluntary field sobriety tests was testimonial in nature, and thus subject to the Fifth Amendment protection against self-incrimination, as a refusal to submit to the tests was not testimonial in nature, and the mere fact that the defendant refused to submit to a blood test was not subject to the privilege against self-incrimination since no impermissible coercion was involved, regardless of the form of refusal. *Ferega v. State*, 286 Ga. App. 808, 650 S.E.2d 286 (2007), cert. denied, 129 S. Ct. 195, 172 L.Ed.2d 140 (2008).

Because there was no evidence that an officer threatened or coerced the defendant to perform three field sobriety tests,

the results of the tests were properly admitted; moreover, as the defendant was not entitled to Miranda warnings prior to performing an alco-sensor test, refusal to undergo the test did not violate any right against self-incrimination. *Clark v. State*, 289 Ga. App. 884, 658 S.E.2d 372 (2008).

Evidence showed that a DUI defendant voluntarily performed three field sobriety tests while the defendant was not in custody, although the defendant had been stopped by a deputy and asked to perform the tests without Miranda warnings. Therefore, the motion to suppress evidence from the tests was properly denied. *Bramlett v. State*, 302 Ga. App. 527, 691 S.E.2d 333 (2010).

Trial court erred in granting the defendant's motion to suppress on the basis of a Miranda violation because the defendant was not in custody for the purposes of Miranda at the time the field-sobriety tests were conducted; nothing in the deputy's words or actions would have caused a reasonable person to conclude that the person's freedom was more than temporarily curtailed pending the outcome of the investigation. *State v. Mosley*, 321 Ga. App. 236, 739 S.E.2d 106 (2013).

Breath test. — Because defendant was not compelled by the state to submit to a breath test after the defendant's arrest, the admission at trial of the test results did not violate the defendant's right against self-incrimination. *Fantasia v. State*, 268 Ga. 512, 491 S.E.2d 318 (1997).

DNA tests. — In convictions of aggravated sodomy, kidnapping, burglary, and aggravated assault, use of evidence comparing DNA on lip balm found at the crime scene with the defendant's blood sample and with evidence retained from a prior rape prosecution, which resulted in the defendant's acquittal pursuant to former O.C.G.A. § 24-4-60 et seq. (see now O.C.G.A. § 35-3-160 et seq.) did not violate defendant's right against self-incrimination under former O.C.G.A. § 24-9-20(a) (see now O.C.G.A. § 24-5-506). *Fortune v. State*, 300 Ga. App. 550, 685 S.E.2d 466 (2009).

Evidence voluntarily produced from body cavity. — When a small piece of plastic containing cocaine residue was produced by the defendant from a body

Evidence (Cont'd)**2. Admissible (Cont'd)**

cavity in acquiescence to a search warrant for the defendant's person while the defendant was in lawful detention, the evidence was admissible. *Scott v. State*, 216 Ga. App. 692, 455 S.E.2d 609 (1995).

Admissions made while accused under illegal arrest are admissible and this paragraph is not violated. *Boyers v. State*, 198 Ga. 838, 33 S.E.2d 251 (1945).

Admissibility of evidence given to school official. — When an item is produced by a student in accordance with the proper request of a school official having "adequate reason" and before any involvement of law enforcement officers, the item is not inadmissible in evidence as being violative of any rights against self-incrimination. *State v. J.T.*, 155 Ga. App. 812, 273 S.E.2d 214 (1980).

State was properly allowed to use defendant's signature on fingerprint card for comparison by an expert with the signatures on allegedly forged checks since there was no indication that requiring the signing of the card was for any purpose other than as part of the administrative processing when the defendant was booked by police. *Hudson v. State*, 188 Ga. App. 684, 374 S.E.2d 212 (1988).

Grant of consent for search of defendant's automobile was neither incriminating nor exculpatory and, therefore, the defendant was not entitled to suppression of evidence found during the search based on the defendant's privilege against self-incrimination. *Cotton v. State*, 237 Ga. App. 18, 513 S.E.2d 763 (1999).

Trial court properly denied the defendant's motion to suppress the marijuana seized, as the search of the defendant's truck was conducted after a valid traffic stop after the defendant gave the officer consent to conduct the search, and nothing supported the defendant's claim that this consent was coerced because it was obtained during a custodial interrogation and without the benefit of Miranda warnings, as the officer's questioning did not unduly prolong the traffic stop and did not result in an unauthorized seizure or an

equivalent custodial detention for which Miranda warnings were required. *Trujillo v. State*, 286 Ga. App. 438, 649 S.E.2d 573 (2007).

Videotape confession. — Because defendant was advised of defendant's Miranda rights before giving a videotaped statement to the police, the trial court did not err in ruling that the videotaped statement was admissible. *Boynton v. State*, 277 Ga. 130, 587 S.E.2d 3 (2003).

Voluntary statements. — While the defendant claimed an officer had promised the defendant leniency in exchange for the defendant's statement, the officer denied this; therefore, the trial court's denial of the defendant's motion to suppress the defendant's custodial statements on the grounds those statements were not voluntary was not clearly erroneous. *Pennymon v. State*, 261 Ga. App. 450, 582 S.E.2d 582 (2003).

Trial court properly admitted defendant's statement to the police as defendant voluntarily and intelligently waived defendant's Miranda rights, despite defendant's .093 blood alcohol level, as the interviewing officer testified that defendant appeared to understand defendant's rights, that defendant was not confused, that defendant's eyes were focused, that defendant was coherent and answered questions clearly, and that defendant did not have slurred speech or glassy eyes; there was no evidence that promises or threats were made. *Forehand v. State*, 271 Ga. App. 746, 611 S.E.2d 78 (2005).

Trial counsel was not ineffective in failing to object when the state asked the defendant why the defendant did not stay at the victim's home following the robbery, report the incident to authorities, or tell anyone the defendant's version of events prior to the trial; the state's cross-examination did not infringe upon the defendant's right to remain silent and since defendant's direct examination brought out virtually the same testimony as the allegedly improper cross-examination, the defendant was not prejudiced by the state's inquiry. *Olarte v. State*, 273 Ga. App. 96, 614 S.E.2d 213 (2005).

Trial court did not err in admitting the defendant's statement to a police officer as

it was a voluntary spontaneous utterance, rather than the product of custodial interrogation, since: (1) the statement was made shortly after the defendant's arrest while the officer was transporting the defendant to the police barracks; (2) the defendant made the statement after hearing a police broadcast about the discovery of the gun used in the shooting; and (3) the officer did not prompt the defendant to speak. *Haggins v. State*, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Videotape made at a police barracks while an officer was completing paperwork and swabbing the defendant's hands to test for gun residue that showed the defendant making a number of comments to the officer was properly admitted as: (1) the officer asked the defendant only for basic biographical data and whether the defendant was right- or left-handed, so that the officer would know which hand to un-cuff to permit the defendant to sign paperwork, which were all related to legitimate administrative needs and fell within the "booking exception" to the Miranda rule; and (2) all further discussion between the officer and the defendant, including the defendant's volunteered statement that the defendant might have fired guns on the defendant's birthday, was initiated by the defendant and was not the product of custodial interrogation. *Haggins v. State*, 277 Ga. App. 742, 627 S.E.2d 448 (2006).

Motion to suppress a statement was properly denied because the defendant was given Miranda rights, both orally and in writing, the defendant indicated an understanding and waived those rights, and the statement was found to have been given voluntarily and knowingly; the fact that the defendant may have been under the influence of a chemical agent did not, on its own, render the confession inadmissible. *Williams v. State*, 277 Ga. App. 884, 627 S.E.2d 897 (2006).

Since, at the time the defendant made statements to an officer, the defendant was not under arrest or being restrained in any way, but rather, the officer, the defendant, and the defendant's wife were outside the couples' house, and the officer was simply investigating why the officer had been called to the house, the trial

court did not err in finding that defendant made voluntary, non-custodial statements which did not trigger the requirement that Miranda warnings be given. *Jones v. State*, 278 Ga. App. 616, 629 S.E.2d 546 (2006).

Defendant's admission to a different burglary was properly admitted as similar transaction evidence in a burglary trial since, although the defendant was in custody when the statement was made, the statement was exculpatory, volunteered by defendant, and unprompted by police questioning. *Studiemeyer v. State*, 278 Ga. App. 756, 629 S.E.2d 593 (2006).

Defendant's motion to suppress the custodial statement the defendant gave to the police was properly denied as: (1) the Miranda warnings were first read aloud to the defendant and then the defendant was allowed to read and initial each right and to sign the waiver form; (2) the defendant's mother was present during the interrogation; (3) the defendant's statement to the police was not the result of threats or intimidation; and (4) the interrogation tactics used, including alleged screaming and chair-kicking, were not more than were ordinarily employed. *Peterson v. State*, 280 Ga. 875, 635 S.E.2d 132 (2006).

Despite the defendant's possible intoxication, a statement given to police was knowingly and voluntarily made, and a waiver of the rights accorded under Miranda was intelligent; thus, the trial court did not err in admitting the defendant's videotaped custodial statements into evidence. *Bryant v. State*, 286 Ga. App. 493, 649 S.E.2d 597 (2007).

A trial court properly admitted a defendant's incriminating statement into evidence, having found that the statement was freely and voluntarily made. The trial court found particularly noteworthy the fact that the interviewing officer stopped the interview to make sure the defendant understood the defendant's rights, and a mental evaluation revealed that defendant had an average intelligence quotient and was neither mentally nor cognitively impaired; even if the defendant was slow to understand the defendant's rights, this did not render the defendant's confession inadmissible. *Mezick v. State*, 291 Ga. App. 257, 661 S.E.2d 635 (2008).

Evidence (Cont'd)**2. Admissible (Cont'd)**

Defendant's confessions to the murder of defendant's spouse made to police were voluntary: the defendant was 37 years old, could read and write, had graduated from high school, and was not under the influence of drugs or alcohol. Defendant accompanied police to the station voluntarily, was not handcuffed, and was free to leave at any time. *Turner v. State*, 287 Ga. 793, 700 S.E.2d 386 (2010).

Defendant's videotaped statement made to police during a custodial interrogation was admissible because the defendant made the statement voluntarily after the defendant was advised of, and waived, the defendant's Miranda rights, and the defendant presented no evidence the statement was made under duress or coercion. *McCoy v. State*, 292 Ga. 296, 736 S.E.2d 425 (2013).

Statements the defendant made to police at the hospital and the police station were admissible because the defendant was not in custody at the hospital and, thus, no Miranda warnings were required, and the defendant voluntarily waived those rights at the police station. *Schutt v. State*, 292 Ga. 625, 740 S.E.2d 163 (2013).

Admission of the defendant's statements to an investigator was not erroneous because Miranda rights were read to the defendant, the defendant waived those rights, and there was no evidence that the defendant was coerced prior to giving the taped statement. *Lindsey v. State*, 321 Ga. App. 808, 743 S.E.2d 481 (2013).

Defendant's videotaped statement, which police obtained before giving Miranda warnings, was properly admitted because a reasonable person would not have perceived the defendant to be in custody when the defendant made a statement agreeing to an examiner's summary of the defendant's prior, unrecorded confession, and the defendant confessed again after the Mirandized portion of the interview. *Pressley v. State*, 322 Ga. App. 243, 744 S.E.2d 439 (2013).

Spontaneous statements. — It was not error for the trial court to refuse to suppress the defendant's inculpatory

statements made while being transported by officers from Maryland to Georgia; the evidence supported the trial court's findings that the inculpatory statements at issue, which had been made after the defendant was advised of the Miranda rights, were not the result of interrogation or questioning but were spontaneously uttered by the defendant. *Stokes v. State*, 281 Ga. 825, 642 S.E.2d 82 (2007).

Admission of inculpatory statement was harmless error. — Any error in the admission of a defendant's inculpatory statement was harmless beyond a reasonable doubt based on the overwhelming evidence against the defendant in an armed robbery prosecution; the defendant made inculpatory admissions at trial, the defendant met the physical description of one of the armed robbers, and the gun and proceeds from the robbery were on the defendant's person when the defendant was arrested. *Hawkins v. State*, 292 Ga. App. 76, 663 S.E.2d 406 (2008).

Request for attorney on videotape permitted. — Admission of videotape which ended with a segment when the defendant requested an attorney was proper and did not involve a comment on the defendant's right to remain silent, as defendant's request was not evidence of the defendant's guilt nor was it directed to undermining any of the defendant's defenses. *Rowe v. State*, 276 Ga. 800, 582 S.E.2d 119 (2003).

Presumption of regularity attached. — Given that no transcript of the defendant's Jackson v. Denno hearing appeared in the record, the appeals court was left only to assume the trial court's findings at the hearing admitting the defendant's statement to police, upon the officers' full compliance with Miranda, were supported by the evidence and the trial court's actions during that hearing were appropriate; moreover, illiteracy did not dictate a determination that there was no voluntary and knowledgeable waiver of a person's Miranda rights. *Hicks v. State*, 281 Ga. App. 461, 636 S.E.2d 183 (2006).

Administrative processing. — When, after the defendant was arrested, the defendant was asked about the defendant's employment, in the course of completing biographical information about

the defendant, defendant's response, before the defendant was warned of the defendant's Miranda rights, was admissible, because, while the question was not asked as part of a formal booking, it was part of an administrative processing which was not intended to elicit an incriminating response. *English v. State*, 260 Ga. App. 620, 580 S.E.2d 351 (2003).

The trial court did not err in admitting the defendant's statements made at a hospital to a sheriff's deputy and an investigator, as the statements were given while the defendant was in a medical, rather than an investigative, setting; moreover, the fact that the officers might have suspected the defendant of having committed a murder did not render the statements at issue violative of Miranda, and thus subject to suppression. *Jennings v. State*, 282 Ga. 679, 653 S.E.2d 17 (2007).

Not in custody. — Defendant was not in custody simply from being pulled over and temporarily detained; since the defendant was not in custody at the time that the officer pulled the defendant over, there was no need for the officer to give a Miranda warning prior to asking the defendant about drugs found in the defendant's car, and the defendant's motion to suppress was properly denied. *Connell v. State*, 279 Ga. App. 413, 631 S.E.2d 456 (2006).

Trial court did not err in determining that the defendant was not in custody at the time the defendant made statements to an officer. While the statements were made prior to the defendant being advised of the defendant's Miranda rights, there was no evidence that the defendant had been placed under formal arrest or restrained to the degree associated with a formal arrest, the defendant was not in a police-dominated atmosphere, the defendant's mother and aunt were present during the interview, and the temporary detention, although two hours, was not unreasonably long under the circumstances. *Tobias v. State*, 319 Ga. App. 320, 735 S.E.2d 113 (2012).

Statement admissible after juvenile defendant did not invoke right to have parent present. — Because the undisputed evidence established that a juvenile defendant was informed of the

right to have a parent present during an interview with police in which a custodial statement was obtained, but did not invoke that right, there was no error in allowing the juvenile defendant's statement into evidence. *Green v. State*, 282 Ga. 672, 653 S.E.2d 23 (2007).

The Court of Appeals rejected the defendant's claim that the admission of statements given to a polygraph examiner had to be excluded as not freely and voluntarily given and because Miranda warnings had not been given, as: (1) the defendant was not in custody when the challenged statements were made; (2) incriminating statements were made only upon receipt of Miranda after an arrest; and (3) the confession was not given with the hope of benefit. *Ramirez v. State*, 288 Ga. App. 249, 653 S.E.2d 837 (2007).

Defendant was not entitled to Miranda warnings under Ga. Const. 1983, Art. I, Sec. I, Para. XVI when the defendant was interviewed by police in a child abuse case; the defendant voluntarily went to the police station to be interviewed, no restraint was placed on the defendant's freedom of movement, nor was the defendant otherwise prevented from leaving the interview, and the defendant was not arrested until after the interview had ended. *Bass v. State*, 282 Ga. App. 159, 637 S.E.2d 863 (2006).

Because the record failed to contain any indication that the defendant: (1) informed the officers of the defendant's desire to end an interview; (2) wished to speak with counsel; or (3) wished to leave the station, and after the statements were made the defendant was driven home by an officer, the defendant was not in custody for purposes of Miranda; therefore, admission of these non-custodial statements was proper. *Vaughn v. State*, 282 Ga. 99, 646 S.E.2d 212 (2007).

3. Inadmissible

Inadmissibility of evidence that witness invoked privilege during testimony before grand jury. — The court erred in admitting certain documentary evidence showing that the witness in a criminal case has declined to answer before the grand jury certain questions propounded to the witness on the ground that

Evidence (Cont'd)**3. Inadmissible (Cont'd)**

the witness's answer to those questions might tend to incriminate the witness. The admission of this evidence tended to destroy or at least abridge the privilege of the witness guaranteed by the Constitution of this state of refusing to answer questions tending to incriminate the witness, and to deprive the witness of the protection of that privilege which it was the purpose of the Constitution to give. *Loewenherz v. Merchants' & Mechanics' Bank*, 144 Ga. 556, 87 S.E. 778, 1917E Ann. Cas. 877 (1916).

Instances when evidence inadmissible. — Evidence that a witness forcibly placed the defendant's foot in certain tracks near the scene of the burglary, and that the footprints were of the same size, is not admissible. *Day v. State*, 63 Ga. 667 (1879).

Evidence of guilt found upon a person under legal arrest may be used in evidence against the person, but when a person not in legal custody is compelled to furnish incriminating evidence against that person, the evidence is not admissible. *Evans v. State*, 106 Ga. 519, 32 S.E. 659, 71 Am. St. R. 276 (1899).

Although the trial court erred in allowing the state to introduce defendant's custodial statement to police, the error was harmless because the record established beyond a reasonable doubt that it did not contribute to the guilty verdict when the eyewitness testimony was overwhelming evidence of the defendant's guilt of the crimes of which the defendant was convicted. *Gardner v. State*, 261 Ga. App. 10, 582 S.E.2d 7 (2003).

Trial court properly suppressed the alco-sensor tests taken by the defendant because the officer incorrectly informed defendant that defendant did not have the right to refuse the test; O.C.G.A. § 40-5-55 gave the defendant the right to withdraw implied consent, as, pursuant to Ga. Const. 1983, Art. I, Sec. I, Para. XIII, a reasonable person in the defendant's position would have thought the defendant, who was ordered to turn around and place the defendant's hands behind the defendant's back after refusing the test,

was being placed under arrest. *State v. Norris*, 281 Ga. App. 193, 635 S.E.2d 810 (2006).

Trial court properly suppressed the oral and written statements made by the defendant, a public employee, during an internal investigation interview conducted by the Georgia Department of Corrections, and after the defendant was forbidden to seek the advice of counsel, as the defendant had an objective belief that a failure to cooperate with the investigation by taking part in the interview and signing a written document entitled "Notice of Interfering with On-Going Internal Investigation" would result in a loss of employment; thus, the defendant's right against self-incrimination was violated. *State v. Aiken*, 281 Ga. App. 415, 636 S.E.2d 156 (2006).

The trial court did not err in refusing to strike a victim's testimony upon invoking a Fifth Amendment privilege against self-incrimination, because the questions posed to that victim concerning a weapon dealt with collateral matters that occurred prior to the commission of the crimes at issue. *Mercer v. State*, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

While non-custodial and custodial statements were properly admitted, as not vitiating the defendant's constitutional rights once defendant invoked the right to counsel, a subsequent interview initiated by police violated this right; as a result, cocaine seized through information obtained from the interview had to be suppressed as fruit of the poisonous tree. *Vergara v. State*, 283 Ga. 175, 657 S.E.2d 863 (2008).

The trial court properly suppressed those statements made by the defendant in violation of *Miranda*, and after the defendant invoked the right to counsel, as the mere act of allowing the defendant to meet with an attorney did not permit law enforcement to re-initiate any conversation with the defendant at a later time without counsel present. *State v. Sammons*, 283 Ga. 364, 659 S.E.2d 598 (2008).

As a defendant's statements to an officer were inadmissible under *Miranda*, those portions of a videotaped conversation between the defendant and the defen-

dant's parent that recapped the interrogation by the officer (who had told the parent of the defendant's incriminating statements) were inadmissible. However, the remaining portions of the videotape were admissible. *State v. Darby*, 284 Ga. 271, 663 S.E.2d 160 (2008).

As the state could not comment on a defendant's failure to come forward, defense counsel was ineffective in not objecting when the state elicited testimony that the defendant knew police were looking for the defendant in connection with the charged crimes, but did not contact the authorities. *Johnson v. State*, 293 Ga. App. 728, 667 S.E.2d 637 (2008).

4. Voluntariness

Factors which indicate voluntariness of confession. — When the evidence heard was sufficient to authorize the trial court to determine that the defendant was advised of the defendant's rights, that the defendant was not placed under any duress, that the defendant seemed to understand the defendant's rights, that the defendant was not under the influence of drugs or alcohol, and that the defendant seemed completely aware of what was going on around the defendant, the defendant's confession was voluntarily elicited and not in violation of the Fifth and Sixth amendments. *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979).

A trial court properly admitted defendant's statement at trial with regard to defendant's conviction of felony murder and possession of a firearm in connection with the shooting death of another, as the evidence supported the trial court's conclusion that the defendant made a knowing, voluntary, and intelligent waiver of the defendant's rights before making the statement to police; the evidence established that State of Georgia police officers went to the city in the State of Florida where the defendant had fled and had been arrested and, prior to the interview, the defendant was read Miranda rights and agreed to speak with the officers after informing the officers that the defendant understood the defendant's rights. The evidence further showed that no promises or threats were made to the defendant to

get the defendant to speak and at no time did the defendant ask for the questioning to stop. *Martinez v. State*, 283 Ga. 122, 657 S.E.2d 199 (2008).

Defendant, convicted of voluntary manslaughter, argued that because the defendant was hysterical after being told that the defendant's spouse, whom the defendant had stabbed in the chest, had died, the defendant did not understand the defendant's Miranda rights or the consequences of the defendant's statements and that those statements were thus not voluntary. This claim failed as the interviewing officer testified that the defendant understood the questions and made coherent responses and that the officer did not threaten or coerce the defendant to give a statement. *McKenzie v. State*, 294 Ga. App. 376, 670 S.E.2d 158 (2008).

Defendant's custodial statements were properly deemed voluntary under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-824). The defendant was advised of defendant's Miranda rights; signed a waiver of those rights; admitted no threats or promises were made; and, although the defendant claimed not to understand the Miranda rights due to limited mental capacity, there was no evidence the defendant was mentally or cognitively impaired. *Inman v. State*, 295 Ga. App. 461, 671 S.E.2d 921 (2009).

Although the defendant was 17 when the defendant had intercourse with a 12-year-old child, as the defendant was 18 when interrogated by police about the statutory rape, the nine-factor analysis of voluntariness set forth in *Riley v. State*, 226 S.E. 2d 922 (Ga. 1976), was inapplicable. The test that applied was whether, considering the totality of the circumstances, the statements were made voluntarily, without being induced by hope of benefit or coerced by threats. *Henry v. State*, 295 Ga. App. 758, 673 S.E.2d 120 (2009).

Voluntary statements by an accused admitted into evidence. — When an accused freely and voluntarily submits to examination by arresting officers and the prosecuting attorney, respecting the accused's alleged crime, and there is no claim that the accused was influenced by force, threats, hope, or reward, it

Evidence (Cont'd)**4. Voluntariness (Cont'd)**

is not error on the accused's trial to receive in evidence a signed transcript of such examination containing incriminating admissions. *Russell v. State*, 196 Ga. 275, 26 S.E.2d 528 (1943).

Although defendant disputed many of the facts offered by a police detective and a federal agent regarding whether defendant was given Miranda warnings prior to defendant's statements to the detective and the agent and whether defendant's statements were made without bribery and coercion, the trial judge was the arbiter of the credibility of the witnesses at defendant's *Jackson v. Denno* hearing and ample testimony supported the trial court's conclusion that the statements were voluntarily given where the testimony of the detective and the federal agent indicated that the two custodial interviews each lasted about an hour, defendant was read Miranda warnings and executed a written waiver of rights form before giving each statement, and defendant was never threatened or promised any hope of benefit in exchange for the statements; since the trial court's factual and credibility findings were not clearly erroneous, its decision to admit the statements was upheld on appeal. *Phanamixay v. State*, 260 Ga. App. 177, 581 S.E.2d 286 (2003).

Since the defendant, who was not in custody at the time, volunteered an explanation as to why the defendant possessed a weapon without authority, no Miranda warning was necessary and the evidence was sufficient to show that the defendant was shot by the defendant in a government building with a weapon that the defendant took from police custody, in violation of O.C.G.A. §§ 16-8-2 and 16-7-24(a); therefore, the trial court's findings were not clearly erroneous. *McClendon v. State*, 264 Ga. App. 174, 590 S.E.2d 189 (2003).

Trial court did not err in admitting defendant's statement that if the police would let defendant walk away, defendant would identify a major drug dealer, as there was no evidence that defendant was coerced or threatened by the police, or

that defendant did not understand defendant's Miranda rights; the trial court was authorized to find that the statement was freely and voluntarily given. *Johnson v. State*, 267 Ga. App. 549, 600 S.E.2d 667 (2004).

Defendant's statement to the police during a custodial interrogation was voluntary and was admissible as defendant was an adult and did not have a right to have defendant's parent present during questioning. *Finney v. State*, 270 Ga. App. 422, 606 S.E.2d 637 (2004).

Trial court's findings that defendant was advised of defendant's constitutional rights, that defendant knowingly and voluntarily relinquished those rights, and that defendant's subsequent statements were voluntary was not clearly erroneous because an officer testified that defendant was not under arrest when the defendant made the statement, that defendant was nonetheless advised of defendant's Miranda rights and appeared to understand them, and that defendant was not threatened, coerced, or promised anything in return for a statement; thus, defendant did not provide a specific basis for excluding defendant's statement. *Flanders v. State*, 279 Ga. 35, 609 S.E.2d 346 (2005).

Defendant voluntarily and knowingly waived defendant's constitutional rights before making a statement to the police because defendant was 15 years old when questioned, defendant had the verbal comprehension level of a nine-year-old, defendant was advised that defendant was suspected of child molestation, and defendant was advised of defendant's Miranda rights and exercised them; the methods used in the interrogation and the 27-minute length of the interrogation were not coercive. *Stone v. State*, 271 Ga. App. 748, 610 S.E.2d 684 (2005).

Defendant's statement to the police was presumptively valid as before making the statement, defendant was advised of defendant's Miranda rights, defendant understood those rights, defendant executed a waiver of rights form, and defendant did not invoke defendant's right to have an attorney present during defendant's interview. *Ray v. State*, 273 Ga. App. 656, 615 S.E.2d 812 (2005).

Defendant's videotaped statement to

police was voluntarily given as defendant was advised of defendant's Miranda rights, was coherent, and did not appear to be under the influence of alcohol or drugs; there was no evidence of mental incapacity other than a draft suicide note written while defendant was hiding. *Young v. State*, 280 Ga. 65, 623 S.E.2d 491 (2005).

The trial court did not err in admitting a defendant's custodial statement, taken when the defendant was 17, after finding that the defendant had voluntarily waived the defendant's rights and signed the statement; there was testimony that the defendant was read the Miranda rights, signed a waiver, did not ask for the defendant's parents or an attorney, did not appear to be under the influence of alcohol or drugs, that an investigator advised the defendant that the defendant would be asked questions about the crimes in question, and that the defendant was not threatened or promised leniency and read and corrected the statement. *Medlin v. State*, 285 Ga. App. 709, 647 S.E.2d 392 (2007).

The trial court properly refused to suppress a defendant's confession. The evidence enabled the trial court to find that the defendant's relative was present during most of the questioning, that the defendant was able to speak privately with the relative on occasion, that the defendant was not under the influence of drugs or alcohol, that the defendant was not threatened or offered any hope of benefits, and that the defendant was not handcuffed or otherwise restrained prior to confessing to participation in a shooting; furthermore, although the defendant claimed that the statement was not knowing and voluntary because of the defendant's limited intellect, the defendant was able to provide some involved explanations to police, a police interviewer saw no confusion about the defendant's rights, and the relative testified that the defendant never indicated that the defendant felt that the defendant had to talk to the police. *Boseman v. State*, 283 Ga. 355, 659 S.E.2d 364 (2008).

Evidence supported the trial court's finding that a defendant waived the defendant's right to counsel and that the defen-

dant's statements to a detective were made voluntarily; thus, the statements were properly admitted into evidence. After the defendant said that the defendant wanted a lawyer, the defendant said that the defendant would tell the detective what happened if the defendant could speak to the defendant's family; after speaking with family members, the defendant was again advised of the defendant's rights and waived those rights; and after again asking to speak to police the next day, the defendant was again advised of the defendant's rights and waived those rights. *Holmes v. State*, 284 Ga. 330, 667 S.E.2d 71 (2008).

In a statutory rape case, as the record showed that police had not misrepresented the 12-year-old victim's status to the defendant or promised that the defendant would be charged with rape only if the investigation established that the defendant had committed forcible rape, the defendant's confession and DNA test results were not inadmissible as having been obtained through trickery and deceit. *Henry v. State*, 295 Ga. App. 758, 673 S.E.2d 120 (2009).

Trial court did not err by determining that the defendant's response to law enforcement agents, who stopped the defendant's car at a park, that the defendant was at the park to counsel a 14-year-old-girl about the dangers of meeting men from the Internet was admissible because the trial court determined that the stop of the defendant's car was authorized by the facts before the officers as: (1) the defendant arrived at 10:00 P.M. at the isolated park location in a vehicle with a Tennessee license plate, which fit the description of the individual whom a task force was investigating; (2) the statements made by the investigating officer who stopped the defendant's vehicle and explained the reason for the stop would not objectively have been understood to be an interrogation; and (3) the statement made by the defendant was spontaneous and voluntary. Moreover, because the defendant was properly Mirandized prior to giving a later statement to the officers, the trial court did not err by admitting that statement. *Logan v. State*, 309 Ga. App. 95, 709 S.E.2d 302,

Evidence (Cont'd)**4. Voluntariness (Cont'd)**

cert. denied, No. S11C1101, 2011 Ga. LEXIS 579; cert. denied, 132 S. Ct. 823, 181 L. Ed. 2d 533 (2011).

Defendant's custodial statement was admissible because the statement was made during questioning prompted by the defendant after the defendant signed a written waiver of rights form. *Smith v. State*, 292 Ga. 620, 740 S.E.2d 158 (2013).

Voluntary statements by an accused after using ecstasy admitted into evidence. — Trial court did not err in denying the defendant's motion to exclude a statement made to a detective because the statement was made while the defendant was under the influence of Ecstasy and was induced by the hope of a light sentence because the defendant never told the detective that the defendant had taken Ecstasy a few hours earlier and the detective credibly testified that no promise of leniency was made. *Leonard v. State*, 292 Ga. 214, 735 S.E.2d 767 (2012).

Questions of fact concerning voluntariness determined by jury after prima facie showing by state. — After the state made a prima facie showing of voluntariness, the court properly admitted the defendant's statement into evidence for the jury's consideration, and thereafter, the question of whether or not defendant's confession was freely and voluntarily given, without hope of benefit or fear of injury, became one of fact for determination by the jury. *Simonton v. State*, 151 Ga. App. 431, 260 S.E.2d 487 (1979).

Appellate court will not override verdict unless evidence that confession unlawfully obtained. — Although the facts in evidence will be examined to determine whether or not they show a conviction by use of a coerced confession, in violation of the due process clause of the Fourteenth Amendment to the federal Constitution, or the provision in the state Constitution against self-incrimination, when such a question has been properly raised and presented, yet when a prima facie case as to the voluntary character of the confession has been made, it is not within the power of the court to usurp the

function of the jury in passing upon an issue, and to override the jury's verdict supported by legal evidence and upheld by the judge in refusing a new trial, or to reverse a ruling admitting the confession in evidence, unless the evidence requires but one rational inference, that the confession was unlawfully obtained. Under this and the preceding rulings, the judge did not err in refusing to exclude from evidence the alleged illegal confession and incriminatory statements of the defendant. *Bryant v. State*, 191 Ga. 686, 13 S.E.2d 820 (1941).

Statements overheard by police do not amount to evidence involuntarily given and without advice of counsel.

— Evidence of statements made by the defendant in a conversation overheard by the arresting officers who had concealed themselves, as planned between them and the person with whom the defendant talked, does not amount to evidence given by the defendant involuntarily and without the advice of counsel, and is not coerced from the defendant in violation of the defendant's rights against self incrimination. *Blackwell v. State*, 113 Ga. App. 536, 148 S.E.2d 912 (1966).

No error to allow evidence of voluntary acts into trial. — When a person after arrest does an act voluntarily or without objection which tends to incriminate the person it is not error or unconstitutional to allow evidence of the act in the trial of the case. *State v. J.T.*, 155 Ga. App. 812, 273 S.E.2d 214 (1980).

Defendant's contention of forced self incrimination in violation of the broader protection offered by the Georgia Constitution or O.C.G.A. § 24-9-20(a) was without merit because defendant voluntarily provided the handwriting samples which were used in overturning defendant's probation. *Poole v. State*, 270 Ga. App. 432, 606 S.E.2d 878 (2004).

Question was not a request for counsel. — Question by a defendant as to whether the defendant would have been arrested if the defendant asked for an attorney was not a clear request for counsel that required cessation of police questioning or clarification before continuing the interrogation and there was no evidence that the statement was given in

fear of injury or for a hope of benefit; additionally, while the investigator lied to the defendant throughout the interview about the existence and amount of inculpatory evidence, nothing suggested that the investigator sought to procure a false statement. *Wright v. State*, 279 Ga. App. 155, 630 S.E.2d 656 (2006).

Hope of benefit not created. — In a prosecution for felony murder, armed robbery, and burglary, a defendant's post-Miranda statements were properly admitted at trial as a detective's telling the defendant the detective knew the defendant was not the shooter did not constitute the hope of a lighter sentence that tainted the voluntariness of the defendant's statements. *Jackson v. State*, 284 Ga. 484, 668 S.E.2d 700 (2008).

Defendant's confession was voluntary and admissible because the investigators framed the investigators' inquiries in terms of what they wanted to be able to tell the judge, and any suggestions of a possible benefit were either nonspecific (e.g., "help yourself") or along the lines of allowing the defendant to have more credibility with the jury for being honest; the promises did not relate to the charges or sentence the defendant was facing so as to render the confession inadmissible under O.C.G.A. § 24-8-824. *Baughns v. State*, 335 Ga. App. 600, 782 S.E.2d 494 (2016).

This provision is not applicable if the defendant voluntarily submits for purpose of others identifying the de-

fendant. *Foster v. State*, 213 Ga. 601, 100 S.E.2d 426 (1957), cert. denied, 355 U.S. 967, 78 S. Ct. 559, 2 L. Ed. 2d 542 (1958); *Whippler v. State*, 218 Ga. 198, 126 S.E.2d 744 (1962), cert. denied, 375 U.S. 960, 84 S. Ct. 446, 11 L. Ed. 2d 318 (1963).

No violation when fingerprinting voluntary. — When a defendant voluntarily submits to fingerprinting, there is no violation of this paragraph. *Gunter v. State*, 223 Ga. 290, 154 S.E.2d 608 (1967).

Suspect's mental illness did not render confession involuntary. — Admissions made by defendant after defendant had been read Miranda rights and had waived them did not violate U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVI; even if defendant was mentally ill as alleged, mental illness did not render a defendant incapable of making a voluntary statement. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Drug and alcohol impairment. — Defendant's claim that a statement to police was involuntary due to drug and alcohol impairment was properly rejected as the defendant admitted during the interview to consuming only two tranquilizers due to nervousness, and the interviewers testified that the defendant did not appear to be impaired and communicated with them in a lucid and coherent manner. *Carter v. State*, 285 Ga. 394, 677 S.E.2d 71 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 1035 et seq. 81 Am. Jur. 2d, Witnesses, § 78 et seq.

Am. Jur. Proof of Facts. — Reliability of Polygraph Examination, 14 POF2d 1.

Involuntary Confession — Psychological Coercion, 22 POF2d 539.

Custodial Interrogation Under *Miranda v. Arizona*, 23 POF2d 713.

Invalidity of Suspect's Waiver of Miranda Rights, 42 POF2d 617.

Invalidity of Confession or Waiver of Miranda Rights by Mentally Retarded Person, 42 POF3d 147.

C.J.S. — 22A C.J.S., Criminal Law, §§ 906, 907.

ALR. — Right to recover property held by public authorities as evidence for use in a criminal trial, 13 ALR 1168.

Constitutional immunity against giving incriminating testimony as affecting contractual stipulation to submit to examination, 18 ALR 749.

Plea of privilege by the woman concerned in violation of White Slave Act, 48 ALR 991.

Privilege against self-incrimination as applicable to answer to pleadings, 52 ALR 143.

Privilege against self-incrimination as extending to danger of prosecution in

other state or country, 59 ALR 895; 82 ALR 1380.

Admissibility of secondary evidence of incriminating document in possession of defendant, 67 ALR 77.

What amounts to violation of statute forbidding comment by prosecuting attorney on failure of accused to testify, 68 ALR 1108.

Constitutional provision against self-incrimination as applicable to questions asked or testimony given in proceeding before nonjudicial officer or body, 68 ALR 1503.

Waiver of immunity from testifying and constitutional provision against self-incrimination, by accomplice testifying for prosecution, 87 ALR 882.

Comment by court suggesting that jury may take into consideration failure of accused person to testify, 94 ALR 701.

Constitutionality, construction, and effect of statutes in relation to conduct of driver of automobile after happening of accident, 101 ALR 911.

Calling upon accused in the presence of jury to produce document in his possession as violation of privilege against self-incrimination, 110 ALR 101.

Admissibility of inculpatory statements made in presence of accused and not denied or contradicted by him, 115 ALR 1510.

Admissibility of plea of guilty at preliminary hearing, 141 ALR 1335.

Power of juvenile court to require children to testify, 151 ALR 1229.

Privilege against self-incrimination as available to member or officer of unincorporated association as regards its books or papers, 152 ALR 1208.

Testimony of incriminating character which witness was compelled to give, by virtue of immunity statute or otherwise, as admissible in a prosecution of the witness for an offense subsequently committed, 157 ALR 428.

Right to cross-examine accused as to previous prosecution for, or conviction of, crime, for purpose of affecting his credibility, 161 ALR 233.

Requiring submission to physical examination or test as violation of constitutional rights, 164 ALR 967; 25 ALR2d 1407.

Waiver of privilege against self-incrimination in exchange for immunity from prosecution as barring reassertion of privilege on account of prosecution in another jurisdiction, 2 ALR2d 631.

Use in subsequent prosecution of self-incriminating testimony given without invoking privilege, 5 ALR2d 1404.

Power of prosecuting attorney to extend immunity from prosecution to witness claiming privilege against self-incrimination, 13 ALR2d 1438.

Right of witness to refuse to answer, on the ground of self-incrimination, as to membership in or connection with party, society, or similar organization or group, 19 ALR2d 388.

Inferences arising from refusal of witness other than accused to answer question on the ground that answer would tend to incriminate him, 24 ALR2d 895.

Requiring submission to physical examination or test as violation of constitutional rights, 25 ALR2d 1407.

Right of witness to claim privilege against self-incrimination on subsequent criminal trial after testifying to same matter before grand jury, 36 ALR2d 1403.

Privilege against self-incrimination as to testimony before grand jury, 38 ALR2d 225.

Assertion of immunity as ground for removing or discharging public officer or employee, 44 ALR2d 789.

Sufficiency of witness' claim of privilege against self-incrimination, 51 ALR2d 1178.

Adequacy of immunity offered as condition of denial of privilege against self-incrimination, 53 ALR2d 1030; 29 ALR5th 1.

Right of state in criminal contempt case to obtain data from defendant by interrogatories or pretrial discovery as permitted in civil actions, 72 ALR2d 431.

Testifying in civil proceeding as waiver of privilege against self-incrimination, 72 ALR2d 830.

Admissibility of inculpatory statements made in presence of accused to which he refuses to reply on advice of counsel, 77 ALR2d 463.

Duty of court to inform accused who is not represented by counsel of his right not to testify, 79 ALR2d 643.

Admissibility, in contempt proceeding against witness, of evidence of incriminating nature of question as to which he invoked privilege against self-incrimination, 88 ALR2d 463.

Admissibility of confession, admission, or incriminatory statement of accused as affected by fact that it was made after indictment and in the absence of counsel, 90 ALR2d 732.

Right of prosecution to pretrial discovery, inspection, and disclosure, 96 ALR2d 1224.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud, 99 ALR2d 772.

Comment on accused's failure to testify, by counsel for codefendant, 1 ALR3d 989.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 ALR3d 545.

Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question, 9 ALR3d 990.

Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation, 10 ALR3d 1054.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify, 14 ALR3d 723.

Propriety under *Griffin v. California* and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify, 18 ALR3d 1335.

Violation of federal constitutional rule (*Griffin v. California*) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 ALR3d 1093; 32 ALR4th 774.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification, 24 ALR3d 1261.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under *Miranda v. Arizona*, 25 ALR3d 1076.

Applicability, in proceedings under stat-

utes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege, but owned by another, 37 ALR3d 1373.

Propriety of requiring accused to give handwriting exemplar, 43 ALR3d 653.

Witness's refusal to testify on ground of self-incrimination as justifying reception of evidence of prior statements or admissions, 43 ALR3d 1413.

Censorship and evidentiary use of unconvicted prisoners' mail, 52 ALR3d 548.

Right of member, officer, agent, or director of private corporation or unincorporated association to assert personal privilege against self-incrimination with respect to production of corporate books or records, 52 ALR3d 636.

Use in disbarment proceeding of testimony given by attorney in criminal proceeding under grant of immunity, 62 ALR3d 1145.

Refusal to answer questions before state grand jury as direct contempt of court, 69 ALR3d 501.

Admissibility, in state probation revocation proceedings, of incriminating statement obtained in violation of *Miranda* rule, 77 ALR3d 669.

Nonverbal reaction to accusation, other than silence alone, as constituting adoptive admission under hearsay rule, 87 ALR3d 706.

Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 ALR3d 1178.

Admissibility in evidence of confession made by accused in anticipation of, during, or following polygraph examination, 89 ALR3d 230.

Admissibility of hypnotic evidence at criminal trial, 92 ALR3d 442; 77 ALR4th 927.

Propriety of requiring criminal defendant to exhibit self, or perform act, or participate in demonstration, during trial and in presence of jury, 3 ALR4th 374.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused, 19 ALR4th 368.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs, 25 ALR4th 419.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 ALR4th 1112.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 ALR4th 367.

Voluntariness of confession as affected by police statements that suspect's relatives will benefit by the confession, 51 ALR4th 495.

What constitutes assertion of right to counsel following Miranda warnings — state cases, 83 ALR4th 443.

Propriety, under state constitutional provisions, of granting use or transactional immunity for compelled incriminating testimony — post-Kastigar cases, 29 ALR5th 1.

Coercive conduct by private person as affecting admissibility of confession under state statutes or constitutional provisions — post-Connelly cases, 48 ALR5th 555.

Admissibility of evidence of voice identification of defendant as affected by allegedly suggestive voice lineup procedures, 55 ALR5th 423.

Sufficiency of showing that voluntariness of confession or admission was affected by alcohol or other drugs — Drugs or narcotics administered as part of medical treatment and drugs or intoxicants administered by the police, 96 ALR5th 523.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — at suspect's or third party's residence, 28 ALR6th 505.

What constitutes "custodial interrogation" of adult by police officer within rule of *Miranda v. Arizona* requiring that sus-

pect be informed of federal constitutional rights before custodial interrogation — at police station or sheriff's office, where defendant voluntarily appears or appears at request of law enforcement personnel, or where unspecified as to circumstances upon which defendant is present, 29 ALR6th 1.

What constitutes "custodial interrogation" of adult by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at police station or sheriff's office, where defendant voluntarily appears or appears at request of law enforcement personnel, or where unspecified as to circumstances upon which defendant is present, 30 ALR6th 103.

What constitutes "custodial interrogation" at hospital by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his federal constitutional rights before custodial interrogation — suspect hospital visitor, not patient, 31 ALR6th 465.

What constitutes "custodial interrogation" of adult by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at police station or sheriff's office, where defendant is escorted or accompanied by law enforcement personnel, or is otherwise at station or office involuntarily, 32 ALR6th 1.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — at police vehicle, where defendant outside, but in immediate vicinity, 34 ALR6th 1.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — at police vehicle, where defendant in moving vehicle, or where unspecified as to whether vehicle moving or stationary, 35 ALR6th 127.

What constitutes "custodial interrogation" within rule of *Miranda v. Arizona*

requiring that suspect be informed of federal constitutional rights before custodial interrogation — in jail or prison, 38 ALR6th 97.

Propriety of using otherwise inadmissible statement, taken in violation of Miranda rule, to impeach criminal defendant's credibility — state cases, 42 ALR6th 237.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — upon hotel property, 45 ALR6th 337.

Suppression of statements made during police interview of non-English-speaking defendant, 49 ALR6th 343.

What constitutes "custodial interrogation" within rule of requiring that suspect be informed of his federal constitutional rights before custodial interrogation — private security guards, detectives, or police, 51 ALR6th 219.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect

be informed of his or her federal constitutional rights before custodial interrogation — at nonpolice vehicle for traffic stop, where defendant outside, but in immediate vicinity of vehicle, or where unspecified as to whether inside or outside of nonpolice vehicle, 55 ALR6th 513.

Availability of sole shareholder's Fifth Amendment privilege against self-incrimination to resist production of corporation's books and records--modern status, 87 ALR Fed. 177.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 USCS § 3501(c)), that defendant's confession shall not be inadmissible in evidence in federal criminal prosecution solely because of delay in presentment before magistrate, 124 ALR Fed. 263.

Duty of court, in federal criminal prosecution, to conduct inquiry into voluntariness of accused's statement — modern cases, 132 ALR Fed. 415.

Construction and application of constitutional rule of *Miranda* — Supreme Court Cases, 17 ALR Fed. 2d 465.

Paragraph XVII. Bail; fines; punishment; arrest, abuse of prisoners.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; nor shall any person be abused in being arrested, while under arrest, or in prison.

1976 Constitution. — Art. I, Sec. I, Para. XIV.

Cross references. — Bail and punishment, U.S. Const., amend. 8. Cruel and unusual punishment, Ga. Const. 1983, Art. I, Sec. I, Para. XXI and § 38-2-1055. Bail, §§ 5-4-20, 5-6-45, 5-7-5, 17-6-1 et seq., 17-7-24, and 17-13-36. Pauper's bail, § 5-4-20. Rights of one refused bail, § 17-7-50. Capital punishment, §§ 17-10-30 and 17-10-38. Abuse of prisoners, §§ 42-4-5 and 42-5-58.

Law reviews. — For article, "The Georgia Bill of Rights: Dead or Alive?" see 34 Emory L.J. 341 (1985). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For survey of 1995 Eleventh Circuit cases on constitutional criminal procedure, see 47 Mer-

cer L. Rev. 765 (1996). For article, "Campbell v. Georgia: Mandatory Minimum Sentencing Survives Separation of Power Attacks, Remaining a Viable Option for the Legislature in Its War on Crime," see 17 Ga. St. U.L. Rev. 637 (2001). For annual survey of death penalty law, see 57 Mercer L. Rev. 479 (2006). For annual survey of death penalty law, see 58 Mercer L. Rev. 111 (2006).

For note, "Communist Aliens and the Right to Bail," see 2 J. of Pub. L. 165 (1953). For note discussing constitutional problems with the bail system, see 4 Ga. St. B.J. 278 (1967). For note, "Bail in Georgia: Elimination of 'Double Bonding' — A Partially Solved Problem," see 8 Ga. St. B.J. 220 (1971). For note, "Behind Closed Doors: An Empirical Inquiry Into

the Nature of Prison Discipline in Georgia," see 8 Ga. L. Rev. 919 (1974). For note, "Not So Shocking: The Death of the Electric Chair in Georgia at the Hands of the Georgia Supreme Court in *Dawson v. State*," see 53 Mercer L. Rev. 1695 (2002).

For comment on *Burger v. State*, 118 Ga. App. 328, 163 S.E.2d 333 (1968), see 5 Ga. St. B.J. 384 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ARREST

BAIL

FINES

CRUEL AND UNUSUAL PUNISHMENT

General Consideration

Acceptable fines. — It is not an excessive fine to require the perpetrator of fraud to pay double the amount of the debt sought to be evaded by the fraudulent act. *Conley v. State*, 85 Ga. 348, 11 S.E. 659 (1890); *Hathcock v. State*, 88 Ga. 91, 13 S.E. 959 (1891).

Excessive damages. — In an action against a truck manufacturer, a punitive damages award of \$2 million was not so excessive as to violate the due process clauses of the Georgia and United States Constitutions, the Eighth Amendment of the United States Constitution, and the excessive fines clause of Ga. Const. 1983, Art. I, Sec. I, Para. XVII. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993).

Duty of police to refrain from unlawfully assaulting or killing prisoner. — It is the duty of an arresting officer who has a person under arrest for a violation of law to refrain from unlawfully assaulting or killing the prisoner. *Powell v. Fidelity & Deposit Co.*, 45 Ga. App. 88, 163 S.E. 239 (1932).

Actions of deputy at security checkpoint. — In a suit based on the actions of a deputy sheriff at a courthouse security checkpoint, official immunity barred the plaintiff attorney's battery claim under the Georgia Constitution because the summary judgment evidence did not show actual malice or intent to cause injury. *West v. Davis*, 767 F.3d 1063 (11th Cir. 2014).

Imposition of consecutive sentence to replace concurrent sentence may

be impermissible. — The imposition of a new sentence to be served consecutively to a sentence on a prior conviction, in place of a vacated sentence that was to be served concurrently with the sentence on that prior conviction, may constitute an impermissible harsher punishment. *Thomas v. State*, 150 Ga. App. 341, 258 S.E.2d 28 (1979).

Contempt sentence imposed on defendant contrary to spirit of law. — When, in sentencing the defendant for contempt of court for failure to obey a court order to return the daughter to custody of the wife after a one-day visitation, the court imposed a sentence for each technical contempt, and the court rendered but one judgment, a fine of \$11,900.00 and confinement in jail for over three years, the sentence is contrary to the spirit of the law of the state and against the state's policy since the law limits the punishment for a single contempt to the maximum of \$200.00 and 20 days in jail, no matter how malicious, how flagrant, and how iniquitous the act of contempt might be. *Kenimer v. State ex rel. Webb*, 81 Ga. App. 437, 59 S.E.2d 296 (1950), later appeal, 83 Ga. App. 264, 63 S.E.2d 280 (1951).

Death penalty instructions must include life sentence alternative. — It is error to provide a sentencing phase instruction in a death penalty case which fails to explain that a life sentence may be recommended even in the presence of statutory aggravating circumstances. *Stynchcombe v. Floyd*, 252 Ga. 113, 311 S.E.2d 828 (1984).

State need not reduce capital sentence which is authorized under its own laws merely because of the effects of another state's judicial processes, brought about by the operation of the Interstate Agreement on Detainers. *Cobb v. State*, 244 Ga. 344, 260 S.E.2d 60 (1979).

Forfeiture of property. — Case involving the forfeiture of 5.1 acres of land and a dwelling house on the basis of the discovery of 8.8 ounces of marijuana would be remanded to the trial court for consideration in light of the decision in *Thorp v. State*, 264 Ga. 712, 450 S.E.2d 416 (1994). *Evans v. State*, 217 Ga. App. 646, 458 S.E.2d 859 (1995).

Cited in *Payne v. State*, 180 Ga. 609, 180 S.E. 130 (1935); *Crosby v. Courson*, 181 Ga. 475, 182 S.E. 590 (1935); *McGraw v. State*, 85 Ga. App. 857, 70 S.E.2d 141 (1952); *Massey v. State*, 220 Ga. 883, 142 S.E.2d 832 (1965); *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118 (1966); *Reid v. State*, 116 Ga. App. 640, 158 S.E.2d 461 (1967); *Strozier v. State*, 116 Ga. App. 777, 159 S.E.2d 182 (1967); *Irwin v. Arrendale*, 117 Ga. App. 1, 159 S.E.2d 719 (1967); *Stuart v. State*, 117 Ga. App. 183, 160 S.E.2d 409 (1968); *Grice v. State*, 224 Ga. 376, 162 S.E.2d 432 (1968); *Henderson v. Dutton*, 397 F.2d 375 (5th Cir. 1968); *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968); *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E.2d 732 (1969); *Goodine v. Griffin*, 309 F. Supp. 590 (S.D. Ga. 1970); *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 431 (1972); *Reed v. State*, 134 Ga. App. 47, 213 S.E.2d 147 (1975); *Crawford v. State*, 236 Ga. 491, 224 S.E.2d 365 (1976); *Gunn v. State*, 150 Ga. 730, 257 S.E.2d 538 (1979); *Southerland v. Ga. Dep't of Corr.*, 293 Ga. App. 56, 666 S.E.2d 383 (2008).

Arrest

Use of choke-hold resulted in officer's suspension. — Police officer was properly suspended for using a choke-hold on a handcuffed suspect in an attempt to prevent the suspect from swallowing narcotics in violation of department rules; there was nothing in Ga. Const. 1983, Art. I, Sec. I, Para. XIII, to suggest that because the use of a choke-hold was reasonable under some circumstances, the officer had the right to use it. *Mercure v. City of*

Atlanta Civil Service Board, 327 Ga. App. 840, 761 S.E.2d 393 (2014).

Bail

This paragraph does not determine any right to bail, or in what cases it exists. *Vanderford v. Brand*, 126 Ga. 67, 54 S.E. 822, 9 Ann. Cas. 617 (1906).

Discretion of court in setting bail amount. — The amount of bail to be assessed in each criminal case is left to the sound legal discretion of the court required to fix it and, in the absence of a flagrant abuse of such discretionary power, the court's action will not be controlled. *Reid v. Perkerson*, 207 Ga. 27, 60 S.E.2d 151 (1950).

Entitlement to bail as matter of right. — The accused in all criminal cases less than capital felonies, before trial, is entitled to bail, at least twice, as a matter of right and not as a matter of discretion. *Reid v. Perkerson*, 207 Ga. 27, 60 S.E.2d 151 (1950).

Excessive bail is equivalent of refusal to grant bail, and in such a case habeas corpus is an available and appropriate remedy for relief. *Reid v. Perkerson*, 207 Ga. 27, 60 S.E.2d 151 (1950).

Excessive bail prohibitions apply in misdemeanor cases after conviction. — The constitutional prohibitions against excessive bail set forth in U.S. Const., amend. 8 and this paragraph apply in misdemeanor cases after conviction. *Jones v. Grimes*, 219 Ga. 585, 134 S.E.2d 790 (1964).

\$100,000 bail in cocaine case held not excessive. — Setting bail in the total amount of \$100,000 in a case involving two charges of selling crack cocaine was not excessive when the trial judge was apprised of the defendant's lengthy residency in the community and the defendant's financial status, and weighed these factors against the serious nature and potential consequences of the charges. *Mayfield v. State*, 198 Ga. App. 252, 401 S.E.2d 297 (1990).

\$250,000 bail in murder case held not excessive. — In a prosecution for murder, based upon the seriousness of the offense charged and the likelihood that defendant would not appear at trial, the trial court did not abuse its discretion in

Bail (Cont'd)

holding that bail of \$250,000, as originally set, was not excessive. *Mullinax v. State*, 271 Ga. 112, 515 S.E.2d 839 (1999).

Bail in the amount of \$750,000 was not excessive since the defendant had prior felony convictions and the trial court's decision to increase bail at this habeas proceeding was based on other information not available at the first hearing. *Pullin v. Dorsey*, 271 Ga. 882, 525 S.E.2d 87 (2000).

Waiver of Fourth Amendment rights proper as condition of bail. — Waiver by the defendant, while free on bond for drug offenses, of rights under U.S. Const., amend. 4 and Ga. Const. 1983, Art. I, Sec. I, Para. XIII as a bond condition, was constitutional under U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII; it was a reasonable exercise of the trial court's function of balancing the rights of the accused with public safety interests. *Rocco v. State*, 267 Ga. App. 900, 601 S.E.2d 189 (2004).

Denial of bail not an abuse of discretion nor grounds for habeas petition. — Petitioner charged with 16 counts of violating the Georgia RICO Act, O.C.G.A. § 16-14-1, securities fraud, and theft, who owned no assets in the United States and had allegedly funneled significant assets to Belize, where the petitioner traveled frequently, was not entitled to bail as of right under O.C.G.A. § 17-6-1(a), Ga. Const. 1983, Art. I, Sec. I, Para. XVII, or U.S. Const., amend. VIII. The denial of bail was not an abuse of discretion, and petitioner was not entitled to a writ of habeas corpus. *Constantino v. Warren*, 285 Ga. 851, 684 S.E.2d 601 (2009).

Fines

Provisions of Tort Reform Act unconstitutional. — Provisions of the Tort Reform Act, O.C.G.A. § 51-12-5.1, relating to punitive damages, violated the due process and equal protection clauses of the federal and state constitutions, violated the excessive fines provisions of both constitutions, and violated the double jeopardy provision of the Fifth Amendment to the federal constitution. *McBride v. GMC*,

737 F. Supp. 1563 (M.D. Ga. 1990).

Fine did not violate defendant's constitutional rights. — When the defendant was convicted of trafficking cocaine in violation of O.C.G.A. § 16-13-31 and was sentenced to 20 years imprisonment and fined \$100,000, the fine was not out of proportion to the severity of the crime and not constitutionally infirm either because of the fine's mandatory nature or the fine's amount. *Wyatt v. State*, 259 Ga. 208, 378 S.E.2d 690 (1989).

Punitive damages in civil cases. — The excessive fines clause of this section applies to the imposition of punitive damages in civil cases. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827, appeal dismissed, 488 U.S. 805, 109 S. Ct. 36, 102 L. Ed. 2d 15 (1988).

A \$5,000,000 punitive damages award to the owner of a bulldozer which was destroyed when it hit an improperly marked underground petroleum pipeline was excessive since: (1) any negligence present was passive; (2) there was no bodily injury to the plaintiff and the award did not bear a rational relationship to the actual damages award; and (3) there was no rational relationship between the offense and the punishment in that the punitive damage award was 100 times the property damage award. *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 365 S.E.2d 827, appeal dismissed, 488 U.S. 805, 109 S. Ct. 36, 102 L. Ed. 2d 15 (1988).

Cruel and Unusual Punishment

State constitution provides same protection as Fourteenth Amendment. — Ga. Const. 1983, Art. I, Sec. I, Para. XVII, which states that no person shall be abused while under arrest, provides an independent state ground for this action, and provides at least as much protection to pretrial detainees under certain circumstances as the Fourteenth Amendment due process clause. *Long v. Jones*, 208 Ga. App. 798, 432 S.E.2d 593 (1993).

Arrestee's 42 U.S.C. § 1983 suit against a county sheriff, alleging that the arrestee was raped by a deputy at the county jail, failed as a matter of law because § 1983 relief did not extend to inadequate hiring

practices, and the arrestee failed to raise a fact question as to the constitutional failure to protect, staff, and train claims against the sheriff individually; because the arrestee had not suffered a federal Eighth Amendment violation, the arrestee also had not suffered a violation under Ga. Const. 1983, Art. I, Sec. I, Para. XVII. *Boyd v. Nichols*, 616 F. Supp. 2d 1331 (M.D. Ga. 2009).

Prohibition relates to sentences for criminal convictions. — The prohibition against cruel and unusual punishment has relation to punishment imposed by sentences on conviction for criminal offenses. *Hill v. State*, 119 Ga. App. 612, 168 S.E.2d 327 (1969).

Statutes authorizing capital punishment constitutional. — The imposition of the penalty of death upon one who rapes a woman is not “cruel and unusual” punishment. *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964); *Vanleeward v. State*, 220 Ga. 135, 137 S.E.2d 452 (1964), cert. denied, 380 U.S. 982, 85 S. Ct. 1348, 14 L. Ed. 2d 275 (1965).

A sentence to death by electrocution for murder is not “cruel and unusual punishment”. *Trimble v. State*, 220 Ga. 229, 138 S.E.2d 274 (1964).

The death penalty for the crime of murder is not cruel and unusual punishment. *Whisman v. State*, 221 Ga. 460, 145 S.E.2d 499 (1965), cert. denied, 384 U.S. 895, 86 S. Ct. 1977, 16 L. Ed. 2d 1001 (1966).

The statutes of this state authorizing capital punishment have repeatedly been held not to be cruel and unusual punishment in violation of the Constitution. *Hart v. State*, 227 Ga. 171, 179 S.E.2d 346 (1971).

Petitioner, a death row inmate, challenged the imposition of the death penalty, in a federal habeas petition arguing that the death penalty was being administered in a racially discriminatory manner; however, the argument failed because the statistical evidence was not so strong as to permit no inference other than that the results were the product of a racially discriminatory intent or purpose in that the death penalty was sought in 58 percent of the possible death penalty cases where the defendant was black but in only 40

percent of the cases where the defendant was white, and sought in only 25 percent of the cases where the victim was black and 54 percent of the cases where the victim was white. *Jefferson v. Terry*, 490 F. Supp. 2d 1261 (N.D. Ga. 2007), aff’d in part and rev’d in part, 570 F.3d 1283 (11th Cir. Ga. 2009).

Proportionality review. — Defendant’s conviction was affirmed as the Georgia Supreme Court’s proportionality review was neither unconstitutional nor inadequate under Georgia statutory law. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Execution by electrocution. — As electrocution inflicts purposeless violence and needless mutilation, in violation of the Georgia Constitution’s proscription of cruel and unusual punishments, future executions of death sentences are to be carried out by lethal injection only. *Dawson v. State*, 274 Ga. 327, 554 S.E.2d 137 (2001).

Execution of the mentally retarded constitutes cruel and unusual punishment. *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989).

Death sentence proper despite defendant’s mental illness. — Defendant, who was not found by the jury to be mentally ill, was not entitled to have the death sentence vacated on mental illness grounds, as O.C.G.A. § 17-7-131 did not preclude a death sentence on mental illness grounds, and there was no constitutional prohibition under U.S. Const., amend. 8 or Ga. Const. 1983, Art. I, Sec. I, Para. XVII against a death sentence for a competent but mentally ill defendant. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Death penalty for codefendant not proven to have directly committed murderous act. — Since the defendant was not only present but active and participating throughout the commission of kidnapping, rape, murder and aggravated assault of which the defendant was convicted, imposition of the death penalty was not excessive or disproportionate to the penalty imposed in similar cases even though it was not established whether

Cruel and Unusual Punishment (Cont'd)

defendant or the codefendant fired the gunshots which killed the victim. *Johnson v. Zant*, 249 Ga. 812, 295 S.E.2d 63 (1982).

Barbarities of quartering are forbidden. *Whitten v. State*, 47 Ga. 297 (1872).

Paddling of children in public school is not cruel and unusual punishment, yet any punishment beyond corporal punishment as is reasonably necessary may result in remedial action to deter excesses. *Fuller v. Williams*, 150 Ga. App. 730, 258 S.E.2d 538, rev'd on other grounds, 244 Ga. 846, 262 S.E.2d 135 (1979).

This paragraph does not put any limit upon legislative discretion to punish one convicted of crime so long as the legislature does not provide cruel and unusual punishments such as disgraced the civilization of former ages, and make one shudder with horror to read of them, as drawing, quartering, burning, or other acts; this paragraph does not put any limit upon legislative discretion to punish one convicted of a crime. *Sims v. Balkcom*, 220 Ga. 7, 136 S.E.2d 766 (1964); *Dutton v. Smart*, 222 Ga. 35, 148 S.E.2d 396 (1966).

Certain discretion as to term of imprisonment may be left to trial judge. *Whitten v. State*, 47 Ga. 297 (1872).

Prosecutors did not have unfettered discretion. — Defendant's claim that the prosecutor's authority to choose in which cases to seek the death penalty permitted the possibility of an arbitrary and capricious abuse of discretion and was unconstitutional was rejected as prosecutors did not have unfettered discretion to seek the death penalty, and challenges to the Georgia legislature's determination that district attorneys should have the discretion to decide whether a murder defendant met the statutory criteria for the death penalty and whether to pursue the death penalty when a defendant was eligible had been repeatedly rejected. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Sentence not for unspecified period. — Defendant's sentences did not

constitute cruel and unusual punishment. Although defendant was remanded to jail for an unspecified period, until there was an opening for the defendant at a detention center, the defendant had not been sentenced for an unspecified period of time. The defendant received a 12 month sentence and had been permitted to serve that sentence on probation, provided the defendant comply with certain conditions. *Boyd v. State*, 204 Ga. App. 729, 420 S.E.2d 389 (1992).

Sentence within statutory limit will not be set aside. — When the sentence imposed by the trial court is within the limit fixed by the statute, the sentence will not be set aside and a new trial granted on the ground that the sentence imposed is excessive and the punishment cruel and unusual, and, therefore, in violation of the state Constitution. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960).

A sentence is not cruel and inhumane within the constitutional inhibition so long as it is within the statutory limit. *Boyd v. State*, 204 Ga. App. 729, 420 S.E.2d 389 (1992).

O.C.G.A. § 17-10-6.1, imposing mandatory minimum sentences in certain cases, does not impose unconstitutionally excessive punishment, and the fact that the defendants were 18 years old at the time of sentencing and may have been first offenders did not render the statute unconstitutional as applied to the defendants. *Campbell v. State*, 268 Ga. 44, 485 S.E.2d 185 (1997).

Claim by the defendant that a sentence pursuant to O.C.G.A. §§ 16-6-22.2(b) and 17-10-6.1(b)(2) constituted cruel and unusual punishment because the sentence was grossly out of proportion to the severity of the crime, and that the sentence was overly severe under the circumstances, was within the exclusive jurisdiction of the Georgia Supreme Court where the claim challenged the constitutionality of the statutes themselves; as the sentence was legally authorized and within statutory limits, the sentence was upheld. *Colton v. State*, 297 Ga. App. 795, 678 S.E.2d 521 (2009).

Sentence is not cruel and inhumane within constitutional inhibi-

tion so long as it is within statutory limit. *Bearden v. State*, 122 Ga. App. 25, 176 S.E.2d 243 (1970).

When the sentence imposed was the mandatory minimum sentence and was no greater than what could have been imposed under prior law, the punishment was not cruel and unusual as to be completely disproportionate to the offense. *Paras v. State*, 247 Ga. 75, 274 S.E.2d 451 (1981).

A life without parole sentence imposed on a juvenile who is not properly determined to be in the very small class of juveniles for whom such a sentence may be deemed constitutionally proportionate is not just erroneous but contrary to law and, as a result, void; it follows that state collateral review courts that are open to federal law claims must apply the holding of *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012), retroactively if a petitioner challenges such a sentence under the Eighth Amendment, and it follows, as a matter of Georgia procedural law, that a defendant's *Miller* claim, a substantive claim that, if meritorious, would render a sentence void, can be properly raised in an amended motion for new trial and in a direct appeal, despite the failure to raise the claim before the defendant was sentenced. *Veal v. State*, 298 Ga. 691 (2016).

Consecutive sentencing permissible. — Defendant who was convicted of simple battery and criminal trespass after defendant attacked defendant's spouse and defendant's mother-in-law and broke the windshield and at least one other window on the spouse's car was not subjected to cruel and unusual punishment because the trial court imposed a sentence of 12 months' incarceration for each charge, and ordered that the defendant serve the sentences consecutively. *Hill v. State*, 259 Ga. App. 363, 577 S.E.2d 61 (2003).

Imposition of maximum misdemeanor punishment excessive. — Imposition of the maximum misdemeanor punishment upon conviction for criminal trespass exceeded constitutional bounds against cruel and unusual punishment since the trespass involved the defendant's trimming of the defendant's neighbor's hedge. *Haygood v. State*, 225 Ga.

App. 81, 483 S.E.2d 302 (1997).

Excessive, unusual, and cruel sentence imposed. — Although under the law of the case, the trial court may be authorized to hold the defendant guilty of 238 separate contempts when the offenses are all nevertheless based on only one culpable intent there is one contempt coupled with that culpable intent, and 237 other technical violations. Therefore, all of the sentence of the trial court over and above the maximum fixed for the first offense, and in addition thereto amounts of imprisonment and fines for each of the remaining 237 technical violations totaling the equivalent of one other maximum offense, is an abuse of judicial discretion and so cruel and unusual as to contravene the state Constitution. *Kenimer v. State*, 83 Ga. App. 264, 63 S.E.2d 280 (1951).

No merit to contention that separate sentences constituted cruel and unusual punishment. — Contention that imposition of 36 separate sentences, to be computed consecutively, upon convictions on 36 separate and distinct counts, constituted cruel and unusual punishment, is without merit. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960).

More severe sentence may be imposed upon resentencing, but vindictiveness must not be motivating force. — There is no absolute constitutional bar to imposing a more severe sentence upon resentencing, but vindictiveness must not be the motivating force behind an increased sentence. *Pressley v. State*, 158 Ga. App. 638, 281 S.E.2d 364 (1981).

Conduct justifying imposition of more severe sentence upon resentencing. — Reasons for imposing a more severe sentence must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. *Pressley v. State*, 158 Ga. App. 638, 281 S.E.2d 364 (1981).

Factual data upon which increased sentence is based must be made part of record, so that constitutional legitimacy of increased sentence may be fully reviewed on appeal. *Pressley v. State*, 158 Ga. App. 638, 281 S.E.2d 364 (1981).

Maltreatment prior to trial does not constitute cruel and unusual punish-

Cruel and Unusual Punishment (Cont'd)

ment. — Maltreatment occurring prior to the time of the trial constitutes no part of the sentences imposed as a result of the trial and, therefore, does not constitute cruel and unusual punishment. *Hill v. State*, 119 Ga. App. 612, 168 S.E.2d 327 (1969).

Permissible punishment. — Violator of an ordinance may be compelled to work on city streets. *Loeb v. Jennings*, 133 Ga. 796, 67 S.E. 101, 18 Ann. Cas. 376 (1910), *aff'd*, 219 U.S. 582, 31 S. Ct. 469, 55 L. Ed. 345 (1911).

Defendant failed to establish the threshold gross disproportionality inference needed to support a claim that the 10 years confinement, 10 years probation sentence imposed on the defendant violated U.S. Const., amend. VIII and Ga. Const. 1983, Art. I, Sec. I, Para. XVII; the sentence was within the sentencing range in O.C.G.A. § 16-6-4(b)(1), the 2006 amendment to O.C.G.A. § 16-6-4(b)(2) did not apply to the defendant, so it did not provide a basis for any proportionality argument, and the evidence showed that the defendant engaged in sexual intercourse with a 12-year-old child without the child's consent, and Georgia's child molestation law punished acts that were far less severe. *Bragg v. State*, 296 Ga. App. 422, 674 S.E.2d 650 (2009).

Juvenile's sentence of four years in custody was proper on six counts of aggravated assault and one count of possession of a handgun by an underage person because the juvenile was not subject to one of the most severe punishments allowed by law, but was sentenced under former O.C.G.A. § 15-11-63 (see now O.C.G.A. §§ 15-11-2 and 15-11-602), which had the central purpose of rehabilitation and treatment of the child and not punishment. In the Interest of T. D. J., 325 Ga. App. 786, 755 S.E.2d 29 (2014).

Appellant's sentence of two consecutive terms of life imprisonment plus 85 years was not cruel and unusual punishment, despite being 17 years old at the time of the crimes, since the trial court balanced the appellant's youth against the violent behavior and the adult conduct engaged

in, which included the murder of two innocent bystanders. *Jones v. State*, 296 Ga. 663, 769 S.E.2d 901 (2015), overruled in part by *Veal v. State*, 2016 Ga. LEXIS 243 (Ga. 2016).

Impermissible punishment prescribed. — A municipal ordinance authorizing punishment of its prisoners by working on a chain gang with state prisoners is void. *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751, 4 Ann. Cas. 501 (1906).

Fine for contempt of discovery order. — When the per diem fine for contempt of a discovery order imposed by the trial court totaled \$193,500, the Court of Appeals agreed with the defendant that the fine imposed was substantial but found no basis in the record for concluding that this punishment constituted cruel and unusual punishment. *Carey Can., Inc. v. Hinely*, 181 Ga. App. 364, 352 S.E.2d 398 (1986), *rev'd* on other grounds, 257 Ga. 150, 356 S.E.2d 202, *cert. denied*, 484 U.S. 898, 108 S. Ct. 233, 98 L. Ed. 2d 192 (1987).

Life sentence for second conviction of selling cocaine not cruel and unusual punishment. — O.C.G.A. § 16-13-30(d), which mandates a life sentence for a second conviction of selling cocaine, does not constitute cruel and unusual punishment under Ga. Const. 1983, Art. I, Sec. I, Para. XVII. *Stephens v. State*, 261 Ga. 467, 405 S.E.2d 483 (1991).

O.C.G.A. § 16-13-30(d), which mandates a sentence of life imprisonment upon a second conviction for selling cocaine, does not violate due process or equal protection and does not violate state or federal constitutional guarantees against cruel and unusual punishment. *Isom v. State*, 261 Ga. 596, 408 S.E.2d 701 (1991); *Crutchfield v. State*, 218 Ga. App. 360, 461 S.E.2d 555 (1995).

Mandatory child molestation sentence. — Mandatory sentence for aggravated child molestation of 10 years without parole pursuant to O.C.G.A. §§ 16-6-4(d)(1) and 17-10-6.1 was not cruel and unusual punishment as applied to the defendant, despite the fact that the defendant was 18 years old at the time of the act and the victim was only 4 years younger. *Widner v. State*, 280 Ga. 675, 631 S.E.2d 675 (2006).

Twenty-five year sentence for trafficking in methamphetamine. — When the defendant was in possession of 434.72 grams of methamphetamine, the sentence of 25 years in prison and a one million dollar fine was mandated; given the large quantity and value of the methamphetamine, the sentence required by the legislature was not wholly irrational or grossly disproportionate to the severity of the crime, and because trafficking in methamphetamine was so lucrative, the mandatory sentence did not constitute cruel and unusual punishment. *Flores v. State*, 277 Ga. App. 211, 626 S.E.2d 181 (2006).

Death by lethal injection is not unconstitutional under U.S. Const., amend. 8 and Ga. Const. 1983, Art. I, Sec. I, Para. XVII, both of which prohibit cruel and unusual punishment. *Lewis v. State*, 279 Ga. 756, 620 S.E.2d 778 (2005), cert. denied, 547 U.S. 1116, 126 S. Ct. 1917, 164 L. Ed. 2d 671 (2006).

Defendant's pre-trial motion regarding lethal injection and the defendant's amended motion for a new trial addressing lethal injection were properly denied as the defendant failed to identify any particular aspect of the evidence admitted in the trial court that would require a departure from the prior decisions holding that lethal injection was a constitutional form of execution. *Williams v. State*, 281 Ga. 87, 635 S.E.2d 146 (2006), cert. denied, 553 U.S. 1004, 128 S. Ct. 2046, 170 L. Ed. 2d 793 (2008).

Trial court did not err in rejecting a defendant's claim that lethal injection was unconstitutional as the defendant proffered no evidence to sustain the claim. *Walker v. State*, 281 Ga. 157, 635 S.E.2d 740 (2006), cert. denied, 552 U.S. 833, 128 S. Ct. 60, 169 L. Ed. 2d 50 (2007).

Life sentence for repeat offense of failing to register as sexual offender unconstitutional. — Imposition of a mandatory sentence of life imprisonment

imposed against a defendant, who was a second time offender, for failing to register as a sexual offender was held unconstitutional as grossly disproportionate to the crime of failing to register. *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

Sentence of life in prison plus years consecutive for convictions of felony murder and armed robbery did not exceed the statutorily authorized maximum and did not amount to cruel and unusual punishment; the felony murder statute, O.C.G.A. § 16-5-1, authorized a sentence of life in prison on conviction for felony murder, and the armed robbery statute, O.C.G.A. § 16-8-41, authorized a sentence of death or imprisonment for life or by imprisonment for not less than 10 nor more than 20 years. The trial court sentenced the defendant to life in prison for the felony murder conviction plus two 20-year terms, running concurrent to each other but consecutive to the felony murder sentence, for the two convictions for armed robbery, and thus the statutory maximum was not exceeded. *Washington v. State*, 285 Ga. 541, 678 S.E.2d 900 (2009).

Life sentence for aggravated child molestation not cruel and unusual. — Trial counsel was not ineffective in failing to object to the life sentence for aggravated child molestation as the defendant's sentence did not raise a threshold inference of gross disproportionality because the evidence established that the defendant, while engaged in sexual intercourse with a girlfriend, summoned the 14-year-old victim, who was working alongside other young women as a prostitute on the defendant's behalf, to the defendant's room and placed the defendant's sexual organ in the victim's mouth while the defendant's testicles were placed in the girlfriend's mouth. *Pepe-Frazier v. State*, 331 Ga. App. 263, 770 S.E.2d 654 (2015), cert. denied, 2015 Ga. LEXIS 412 (Ga. 2015).

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Constitutionality of statutes in relation to treatment or discipline of convicts, 50 ALR 104.

Amount of bail required in criminal action, 53 ALR 399.

Rights and responsibilities, civil or criminal, of police officers in respect of examination of persons under arrest ("third degree"), 79 ALR 457.

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Constitutionality of statute providing for penalty or forfeiture as affected by failure to fix maximum amount, 114 ALR 1126.

Court's power and duty, pending determination of habeas corpus proceeding on merits, to admit petition to bail, 56 ALR2d 668.

Insanity of accused as affecting right to bail in criminal case, 11 ALR3d 1385.

Right of motorist stopped by police officers for traffic offense to be informed at that time of his federal constitutional rights under *Miranda v. Arizona*, 25 ALR3d 1076.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment, 33 ALR3d 335.

Applicability, in proceedings under statutes relating to sexual psychopaths, of constitutional provisions for the protection of a person accused of crime, 34 ALR3d 652.

Right of exonerated arrestee to have

fingerprints, photographs, or other criminal identification or arrest records expunged or restricted, 46 ALR3d 900; 58 ALR4th 902.

Prison conditions as amounting to cruel and unusual punishment, 51 ALR3d 111.

Review for excessiveness of sentence in narcotics case, 55 ALR3d 812.

Drug addiction or related mental state as defense to criminal charge, 73 ALR3d 16.

Pretrial preventive detention by state court, 75 ALR3d 956.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 ALR3d 780.

Validity of a state statute imposing mandatory sentence or prohibiting granting of probation or suspension of sentence for narcotics offenses, 81 ALR3d 1192.

Modern status of right of peace officer to use deadly force in attempting to arrest fleeing felon, 83 ALR3d 174.

Validity, construction, and effect of Uniform Alcoholism and Intoxication Treatment Act, 85 ALR3d 701.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 ALR3d 225.

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Propriety of imposing capital punishment on mentally retarded individuals, 20 ALR5th 177.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities, 36 ALR5th 161.

Propriety of carrying out death sentences against mentally ill individuals, 111 ALR5th 491.

Application of constitutional rule of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that exe-

cution of mentally retarded persons constitutes "cruel and unusual punishment" in violation of Eighth Amendment, 122 ALR5th 145.

When does forfeiture of real property violate excessive fines clause of Eighth Amendment or state constitutions — State cases, 124 ALR5th 509.

When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 ALR6th 93.

Prison inmate's Eighth Amendment rights to treatment for sleep disorders, 68 ALR6th 389.

When does forfeiture of currency, bank account, or cash equivalent violate excessive fines clause of Eighth Amendment, 164 ALR Fed. 591.

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When does forfeiture of motor vehicle pursuant to federal statute violate excessive fines clause of Eighth Amendment, 169 ALR Fed. 615.

Excessive fines clause of Eighth Amendment — Supreme Court cases, 172 ALR Fed. 389.

Paragraph XVIII. Jeopardy of life or liberty more than once forbidden.

No person shall be put in jeopardy of life or liberty more than once for the same offense except when a new trial has been granted after conviction or in case of mistrial.

1976 Constitution. — Art. I, Sec. I, Para. XV.

Cross references. — Due process of law and just compensation, U.S. Const., amend. 5, and §§ 16-1-6 et seq., and 38-2-438. Bail for juveniles, § 15-11-507. Multiple jeopardy in grand jury proceedings, § 17-7-53. Plea of nolo contendere constituting jeopardy, § 17-7-95.

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criminal law and procedure, see 35 Mercer L. Rev. 103 (1983). For survey of 1995 Eleventh Circuit cases on constitutional criminal procedure, see 47 Mercer L. Rev. 765 (1996).

For note, "The Posture of Former Jeopardy on Retrial," see 9 Mercer L. Rev. 354 (1958).

For comment discussing appeal by state after acquittal, in light of *State v. Evjue*, 254 Wisc. 581, 37 N.W.2d 50 (1949), see 1 Mercer L. Rev. 306 (1950). For comment on *State v. Vaughn*, 207 Ga. 583, 63 S.E.2d 357 (1951), see 14 Ga. B.J. 72 (1951). For comment on *Busbee v. State*, 183 So. 2d 27 (Fla. Dist. Ct. App. 1966), discussing multiple prosecutions of distinct offenses arising from the same transaction, see 18 Mercer L. Rev. 304 (1966).

JUDICIAL DECISIONS

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General Consideration

Definition of liberty. — Liberty, as used in this paragraph, is not confined to detention of the person, but embraces every inalienable right of the citizen. *Jenkins v. State*, 14 Ga. App. 276, 80 S.E. 688 (1914).

Nolle prosequi entered after jeopardy attached amounts to acquittal. *Reynolds v. State*, 3 Ga. 53 (1847); *Franklin v. State*, 85 Ga. 570, 11 S.E. 876 (1890).

No applicability of former jeopardy concept to certain traffic violations. — The constitutional concept of former jeopardy has a strict application to criminal prosecutions only, and will not be invoked when the traffic violations resulting in the mandatory suspension of a driver's license are subsequently included in a determination of the driver's status as a habitual offender. *Williams v. State*, 138 Ga. App. 662, 226 S.E.2d 816 (1976).

Distinction between successive prosecutions for speeding and for driving under influence. — When a motorist is charged with speeding and driving under the influence in two counties, the motorist may be tried and convicted in both counties for speeding, but a conviction for driving under the influence in one county will bar prosecution in the other as this charge arises out of the same conduct in both counties. *State v. Willis*, 149 Ga. App. 509, 254 S.E.2d 743 (1979).

Statutes expand proscription of double jeopardy. — The 1968 Georgia Criminal Code expanded the proscription of double jeopardy beyond that provided for in the United States and Georgia Constitutions. Therefore, questions of double jeopardy in Georgia must now be determined under the expanded statutory proscriptions of former Code 1933, §§ 26-505, 26-506, 26-507 (see now O.C.G.A. §§ 16-1-6, 16-1-7, and 16-1-8). Consequently, previous Georgia decisions applying constitutional standards of double jeopardy will generally not be applicable. *State v. Estevez*, 232 Ga. 316, 206 S.E.2d

475 (1974), overruled on other grounds, *Drinkard v. Walker*, 281 Ga. 211, 636 S.E.2d 530 (2006); *State v. Warren*, 133 Ga. App. 793, 213 S.E.2d 53 (1975).

Effect of jeopardy and statute of limitations on subsequent prosecutions when previous general accusation. — When a case belongs to the class of cases, such as possession of nontax-paid liquor when the state by the generality of the indictment need not be confined to proof of any specific date or transaction within the period of limitation, the result is that a plea of nolo contendere for a prior particular crime will usually operate as a bar for any such offense committed within the period of limitation previously to the second indictment, since to hold otherwise would twice place the defendant in jeopardy. *Key v. State*, 83 Ga. App. 839, 65 S.E.2d 278 (1951).

Following defendant's conviction in superior court under an accusation which charged the defendant in general terms with the possession of alcoholic liquors, such conviction would operate as a bar to another prosecution for the same offense committed at any time within the two-year period immediately preceding the filing of the accusation. *Gilstrap v. State*, 90 Ga. App. 12, 81 S.E.2d 872 (1954).

When the state by the generality of the accusation is not confined to proof of any specific date or transaction within the period of the statute of limitations, the result is that a prosecution for a particular crime operates as a bar for any such offense committed within the period of limitation prior to the return of the accusation. *Hawks v. State*, 94 Ga. App. 594, 95 S.E.2d 764 (1956).

Defendant in jeopardy for second time when trial for lesser included offense. — When the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes included within a larger, since it is impossible one should be convicted of the larger without being also convicted of the

smaller, thus, if one has been so found guilty or not guilty of the smaller, one is, when on trial for the larger, in jeopardy a second time for the offense, namely, the smaller offense. *Jordan v. State*, 75 Ga. App. 815, 44 S.E.2d 821 (1947).

No error in proceeding upon subsequent indictment in criminal case while previous indictment is still pending. *Lastinger v. State*, 84 Ga. App. 760, 67 S.E.2d 411 (1951).

In a criminal proceeding, the pendency of a former indictment for the same offense is no ground for a plea in abatement or in bar, although the accused may have been arraigned thereon and have filed a plea, as when several indictments for the same offense are pending against the same person, it is immaterial upon which the accused is first tried. Whenever the accused has been acquitted or convicted upon any one of them, the accused can plead such acquittal or conviction in bar of a prosecution of the others. *Lastinger v. State*, 84 Ga. App. 760, 67 S.E.2d 411 (1951).

The pendency of a prior indictment for the same offense based on the same facts for which the defendant was arraigned on and entered a plea did not place the defendant in jeopardy. Defendant did not face a repeated prosecution simply because the defendant was tried on a subsequent indictment. *Hubbard v. State*, 225 Ga. App. 154, 483 S.E.2d 115 (1997).

No former jeopardy when trial under void accusation. — A plea of former jeopardy cannot be predicated on the fact that the defendant has previously been put on trial under a void accusation, that accusation being an absolute nullity, the defendant could not waive defects therein and consent that the trial proceed. *Culpepper v. State*, 44 Ga. App. 351, 161 S.E. 849 (1931).

Constitutions control rights when successive prosecutions involved. — When successive municipal and state prosecutions are involved, a criminal defendant's rights are controlled solely by the state and federal Constitutions. *State v. Burroughs*, 244 Ga. 288, 260 S.E.2d 5 (1979), rev'd on other grounds, 448 U.S. 903, 100 S. Ct. 3044, 65 L. Ed. 2d 1134 (1980).

Double jeopardy does not preclude use of acquitted crime as ground for probation revocation. — The principle of double jeopardy does not preclude the use of a crime, for which a probationer has been acquitted by a jury, as a ground for revocation of probation. *Johnson v. State*, 240 Ga. 526, 242 S.E.2d 53, cert. denied, 439 U.S. 881, 99 S. Ct. 221, 58 L. Ed. 2d 194 (1978).

Retrial on count quashed for second time controlled by statute. — Retrial of a charge of possession of a firearm by a convicted felon would not itself violate double jeopardy or any other constitutional right since the right not to be prosecuted on a count which was quashed for the second time was purely statutory pursuant to O.C.G.A. § 17-7-53.1. *Langlands v. State*, 282 Ga. 103, 646 S.E.2d 253 (2007).

Venue. — Venue is jurisdictional in Georgia so as to allow its being raised by general grounds of motion for new trial, but it does not go to guilt or innocence of accused and this is not substantive such that jeopardy attaches. *Patterson v. State*, 162 Ga. App. 455, 291 S.E.2d 567 (1982).

Because the state failed to prove the element of venue beyond a reasonable doubt, and there was no indication in the record that the juvenile waived the requirement or that the court took judicial notice of venue as an element of the offenses charged, the juvenile's adjudications of delinquency had to be reversed. However, although the delinquency adjudications had to be reversed, the state was permitted to retry the juvenile without violating the Double Jeopardy Clause, because there was otherwise sufficient evidence at trial to support the adjudications entered. *In the Interest of J.B.*, 289 Ga. App. 617, 658 S.E.2d 194 (2008).

Cited in *Reed v. State*, 163 Ga. 206, 135 S.E. 748 (1926); *Cliett v. State*, 167 Ga. 835, 147 S.E. 35 (1929); *Hall v. State*, 41 Ga. App. 455, 153 S.E. 534 (1930); *State v. B'Gos*, 175 Ga. 627, 165 S.E. 566 (1932); *Burns v. State*, 191 Ga. 60, 11 S.E.2d 350 (1940); *Williams v. State*, 66 Ga. App. 93, 17 S.E.2d 83 (1941); *Manry v. State*, 77 Ga. App. 43, 47 S.E.2d 817 (1948); *Dodd v. State*, 85 Ga. App. 589, 69 S.E.2d 784 (1952); *McGraw v. State*, 85 Ga. App. 857,

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70 S.E.2d 141 (1952); *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118 (1966); *Harwell v. State*, 230 Ga. 480, 197 S.E.2d 708 (1973); *Marchman v. State*, 132 Ga. App. 677, 209 S.E.2d 88 (1974); *Singer v. State*, 156 Ga. App. 416, 274 S.E.2d 612 (1980); *Walker v. State*, 156 Ga. App. 478, 274 S.E.2d 680 (1980); *State v. Abdi*, 162 Ga. App. 20, 288 S.E.2d 772 (1982); *Swafford v. State*, 161 Ga. App. 139, 291 S.E.2d 3 (1982); *Brooks v. State*, 162 Ga. App. 485, 292 S.E.2d 89 (1982); *State v. Hightower*, 252 Ga. 220, 312 S.E.2d 610 (1984); *Taylor v. State*, 177 Ga. App. 624, 340 S.E.2d 263 (1986); *Riley v. State*, 181 Ga. App. 667, 353 S.E.2d 598 (1987); *Eidson v. State*, 182 Ga. App. 321, 355 S.E.2d 691 (1987); *Cox v. State*, 203 Ga. App. 869, 418 S.E.2d 133 (1992); *Johnson v. State*, 258 Ga. App. 33, 572 S.E.2d 669 (2002); *Bentley v. State*, 262 Ga. App. 541, 586 S.E.2d 32 (2003); *Seymour v. State*, 262 Ga. App. 823, 586 S.E.2d 713 (2003); *Usher v. State*, 290 Ga. App. 710, 659 S.E.2d 920 (2008); *Freeman v. State*, 329 Ga. App. 429, 765 S.E.2d 631 (2014).

Separate Offenses

Prohibition against second jeopardy for same offense signifies same criminal act or omission. — The words “same offense,” in this paragraph, prohibiting a second jeopardy, do not signify the same offense *eo nomine*, but the same criminal act or omission. *Crumley v. City of Atlanta*, 68 Ga. App. 69, 22 S.E.2d 181 (1942).

Single act may constitute two or more distinct and separate offenses. *Dutton v. Smart*, 222 Ga. 35, 148 S.E.2d 396 (1966).

No violation when act results in injury to two or more persons. — When an unlawful act is committed resulting in the injury or death of two or more persons in the operation of a motor vehicle, the accused may be convicted of two or more crimes if two or more persons are the victims, without violating the constitutional provisions as it relates to former jeopardy. *Wellons v. State*, 77 Ga. App. 652, 48 S.E.2d 922 (1948).

Upon conviction of defendant of three

counts of homicide by vehicle under O.C.G.A. § 40-6-393 through a violation of O.C.G.A. § 40-6-391, the driving under the influence statute, it was not a violation of double jeopardy to sentence defendant to 15 years for each of the homicide counts. *Cox v. State*, 243 Ga. App. 668, 533 S.E.2d 435 (2000).

Offender may be convicted of both offenses when they are not same offense. — If the offense is one of assault with intent to murder, and assault with intent to rob by an assault with an offensive or dangerous weapon or instrument, and the evidence supports an intent to murder and an intent to rob, the offender may be convicted of assault with intent to murder and assault with intent to rob. Under the provisions of this paragraph, the offenses are not the same offenses, although the offenses include the same occasion, time, and place. *Martin v. State*, 77 Ga. App. 297, 48 S.E.2d 485 (1948).

Even if a defendant is convicted for the same transaction as a matter of fact of both burglary and assault with intent to rape, the offenses are legally separate and distinct since not only are the elements of the crimes of burglary and assault with intent to rape substantially different, but the former crime is one against the habitation while the latter is a crime against the person, and, therefore, the defendant could not have been placed in former jeopardy. *Dutton v. Smart*, 222 Ga. 35, 148 S.E.2d 396 (1966).

When a defendant engaged in two separate courses of conduct, one, the attempt to sell marijuana to an undercover police officer, and two, possession of 12 pounds of marijuana at defendant's home, double jeopardy did not attach to the second prosecution, as these acts occurred at different times and locations, with distinct quantities of contraband, even though defendant might have at some earlier time possessed all the marijuana in defendant's home. *Kinchen v. State*, 265 Ga. App. 474, 594 S.E.2d 686 (2004).

Separate convictions for armed robbery and hijacking a motor vehicle did not violate the state and federal prohibitions against double jeopardy, as the latter constituted a separate offense warranting a separate sanction under Georgia law, thus

warranting an additional punishment. *Dumas v. State*, 283 Ga. App. 279, 641 S.E.2d 271 (2007).

Punishment by different governmental entities. — One may be punishable by the state, the other by the municipality. *Hood v. Von Glahn*, 88 Ga. 405, 14 S.E. 564 (1892).

An acquittal under an indictment charging the accused with the offense of using obscene and vulgar language in the presence of a female will not operate to bar a prosecution for using opprobrious words and abusive language to and of another, even though both indictments related to the same act. *McIntosh v. State*, 116 Ga. 543, 42 S.E. 793 (1902).

One offense may be punishable by the state and the other by the federal government. *Cooley v. State*, 152 Ga. 469, 110 S.E. 449 (1922), appeal dismissed, 260 U.S. 760, 43 S. Ct. 251, 67 L. Ed. 501 (1923).

Multiple offenses may be punishable by the state. Two assault with murder convictions were not the same and in no sense involved any construction of the constitutional provision; and by determining that the trial court committed no error in that finding, there was no constitutional question to be decided. *Fews v. State*, 1 Ga. App. 122, 58 S.E. 64 (1907).

Financial transaction card theft not lesser included offense of financial transaction card fraud. — Financial transaction card theft, O.C.G.A. § 16-9-31, is not a lesser included offense of financial transaction card fraud, O.C.G.A. § 16-9-33; thus, defendant's prior conviction for the former offense did not preclude prosecution for the latter. *Sword v. State*, 232 Ga. App. 497, 502 S.E.2d 334 (1998).

Mere different descriptions in two indictments or two charges will not constitute different offenses. *Crumley v. City of Atlanta*, 68 Ga. App. 69, 22 S.E.2d 181 (1942).

Evidence must be sufficient to show distinct transactions when several counts contained in indictment. — Where separate counts are contained in an indictment, the evidence must be sufficient as to each count and must be sufficient to show that the several counts re-

late to distinct transactions; otherwise, a defendant may be convicted more than once for the same offense in violation of this section. *Estes v. State*, 98 Ga. App. 521, 106 S.E.2d 405 (1958).

Multiple prosecutions barred when one offense included in another. — When a person has been put in jeopardy of a conviction of an offense which is a necessary element in, and constitutes an essential part of, another offense, such jeopardy is a bar to subsequent prosecution for the latter offense, if founded upon the same act. *Gully v. State*, 116 Ga. 527, 42 S.E. 790 (1902).

Lesser included offense. — A conviction based on a greater offense bars a subsequent conviction for a lesser included offense if both convictions are based on proof of the same facts. *Bailey v. State*, 184 Ga. App. 890, 363 S.E.2d 172 (1987).

A conviction based on a lesser included offense bars a subsequent conviction for a greater offense if both convictions are based on proof of the same facts. *Bailey v. State*, 184 Ga. App. 890, 363 S.E.2d 172 (1987).

In order for the rule that jeopardy for an offense ends after a jury convicts a defendant of a lesser-included offense to apply, there must be an unambiguous conviction of the lesser offense, and the trial court must have given the jury full opportunity to return a verdict on the greater charge. *Potts v. State*, 258 Ga. 430, 369 S.E.2d 746 (1988), cert. denied, 489 U.S. 1068, 109 S. Ct. 1347, 103 L. Ed. 2d 815 (1989).

Crimes separate for purposes of double jeopardy and multiple prosecution. — As a matter of law, the crime of illegal possession of heroin is not included in the crime of illegal sale of heroin for the purposes of double jeopardy and multiple prosecution. *Wilson v. Hopper*, 234 Ga. 859, 218 S.E.2d 573 (1975).

Although both indictments against the defendant alleged similar schemes to defraud lending institutions, double jeopardy protections under O.C.G.A. §§ 16-1-7(b), 16-1-8(b), and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII did not bar the second prosecution; the indictments involved different properties, different co-conspirators, different real estate transac-

Separate Offenses (Cont'd)

tions, and, for the most part, different lenders, and the fact that the two separate conspiracies may have overlapped in time and resulted in violations of the same criminal statutes was not determinative. *Harrison v. State*, 282 Ga. App. 29, 637 S.E.2d 773 (2006).

Defendant's guilty pleas for aggravated assault with intent to rape in violation of O.C.G.A. § 16-5-21(a)(1) and kidnapping in violation of O.C.G.A. § 16-5-40(a) were not accepted in violation of the constitutional prohibition against double jeopardy because the offenses did not merge as a matter of law since each of the offenses was separate and required proof of different facts; the state asserted that the defendant had dragged the victim from the front of a laundromat facility into a bathroom in the back of the facility, which formed a basis for the kidnapping charge, and that the defendant had sexually assaulted the victim while holding the victim in the bathroom, which formed a basis for the aggravated assault with the intent to rape charge. *Shelton v. State*, 307 Ga. App. 599, 705 S.E.2d 699 (2011).

Hijacking of motor vehicle. — The statute prohibiting the hijacking of a motor vehicle does not violate the prohibition against double jeopardy since the double jeopardy clause of the Georgia Constitution does not prohibit additional punishment for a separate offense which the General Assembly has deemed to warrant separate sanction. *Mathis v. State*, 273 Ga. 508, 543 S.E.2d 712 (2001).

Multiple offenses for multiple viewings of obscene films. — Double jeopardy rights are not denied when defendant is convicted of multiple offenses for numerous showings of obscene film. A separate offense occurs each time the obscene film is shown. *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974), cert. denied, 421 U.S. 952, 95 S. Ct. 1687, 44 L. Ed. 2d 106 (1975).

Burglary and murder not lesser-included offenses. — For substantive double-jeopardy purposes, neither a burglary conviction nor a murder conviction is a lesser-included offense within the other, since proof of additional

elements must necessarily be shown to establish each crime. *Cash v. State*, 258 Ga. 460, 368 S.E.2d 756 (1988).

Effect of error in failing to require state to elect which indictment to proceed upon. — An indictment for assault with intent to murder charging the commission of that offense on the part of the defendant by pointing, aiming at, and attempting to shoot and kill the prosecutor by pulling the trigger of a pistol, and the indictment charging the offense of pointing a pistol at another, being the same pointing essential to constitute the crime in each instance, the trial court erred in denying a timely motion of the defendant requiring the state to elect upon which of the two indictments it would proceed. The error was harmful to the defendant, who, on conviction under both indictments, was sentenced to two consecutive terms of imprisonment for the single offense. *Davis v. State*, 100 Ga. App. 308, 111 S.E.2d 116 (1959).

Defendant properly sentenced on separate counts of attempting to elude police. — Trial court properly sentenced the defendant on five separate counts of attempting to elude a police officer because the evidence supported the jury's conclusion that the defendant willfully led police on a dangerous high speed chase after being given clear signals by five separate police vehicles to stop; it is the act of fleeing from an individual police vehicle or police officer after being given a proper visual or audible signal to stop from that individual police vehicle or officer, and not just the act of fleeing itself, that forms the proper "unit of prosecution" under O.C.G.A. § 40-6-395. *Smith v. State*, 290 Ga. 768, 723 S.E.2d 915 (2012).

Double Jeopardy**1. In General**

Georgia Constitution is less protective than the Fifth Amendment, for it recognizes an exception to the bar against double jeopardy when the first trial ends in mistrial. *State v. Oliver*, 188 Ga. App. 47, 372 S.E.2d 256, cert. denied, 188 Ga. App. 47, 372 S.E.2d 256 (1988).

Protection of right. — The right not to be put in jeopardy a second time for the

same cause is as sacred as the right of trial by jury, and is guarded with much care by the common law and by the Constitution. *Hines v. State*, 41 Ga. App. 294, 152 S.E. 616 (1930).

Double jeopardy is applied to criminal prosecutions alone. *Keenan v. Hardison*, 245 Ga. 599, 266 S.E.2d 205 (1980).

This constitutional provision has application only to crime and not to civil contempt. *City of Macon v. Massey*, 214 Ga. 589, 106 S.E.2d 23 (1958).

This paragraph is applicable only to a crime, but a contempt, whether it be civil or criminal, is not a crime within the purview of this section of the Constitution. *Garland v. State*, 101 Ga. App. 395, 114 S.E.2d 176 (1960).

Indictment must identify victim, if known. — When the defendant was charged by indictment with crimes against a minor victim who was identified by initials only, the court found that such was insufficient because the defendant was entitled to be charged by an indictment in perfect form; failure to identify the victim with a full name, if known, violated the defendant's constitutional rights to due process under Ga. Const. 1983, Art. I, Sec. I, Para. I and U.S. Const., amend. 5, as well as the defendant's double jeopardy rights under Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5. *Sellers v. State*, 263 Ga. App. 144, 587 S.E.2d 276 (2003).

Accusation did not expose defendant to double jeopardy. — Accusation was sufficient because if, after jeopardy had attached, any other proceedings were taken against the defendant arising out of a domestic incident, the defendant could plead a former acquittal or conviction because the accusation set forth specific acts and adequately defined the offenses of battery, family violence battery, and criminal trespass. The state would not be able to charge the defendant with a new offense simply by alleging that the defendant struck the victim or the victim's closet door with an object. *State v. Leatherwood*, 326 Ga. App. 730, 757 S.E.2d 434 (2014).

Determination must begin with criminal statute itself. — Whether mul-

tiple punishment is permissible under the rubric of substantive double jeopardy requires examination of the legislative intent underlying the criminal statute because it is for the legislature to determine to what extent certain criminal conduct has demonstrated more serious criminal interest and damaged society and to what extent it should be punished; the question of whether a course of conduct can result in multiple violations of the same statute requires a determination of the "unit of prosecution," or the precise act or conduct that is being criminalized under the statute; thus, the starting point must be the statute itself. *State v. Marlowe*, 277 Ga. 383, 589 S.E.2d 69 (2003).

Suspension of a driver's license at an administrative hearing was not punishment, nor was the hearing a prosecution for the purposes of double jeopardy thus, a subsequent criminal prosecution for driving under the influence was not barred. *Nolen v. State*, 218 Ga. App. 819, 463 S.E.2d 504 (1995), cert. denied, 518 U.S. 1018, 116 S. Ct. 2550, 135 L. Ed. 2d 1070 (1996).

Payment of the fee required for reinstatement of a driver's license after it was suspended following an arrest for driving under the influence was not punishment and did not bar a subsequent prosecution for driving under the influence. *Thompson v. State*, 229 Ga. App. 526, 494 S.E.2d 306 (1997); *Morgan v. State*, 229 Ga. App. 861, 495 S.E.2d 138 (1998).

Modification of bond conditions were not criminal punishment for double jeopardy purposes. — Conducting a hearing to modify the bond conditions of a third-time DUI offender and placing limitations upon the offender's driving privileges, predicated upon the necessity to protect the welfare and safety of the citizens of Georgia from a recidivist offender, was not punishment, nor was the hearing prosecution, for the purposes of double jeopardy. *Strickland v. State*, 300 Ga. App. 898, 686 S.E.2d 486 (2009).

Application of O.C.G.A. § 16-1-7. — Given that a charge of DUI served as the predicate act underlying a charge of serious injury by vehicle, thus constituting a lesser included crime of the serious injury by vehicle, O.C.G.A. § 16-1-7(a) barred

Double Jeopardy (Cont'd)**1. In General (Cont'd)**

conviction of and punishment for both; hence, in light of this incongruence, defendant's DUI conviction and sentence, as well as the sentence for serious injury by vehicle, were vacated. *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

Ten-day suspension from school following defendant's arrest and indictment for armed robbery did not rise to the level of "punishment" for double jeopardy purposes. *Clark v. State*, 220 Ga. App. 251, 469 S.E.2d 250 (1996).

Forfeiture proceedings not a bar to prosecution. — Double jeopardy did not attach to bar prosecution of defendant on state drug charges following federal civil forfeiture proceedings because defendant's failure to contest the forfeiture meant the defendant was not placed in jeopardy in those proceedings and, also, Georgia constitutional and statutory provisions did not bar the prosecution because they apply only to criminal proceedings, not civil proceedings. *Waye v. State*, 219 Ga. App. 22, 464 S.E.2d 19 (1995).

A civil federal forfeiture action was neither punishment nor criminal for purposes of the double jeopardy clause. *Battista v. State*, 223 Ga. App. 369, 477 S.E.2d 665 (1996).

Forfeiture proceedings did not bar a criminal prosecution based on application of Ga. Const. 1983, Art. I, Sec. I, Para. XVIII since such proceedings have been held to be primarily remedial in nature. *Manley v. State*, 224 Ga. App. 661, 482 S.E.2d 416 (1997); *Cuellar v. State*, 230 Ga. App. 203, 496 S.E.2d 282 (1998).

Civil commitment and life imprisonment did not constitute double jeopardy violation. — Civil commitment, following finding that the defendant was not guilty by reason of insanity of malice murder, and a sentence of life imprisonment based on convictions for felony murder, with a finding of guilty but mentally ill, did not violate the defendant's double jeopardy rights under U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, as the civil commitment procedure under O.C.G.A. § 17-7-131 was not punitive in nature.

Shepherd v. State, 280 Ga. 245, 626 S.E.2d 96 (2006).

Questions of double jeopardy in Georgia must be determined under the expanded statutory proscriptions found in O.C.G.A. §§ 16-1-6, 16-1-7, and 16-1-8, which place limitations upon multiple prosecutions, convictions, and punishments for the same criminal conduct. *Stone v. State*, 166 Ga. App. 245, 304 S.E.2d 94 (1983).

Failure to establish venue does not bar re-trial in a court where venue is proper and proven. *Kimmel v. State*, 261 Ga. 332, 404 S.E.2d 436 (1991).

Absent sufficient proof to establish venue, the defendant's aggravated sexual battery and aggravated sodomy convictions were reversed; but, given that sufficient evidence otherwise existed to support the former charge, retrial on the sexual battery would not violate the defendant's double jeopardy rights. *Melton v. State*, 282 Ga. App. 685, 639 S.E.2d 411 (2006).

When the appellate court held in a juvenile delinquency case that the evidence supported the adjudication but that the state had not proven venue, the state could retry the defendant without violating the double jeopardy clause because there was otherwise sufficient evidence at trial to support the adjudication based on the crimes charged. In the Interest of D.D., 287 Ga. App. 512, 651 S.E.2d 817 (2007).

Plea of nolo contendere constitutes former jeopardy. *Fortson v. Hopper*, 242 Ga. 81, 247 S.E.2d 875 (1978).

Administrative convictions not double jeopardy. — Suspension of defendant's operator's license pursuant to administrative proceedings did not constitute former punishment foreclosing prosecution for driving under the influence in violation of double jeopardy provisions. *Jackson v. State*, 218 Ga. App. 677, 462 S.E.2d 802 (1995).

State has no right to appeal from a verdict by a jury in a criminal case based on an error of law or of fact because this section prevents double jeopardy. *Register v. State*, 10 Ga. App. 623, 74 S.E. 429 (1911), later appeal, 12 Ga. App. 1, 76 S.E. 649 (1912), later appeal, 12 Ga. App. 688, 78 S.E. 142 (1913).

Retrial barred by successful appeal including finding that evidence did not authorize verdict. — The reversal of the defendants' convictions for felony murder based upon armed robbery due to insufficient evidence not only raised a procedural double jeopardy bar for that particular crime, but also raised a procedural double jeopardy bar for the lesser-included offense of criminal attempt to commit armed robbery. *Prater v. State*, 273 Ga. 477, 541 S.E.2d 351 (2001).

Subsequent prosecution not barred since prosecutor had no earlier knowledge. — Because the defendant failed to affirmatively show that the prosecutor had any actual knowledge regarding approximately \$300,000 worth of jewelry items found in a toolbox located at the defendant's residence upon an eviction, which were the subject of a second theft prosecution involving jewelry the defendant had stolen, the second prosecution regarding those items was not barred on double jeopardy grounds. *White v. State*, 284 Ga. App. 805, 644 S.E.2d 903 (2007), cert. denied, 2007 Ga. LEXIS 564 (Ga. 2007).

Conviction for violating municipal ordinance. — Because conviction of a violation of a municipal ordinance subjects a person to stigma and punishment by incarceration or fine, a defendant prosecuted in a municipal court proceeding is in "jeopardy" in the constitutional sense. *Holcomb v. Peachtree City*, 187 Ga. App. 258, 370 S.E.2d 23 (1988).

Order barring the defendant's prosecution for aggravated assault and aggravated battery on double jeopardy grounds based on the defendant's prior guilty plea to violating a disorderly conduct ordinance, a charge arising from the same fight, was error because the defendant failed to set forth the elements of the ordinance, and failed to properly plead and prove the ordinance; Georgia courts were not allowed to take judicial notice of local ordinances, but, rather, they must have been alleged and proved by production of the original or of a properly certified copy. Further, because the defendant failed to prove below that the charges could have been brought within the jurisdiction of a single court and that the

proper prosecuting attorney knew of the recorder's court proceedings, the trial court was not authorized to grant the plea in bar under O.C.G.A. § 16-1-7(b). *State v. Jeffries*, 298 Ga. App. 141, 679 S.E.2d 368 (2009).

Consideration of murder in federal sentencing not a bar to state prosecution. — Double jeopardy did not bar the state from prosecuting defendant for murder even though the federal district court had considered the murder in its sentencing of defendant for bank robbery. *Nance v. State*, 266 Ga. 816, 471 S.E.2d 216 (1996), cert. denied, 519 U.S. 1043, 117 S. Ct. 615, 136 L. Ed. 2d 539 (1996).

Mere overreaching or harassment by the prosecutor, without a finding the prosecutorial misconduct was intended to subvert the protections of the double jeopardy clause, would not bar retrial of defendant's case pursuant to Georgia law. *State v. Oliver*, 188 Ga. App. 47, 372 S.E.2d 256, cert. denied, 188 Ga. App. 47, 372 S.E.2d 256 (1988).

Prosecutor's failure to follow instruction of the trial court to avoid questions concerning a witness' credibility did not bar retrial since the prosecutor's mistakes were made in good faith and there was no intention to provoke a mistrial. *State v. Oliver*, 188 Ga. App. 47, 372 S.E.2d 256, cert. denied, 188 Ga. App. 47, 372 S.E.2d 256 (1988).

Waiver by plea agreement ineffectual. — Since the defendant had already pled guilty, been sentenced, and completed sentence for certain crimes, an effort to re-indict the defendant based on the defendant's violation of a plea agreement that defendant would not seek public office was properly dismissed on the grounds of double jeopardy; defendant's agreement to submit to such prosecution by waiving any bar to prosecution, regardless of the failure to mention double jeopardy, was ineffectual. *State v. Barrett*, 215 Ga. App. 401, 451 S.E.2d 82 (1994), rev'd on other grounds, 265 Ga. 489, 458 S.E.2d 620 (1995).

Improper revocation of bond. — Incarceration of defendant resulting from the improper revocation of the defendant's bond was not a bar to prosecution for vehicular homicide and related offenses.

Double Jeopardy (Cont'd)**1. In General (Cont'd)**

Shaw v. State, 225 Ga. App. 193, 483 S.E.2d 646 (1997).

Extension of juvenile disposition order. — Provision permitting the juvenile court to extend an order of disposition for two years did not violate the constitutional prohibition against double jeopardy since it operated to further the accomplishment of the juvenile's treatment and rehabilitation. *In re T.B.*, 268 Ga. 149, 486 S.E.2d 177 (1997).

Corporations. — Georgia Supreme Court has declared that because a corporation is a person pursuant to Georgia law, the corporation is entitled to due process and equal protection from the state; thus, a corporation is entitled to the double jeopardy protection afforded by Ga. Const. 1983, Art. I, Sec. I, Para. XVIII. *Wilbros, LLC v. State*, 294 Ga. 514, 755 S.E.2d 145 (2014).

Drug possession and multiple convictions. — Trial court did not err when the court granted the defendant's plea in bar as to the second accusation for possession of Xanax because the state had charged the defendant with the identical crime of possession of an unspecified amount of Xanax on a prior date in two accusations, the second of which was brought after the defendant had pled guilty to the first. *State v. Pruiett*, 324 Ga. App. 789, 751 S.E.2d 579 (2013).

Trial court erred by granting the defendant's plea in bar as to the second accusation's charges for possession of methamphetamine, clonazepam, and marijuana because the defendant could not have been convicted of possession of those drugs in a former prosecution, which involved only Xanax. *State v. Pruiett*, 324 Ga. App. 789, 751 S.E.2d 579 (2013).

No double jeopardy found. — Defendant's plea of double jeopardy failed because the directed verdict on the weapon possession count did not prevent retrial on the murder charges. *Moody v. State*, 272 Ga. 55, 525 S.E.2d 360 (2000).

Evidence at defendant's first trial was sufficient to sustain convictions for aggravated sodomy pursuant to O.C.G.A. § 16-6-2(a), sexual battery pursuant to

O.C.G.A. § 16-6-22.1, and aggravated sexual battery pursuant to O.C.G.A. § 16-6-22.2(b); thus, double jeopardy did not prohibit a retrial granted on the ground that defendant received ineffective assistance of counsel. *Weldon v. State*, 270 Ga. App. 574, 607 S.E.2d 175 (2004).

No double jeopardy if conviction reversed for ineffective assistance of counsel. — Because defendant's conviction for possession of cocaine was reversed due to a finding that trial counsel rendered ineffective assistance for failing to object to the admission of cocaine without establishing an adequate chain of custody, and for failing to preserve objections to the jury instructions, retrial was not barred by the double jeopardy clause of Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5, as the evidence offered by the state and admitted by the trial court, whether erroneous or not, would have been sufficient to sustain a guilty verdict against the defendant. *Wilson v. State*, 271 Ga. App. 359, 609 S.E.2d 703 (2005).

Defendant's conviction of hijacking a motor vehicle and armed robbery were properly entered, despite defendant's contention that the state used the same facts to establish both offenses and that defendant should have only been convicted of and sentenced for one of the offenses, as: (1) hijacking a motor vehicle was considered a separate offense and did not merge with any other offense; (2) O.C.G.A. § 16-5-44.1 superseded the double jeopardy provisions of O.C.G.A. § 16-1-7 in motor vehicle hijacking cases; (3) O.C.G.A. § 16-5-44.1(d) did not violate the prohibition against double jeopardy, since the double jeopardy clause of the Georgia Constitution did not prohibit additional punishment for a separate offense which the legislature deemed to warrant separate sanction; and (4) defendant failed to offer any evidence in support of defendant's allegation that O.C.G.A. § 16-5-44.1(d) otherwise violated defendant's double jeopardy rights. *Holman v. State*, 272 Ga. App. 890, 614 S.E.2d 124 (2005).

Variance between indictment and evidence did not pose risk of double jeopardy violation. — Fact that an in-

dictment charged the defendant with aggravated assault and battery by slicing the victim's neck with a knife, but the evidence showed the defendant used a box cutter, did not constitute a fatal variance between the indictment and the proof, because the defendant was sufficiently informed of the charges and faced no danger of further prosecution arising out of the incident. *Lawson v. State*, 278 Ga. App. 852, 630 S.E.2d 131 (2006).

Defendant's separate convictions for armed robbery and hijacking a motor vehicle did not violate the prohibitions against double jeopardy as O.C.G.A. § 16-5-44.1(d) provided that hijacking a motor vehicle was a separate offense and did not merge and it therefore superseded the state statutory double jeopardy provision; further, the Georgia Constitution did not prohibit additional punishment for a separate offense that the Georgia legislature warranted a separate sanction; the defendant failed to show how the hijacking statute violated the federal double jeopardy clause. *Mullins v. State*, 280 Ga. App. 689, 634 S.E.2d 850 (2006).

Discrepancy in presentment not double jeopardy violation. — Trial court did not err in allowing the manufacturing methamphetamine offense to proceed to the jury under O.C.G.A. § 16-13-30(b); despite the poor wording of the caption of the count at issue, which stated "trafficking in methamphetamine," because the body of the count clearly charged the defendant with manufacturing methamphetamine, and the defendant failed to show how the defendant was misled by the presentment, nor did it expose the defendant to double jeopardy in violation of U.S. Const., amend. 5 or Ga. Const. 1983, Art. I, Sec. I, Para. XVIII. *Gentry v. State*, 281 Ga. App. 315, 635 S.E.2d 782 (2006), cert. denied, 2007 Ga. LEXIS 78 (Ga. 2007).

Because no evidence showed that the information concerning the defendant was known to the proper prosecuting officer in Gwinnett County, and because no basis otherwise existed for a charge of conspiracy to traffic based on what officers recovered in the search of the defendant's home, the appeals court refused to state that the defendant could have been con-

victed of conspiracy to traffic methamphetamine in Gwinnett County, or that Gwinnett County should have charged the defendant with this crime; hence, under these circumstances, the Dawson County indictment was not barred under O.C.G.A. §§ 16-1-6(b)(1) and 16-1-7(b). *Bradford v. State*, 283 Ga. App. 75, 640 S.E.2d 630 (2006).

Because a plea of double jeopardy was found to be frivolous, the defendant's filing of a notice of appeal from the denial of an earlier double jeopardy plea did not divest the trial court of jurisdiction over the case, and hence the filing of a notice of appeal merely deprived the trial court of the court's power to execute the sentence; thus, because the sentence was not imposed against the defendant until after the remittitur was filed below, that sentence was upheld. *DeSouza v. State*, 285 Ga. App. 201, 645 S.E.2d 684 (2007), cert. denied, 2007 Ga. LEXIS 539 (Ga. 2007).

Prosecution under dual sovereignty doctrine of double jeopardy clause. — As the defendant's theft by taking an automobile occurred in both Georgia and Kentucky, the fact that the defendant was prosecuted in Kentucky did not bar Georgia from also prosecuting the defendant under the dual sovereignty doctrine of the double jeopardy clause; further, O.C.G.A. § 16-1-8(c) was inapplicable because there was not a federal prosecution for the same crime. *Jackson v. State*, 284 Ga. 826, 672 S.E.2d 640 (2009).

Second indictment, which was apparently filed to address the eventuality that the defendants' motion to withdraw a guilty plea would be granted, was returned while the defendant's jeopardy was ongoing, and, as such, the indictment did not violate U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, or O.C.G.A. § 16-1-8. *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Fact that the defendant had been convicted in federal court of possession of a firearm under 18 U.S.C. § 922 did not bar a felony murder prosecution in state court on double jeopardy grounds as the state had to prove facts in the felony murder case that were not required to be proved in the federal case. Moreover, the federal offense, which required that a firearm be

Double Jeopardy (Cont'd)**1. In General (Cont'd)**

possessed in and affecting interstate commerce, was not within the concurrent jurisdiction of Georgia and under O.C.G.A. § 16-1-8(c) did not bar a subsequent prosecution for felony murder predicated on the underlying firearm possession charge. *Marshall v. State*, 286 Ga. 446, 689 S.E.2d 283 (2010).

Defendant's convictions for two counts of aggravated stalking based on the defendant's following and contacting the victim did not merge for sentencing purposes because there was sufficient evidence from which the jury could find that the defendant, in violation of a protective order, both followed the victim to a hotel and then contacted the victim; the act of following was complete when the defendant arrived at the premises of the hotel because, at that time, the defendant violated the protective order by coming within 500 feet of a place where the victim was residing. *Louisyr v. State*, 307 Ga. App. 724, 706 S.E.2d 114 (2011).

Implied consent to mistrial waived right to double jeopardy plea. — Although defense counsel had an opportunity to raise an objection after the court announced its intention to excuse the jurors and before the jurors returned to the courtroom, counsel failed to do so; therefore, the trial court was authorized to find that defendant, through counsel, impliedly consented to the grant of a mistrial and defendant's plea of double jeopardy made during the trial was properly denied. *Howell v. State*, 266 Ga. App. 480, 597 S.E.2d 546 (2004).

Trial court abused the court's discretion in declaring a mistrial and abridging defendant's constitutional right to be tried by the originally impaneled jury without first considering less drastic alternatives when the assigned courtroom was unavailable at the appointed time. The procedure the court used was flawed, not the result. A trial court is not categorically required to grant a continuance under similar circumstances; merely the court should consider a continuance as an alternative to declaring a mistrial. Since the trial court told defense counsel that if

the defendant did not plead guilty, the court would declare a mistrial, the court took little or no heed to McGee's constitutional rights thereby constituting an abuse of discretion. *McGee v. State*, 287 Ga. App. 839, 652 S.E.2d 822 (2007).

Sentencing error corrected by Supreme Court of Georgia on appeal averted double jeopardy violation. —

While the defendant was correct in asserting that the trial court should not have imposed sentence on both felony murder guilty verdicts, the Supreme Court of Georgia corrected that error on appeal when it affirmed the judgment of conviction and sentence only on the count 3 guilty verdict, and the defendant's argument was not based on what actually occurred, but upon speculation that, had the trial court imposed the correct sentence, it would have done so by merging count 3 into count 2. Thus, even assuming, arguendo, that such speculation warranted a review of the sentence imposed, such presented no basis for reversal because nothing required the trial court to merge the two counts in the way the defendant proposed. *Brady v. State*, 283 Ga. 359, 659 S.E.2d 368 (2008).

Exclusion from drug court program did not violate double jeopardy ban.

— Denying a defendant access to the drug court program under O.C.G.A. § 16-13-2(a), which had been a condition of the defendant's guilty plea, was not a double jeopardy violation as the trial court did not involuntarily withdraw the guilty plea, but offered the defendant the option of withdrawing the plea or accepting one of several alternative sentences. Moreover, agreeing to attend drug court was not a "sentence," and completion of the drug court contract was dependent on the defendant's completing the drug court program. *Evans v. State*, 293 Ga. App. 371, 667 S.E.2d 183 (2008).

Failure to preserve for review. —

Court would not consider a pro se defendant's double jeopardy argument when the issue had not been raised below. *Bruster v. State*, 291 Ga. App. 490, 662 S.E.2d 265 (2008).

2. When Jeopardy Attaches

No jeopardy if original court lacked jurisdiction. — Since the defendant's

original trial was before a court which lacked jurisdiction, the trial court did not err in denying the defendant's plea of former jeopardy. *Jackett v. State*, 209 Ga. App. 112, 432 S.E.2d 586 (1993).

No double jeopardy if prior judgment was void. — Because a uniform traffic citation was deliberately withheld from filing, and the state did not authorize or participate in the prosecution of the case, the probate court lacked authority to accept defendant's plea to the proposed charge and impose a fine, making its resulting judgment void; hence, the trial court did not err in denying defendant's plea in bar based on double jeopardy, since the probate court's void judgment could not serve as the basis for barring the subsequent indictment and prosecution of defendant in the superior court. *Roberts v. State*, 280 Ga. App. 672, 634 S.E.2d 790 (2006).

Threshold question regarding jeopardy. — The threshold question to be addressed in any case involving double jeopardy is whether jeopardy has attached to defendant during the proceedings which the defendant contends preclude further prosecution. *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

When jeopardy attaches. — Jeopardy attached when the defendant is arraigned in a valid indictment. *Conley v. State*, 85 Ga. 348, 11 S.E. 659 (1890); *Barrs v. State*, 22 Ga. App. 642, 97 S.E. 86, cert. denied, 22 Ga. App. 803 (1918).

A defendant is placed in constitutional jeopardy when, in a court of competent jurisdiction with a sufficient indictment, a defendant has been arraigned, has pled, and a jury has been impaneled and sworn. *State v. Martin*, 173 Ga. App. 370, 326 S.E.2d 558 (1985).

Trial court's grant of a defendant's motion for a mistrial over two months after a guilty verdict had been returned was void as a mistrial could not be entered after the verdict was returned; motions for mistrial were not to be confused with motions for a new trial, which were appropriate after the verdict was returned, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, provided for double jeopardy protection except when a new trial had been granted after the conviction or in the case of a mistrial.

State v. Sumlin, 281 Ga. 183, 637 S.E.2d 36 (2006).

Jeopardy attaches when jury impaneled and sworn or when court begins to hear evidence. — In the case of a jury trial, jeopardy attaches when a jury is impaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence. *Franklin v. State*, 85 Ga. 570, 11 S.E. 876 (1890); *White v. State*, 143 Ga. App. 315, 238 S.E.2d 247 (1977); *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

Jeopardy attaches when the issue is joined and the defendant's plea of not guilty by reason of insanity and evidence is presented to the court sitting alone as the trier of the facts and the law. *White v. State*, 143 Ga. App. 315, 238 S.E.2d 247 (1977).

Defendants were not placed in jeopardy before the trial court granted the state's Batson challenge and dismissed a jury that was selected to try them on charges of armed robbery and possession of a firearm during the commission of a crime because the jury was never empaneled and sworn, and the trial court did not err when it denied defendants' plea in bar and proceeded with trial. *Garlington v. State*, 268 Ga. App. 264, 601 S.E.2d 793 (2004).

Jeopardy did not attach at a motion to suppress hearing. — Defendant's plea in bar based on double jeopardy was properly denied because a motion to suppress hearing in a recorder's court, even with sworn testimony, did not trigger double jeopardy safeguards. *Tremelling v. State*, 263 Ga. App. 418, 587 S.E.2d 785 (2003).

Jeopardy attaches after witness sworn. — Allowing the solicitor more time to prepare for trial was not a proper basis for terminating a bench trial since the first witness had already been sworn and particularly since the case was completely terminated and then started anew before an entirely different judge. Due to this improper termination, double jeopardy attached. *Puplampu v. State*, 257 Ga. App. 5, 570 S.E.2d 83 (2002).

In a criminal matter wherein the state brought charges against defendant, a bench trial was commenced, witnesses were sworn in and testified, and the state

Double Jeopardy (Cont'd)**2. When Jeopardy Attaches (Cont'd)**

thereafter terminated that case when it nolle prossed the charges over defendant's objection, jeopardy attached under Ga. Const. 1983, Art. I, Sec. 1, Para. XVIII, and under O.C.G.A. § 16-1-8(a)(2), the state could not thereafter retry defendant on the same charges; although the state's reason for nolle prossing the first set of charges was due to its inability to introduce DNA evidence as to defendant's identity, as it failed to include that information in the indictment in order to avoid a limitations issue, the reason was inconsequential because jeopardy had attached. *State v. Aycock*, 283 Ga. App. 876, 643 S.E.2d 249 (2007).

Double jeopardy for city court to stop trial and bind defendant over to superior court. — When there is nothing in an Act establishing a city court which authorizes the judge of that court to discontinue a trial and bind over the accused to the next superior court, if, after hearing the evidence, the judge should be of the opinion that the defendant is guilty of an offense which is beyond the jurisdiction of such criminal court, it constitutes double jeopardy for the judge to stop the trial and bind the defendant over to the superior court to be tried for a felony. *Jordan v. State*, 75 Ga. App. 815, 44 S.E.2d 821 (1947).

Jeopardy does not attach at a probation revocation hearing so as to invoke the double jeopardy clause. *Smith v. State*, 171 Ga. App. 279, 319 S.E.2d 113 (1984).

Admission of crimes at juvenile transfer hearing. — Jeopardy did not attach so as to preclude further proceedings against a juvenile for crimes admitted at a transfer hearing since the juvenile court accepted the admission for the limited purpose of determining whether the case should be transferred to superior court. *In re M.E.J.*, 260 Ga. 805, 401 S.E.2d 254 (1991).

Motion in limine hearing in recorder's court. — When a recorder's court granted a defendant's motion in limine and dismissed DUI and failure to yield charges against the defendant, the state

was not barred from bringing the same charges in a state court; the motion in limine hearing did not trigger double jeopardy safeguards, and because a ruling on a motion in limine was subject to modification at trial to prevent manifest injustice, it did not result in a final judgment limiting issues under the doctrine of collateral estoppel or bar another trial. *Thomas v. State*, 287 Ga. App. 124, 650 S.E.2d 793 (2007).

Aggravating circumstances in death penalty action. — Trial court properly convicted and sentenced defendant on charges of armed robbery and burglary, because the fact that those acts served as aggravating circumstances in relation to defendant's murder charge pursuant to O.C.G.A. § 17-10-30(b) did not trigger double jeopardy, Ga. Const. 1983, Art. I, Sec. I, Para. XVIII. *Jones v. State*, 279 Ga. 854, 622 S.E.2d 1 (2005).

Swearing in of jury required for jeopardy to attach. — Defendant did not receive ineffective assistance of trial counsel due to counsel's failure to object to the second trial on the ground of double jeopardy because the jury was never sworn in the first trial, and jeopardy did not attach. *Neal v. State*, 308 Ga. App. 551, 707 S.E.2d 503 (2011).

Trial court erred in holding that jeopardy had not attached on the previous charges filed against the defendant due to a mistrial because the defendant was placed in jeopardy when the jury was sworn in the first trial. *Herrington v. State*, 315 Ga. App. 101, 726 S.E.2d 625 (2012).

3. Same Transaction Test

Burden of proof. — The burden of proof under a special plea of former jeopardy is upon the defendant. *Mance v. State*, 5 Ga. App. 229, 62 S.E. 1053 (1908); *Maher v. State*, 53 Ga. 448, 21 Am. R. 269 (1874); *Robinson v. State*, 63 Ga. App. 490, 11 S.E.2d 414 (1940); *Williams v. State*, 63 Ga. App. 492, 11 S.E.2d 415 (1940).

Merits of plea of former jeopardy determined by what is known as "same transaction test." *Moore v. State*, 12 Ga. App. 576, 77 S.E. 1132 (1913).

Origin and approval of "same transaction test." — In *Roberts v. State*, 14

Ga. 8, 58 Am. Dec. 528 (1853), the Supreme Court adopted the rule “that the plea of autrefois acquit or convict is sufficient whenever the proof shows the second case to be the same transaction with the first.” In *Gully v. State*, 116 Ga. 527, 42 S.E. 790 (1902), the Supreme Court unqualifiedly approved the “same transaction test,” as laid down in the *Roberts* case. *Harris v. State*, 43 Ga. App. 485, 159 S.E. 603 (1931).

Defendant must plead and prove both transactions are same. — When one is put on trial for an offense, and one’s plea is that the same facts were involved in another charge against that person, for which one has been tried by a court of competent jurisdiction, one may plead the final result of the former trial in bar of the second proposition. In determining whether the first case is a bar to the prosecution of the second, the test is whether or not the same transaction is involved; that is, whether both indictments and the investigation that may be had thereunder relate to the same offense. *Hines v. State*, 41 Ga. App. 294, 152 S.E. 616 (1930).

In order to sustain a plea of former jeopardy, it is always incumbent upon the defendant to plead and prove that the transaction charged in the second indictment is the same as a matter of fact as that charged in the first indictment under which the defendant was put in jeopardy. *Harris v. State*, 193 Ga. 109, 17 S.E.2d 573 (1941); *Gilstrap v. State*, 90 Ga. App. 12, 81 S.E.2d 872 (1954).

Sufficiency of plea of autrefois acquit. — A plea of autrefois acquit is legally sufficient when it alleges that the offense in the second indictment is identical with the offense which was or could have been made the subject of investigation under the first indictment, and further alleges an acquittal under the first indictment in a court of competent jurisdiction. *Lock v. State*, 122 Ga. 730, 50 S.E. 932 (1905); *Harris v. State*, 43 Ga. App. 485, 159 S.E. 603 (1931).

Pleading and proof required for “same transaction test.” — In addition to pleading and proving that the transaction is the same as a matter of fact, it is also necessary to plead and prove either:

(a) that the transaction charged in the second indictment is an offense which is identical in law with that charged in the first indictment, or else that under the actual terms of the first indictment proof of the second offense was made necessary as an essential ingredient of the offense as first charged; or (b) that the transaction charged in the second indictment is an offense which represents either a major or minor grade of the same offense, of which the defendant might be convicted under an indictment for the major offense; or (c) when the transactions are the same as a matter of fact, even though the offenses be not identical or in effect identical as a matter of law, so as to come within the scope of the preceding subsections (a) or (b), one may nevertheless, under the principles of *res judicata* which may be included in a plea under the broader doctrine of former jeopardy, show that one’s acquittal on the first charge was necessarily controlled by the determination of some particular issue or issues of fact which would preclude one’s conviction of the second charge. *Harris v. State*, 193 Ga. 109, 17 S.E.2d 573 (1941).

Refusal to allow similar transaction evidence. — Defendant’s prosecution for a car hijacking was not barred by the double jeopardy provision of the Georgia Constitution as, even if the collateral estoppel doctrine was embodied in the Georgia Constitution, the refusal to admit evidence of the car hijacking as similar transaction evidence at defendant’s trial for armed robbery was based on the lack of similarity between the car hijacking and the armed robbery incidents, not the lack of evidence of defendant’s culpability for the car hijacking. *Syas v. State*, 273 Ga. App. 161, 614 S.E.2d 803 (2005).

Proof consists of evidence of record and evidence not of record. — In all pleas of former acquittal or former conviction, proof of the plea has to consist partly of matter of record and partly of matter not of record. The identity of the two cases is the part of the plea which it is the peculiar business of the evidence, which is not of record, to make out. *Harris v. State*, 43 Ga. App. 485, 159 S.E. 603 (1931); *Gower v. State*, 71 Ga. App. 127, 30 S.E.2d 298 (1944).

Double Jeopardy (Cont'd)**3. Same Transaction Test (Cont'd)**

Offenses charged in two prosecutions must be same in law and in fact, to entitle an accused to plead successfully former acquittal or conviction. *Lunsford v. State*, 60 Ga. App. 537, 4 S.E.2d 112 (1939).

Court determines whether defendant has established identity of two offenses charged. — A plea of former conviction is good as against demurrer (now motion to dismiss) only when it sets out the record of the former trial and conviction and judgment, and such a state of facts as will show that the former conviction was for the same offense for which the defendant is about to be arraigned. *Gresham v. State*, 52 Ga. App. 77, 182 S.E. 416 (1935).

On a plea of autrefois convict the trial court, as trier of the facts, was authorized to find that the defendant, upon whom the burden of proof rested, had not established the identity of the two offenses charged. *Gilstrap v. State*, 90 Ga. App. 12, 81 S.E.2d 872 (1954).

Same transaction established. — Defendant's conviction of voluntary manslaughter under O.C.G.A. § 16-5-2 was improper, as the defendant was also convicted of felony murder under O.C.G.A. § 16-5-1(c) for the same transaction, and this would have subjected the defendant to multiple convictions and punishments for one crime, which would have placed the defendant in double jeopardy in violation of Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5. *Lawson v. State*, 280 Ga. 881, 635 S.E.2d 134 (2006).

Because all of the facts used to prove the offense of aggravated assault with intent to rob were used up in proving the armed robbery, merger was required. *Mercer v. State*, 289 Ga. App. 606, 658 S.E.2d 173 (2008).

Necessity of proof of additional fact would bar successful plea. — If the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of an additional fact would be necessary to constitute the offense charged in

the second, the former conviction or acquittal could not be pled in bar to the second indictment. *Price v. State*, 76 Ga. App. 108, 45 S.E.2d 84 (1947).

Modified merger rule. — Modified merger rule, which speaks to the validity of a verdict on a charge of felony murder when the jury also finds the accused guilty of voluntary manslaughter, is effective at the time the jury renders the jury's verdict and is not destroyed by the granting of a motion for new trial on the voluntary manslaughter charge; likewise, the presence or absence of a separate charge of aggravated assault in the indictment has no effect on a court's application of the modified merger rule because while the existence of a separate aggravated assault charge must be carefully considered in applying the rule and making determinations as to proper sentencing, its existence does not render the rule inapplicable. *Williams v. State*, 288 Ga. 7, 700 S.E.2d 564 (2010).

Vacation of verdict under modified merger rule. — There is no meaningful distinction between an implicit acquittal based on a guilty verdict for a lesser included offense and the vacation of a verdict under the modified merger rule because in both cases the accused is placed in jeopardy, the jury is given a full opportunity to return a verdict on the greater charge, and the verdict rendered results in no conviction being entered; in both cases there can be no appeal because the accused's jeopardy has ended, and in both cases double jeopardy prevents retrial. *Williams v. State*, 288 Ga. 7, 700 S.E.2d 564 (2010).

Bad check and theft by deception. — When the only way the state could prove theft by deception was by evidence of an act of which defendant had been acquitted and discharged, issuance of a bad check, the action was barred. *Day v. State*, 163 Ga. App. 839, 296 S.E.2d 145 (1982).

A second conviction in a different county. — A prosecution for a lesser included offense, which includes the underlying felony in a felony murder case, after a conviction for the greater offense in a different county violates O.C.G.A. § 16-1-8(a), Ga. Const. 1983, Art. I, Sec. I,

Para. XVIII, and the Fifth and Fourteenth amendments to the United States Constitution. *Perkinson v. State*, 273 Ga. 491, 542 S.E.2d 92 (2001).

Conviction for violating county ordinance did not bar conviction under Code. — Defendant's pit bull mauled a child. The defendant's conviction in recorder's court of violating a county ordinance by failing to exercise ordinary care in controlling the defendant's pet for the protection of others was sufficiently separate from a misdemeanor reckless conduct charge under O.C.G.A. § 16-5-60(b), which required proof of a gross deviation from the standard of care, that a successive prosecution for violating § 16-5-60(b) did not violate the double jeopardy ban. *State v. Stepp*, 295 Ga. App. 813, 673 S.E.2d 257 (2009).

Effect of bifurcation. — Short delay between jury's verdicts on the counts of malice murder and felony murder due to the bifurcation of the trial at defendant's request did not constitute a termination of the prosecution, and, thus, defendant's trial for felony murder in a second, separate phase of trial did not violate defendant's double jeopardy rights because trial of the malice murder charge in the first phase of the trial did not involve the former prosecution necessary to bar the prosecution of the felony murder charge. *Jones v. State*, 276 Ga. 663, 581 S.E.2d 546 (2003).

Guilty plea based on single incident waived double jeopardy challenge. — Because defendant pled guilty to four misdemeanor counts of public indecency based on one lewd act witnessed by several school children, and willingly and knowingly accepted the specified sentences as to the four counts, the defendant waived any claim before the habeas court that there was in fact only one act and that the resulting sentences were void on double jeopardy grounds. *Turner v. State*, 284 Ga. 494, 668 S.E.2d 692 (2008).

Jeopardy and Trial Procedure

1. In General

Impact on retrials when "prosecutorial overreaching." — Reprosecution is barred by the double jeopardy clause

when prosecutorial overreaching forces a defendant to the choice of giving up the substantial right that the defendant has to the trial before the present jury, or moving for a mistrial and giving the government a second chance before another jury with any additional advantage accrued by matter learned in the first trial. *Studyvent v. State*, 153 Ga. App. 161, 264 S.E.2d 695 (1980).

Trial court's refusal to permit the defendant to cross-examine the prosecutor at a hearing on the defendant's plea of double jeopardy amounted to legal error, as such not only amounted to a violation of the defendant's right to confrontation, but also foreclosed the opportunity for the defendant to prove whether the prosecutor intended to goad the defendant into moving for a mistrial. *Wright v. State*, 284 Ga. App. 169, 643 S.E.2d 538 (2007).

"Prosecutorial overreaching" explained. — "Prosecutorial overreaching" occurs and bars retrials when bad faith conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant. *Studyvent v. State*, 153 Ga. App. 161, 264 S.E.2d 695 (1980).

Discharge of accused by commitment court no bar to subsequent indictment and trial. — The discharge of the appellant on an original burglary warrant by a commitment court does not bar a subsequent indictment and trial of the appellant for the offense of burglary in a court of competent jurisdiction to try the appellant. *Wells v. Stynchcombe*, 231 Ga. 199, 200 S.E.2d 745 (1973).

State has right to file motion for rehearing in criminal case. — Since the court, before the remittitur goes out, may on its own motion when it determines that it has committed error, alter, amend, or vacate its judgment by motion for rehearing, the state would merely be calling to the court's attention any errors or mistakes which the state believes the court has committed. Such a motion for rehearing would not amount to placing the defendant in double jeopardy. *Ramsey v. State*, 212 Ga. 381, 92 S.E.2d 866 (1956).

Scope of motion in arrest of judgment. — A motion in arrest of judgment

Jeopardy and Trial**Procedure (Cont'd)****1. In General (Cont'd)**

being narrow and restricted in its province is limited to the face of the pleadings in determining whether a violation of the constitutional provisions as to former jeopardy is presented by the record. *Hall v. State*, 202 Ga. 42, 42 S.E.2d 130 (1947).

Withdrawal of case from jury equivalent to acquittal in most instances.

— When a criminal case has been submitted to a jury upon a valid indictment and is withdrawn from their consideration by the judge for any reason other than the prisoner's consent, a necessity in some of its various forms one of which is mistrial, it is equivalent to an acquittal of the accused, and any subsequent prosecution on the same facts, even if in a higher court for a greater offense, the first prosecution being for a lesser included offense, constitutes jeopardy. *Jordan v. State*, 75 Ga. App. 815, 44 S.E.2d 821 (1947).

Failure to file plea. — Failure to file a written plea of former jeopardy prior to trial will not defeat an accused's right to be free of multiple convictions for the same criminal act. *Bailey v. State*, 184 Ga. App. 890, 363 S.E.2d 172 (1987).

Improper termination of trial. — Superior court erred in overruling defendant's plea of former jeopardy to a prosecution for driving under the influence when a recorder's court judge had improperly terminated the defendant's trial on the same charge in referring the case to the superior court. *Phillips v. State*, 197 Ga. App. 491, 399 S.E.2d 234 (1990).

The trial court properly granted the defendant's plea in bar and plea of former jeopardy in a burglary prosecution, as the state improperly terminated the first trial by dismissing the indictment after jeopardy attached without the defendant's consent, and the second burglary prosecution, although alleging a different date, residence, and accomplice, was based on the same material facts as the first indictment. *State v. Jackson*, 290 Ga. App. 250, 659 S.E.2d 679 (2008).

Jeopardy did not attach because there was no adjudication of guilt. — Because the defendant's alleged mistake

of fact regarding a charge of possession of a firearm by a convicted felon required consideration of facts extrinsic to the accusation to be decided by a jury, the trial court erred in dismissing the charge, sua sponte; moreover, as such dismissal was not an adjudication of guilt, the state could appeal from the dismissal without violating the defendant's double jeopardy rights. *State v. Henderson*, 283 Ga. App. 111, 640 S.E.2d 686 (2006).

Breach of plea agreement. — Trial court did not err in granting the state's motion to set aside and disregard defendant's plea agreement and retry the defendant for the crimes covered by that agreement, as defendant breached the agreement by agreeing to testify truthfully in exchange for a lesser sentence and then falsely testifying at a codefendant's trial that defendant was not involved in an armed robbery that defendant had admitted being involved in at defendant's plea agreement hearing; defendant could not argue that trying defendant on the crimes that were the subject of the plea agreement violated double jeopardy principles since defendant chose to voluntarily violate the plea agreement and a double jeopardy argument was not available to shield defendant from the consequences of defendant's voluntary choice. *Brown v. State*, 261 Ga. App. 115, 582 S.E.2d 13 (2003).

Direction to continue deliberation. — Protection against double jeopardy was not violated when the trial court directed the jury to continue deliberating after it returned the second of its three verdicts since the jury's second verdict indicated that it failed to comply with the trial court's instructions and remained undecided as to the lesser included offenses of aggravated assault and involuntary manslaughter. *Easley v. State*, 262 Ga. App. 144, 584 S.E.2d 629 (2003).

Bench trial and jury trial on separate offenses. — Even assuming arguendo that the defendant's position that O.C.G.A. § 40-6-395 set out two distinct offenses, wilful failure to stop and fleeing and eluding a police officer, the defendant was tried, first in a bench trial and again on remand after an appeal, on an accusation charging the defendant with fleeing

and eluding an officer and was found guilty and sentenced both times for fleeing and eluding; hence, because the defendant was not tried on the offense of wilful failure to stop, the defendant's contention that double jeopardy considerations prohibited a jury trial on that charge, was moot. *Harbuck v. State*, 280 Ga. 775, 631 S.E.2d 351 (2006).

Unsworn jury. — Retrial after not guilty finding returned by an unsworn jury was not barred by the double jeopardy principles under both the U.S. and Georgia Constitutions, as the jury lacked any authority to pass upon any of the issues at trial and, hence, could not make any determinations whatsoever as to the defendant's guilt or innocence. *Spencer v. State*, 281 Ga. 533, 640 S.E.2d 267, cert. denied, 551 U.S. 1103, 127 S. Ct. 2914, 168 L. Ed. 2d 243 (2007).

Prior consent order did not amount to criminal punishment to which double jeopardy prohibitions applied. — Trial court properly denied a solid waste facility operator's double jeopardy plea in bar of prosecution because even though the parties stipulated that the consent order and the criminal action alleged the same nuisance conduct and each proceeding had the same goals of restraint, deterrence, and abatement, the criminal action was not barred by the sanctions imposed in the consent order since the consent order did not amount to criminal punishment to which double jeopardy prohibitions applied. *Wilbros, LLC v. State*, 294 Ga. 514, 755 S.E.2d 145 (2014).

2. Mistrials

After properly declared mistrial, the defendant may be tried again. *Nolan v. State*, 55 Ga. 521, 21 Am. R. 281 (1875).

No double jeopardy when mistrial declared on motion of or with consent of defendant. — The double jeopardy proscription of the United States and Georgia Constitutions generally does not prevent reprosecution of a defendant when a mistrial occurs on the motion of, or with the consent of, the defendant. *Studyvent v. State*, 153 Ga. App. 161, 264 S.E.2d 695 (1980).

When, after a jury was impaneled, the

defendant moved for severance and a mistrial, and the trial court granted the motion for severance and elected to go forward with the trial of the codefendant, but, instead of granting a mistrial, continued defendant's case, the grant of the continuance was equivalent to the grant of a mistrial, and the defendant's plea of double jeopardy was properly rejected since the defendant had sought and consented to the severance. *Stone v. State*, 218 Ga. App. 350, 461 S.E.2d 548 (1995).

Trial court properly denied the defendant's plea in bar based on double jeopardy under U.S. Const., amend. 5 and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, seeking to prevent a retrial of criminal charges against defendant after the motion for a mistrial under O.C.G.A. § 16-1-8(e)(1) was granted in the first trial upon the jury's advisement to the trial court judge that they were hopelessly deadlocked due to the refusal by two jurors to consider the direct evidence; the mistrial was properly declared and there was no improper conduct shown by the trial court or the state but rather, the defendant's counsel admitted that defendant hoped that another jury would be more sympathetic to the defendant upon a retrial, as the first jury was deadlocked 10-2 in favor of conviction. *Jackson v. State*, 282 Ga. App. 476, 638 S.E.2d 865 (2006).

Trial court did not err in denying the defendant's plea in bar on the grounds of double jeopardy because the trial court's finding that the prosecutor did not intend to goad the defendant into moving for a mistrial was not clearly erroneous since the defendant's character was put in evidence by the witness's unresponsive answer to a question and not by any improper conduct of the prosecutor; the trial court was authorized to find that the state would have nothing to gain from delay and that the prosecutor was aggressively seeking a conviction, not a mistrial because the trial was at an early stage when the defendant's motion for a mistrial was granted, and the state had not yet presented the testimony of numerous other witnesses, including the alleged victims. *Appling v. State*, 305 Ga. App. 633, 700 S.E.2d 627 (2010).

Jeopardy and Trial**Procedure (Cont'd)****2. Mistrials (Cont'd)**

No double jeopardy on retrial following judge's or prosecutor's misconduct. — In the context of a granted motion for mistrial, governmental misconduct will support a plea in bar based on double jeopardy if the prosecutor or trial judge intended to goad the defendant into moving for a mistrial. In the context of a reversal or grant of a motion for new trial, on the other hand, double jeopardy may bar a retrial when the prosecutor intended to prevent an acquittal that the prosecutor, or the trial judge accused of misconduct, believed at the time was likely to occur in the absence of the judge's misconduct. *Paul v. State*, 266 Ga. App. 126, 596 S.E.2d 670 (2004).

After a mistrial was declared due to the prosecutor's improper comments during closing, the trial court properly denied defendant's motion for acquittal and discharge, pursuant to O.C.G.A. § 17-9-1, as the prosecutor had not intended to subvert the protections afforded by the double jeopardy clause, at Ga. Const. 1983, Art. I, Sec. I, Para. XVIII and U.S. Const., amend. 5, in the prosecutor's reference to defendant's financial status due to discussions that occurred on that issue, although the prosecutor later realized that such discussions were held outside of the presence of the jury; defendant failed to make the requisite showing of a purposeful subversion of double jeopardy, nor did defendant show an improper motive, a benefit to the state to retry the case, or conduct that gave rise to a presumption of unlawful intent. *Mathis v. State*, 276 Ga. App. 587, 623 S.E.2d 674 (2005).

It was error to grant the defendants' plea in bar based on double jeopardy after granting the defendants' motion for a mistrial when the prosecutor told the defense that a rifle could not be located; even if the conduct of the prosecutor's staff in not telling the prosecutor that the rifle was missing could be imputed to the prosecutor, there was no evidence that those persons intended to goad the defendants into moving for a mistrial. *State v. Traylor*, 281 Ga. 730, 642 S.E.2d 700 (2007).

No double jeopardy when mistrial proper. — Defendant was not improperly placed in double jeopardy given that the mistrial was properly entered on the judge's rightful determination of a hopeless deadlock in light of the jury's continued divided status after 12 hours of deliberation over the course of two days. *Hurston v. State*, 206 Ga. App. 570, 426 S.E.2d 196 (1992).

When the only verdict returned and read in open court was that the jury could not reach a verdict on a murder count, a grant of a mistrial was proper and the state could try the defendant again for murder and the lesser included offense of manslaughter. *State v. Lane*, 218 Ga. App. 126, 460 S.E.2d 550 (1995).

Since the jury in the defendant's first trial on drug charges was hopelessly deadlocked, and the trial court's decision in that trial that the jury deadlock created a manifest necessity for a mistrial, it was not an abuse of discretion, and since the trial court in the first trial provided the jury with more time to deliberate after the defendant moved for a mistrial based on the jury being deadlocked, a second trial on the same drug charges was not barred by double jeopardy; the manifest necessity of the mistrial prevented double jeopardy from attaching to the defendant's second trial. *Leonard v. State*, 275 Ga. App. 667, 621 S.E.2d 599 (2005).

Defendant could be retried on a kidnapping charge under O.C.G.A. § 16-5-40(b) after the defendant was acquitted of felony murder under O.C.G.A. § 16-5-1(c) and a mistrial was declared on the underlying felony of kidnapping; the jury could have based the jury's acquittal on the felony murder charge on factors other than the defendant's participation in the crimes that preceded the homicide. *State v. Lambert*, 276 Ga. App. 668, 624 S.E.2d 174 (2005).

Trial court's declaration of a mistrial as to all counts in an earlier trial, based on evidence that at least one juror had been improperly contacted during the trial, did not bar a retrial of the defendant on double jeopardy grounds, despite the fact that the jury had reached a verdict of not guilty as to one of the counts in the earlier trial. *Smith v. State*, 278 Ga. App. 315, 628 S.E.2d 722 (2006).

As the trial court did not abuse the court's discretion in declaring a mistrial sua sponte on the basis that evidence inadvertently taken to the jury room which contained the defendant's exculpatory statement had irreparably prejudiced the state's right to a fair trial, and that curative instructions would be insufficient, the defendant's retrial was not barred by double jeopardy. *Varner v. State*, 285 Ga. 334, 676 S.E.2d 209 (2009).

After the trial court excused a juror who had been left a telephone message stating that the defendant was a good person, the juror discussed the evidence with the other jurors and made negative comments in an apparent effort to discredit the prosecution. As the trial court concluded that the excused juror may have had a bias that affected the other jurors, the court properly declared a mistrial; therefore, the defendant's retrial did not violate the double jeopardy ban. *Brown v. State*, 285 Ga. 324, 676 S.E.2d 221 (2009).

Trial court did not err in denying the defendant's plea in bar because the evidence authorized the court's determination that the complained-of inquiry by the prosecutor was not intended to goad the defense into seeking a mistrial, and the record contained evidentiary support for the trial court's determination that the prosecutor's direct examination of a police officer did not show that the prosecutor was intentionally trying to abort the trial; since the evidence authorized the trial court to find that the person in control of the prosecution did not instigate any misconduct, either directly or through collusion, in order to goad the defendant into moving for a mistrial, double jeopardy did not bar retrial. *Brown v. State*, 303 Ga. App. 814, 694 S.E.2d 385 (2010).

There was no error in denying the defendant's plea in bar of former jeopardy because the trial court did not abuse the court's discretion in declaring a mistrial in the defendant's first trial because the record supported the court's finding that the jury was hopelessly deadlocked; the jurors informed the trial court early in their deliberations that their vote was nearly evenly split between conviction and acquittal, and at least three separate times, the jury also told the trial court that the

jury was deadlocked and that further deliberations would not result in a verdict. *Mattox v. State*, 305 Ga. App. 600, 699 S.E.2d 887 (2010).

Prosecutor goading defendant into motion for mistrial. — The double jeopardy clause stands as a bar to retrial when "the prosecutor has goaded the defense into making a motion for a mistrial" to avoid a reversal of the conviction based on prosecutorial or judicial error. In that situation, the defendant must show that the prosecutor engaged in intentional misconduct to secure a second opportunity to try the case. Defendant did not show that the prosecutor's questioning of the state's witness rose to the level of intentional misconduct necessary to bar a retrial under the double jeopardy clause. *Ritter v. State*, 269 Ga. 884, 506 S.E.2d 857 (1998).

When actions of prosecutor cause mistrial. — Because a prosecutor's conduct violated one of the most basic rules of prosecutorial procedure, specifically, producing documents in discovery showing that the defendant refused to speak with police and requested a lawyer after being advised of Miranda, and hence intentionally goading the defendant into moving for a mistrial, the trial court erred in denying the defendant's motion for a plea in bar on double jeopardy grounds. *Anderson v. State*, 285 Ga. App. 166, 645 S.E.2d 647 (2007).

Trial court did not err in denying the defendant's plea of former jeopardy because the court's finding that the prosecution's question on cross-examination was an unintentional reference to the defendant's right to remain silent was not clearly erroneous; the record contained evidence to support the trial court's finding that the prosecutor's question was not intended to goad the defense into seeking a mistrial. *Demory v. State*, 313 Ga. App. 265, 721 S.E.2d 93 (2011).

Retrial after mistrial caused by judge's inability to disregard evidence. — In a bench trial, the judge's inability to disregard evidence the judge ruled inadmissible constituted a manifest necessity for a mistrial and the defendant's double jeopardy rights would not be violated by a retrial to a jury. *Bailey v. State*, 219 Ga. App. 258, 465 S.E.2d 284 (1995).

**Jeopardy and Trial
Procedure (Cont'd)
2. Mistrials (Cont'd)**

Motion for mistrial as removing barrier to reprosecution. — When circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. *Studyvent v. State*, 153 Ga. App. 161, 264 S.E.2d 695 (1980).

Granting of mistrial upon defendant's own motion never acts as bar to further prosecution; this is true even if the defendant's motion for mistrial is necessitated by error of the prosecutor or of the court. *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

Defendant did not carry defendant's burden of showing that the state goaded defendant into moving for a mistrial when the state failed to provide the defense with one of two statements that the victim provided to police regarding the charges brought against defendant for child molestation and statutory rape, and, thus, the trial court did not err in denying defendant's plea of former jeopardy under either the state or federal constitution after the trial court granted defendant's motion for a mistrial. *Beach v. State*, 260 Ga. App. 399, 579 S.E.2d 808 (2003).

Procedure amounts to jeopardy for second time. — If a judge capriciously or erroneously declares a mistrial, and the accused is again put upon trial, the accused will be placed in jeopardy a second time for the same offense. *Brindle v. State*, 125 Ga. App. 298, 187 S.E.2d 310 (1972).

Consent of accused needed for declaring mistrial. — When the representative of the state fails to exercise ordinary diligence and therefore does not discern a juror's relationship to the defendant, the representative impliedly waives any cause for complaint by the state, in respect to which, once the accused has been put in jeopardy by the state, the trial judge cannot interfere by declaring a mistrial without the consent of the accused. *Brindle v. State*, 125 Ga. App. 298, 187 S.E.2d 310 (1972).

Moral or physical necessity for mistrial. — To justify grant of a mistrial without the consent of the accused, there must either be moral or physical necessity. *Nolan v. State*, 55 Ga. 521, 21 Am. R. 281 (1875).

When a person accused has been put upon trial, and a jury, selected by the person and the state, charged with the case, there must be a verdict either for the person or against the person, unless there is an absolute moral or physical necessity for a mistrial, or the person consents to the mistrial. *Brindle v. State*, 125 Ga. App. 298, 187 S.E.2d 310 (1972).

Defense counsel's error resulting in mistrial. — In a prosecution for malice murder, the trial court did not abuse its discretion in declaring a mistrial when defense counsel injected the prejudicial issue of the victim's violent acts without having first made a prima facie showing of justification and the state could try defendant again. *Laster v. State*, 268 Ga. 172, 486 S.E.2d 153 (1997).

Mistrial during prosecution of multiple offenses. — When the state seeks to prosecute a defendant for two offenses in a single prosecution, one of which is included in the other, and the defendant receives a mistrial on the greater offense, the remaining conviction of the lesser offense does not bar retrial of the greater offense. *Taylor v. State*, 238 Ga. App. 753, 520 S.E.2d 267 (1999).

Retrial permissible only when "manifest necessity" existed for declaration of mistrial. — The test to be applied by the trial court hearing a double jeopardy plea is that retrial is permissible only if a manifest necessity existed for the declaration of the mistrial lest otherwise the end of public justice be defeated; the existence of "manifest necessity" is to be determined by weighing the defendant's right to have the defendant's trial completed before the particular tribunal against the interest of the public in having fair trials designed to end in just judgments; and the decision must take into consideration all the surrounding circumstances. *Chatham v. State*, 155 Ga. App. 154, 270 S.E.2d 274 (1980), rev'd on other grounds, 247 Ga. 95, 274 S.E.2d 473 (1981).

At defendant's trial for various sexual offenses based on allegations by defendant's stepdaughter, which were later recanted, there was no manifest necessity for a mistrial over defendant's objection when a child abuse investigator mentioned, in violation of the trial court's ruling on a motion in limine based on O.C.G.A. § 24-2-3, that the stepdaughter had viewed pornographic movies even though the trial court did not abuse the court's discretion in granting the state's motion in limine to exclude the evidence; defense counsel's question to the investigator did not call for the improper response, and, once the issue had been injected, the defense was entitled to clarify that the defendant bore no responsibility for the victim's viewing of the pornographic movies. Thus, defendant's plea in bar based on double jeopardy should have been granted. *Payne v. State*, 267 Ga. App. 498, 600 S.E.2d 422 (2004).

Since the jury in defendant's first trial on drug charges was hopelessly deadlocked, and the trial court's decision in that trial that the jury deadlock created a manifest necessity for a mistrial, it was not an abuse of discretion, and since the trial court in the first trial provided the jury with more time to deliberate after defendant moved for a mistrial based on the jury being deadlocked, a second trial on the same drug charges was not barred by double jeopardy; the manifest necessity of the mistrial prevented double jeopardy from attaching to defendant's second trial. *Leonard v. State*, 275 Ga. App. 667, 621 S.E.2d 599 (2005).

Retrial of a criminal defendant after a mistrial caused by the inability of the jury to reach a verdict does not constitute double jeopardy if there is manifest necessity for declaring the mistrial; the determination as to whether the jury is in fact hopelessly deadlocked is a matter somewhat in the discretion of the trial court. *Leonard v. State*, 275 Ga. App. 667, 621 S.E.2d 599 (2005).

Because the evidence showed that the trial court did not consider any less drastic alternatives to declaring a mistrial for what, essentially, was the state's objection to one of the court's evidentiary rulings, the trial court erred in denying defen-

dant's plea in bar of former jeopardy under Ga. Const. 1983, Art. I, Sec. I, Para. XVIII. *Freeman v. State*, 299 Ga. App. 564, 683 S.E.2d 124 (2009).

Defendant's plea in bar on double jeopardy grounds was properly denied because the trial court did not err in finding a manifest necessity for declaring a mistrial after defense counsel, despite being warned, argued in closing statements that the jury should distrust the breath test administered by the state trooper because the machine used had problems. *McCabe v. State*, 318 Ga. App. 720, 734 S.E.2d 539 (2012).

A retrial after a mistrial caused by the failure of the jury to reach a verdict does not constitute double jeopardy under the doctrine of "manifest necessity." *Murff v. State*, 165 Ga. App. 808, 302 S.E.2d 697, rev'd on other grounds, 251 Ga. 478, 306 S.E.2d 267 (1983).

Jeopardy attaches when court grants mistrial over defendant's objections in some instances. — When the prosecutor begins the prosecutor's case without sufficient evidence to convict and the court grants a mistrial over defendant's objection, defendant's plea of former jeopardy should be sustained, should the state attempt to call the case again. *Haynes v. State*, 245 Ga. 817, 268 S.E.2d 325 (1980).

Retrial after mistrial caused by failure of the jury to reach a verdict does not constitute double jeopardy. *Kelly v. State*, 145 Ga. App. 780, 245 S.E.2d 20 (1978).

If a jury cannot agree upon a verdict in a criminal case, the trial judge may declare a mistrial, and the accused may then be tried a second time for the same offense. The declaration of a mistrial under such circumstances precludes an accused from successfully invoking the constitutional principle of double jeopardy at the accused's second trial. *Cameron v. Caldwell*, 232 Ga. 611, 208 S.E.2d 441 (1974).

Since the jury in defendant's first trial on drug charges was hopelessly deadlocked, and the trial court's decision in that trial that the jury deadlock created a manifest necessity for a mistrial, it was not an abuse of discretion, and since the

Jeopardy and Trial**Procedure (Cont'd)****2. Mistrials (Cont'd)**

trial court in the first trial provided the jury with more time to deliberate after defendant moved for a mistrial based on the jury being deadlocked, a second trial on the same drug charges was not barred by double jeopardy; the manifest necessity of the mistrial prevented double jeopardy from attaching to defendant's second trial. *Leonard v. State*, 275 Ga. App. 667, 621 S.E.2d 599 (2005).

Retrial after acquittal on single charge but deadlock on other charges. — Since the defendant was acquitted of a charge of malice murder, and the jury was deadlocked as to other offenses before them, retrial on the lesser included unindicted offense of voluntary manslaughter was not barred, as long as the jury did not know about the murder charge. *State v. Archie*, 230 Ga. App. 253, 495 S.E.2d 581 (1998).

Plea of former jeopardy not sustained when court declared mistrials. — Plea of former jeopardy could not be sustained on the ground that on two former trials of the accused, under the same indictment, the court had declared mistrials on account of the inability of the juries to agree upon a verdict, since it is a matter somewhat in the discretion of the court when and under what circumstances a jury will be discharged from further consideration in criminal cases. *Hyde v. State*, 196 Ga. 475, 26 S.E.2d 744 (1943).

Defendant's introduction of prohibited evidence. — Defendant's introduction of evidence that was prohibited by the rape shield statute gave the court grounds to find manifest necessity for a mistrial; therefore, state and federal double jeopardy provisions did not bar reprosecution. *Banks v. State*, 230 Ga. App. 258, 495 S.E.2d 877 (1998).

3. New Trials

True intent and meaning of this paragraph is that one who, after conviction upon an indictment, voluntarily seeks and obtains a new trial thereon, becomes subject to another trial generally for the offense therein charged. *Waller v. State*,

104 Ga. 505, 30 S.E. 835 (1898); *Jackson v. State*, 154 Ga. App. 367, 268 S.E.2d 418 (1980); *Daniels v. State*, 165 Ga. App. 397, 299 S.E.2d 746 (1983).

Failure to properly establish venue does not bar retrial, because evidence of venue does not go to the guilt or innocence of the accused; hence, it does not invoke double jeopardy concerns. *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000).

Adjudication of delinquency was reversed as the state presented no evidence of venue and the juvenile court did not take judicial notice that the location of an aggravated assault described at a hearing was in Sumter County; the county in which the offense was committed was not established and the evidence was insufficient to support the conviction, but retrial was not barred by the double jeopardy clause so long as venue was properly established at retrial. *In the Interest of T.W.*, 280 Ga. App. 693, 634 S.E.2d 854 (2006).

Although there was sufficient evidence to support a juvenile's adjudication of delinquency based on the finding that the juvenile had committed acts, which, had the juvenile been an adult, would have supported a conviction for burglary in violation of O.C.G.A. § 16-7-1(a), the adjudication was reversed because the state failed to present any evidence to establish proof of venue beyond a reasonable doubt. The investigating officers' county of employment did not, in and of itself, constitute sufficient proof of venue to meet the beyond a reasonable doubt standard; however, the reviewing court noted that retrying the juvenile was not prohibited under the Double Jeopardy Clause, because the evidence presented at trial was otherwise sufficient to support the adjudication of delinquency. *In the Interest of B.R.*, 289 Ga. App. 6, 656 S.E.2d 172 (2007).

First verdict limited to lesser included offense requires that retrial be limited to that lesser offense. *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970).

Acquittal on some offenses did not bar retrial on other offenses with different elements. — Although a defendant was acquitted of charges relating to the beating death and kidnapping of a robbery victim in a first trial, the defen-

dant was convicted of armed robbery and assault of the victim. On the defendant's retrial, granted due to the state's failure to prove venue in the first trial, the state was not barred from re-prosecuting the defendant for armed robbery and assault. *Patmon v. State*, 303 Ga. App. 151, 693 S.E.2d 120 (2010).

Defendant's acquittal on felony murder under O.C.G.A. § 16-5-1(c) and aggravated assault under O.C.G.A. § 16-5-21 did not bar retrial on a voluntary manslaughter charge under O.C.G.A. § 16-5-2(a) as the collateral estoppel doctrine under the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, did not apply because voluntary manslaughter required proof of an element not found in felony murder or aggravated assault, and aggravated assault with a deadly weapon and voluntary manslaughter were mutually exclusive. *Roesser v. State*, 316 Ga. App. 850, 730 S.E.2d 641 (2012).

Procedurally it matters not how defendant obtains a new trial, by direct appeal from the judgment of conviction or after the denial of the defendant's motion for new trial, should the defendant choose to file one. *Jackson v. State*, 154 Ga. App. 367, 268 S.E.2d 418 (1980); *Daniels v. State*, 165 Ga. App. 397, 299 S.E.2d 746 (1983).

No bar to second trial when motion for new trial by defendant granted. — Jeopardy provision does not prohibit a second trial on the same charge when the defendant has been successful in the defendant's motion for new trial in having the conviction set aside for want of sufficient evidence. *Staggers v. State*, 120 Ga. App. 875, 172 S.E.2d 462 (1969).

One who procures a new trial on one's own motion will not be heard to complain that to try the person again places the person in double jeopardy in violation of the state Constitution, even if the reversal was for insufficiency of evidence. *Staggers v. State*, 225 Ga. 581, 170 S.E.2d 430 (1969).

Defendant by securing a new trial defeats a plea of former jeopardy. *Waller v. State*, 104 Ga. 505, 30 S.E. 835 (1898); *Taylor v. State*, 110 Ga. 150, 35 S.E. 161 (1900); *Pride v. State*, 125 Ga. 750, 54 S.E. 688 (1906).

When a defendant in a criminal case secures a new trial by the defendant's own efforts, the defendant waives the right to plead former jeopardy because of the former trial. *Arnold v. State*, 88 Ga. App. 710, 77 S.E.2d 550 (1953).

When the defendant is tried on a new indictment other than the indictment on which the defendant was first tried and convicted, the defendant's plea of former jeopardy is without merit, as the defendant waived the right to plead former jeopardy when the defendant secured a new trial through the defendant's own efforts. *Staggers v. State*, 225 Ga. 581, 170 S.E.2d 430 (1969).

When defendant obtains reversal based upon "trial error," double jeopardy does not bar retrial. *Hall v. State*, 244 Ga. 86, 259 S.E.2d 41 (1979).

Because the reversal of the defendant's conviction was based on trial error, double jeopardy did not prevent retrial. *Daniels v. State*, 165 Ga. App. 397, 299 S.E.2d 746 (1983).

Prosecutorial misconduct did not bar a retrial of the defendant under the Double Jeopardy Clause, U.S. Const., amend. V, and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII, when the defendant alleged that the state made many statements of fact outside the record during closing argument in violation of O.C.G.A. § 17-8-75 as the defendant did not allege that the prosecutor intended to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of the prosecutor's misconduct. *Wadley v. State*, 317 Ga. App. 333, 730 S.E.2d 536 (2012).

Double jeopardy does not bar retrial. — Double jeopardy clause in U.S. Const., amend. V and Ga. Const. 1983, Art. I, Sec. I, Para. XVIII did not bar a second trial on the same charges because the defendant's motion for new trial was granted due to an erroneous evidentiary ruling. *State v. Caffee*, 291 Ga. 31, 728 S.E.2d 171 (2012).

Reversal for trial error explained. — Reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case; it implies nothing with respect to the guilt or innocence of the defendant; it is a

Jeopardy and Trial**Procedure (Cont'd)****3. New Trials (Cont'd)**

determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect. *Hall v. State*, 244 Ga. 86, 259 S.E.2d 41 (1979).

Reversal for insufficiency of evidence, but not for trial error, bars retrial. — Once a reviewing court reverses a conviction solely for insufficiency of the evidence to sustain the verdict of guilty, double jeopardy bars retrial; however, if a defendant obtains a reversal based upon "trial error," double jeopardy does not bar retrial. *Osborne v. State*, 166 Ga. App. 439, 304 S.E.2d 416 (1983).

Defendant's convictions for armed robbery reversed for insufficient evidence. — Reversal of defendant's convictions for felony murder based on the felony of armed robbery due to insufficient evidence raises a procedural double jeopardy bar to any reprosecution for armed robbery. *Prater v. State*, 273 Ga. 477, 541 S.E.2d 351 (2001).

When reversal for erroneous admission of evidence not excludable on retrial, retrial allowed. — When the testimony of a lab technician was not inadmissible because it was incompetent, but because the defense had not been furnished a copy of the laboratory report as required by former O.C.G.A. § 17-7-211, it would not be excluded automatically on retrial. Thus, when the original conviction was reversed due to a trial error, rather than insufficiency of the evidence, a retrial is not barred by the double jeopardy provisions of the Georgia and United States Constitutions. *Osborne v. State*, 166 Ga. App. 439, 304 S.E.2d 416 (1983).

New trial granted due to erroneous evidentiary ruling. — Trial court erred in granting the defendant's plea in bar because double jeopardy did not bar a second trial on the same charges since the retrial was granted due to an erroneous evidentiary ruling; the order granting a new trial did not find the evidence was legally insufficient to sustain the verdict, but instead, the second trial judge granted

the new trial based on the original trial court's error in admitting an exhibit to prove that the defendant had a prior felony conviction after the defendant offered to stipulate that the defendant was a convicted felon. *State v. Caffee*, 291 Ga. 31, 728 S.E.2d 171 (2012).

Death sentence unavailable on retrial following jury sentence of life imprisonment. — If the convicting jury sentences the defendant to life imprisonment, this constitutes an acquittal of the charge that the evidence supports a finding of a statutory aggravating circumstance, and in any retrial the double-jeopardy clause prohibits the defendant from being given the death sentence. *Hill v. State*, 250 Ga. 821, 301 S.E.2d 269 (1983).

No authority for judge to grant new trial on own motion. — A trial judge has no authority in this state on the judge's own motion, and in the absence of such motion by the defendant, to grant the defendant a new trial of a crime, and such action will be reversed on appeal. *Crymes v. State*, 52 Ga. App. 195, 182 S.E. 856 (1935).

4. Sentencing

Amendment of orally pronounced sentence so as to increase it. — Court is authorized to amend its oral pronouncement in order to change sentence from 12 months on probation to 12 months in jail when there was no suggestion of vindictiveness against the defendant for having exercised any legal right, but rather it was only the trial court's effort to make the punishment fit the crime of which the jury had found the defendant to be guilty. *Curry v. State*, 248 Ga. 183, 281 S.E.2d 604 (1981).

Increase of sentence after defendant begins serving sentence. — Oral declaration as to what sentence shall be is not the sentence of the court; the sentence signed by the judge is. However, oral declaration of a sentence may not be increased after the defendant has begun to serve the sentence. *Curry v. State*, 248 Ga. 183, 281 S.E.2d 604 (1981).

Sentence which has been reduced to writing and signed by a judge may not be increased after the defendant has begun

to serve that sentence. *Curry v. State*, 248 Ga. 183, 281 S.E.2d 604 (1981).

Juvenile defendant's voluntary manslaughter sentence was vacated, and a resentencing was ordered, when the trial court erred by increasing the sentence after the defendant had already begun serving it, because the original sentence was final at the time it was imposed, and defendant had no reason to believe otherwise; hence, the trial court's increased sentence constituted double jeopardy and

could not stand. *Williams v. State*, 273 Ga. App. 42, 614 S.E.2d 146 (2005).

Multiple convictions and punishments for single crime improper. — Appeals court agreed that because there was only one homicide victim, only one life sentence, and not three, could be imposed, because such improperly subjected the defendant to multiple convictions and punishments for one crime. *Turner v. State*, 281 Ga. 487, 640 S.E.2d 25 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Concept of double jeopardy requires identity of offenses and not merely identity of transaction. 1963-65 Op. Att'y Gen. p. 690.

Prosecution for separate municipal and state offenses arising in single transaction not barred. — An accused arrested for separate non-included offenses arising out of a single transaction,

which violate municipal ordinances and state law, respectively, may be prosecuted first in the recorder's court for the municipal ordinance violations, and then transferred to the superior court to be prosecuted for the separate state violations, without violating statutory or constitutional double jeopardy prohibitions. 1986 Op. Att'y Gen. No. U86-32.

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, §§ 275 et seq., 620 et seq., 633 et seq.

C.J.S. — 22 C.J.S., Criminal Law, §§ 295, 299 et seq.

ALR. — Occurrences during a view as warranting the jury's discharge without letting in plea of former jeopardy upon subsequent trial, 4 ALR 1266.

Plea of former jeopardy or of former conviction or acquittal where jury was not sworn, 12 ALR 1006.

Conviction or acquittal of larceny as bar to prosecution for burglary, 19 ALR 626.

Pendency in one county of charge of larceny as bar to subsequent charge in another county of offense which involves both felonious breaking and felonious taking of same property, 19 ALR 636.

Substitution of juror after completion of panel as sustaining plea of double jeopardy, 28 ALR 849; 33 ALR 142.

Forgery of names of several individuals to the same instrument as more than one offense, 33 ALR 562.

Plea of double jeopardy where jury was discharged because of inability of the

prosecution to present testimony, 74 ALR 803.

Conviction or acquittal under charge of assault with intent to rob as bar to prosecution for assault with intent to kill based on the same transaction or on closely connected transactions, 81 ALR 701.

Constitutionality and construction of statute enhancing penalty for second or subsequent offense, 82 ALR 345; 116 ALR 209; 132 ALR 91; 139 ALR 673.

Discharge on habeas corpus after conviction as affecting claim or plea of former jeopardy, 97 ALR 160.

Identity, as regards former jeopardy, of offenses charged in different indictments or informations for conspiracy, 112 ALR 983.

Conviction or acquittal upon charge of murder of, or assault upon, one person as bar to prosecution for like offenses against other person at the same time, 113 ALR 222.

Constitutionality of statute permitting appeal by state in criminal case, 113 ALR 636; 157 ALR 1065.

Plea of former jeopardy as affected by

declaration of mistrial after impaneling and swearing of jury on original trial because of errors, or supposed errors, regarding examination or challenging of jurors, 113 ALR 1428.

Former jeopardy as regards successive prosecutions for perjury charged to have been committed in the same action or proceeding, 120 ALR 1171; 29 ALR2d 925.

Plea of former jeopardy where jury is discharged because of illness or insanity of juror, 125 ALR 694.

Income tax: year as of which interest should be returned by taxpayer who makes return on accrual basis, 150 ALR 754.

Double jeopardy where jury is discharged before termination of trial because of illness of accused, 159 ALR 750.

Acquittal or conviction of one offense in connection with operation of automobile as bar to prosecution for another, 172 ALR 1053.

Former jeopardy as ground for habeas corpus, 8 ALR2d 285.

What amounts to habitual intemperance, drunkenness, and the like within statute relating to substantive grounds for divorce, 29 ALR2d 925.

Acquittal on homicide charge as bar to subsequent prosecution for assault and battery, or vice versa, 37 ALR2d 1068.

Conviction or acquittal in criminal prosecution as bar to action for statutory damages or penalty, 42 ALR2d 634.

Conviction of lesser offense as bar to prosecution for greater on new trial, 61 ALR2d 1141.

Conviction from which appeal is pending as bar to another prosecution for same offense, 61 ALR2d 1224.

What constitutes accused's consent to court's discharge of jury or to grant of state's motion for mistrial which will constitute waiver of former jeopardy plea, 63 ALR2d 782.

Plea of guilty as basis of claim of double jeopardy in attempted subsequent prosecution for same offense, 75 ALR2d 683.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 84 ALR2d 1288; 15 ALR4th 1127; 88 ALR4th 711; 10 ALR Fed. 185; 115 ALR Fed. 381; 119 ALR Fed. 589.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 ALR2d 486.

Former jeopardy as ground for prohibition, 94 ALR2d 1048.

Conviction or acquittal in previous criminal case as bar to revocation or suspension of driver's license on same factual charges, 96 ALR2d 612.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense, 4 ALR3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy, 6 ALR3d 905.

Modern status of doctrine of res judicata in criminal cases, 9 ALR3d 203.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 ALR3d 834.

Propriety of increased punishment on new trial for same offense, 12 ALR3d 978.

When does jeopardy attach in a nonjury trial, 49 ALR3d 1039.

Prosecution for robbery of one person as bar to subsequent prosecution for robbery of another person committed at the same time, 51 ALR3d 693.

Former jeopardy: propriety of trial court's declaration of mistrial or discharge of jury, without accused's consent, on ground of prosecution's disclosure of prejudicial matter to, or making prejudicial remarks in presence of jury, 77 ALR3d 1143.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 ALR3d 1228.

Acquittal as bar to prosecution of accused for perjury committed at trial, 89 ALR3d 1098.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 ALR3d 997.

Applicability of double jeopardy to juvenile court proceedings, 5 ALR4th 234.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts — modern view, 6 ALR4th 802.

Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 ALR4th 121.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 ALR4th 970.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached, 14 ALR4th 1014.

Power of state court, during same term, to increase severity of lawful sentence — modern status, 26 ALR4th 905.

Power of court to increase severity of unlawful sentence — modern status, 28 ALR4th 147.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial — state cases, 40 ALR4th 741.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 ALR4th 367.

Double jeopardy: various acts of weapons violations as separate or continuing offense, 80 ALR4th 631.

Determination that state failed to prove charges relied upon for revocation of probation as barring subsequent criminal action based on same underlying charges, 2 ALR5th 262.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts—Modern view, 97 ALR5th 201.

Double jeopardy considerations in federal criminal cases — Supreme Court cases, 162 ALR Fed. 415.

Paragraph XIX. Treason.

Treason against the State of Georgia shall consist of insurrection against the state, adhering to the state's enemies, or giving them aid and comfort. No person shall be convicted of treason except on the testimony of two witnesses to the same overt act or confession in open court.

1976 Constitution. — Art. I, Sec. I, Para. XVI. ishment for treason, U.S. Const., art. III, sec. III, cls. 1 and 2, and § 16-11-1.

Cross references. — Treason and pun-

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Sedition, Subversive Activities, and Treason, § 1 et seq.

C.J.S. — 87 C.J.S., Treason, § 1 et seq.

Paragraph XX. Conviction, effect of.

No conviction shall work corruption of blood or forfeiture of estate.

1976 Constitution. — Art. I, Sec. I, Para. XVII.

Cross references. — Treason and punishment for treason, U.S. Const., art. III, sec. III, cl. 2 and § 44-5-210.

Law reviews. — For article on whether one's property is forfeited after a

conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979).

For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

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This guaranty imposes no restriction upon valid exercise of police power. *Atlantic Coast Line R.R. v. State*, 135 Ga. 545, 69 S.E. 725, 32 L.R.A. 20 (1910), *aff'd*, 234 U.S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914), *aff'd*, 234 U.S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914); *Mack v. Westbrook*, 148 Ga. 690, 98 S.E. 339 (1919).

By reason of this paragraph, felon or the felon's offspring may take testamentary benefits. *Smith v. DuBose*, 78 Ga. 413, 3 S.E. 309, 6 Am. St. R. 260 (1887).

Husband did not forfeit inheritance by murdering wife. — The fact that an heir kills the person from whom the heir expects to inherit will not change the application of the statutes of descent. *Hagan v. Cone*, 21 Ga. App. 416, 94 S.E. 602 (1917).

When wife dies without issue, husband is her sole heir and his right of inheritance is not forfeited by reason of having murdered her. *Crumley v. Hall*, 202 Ga. 588, 43 S.E.2d 646 (1947).

Confiscation of bribe money not prohibited forfeiture. — When trial court, in bribery case, ordered confiscation of bribe money and ruled that the money

might be used toward payment of a fine assessed in the case, and if the bribe money did not exceed the maximum fine under former Code 1933, § 26-2301 (see now O.C.G.A. § 16-10-2), the confiscation was not tantamount to a forfeiture prohibited under former Code 1933, § 85-1109 (see now O.C.G.A. § 44-5-210) and this paragraph. *Hall v. State*, 155 Ga. App. 724, 272 S.E.2d 578 (1980).

Statute was not unconstitutional. — Former § 2500 of the Civil Code 1910 (now repealed, but see now O.C.G.A. § 33-25-5), which provided that “death by suicide, or by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract,” is not unconstitutional as being in conflict with this paragraph and the similar provision of U.S. Const., art. III, sec. III, cl. 1, providing that no conviction “shall work corruption of blood, or forfeiture” of estate. *Adams v. Sovereign Camp, Woodmen of the World*, 176 Ga. 6, 167 S.E. 604 (1932).

Cited in *Caldwell v. Hill*, 179 Ga. 417, 176 S.E. 381 (1934); *Moore v. Moore*, 225 Ga. 340, 168 S.E.2d 318 (1969); *Moore v. Moore*, 231 Ga. 232, 201 S.E.2d 133 (1973).

OPINIONS OF THE ATTORNEY GENERAL

Forfeiture of public retirement system rights. — The General Assembly has the authority to enact a statute which proposes the forfeiture of earned retirement benefits of future public employees due to the conviction of a crime; however, an amendment to the Georgia Constitu-

tion proposing such a forfeiture by employees who are currently by law vested with rights under the public retirement system would, in all probability, be unconstitutional under the federal Impairment Clause contained in U.S. Const., art. I, sec. X. 1985 Op. Att’y Gen. No. U85-3.

RESEARCH REFERENCES

ALR. — Revocability of power or agency to collect interest in estate, 7 ALR 947.

Civil effects of sentence to life imprisonment, 139 ALR 1308.

Paragraph XXI. Banishment and whipping as punishment for crime.

Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime.

1976 Constitution. — Art. I, Sec. I, Para. XVIII.

Cross references. — Corporal punishment and restraint, §§ 38-2-1055 and 42-5-58.

Law reviews. — For article, “The

Georgia Bill of Rights: Dead or Alive?,” see 34 Emory L.J. 341 (1985).

For note, “Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia,” see 8 Ga. L. Rev. 919 (1974).

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Banishment limited to mean only banishment beyond limits of state. —

The drafters of the constitutional prohibition against banishment limited this general definition by choosing to define banishment more narrowly to mean only banishment beyond the limits of the state. *State v. Collett*, 232 Ga. 668, 208 S.E.2d 472 (1974).

No prohibition against banishment from specified areas within state. —

The 1877 drafters of this constitutional provision intended to prohibit banishment “beyond the limits of the state,” but not to prohibit banishment from specified areas within the state. *State v. Collett*, 232 Ga. 668, 208 S.E.2d 472 (1974).

Banishment of a defendant from specified areas in Georgia, imposed as a condition for suspension of a sentence by a trial court, does not violate the public policy of the state. *State v. Collett*, 232 Ga. 668, 208 S.E.2d 472 (1974).

An order modifying the trial court’s prior banishment order imposed as a condition of the defendant’s probation was upheld on appeal, as was the denial of the defendant’s motion to withdraw a negotiated plea, because: (1) the defendant’s sentence was independent, and thus, not part of the negotiated plea agreement; and (2) the trial court adequately considered that the defendant’s crimes were likely motivated by the relationship the defendant had with the victim, the defendant’s ex-spouse, where the ex-spouse resided and worked, as well as where the ex-spouse’s immediate family lived, by de-

termining that the banishment order was issued to protect those affected, but also served a rehabilitative purpose by removing a temptation by the defendant to re offend. *Hallford v. State*, 289 Ga. App. 350, 657 S.E.2d 10 (2008).

Habeas court properly denied defendant’s petition for habeas relief based on the contention that a condition of probation banishing the defendant from every county in the State of Georgia but one was unconstitutional as the defendant failed to show that the probation condition to remain in Toombs County only was unreasonable or otherwise failed to bear a logical relationship to the rehabilitative scheme of the sentence pronounced. The Supreme Court of Georgia noted that the banishment was justified to protect the victim, the defendant’s ex-spouse, from the defendant’s propensity for violence toward the victim. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. denied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

Defendant failed to meet the burden of proving on the record that the condition of probation banishing the defendant from Bartow and Gordon Counties was unreasonable because the record contained no evidence supporting the defendant’s contentions regarding the restrictions on the defendant’s ability to obtain release from confinement and begin serving the remainder of a sentence under probation. *Mallory v. State*, 335 Ga. App. 852, (2016).

Cited in *Sanchez v. State*, 234 Ga. App. 809, 508 S.E.2d 185 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 21A Am. Jur. 2d, Criminal Law, § 883 et seq.

Am. Jur. Trials. — Public School Lia-

bility: Constitutional Tort Claims for Excessive Punishment and Failure to Supervise Students, 48 Am. Jur. Trials 587.

Paragraph XXII. Involuntary servitude.

There shall be no involuntary servitude within the State of Georgia except as a punishment for crime after legal conviction thereof or for contempt of court.

1976 Constitution. — Art. I, Sec. I, Para. XIX.

Cross references. — Slavery prohibited, U.S. Const., amend. 13.

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This paragraph was directed against any attempt to reestablish slavery. *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751, 4 Ann. Cas. 501 (1906).

This paragraph prohibits leasing of convicts to private persons. *Penitentiary Co. v. Rountree*, 113 Ga. 799, 39 S.E. 508 (1901).

Right to provide for control of one's labor by contract is not prohibited. *Potts v. Riddle*, 5 Ga. App. 378, 63 S.E. 253 (1908).

Ballplayers. — A ballplayer may be released from one club to another. *Augusta Baseball Ass'n v. Thomasville Baseball Club*, 147 Ga. 201, 93 S.E. 208, 1917F L.R.A. 841 (1917).

Labor under municipal control as punishment not violative of paragraph. — To punish an offender charged with the violation of a valid municipal ordinance by confining the offender at labor under municipal control is not obnoxious to this paragraph. *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751, 4 Ann. Cas. 501 (1906).

"Crime" construed. *Pearson v. Wimbish*, 124 Ga. 701, 52 S.E. 751, 4 Ann. Cas. 501 (1906); *Williams v. City of Hazelhurst*, 11 Ga. App. 194, 74 S.E. 1039 (1912).

Involuntary demotions do not conflict with prohibition against invol-

untary servitude. *Brown v. State Merit Sys. of Personnel Admin.*, 245 Ga. 239, 264 S.E.2d 186 (1980).

Statute does not create involuntary servitude. — The legislative purpose of former Code 1933, § 26-1808 (see now O.C.G.A. § 16-8-4) was to punish for the fraudulent conversion, and not for a failure to comply with a contractual obligation. It follows that former Code 1933, § 26-1808 was not unconstitutional for violating due process, creating involuntary servitude, or imprisoning for debt. *Smith v. State*, 229 Ga. 727, 194 S.E.2d 82 (1972).

Involuntary servitude not criminal defense. — Involuntary servitude is a constitutional violation, as well as a criminal offense, but is not a criminal defense; therefore, the trial court did not err in failing to give the defendant's requested charges on involuntary servitude in a prosecution for selling and trafficking in cocaine in which the defendant alleged that the defendant had been illegally procured as an agent to work for the state involuntarily in connection with drug transactions. *Satterfield v. State*, 248 Ga. App. 479, 546 S.E.2d 859 (2001).

Cited in *King v. State*, 174 Ga. 432, 163 S.E. 168 (1932); *Garner v. Wood*, 188 Ga. 463, 4 S.E.2d 137 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 45 Am. Jur. 2d, Involuntary Servitude and Peonage, § 1 et seq.

C.J.S. — 16A C.J.S., Constitutional Law, § 798 et seq.

ALR. — Injunction against strike as

violating constitutional provision against involuntary servitude, 46 ALR 1541.

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 ALR4th 1063.

Paragraph XXIII. Imprisonment for debt.

There shall be no imprisonment for debt.

1976 Constitution. — Art. I, Sec. I, Para. XX.

Cross references. — Payment of fine as condition of probation, § 17-10-8. Assessment and payment of costs of criminal proceedings, § 17-11-1 et seq.

Law reviews. — For article, “Jury Trials in Contempt Cases,” see 20 Ga. B.J. 297 (1957).

For note, “Wrongful Repossession in Georgia,” see 8 Ga. St. U.L. Rev. 223 (1992).

For comment criticizing *Messenger v. State*, 209 Ga. 340, 72 S.E.2d 460 (1952), see 4 Mercer L. Rev. 371 (1953). For comment on *Plapinger v. State*, 217 Ga. 11, 120 S.E.2d 609 (1961), see 25 Ga. B.J. 102 (1962).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- IMPRISONMENT FOR CONTEMPT
- PERMISSIBLE PROBATION CONDITIONS
- PERMISSIBLE PUNISHMENT

General Consideration

Language commands three departments of government to refrain from imprisoning for debt. — The unambiguous language of this paragraph leaves no room for equivocation, exception, or doubt. It simply means that the sovereign people, speaking through their Constitution, command the three departments of the government — legislative, executive, and judicial — and all officials of those departments to refrain from imprisoning a single person for debt. *Messenger v. State*, 209 Ga. 340, 72 S.E.2d 460 (1952). For comment, see 4 Mercer L. Rev. 371 (1953).

Inhibition of Constitution applies to any and all imprisonment for debt, irrespective of the period of its duration or the means whereby it is accomplished. *Messenger v. State*, 209 Ga. 340, 72 S.E.2d 460 (1952). For comment, see 4 Mercer L. Rev. 371 (1953).

Criminal laws cannot be invoked to enforce payment of debts. — However equitable it may seem that the victim of the transaction should be paid the money which the victim was induced to part with by fraudulent representations, there is no provision in the law of the state for hanging over the head of a convicted criminal the threatened enforcement of an imposed

sentence for the purpose of coercing the criminal to pay a debt. Criminal laws cannot be invoked to enforce the payment of debts. *Ray v. State*, 40 Ga. App. 145, 149 S.E. 64 (1929).

Deputy did not show entitlement to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) as to the claims of false arrest and malicious prosecution because plaintiff offered evidence tending to show that the deputy violated Ga. Const. 1983, Art. I, Sec. I, Para. XXIII and O.C.G.A. § 51-7-20; thus, there were material fact issues precluding summary judgment. *Jordan v. Mosley*, 487 F.3d 1350 (11th Cir. 2007).

Court without authority to order part of fine to be paid as debt. — The fact that the court was without authority to order a part of the fine to be paid as a debt would not render the whole sentence void. Only that part which attempted to make such illegal distribution would be void. Though part of a sentence is unauthorized by law, that part will not make void the whole, but that which is good may be enforced. *Ray v. State*, 40 Ga. App. 145, 149 S.E. 64 (1929).

When the judgments are to be construed as imposing a chain gang and jail sentence, to be discharged on the payment of a fine of \$100.00, and an additional sum

General Consideration (Cont'd)

of \$400.00 to the prosecutrix, as a penalty, then the defendant was entitled to be released upon the payment of the \$100.00 fine, the court being without authority to order the defendant to pay, as a part of the penalty, an additional sum to the prosecutrix. *Ray v. State*, 40 Ga. App. 145, 149 S.E. 64 (1929).

Failure to pay taxes not punishable by imprisonment. — While there is no constitutional inhibition against criminalizing the failure to make an income tax return, income tax obligations constitute “debts” and any statute which characterizes the failure to pay income tax as an offense punishable by imprisonment violates the constitutional prohibition against imprisonment for debt. *State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985).

Cited in *Walden v. Sellers*, 174 Ga. 774, 163 S.E. 897 (1932); *Summers v. State*, 63 Ga. App. 445, 11 S.E.2d 409 (1940); *Howard v. State*, 222 Ga. 525, 150 S.E.2d 834 (1966); *Lindsey v. Solutions Exch., Inc.*, 178 Bankr. 895 (Bankr. N.D. Ga. 1995).

Imprisonment for Contempt

Editor’s notes. — In addition to the cases noted under this heading, see Ga. Const. 1983, Art. I, Sec. I, Para. XXII, which specifically authorizes imprisonment for contempt of court.

Imprisonment for contempt is lawful. *Smith v. McLendon*, 59 Ga. 523 (1877); *Clements v. Tillman*, 79 Ga. 451, 5 S.E. 194, 11 Am. St. R. 441 (1887); *Lamar v. Lamar*, 123 Ga. 827, 51 S.E. 763, 107 Am. St. R. 169, 3 Ann. Cas. 294 (1905); *Samel v. Dodd*, 142 F. 68 (5th Cir.), cert. denied, 201 U.S. 646, 26 S. Ct. 761, 50 L. Ed. 903 (1906).

Imprisonment for civil contempt in alimony case is permissible. — Imprisonment for civil contempt in a case involving alimony when the contemnor, although ordered imprisoned, may be purged prior to the imprisonment, was constitutionally permissible. *Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980).

Unconditional imprisonment for nonpayment of alimony permissible. — A finding of criminal contempt with the

sanction of unconditional imprisonment for nonpayment of alimony is constitutionally permissible. *Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980).

Contempt order was abuse of discretion and amounted to imprisonment for debt. — The court erred in confining defendant to the custody of the sheriff until the defendant was purged of contempt by paying the entire sum of \$8,667.00, found to be the amount of alimony in arrears; it was an abuse of discretion to require the defendant to pay the entire amount when the evidence disclosed the defendant was unable to comply, and amounted to imprisonment for debt. *Blalock v. Blalock*, 214 Ga. 586, 105 S.E.2d 721 (1958).

Failure to pay the \$60,000 required under a consent decree provided no grounds for a contempt ruling when the consent decree was not interlocutory and incarcerating the debtor for contempt would have violated the clear prohibition in Ga. Const. 1983, Art. I, Sec. I, Para. XXIII. *Hill v. Paluzzi*, 261 Ga. App. 123, 581 S.E.2d 730 (2003).

Imprisonment for refusal to pay support, not for debt. — A person who refuses to pay alimony or child support when the person is able to do so is imprisoned for the person’s refusal to abide by the court’s order, not for debt. *Ensley v. Ensley*, 239 Ga. 860, 238 S.E.2d 920 (1977).

A parent who willfully refuses to pay child support which the parent is able to pay and which is required by an order of court may be found guilty of either civil or criminal contempt of court, or both, and dealt with as provided by law. *Ensley v. Ensley*, 239 Ga. 860, 238 S.E.2d 920 (1977).

Settlement agreement in divorce proceeding. — An order of specific performance as to a merely private debt in the form of an unincorporated settlement agreement in a divorce proceeding cannot be deemed to be a more adequate remedy than an action at law for breach of contract damages, since that order cannot constitutionally be enforced by contempt and would not obviate the necessity of the

obligee's resort to successive lawsuits for the obligor's future breaches. *Eickhoff v. Eickhoff*, 263 Ga. 498, 435 S.E.2d 914 (1993).

Permissible Probation Conditions

Probation conditions certainly may be imposed under this paragraph, and unless illegal or unreasonable should be upheld. *Davis v. State*, 53 Ga. App. 325, 185 S.E. 400 (1936).

Privatization of probation services. — In a suit brought by misdemeanor defendants challenging the privatization of probation services under O.C.G.A. § 42-8-100(g)(1), the Georgia Supreme Court agreed with the trial court that § 42-8-100(g)(1) was not unconstitutional on the statute's face and did not offend due process or equal protection nor condone imprisonment for debt. *Sentinel Offender Svcs., LLC v. Glover*, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

Imposition of payment of child support arrears as a condition of probation after conviction for abandonment does not violate this paragraph. *Geiger v. State*, 140 Ga. App. 800, 232 S.E.2d 109 (1976).

Condition of restitution imposed for suspending sentence is legal and constitutional. — The payment of restitution to an injured party as a condition imposed for suspending a sentence upon conviction of an offense against the laws of this state does not prevent the sentence from being valid and legal, and is not violative of this paragraph. *Maurier v. State*, 112 Ga. App. 297, 144 S.E.2d 918 (1965).

Permissible Punishment

No intent to protect debtor who violates penal statute in creating debt. — The framers of the Constitution did not intend, by protecting the citizen against imprisonment for a mere debt, to thereby render one who happened to owe a debt immune from prosecution, if in creating the debt the person violated, at the same time and in the same Act, a penal statute in which all the citizens of

the commonwealth are interested; any other rule would protect one who obtained money by false pretense, or even by robbery. *Duncan v. State*, 172 Ga. 186, 157 S.E. 670 (1931).

This paragraph is not violated by imprisoning person who becomes another's debtor by fraudulent practice. *Lamar v. State*, 120 Ga. 312, 47 S.E. 958 (1904).

Provision aimed at fraudulent conduct and not failure to pay debts. — The offense declared in former Code 1933, §§ 26-7408 and 26-7409 was not for failure to perform service or pay debts, but for fraudulently procuring money, or other thing of value. The fraudulent conduct of the defendant was the gist of the crime, not merely the defendant's failure to perform the defendant's contract. *Bullard v. State*, 60 Ga. App. 33, 2 S.E.2d 725 (1939).

Punishment under fraudulent conversion statute not imprisonment for debt. — The legislative purpose of former Code 1933, § 26-1808 (see now O.C.G.A. § 16-8-4) was to punish for the fraudulent conversion, and not for a failure to comply with a contractual obligation. It follows that this section was not unconstitutional for violating due process, creating involuntary servitude, or imprisoning for debt. *Smith v. State*, 229 Ga. 727, 194 S.E.2d 82 (1972).

Imprisonment as a sentence for a conviction of theft by conversion does not violate Ga. Const. 1983, Art. I, Sec. I, prohibiting imprisonment for debt, because the Constitution does not forbid imprisonment for criminal conduct merely because the criminal conduct also results in civil debt. *Connally v. State*, 265 Ga. 563, 458 S.E.2d 336 (1995).

Former Code 1933, § 26-1704 (see now O.C.G.A. § 16-9-20) did not authorize imprisonment for debt as prohibited by this paragraph. *Cobb v. State*, 246 Ga. 567, 272 S.E.2d 299 (1980).

Act making overdrawing bank account criminal offense does not violate this paragraph. *Duncan v. State*, 172 Ga. 186, 157 S.E. 670 (1931).

Imprisonment for giving bad check not imprisonment for debt. — A person who might be imprisoned for the act of

Permissible Punishment (Cont'd)

giving a bad check for an antecedent debt

is not imprisoned for debt but, rather, for an independent act. *Cobb v. State*, 246 Ga. 567, 272 S.E.2d 299 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 16B Am. Jur. 2d, Constitutional Law, § 674 et seq.

C.J.S. — 16A C.J.S., Constitutional Law, § 813 et seq.

ALR. — Alimony or maintenance as debt within constitutional or statutory provisions against imprisonment for debt, 30 ALR 130.

Constitutional provision against imprisonment for debt as applicable to non-payment of tax, fee, or other obligation to government, 40 ALR 77.

Constitutional provision against imprisonment for debt as applicable in bastardy proceeding, 118 ALR 1109.

Constitutional provision against im-

prisonment for debt as applicable to non-payment of tax, 48 ALR3d 1324.

Validity and construction of statute providing criminal penalties for failure of contractor who has received payment from owner to pay laborers or materialmen, 78 ALR3d 563.

Validity of requirement that, as condition of probation, indigent defendant reimburse defense costs, 79 ALR3d 1025.

Constitutionality of "bad checks" statute, 16 ALR4th 631.

Validity, construction, and effect of body execution statutes allowing imprisonment based on judgment, debt, or the like — modern cases, 79 ALR4th 232.

Paragraph XXIV. Costs.

No person shall be compelled to pay costs in any criminal case except after conviction on final trial.

1976 Constitution. — Art. I, Sec. I, Para. XXI.

Cross references. — Costs to indigents, §§ 5-3-22 and 9-15-2. Appeal costs, §§ 5-3-22 and 5-4-5. Costs following appellate reversal, §§ 5-4-17 and 5-6-5. Judgments, § 9-11-54. Court and litigation costs, T. 9, C. 15. Constables' fees for

levies and judicial sales, § 15-10-83. Costs in criminal cases generally, T. 17, C. 11. Cost against private citizen bringing action without reasonable grounds, § 41-3-6.

Law reviews. — For annual survey of criminal law, see 38 Mercer L. Rev. 129 (1986).

JUDICIAL DECISIONS

Generally, defendant in criminal case can be taxed with costs. *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026, 101 S. Ct. 1733, 68 L. Ed. 2d 220 (1981).

Attendance of witnesses and process to procure it are part of costs of trial. *Roberts v. State*, 72 Ga. 673 (1884).

When subpoena was given to the sheriff for service, but was not served, ostensibly because the sheriff was not paid a fee, the defendant had a right to compulsory process to obtain the witness. *Harpe v. State*, 134 Ga. App. 493, 214 S.E.2d 738 (1975).

Costs include charges for services

rendered by officers of court. — Costs generally include all charges fixed by statute as compensation for services rendered by officers of the court in the progress of the cause. *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026, 101 S. Ct. 1733, 68 L. Ed. 2d 220 (1981).

Sheriff and court reporter are also "officers of the court" for purposes of taxation of costs. *Giddens v. State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026, 101 S. Ct. 1733, 68 L. Ed. 2d 220 (1981).

All officers charging costs must al-

ways show authority of law to do so. Giddens v. State, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026, 101 S. Ct. 1733, 68 L. Ed. 2d 220 (1981).

This paragraph provides for payment of costs after trial in lower court and not appellate court. Swearngen v. State, 146 Ga. 3, 90 S.E. 283 (1916); Wynne v. Stonecypher, 146 Ga. 5, 90 S.E. 284 (1916).

Probation may be conditioned

upon payment of expenses in accordance with the conditions of probation. Giddens v. State, 156 Ga. App. 258, 274 S.E.2d 595 (1980), cert. denied, 450 U.S. 1026, 101 S. Ct. 1733, 68 L. Ed. 2d 220 (1981).

Cited in Shafer v. State, 193 Ga. 748, 20 S.E.2d 34 (1942); Trowbridge v. Dominy, 92 Ga. App. 177, 88 S.E.2d 161 (1955); Holloway v. State, 178 Ga. App. 141, 342 S.E.2d 363 (1986).

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Costs cannot be collected until conviction. — Since cases were never signed by the defendant or a judge, which were not nol prossed, and which were transmitted to the clerk’s office prior to the return

of the indictment against the officer, the county does not have a claim for any portion of the money based on chargeable fees of its officers. 1974 Op. Att’y Gen. No. U74-90.

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Costs, § 1 et seq.

ALR. — Items of cost of prosecution for which defendant may be held, 65 ALR2d 854.

Taxable costs and disbursements as including expenses for bonds incident to steps taken in action, 90 ALR2d 448.

Paragraph XXV. Status of the citizen.

The social status of a citizen shall never be the subject of legislation.

1976 Constitution. — Art. I, Sec. I, Para. XXII.

Cross references. — Prohibition on

special laws relating to rights or status of private persons, Ga. Const. 1983, Art. III, Sec. VI, Para. IV.

RESEARCH REFERENCES

ALR. — Constitutionality of statute fixing or regulating (or authorizing the fixing

or regulating) of prices for personal services, 111 ALR 353; 119 ALR 1481.

Paragraph XXVI. Exemptions from levy and sale.

The General Assembly shall protect by law from levy and sale by virtue of any process under the laws of this state a portion of the property of each person in an amount of not less than \$1,600.00 and shall have authority to define to whom any such additional exemptions shall be allowed; to specify the amount of such exemptions; to provide for the manner of exempting such property and for the sale, alienation, and encumbrance thereof; and to provide for the waiver of said exemptions by the debtor.

1976 Constitution. — Art. I, Sec. I, Para. XXIII.

Cross references. — Exemption from levy and sale, § 44-13-1 et seq.

Law reviews. — For article discussing

liens and assignments of bankrupt exemption property under Georgia practice and decisions, see 1 Ga. L. Rev. No. 2, p. 31 (1927).

JUDICIAL DECISIONS

Alienage of resident of this state is no bar to claim of exemption provided by this paragraph. In re Trammell, 5 F.2d 326 (N.D. Ga.), petition denied, 8 F.2d 451 (5th Cir.), cert. denied, 270 U.S. 649, 46 S. Ct. 349, 70 L. Ed. 780 (1925).

"Setting apart" explained. — "Setting apart" of debtor's exempt property is a mere identification of property to which exemption shall be applied, the burden of securing which is put on the debtor. In re Trammell, 5 F.2d 326 (N.D. Ga.), petition denied, 8 F.2d 451 (5th Cir.), cert. denied, 270 U.S. 649, 46 S. Ct. 349, 70 L. Ed. 780 (1925).

Purpose of Constitution in providing that certain property shall be exempt from levy and sale was not to prohibit any other species of property from being declared exempt, but to guarantee the exemption of the property specified for the benefit of the persons entitled thereto, to be set aside in the manner to be provided by the General Assembly. Southall v. Blount, 182 Ga. 368, 185 S.E. 321 (1936).

Provision not exhaustive as to other species of property which may be exempted. — Even if the legislature may not amend the homestead exemptions provided for in the Constitution so as to lessen or extend the exemption as to the species of property therein dealt with, the constitutional provisions are not exhaustive as to other species of property. Southall v. Blount, 182 Ga. 368, 185 S.E. 321 (1936).

Exemption provided for in this paragraph does not include money as subject to exemption. Southall v. Blount, 182 Ga. 368, 185 S.E. 321 (1936).

Legislature, in enacting former Code 1933, § 51-601, was dealing with different species of property from that dealt with in the Constitution. Southall v. Blount, 182 Ga. 368, 185 S.E. 321 (1936).

Former Code 1933, § 46-213, relating to exemption of benefits to be paid by fraternal benefit societies, is not violative of this paragraph providing for exemption from levy and sale of the property of certain specified persons, realty or personalty, or both, to the value in the aggregate of \$1,600.00; such provision not being a limitation upon legislative power as to a species of property not therein dealt with and not being applicable to cases of exemption of "money or other benefit" payable by a fraternal benefit society. Southall v. Blount, 182 Ga. 368, 185 S.E. 321 (1936).

Applicant for homestead is not authorized to take both statutory and constitutional homesteads. Worley v. Arnold, 74 Ga. App. 772, 41 S.E.2d 568 (1947).

Judgment debtor claiming invalid statutory homestead entitled to constitutional homestead. — When statutory homestead claimed by a judgment debtor is valid, and the debtor cannot thereafter take constitutional homestead, but, if the former was invalid the debtor was entitled to the latter. Worley v. Arnold, 74 Ga. App. 772, 41 S.E.2d 568 (1947).

No valid conveyance of land during existence of homestead. — When a homestead was set apart to the head of a family, under the Constitution of 1877, in land belonging to the head of the family, the head of the family could not make a valid conveyance of the land during the existence of the homestead, and a deed so made was void. Dorsey v. Dorsey, 189 Ga. 662, 7 S.E.2d 273 (1940).

Creditor may seek to have exempted property subjected to payment when debtor has waived exemption. — When a debtor has not set aside household and kitchen furniture as prescribed in Ga. L. 1924, p. 57, § 1 (see now O.C.G.A. § 44-13-42), and when the

debtor has executed a note to a creditor waiving this exemption, the creditor may seek to have the exempted property subjected to the payment of the debtor's note. *Turner v. Caudill*, 175 Ga. 170, 165 S.E. 24 (1932).

Homestead right can be asserted against purchaser with notice. — Real estate paid for in full with other realty previously set apart in due and proper manner under the homestead and exemption laws of this state, and dealt with by the head of the family and the spouse (there being no other beneficiaries of the

homestead) as exempted property, takes the place of the latter and is impressed with the homestead character, and such homestead right can be asserted against a purchaser with notice. *Amerson v. Cox*, 173 Ga. 477, 160 S.E. 506 (1931).

Cited in *Aspinwall v. Latimer*, 174 Ga. 712, 164 S.E. 50 (1932); *Blackshear Mfg. Co. v. Carter*, 180 Ga. 828, 181 S.E. 155 (1935); *McDaniel v. Kelley*, 61 Ga. App. 105, 5 S.E.2d 672 (1939); *Pass v. Pass*, 195 Ga. 155, 23 S.E.2d 697 (1942); *Rose v. Crane Heating Co.*, 198 Ga. 295, 31 S.E.2d 717 (1944).

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Homestead exemption must be applied for and is not granted solely on basis of information contained in tax return. 1957 Op. Att'y Gen. p. 292.

Delinquent state tax collection. — A taxpayer's assertion of the statutory

homestead exemption contained in a former law would not prevent the Revenue Department from levying upon the taxpayer's personal automobile to satisfy delinquent state taxes. 1983 Op. Att'y Gen. No. 83-14.

RESEARCH REFERENCES

Am. Jur. 2d. — 31 Am. Jur. 2d, Exemptions, §§ 1 et seq., 24 et seq.

C.J.S. — 35 C.J.S., Exemptions, § 1 et seq.

ALR. — Validity of mortgage executed by entryman on public land before patent, 41 ALR 938.

Loss of homestead rights by wife through absence enforced by act of husband, 42 ALR 1162; 129 ALR 305.

Deposit of exempt funds as affecting debtor's exemption, 67 ALR 1203.

Estoppel to claim, or waiver of, homestead by direction of judgment debtor to levy on real estate, 101 ALR 851.

One who supports (or is under a duty to support) in whole or part relatives who do not live with him as "head of family," "householder," etc., within homestead exemption statute, 118 ALR 1386.

Debtor's exemption of personalty as attaching to proceeds of sale or exchange thereof, 119 ALR 467.

Creation of homestead right in real estate as affecting previous mortgage, trust deed, or purchase money or vendor's lien, 123 ALR 427.

Constitutionally permissible classification or discrimination in debtors' exemption statutes, 128 ALR 107.

Exemption of motor vehicle from seizure for debt, 37 ALR2d 714.

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions, 54 ALR2d 1422.

What state exemption law, in point of time, governs bankrupt's exemption rights, 61 ALR2d 748.

Wife as head of family within homestead or other property exemption provision, 67 ALR2d 779.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 ALR3d 607.

Paragraph XXVII. Spouse's separate property.

The separate property of each spouse shall remain the separate property of that spouse except as otherwise provided by law.

1976 Constitution. — Art. I, Sec. I, Para. XXIV.

Cross references. — Each spouse's property separate, § 19-3-9.

Law reviews. — For note, "The Economics of Divorce in Georgia: Toward a

Partnership Model of Marriage," see 12 Ga. L. Rev. 640 (1978).

For comment as to larceny of separate property of wife or husband, in light of *Gaines v. State*, 65 Ga. App. 763, 16 S.E.2d 517 (1941), see 4 Ga. B.J. 44 (1942).

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Editor's notes. — Some of the cases annotated under this paragraph were decided under Ga. Const. 1976, Art. I, Sec. I, Para. XXIV and antecedent provisions providing for the separation only of the wife's property.

Barring of wife's action for loss of consortium against husband's employer was not a constitutional deprivation of right of wife when the husband had no tort claim against his employer under the Workers' Compensation Act, as the wife's right was derivative of the husband's right. *Henderson v. Hercules, Inc.*, 253 Ga. 685, 324 S.E.2d 453 (1985).

This provision constitutes women as feme soles. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

This paragraph does not restrict a woman's assumption of debts of her husband. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

Sale by married woman to pay debt of husband is valid. — A sale by a married woman of property belonging to her separate estate, though made for the sole purpose of raising money with which to pay a debt or liability of her husband, is nevertheless valid and binding upon her, even if the purchaser, not being a creditor of the husband and having nothing to do with any arrangement or transaction between the husband and wife, knew that the proceeds thereof were to be applied for the purpose stated. *Ross v. Durrence*, 173 Ga. 457, 160 S.E. 370 (1931), later appeal, 181 Ga. 52, 181 S.E. 581 (1935).

Wife may legally procure third person to pay debt of her husband, and will be bound by her contract to reimburse the third person for so doing. *Ross v. Durrence*, 173 Ga. 457, 160 S.E. 370 (1931), later appeal, 181 Ga. 52, 181 S.E. 581 (1935).

Recovering part of separate estate applied on husband's debt. — When

the defendant made threats to have the plaintiff's husband criminally prosecuted for a misappropriation of the defendant's funds unless she consented to a sale of a part of her separate estate and delivered the proceeds to the defendant to be applied against the debt due by the husband on account of the misappropriation, there was duress as to the plaintiff wife and the law would not deem her to be in *pari delicto* with the defendant so as to deny her relief in recovering a part of her separate estate which was, with the knowledge of the defendant, applied on her husband's debt. *Thrift Credit Union v. Moore*, 88 Ga. App. 92, 76 S.E.2d 129 (1953).

Action by husband against wife for recovery of property converted by her. — While the statutes of this state do not purport to change the common law in respect to personal torts committed by one spouse against the other, they do change the common law in respect to property rights of the wife; with respect to such rights she is a feme sole, and may be sued by her husband in a bail-trover proceeding for recovery of his personal property converted by her. *Eddleman v. Eddleman*, 183 Ga. 766, 189 S.E. 833 (1937).

Void instrument cannot be validated by subsequent conduct of married woman. — When an instrument is made by a married woman, "which is void by reason of being in violation of the special provisions of the law on that subject," it cannot be vitalized by any subsequent conduct on her part; she is as much disabled from rendering it valid after she makes it as she is from making it in the first instance. *Baxter v. Bank of Grantville*, 48 Ga. App. 458, 172 S.E. 810 (1934).

Cited in *Taylor v. Vezzani*, 109 Ga. App. 167, 135 S.E.2d 522 (1964); *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Proposed Equal Rights Amendment might affect all state laws which discriminate, even innocuously, between the sexes or deny or abridge any equality

of rights between sexes for any reason whatsoever. 1970 Op. Att’y Gen. No. 70-165 (decided under Ga. Const. 1945, Art. IV, Sec. V, Para. I).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, §§ 11 et seq., 19.

C.J.S. — 41 C.J.S., Husband and Wife, § 16 et seq.

ALR. — Right of wife to exclude husband from possession, use, or enjoyment of family residence or homestead owned by her, 21 ALR 745.

Validity of testamentary trust to promote women’s rights, 28 ALR 720.

Marriage as extinguishing contractual

indebtedness between parties, 45 ALR2d 722.

Divorce and separation: appreciation in value of separate property during marriage without contribution by either spouse as separate or communal property, 24 ALR4th 453.

Divorce property distribution: real estate or trust property in which interest vested before marriage and was realized during marriage, 60 ALR4th 217.

Paragraph XXVIII. Fishing and hunting.

The tradition of fishing and hunting and the taking of fish and wildlife shall be preserved for the people and shall be managed by law and regulation for the public good. (Ga. Const. 1983, Art. 1, § 1, Para. 28, approved by Ga. L. 2005, p. 1533, § 1/SR 67.)

Editor’s notes. — Ga. L. 2005, p. 1533, § 1, redesignated former Ga. Const. 1983, Art. I, Sec. I, Para. XXVIII as present Ga. Const. 1983, Art. I, Sec. I, Para. XXIX.

The constitutional amendment (Ga. L. 2005, p. 1533, § 1) which redesignated

former Paragraph XXVIII as Paragraph XXIX and added present Paragraph XXVIII was approved by a majority of the qualified voters voting at the general election held on November 7, 2006.

Paragraph XXIX. Enumeration of rights not denial of others.

The enumeration of rights herein contained as a part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed. (Ga. Const. 1983, Art. 1, § 1, Para. 28; Ga. Const. 1983, Art. 1, § 1, Para. 29 as redesignated by Ga. L. 2005, p. 1533, § 1/SR 67.)

1976 Constitution. — Art. I, Sec. I, Para. XXV.

Cross references. — Rights retained by people, U.S. Const., amend. 9.

Editor’s notes. — The constitutional amendment (Ga. L. 2005, p. 1533, § 1) which redesignated former Paragraph XXVIII as Paragraph XXIX and added

present Paragraph XXVIII was approved by a majority of the qualified voters voting at the general election held on November 7, 2006.

Law reviews. — For article, “The Georgia Bill of Rights: Dead or Alive?” see 34 Emory L.J. 341 (1985).

For comment, “Pay What You Like —

No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses,” see 58 Emory L.J. 1495 (2009).

JUDICIAL DECISIONS

No inherent right to intoxicating liquors. — The people did not have an inherent right to make, sell, barter, give away, keep, and furnish intoxicating liquors. Whitley v. State, 134 Ga. 758, 68 S.E. 716 (1910); Saddler v. State, 148 Ga. 462, 97 S.E. 79 (1918).

Cited in Jackson v. Beavers, 156 Ga. 71, 118 S.E. 751 (1923); Green v. City of Atlanta, 162 Ga. 641, 135 S.E. 84 (1926); Gernatt v. Huiet, 192 Ga. 729, 16 S.E.2d 587 (1941); Murphy v. West, 205 Ga. 116, 52 S.E.2d 600 (1949).

RESEARCH REFERENCES

ALR. — Renewal of copyright where author is dead, 19 ALR 295.
Right of privacy, 138 ALR 22; 57 ALR3d 16.
Waiver or loss of right of privacy, 57 ALR3d 16.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 ALR3d 225.

SECTION II.

ORIGIN AND STRUCTURE OF GOVERNMENT

Paragraph	Paragraph
I. Origin and foundation of government.	VII. Separation of church and state.
II. Object of government.	VIII. Lotteries and nonprofit bingo games.
III. Separation of legislative, judicial, and executive powers.	IX. Sovereign immunity and waiver thereof; claims against the state and its departments, agencies, officers, and employees.
IV. Contempts.	
V. What acts void.	
VI. Superiority of civil authority.	

Law reviews. — For comment, “Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh

Amendment Arm of the State Doctrine,” see 64 Emory L.J. 819 (2015).

Paragraph I. Origin and foundation of government.

All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them.

1976 Constitution. — Art. I, Sec. II, Para. I.

Cross references. — Recall of elected officials, Ga. Const. 1983, Art. II, Sec. II, Para. IV, and Ch. 4, T. 21.

Law reviews. — For article, “The Law of the Land,” focusing on the role of the Supreme Court, see 6 J. of Pub. L. 444 (1957). For article, “Conflicts of Interests of Public Officers and Employees,” see 13 Ga. St. B.J. 64 (1976). For article, “Some Thoughts on Lawyer/Legislators in the Georgia House of Representatives,” see 23 Ga. St. B.J. 110 (1987). For annual survey of legal ethics, see 38 Mercer L. Rev. 269 (1986). For article, “Administrative Law,” see 53 Mercer L. Rev. 81 (2001). For arti-

cle, “Local Government Law,” see 53 Mercer L. Rev. 389 (2001). For article, “The Status of Administrative Agencies under the Georgia Constitution,” 40 Ga. L. Rev. 1109 (2006). For article, “Must Government Contractors ‘Submit’ to Their Own Destruction?: Georgia’s Trade Secret Disclosure Exemption and United HealthCare of Georgia, Inc. v. Georgia Department of Community Health,” see 60 Mercer L. Rev. 825 (2009).

For comment on *City of Atlanta v. Mapel*, 121 Ga. App. 567, 174 S.E.2d 599 (1970), as to municipal corporations’ negligence liability for injuries sustained at municipal golf courses, see 22 Mercer L. Rev. 608 (1971).

JUDICIAL DECISIONS

Election is expression of people’s will. — Under Georgia’s system of government, the method of expressing the will of the people is by voting in a legally held election. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Power to elect Governor. — The general power or jurisdiction to elect a Governor remains in the people under the Constitution, and that as related to the election of such officer by the General Assembly, that body is an agency or tribunal of special or limited jurisdiction. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

This paragraph imposes no restriction on the legislative power to control municipal governments and appoint municipal officers. *Mayor of Americus v. Perry*, 114 Ga. 871, 40 S.E. 1004, 57 L.R.A. 230 (1902).

Territory may be annexed to a city without submission of question to the people. *Toney v. Mayor of Macon*, 119 Ga. 83, 46 S.E. 80 (1903), appeal dismissed, 195 U.S. 625, 25 S. Ct. 791, 49 L. Ed. 350 (1904); *White v. City of Atlanta*, 134 Ga. 532, 68 S.E. 103 (1910).

Tort Claims Act. — The Tort Claims Act, O.C.G.A. § 50-21-20 et seq., does not violate Ga. Const. 1983, Art. I, Sec. II, Para. I since the Act was enacted under the authority of an amendment approved by a majority of the voters. *Dollar v. Dalton Pub. Schs.*, 233 Ga. App. 827, 505 S.E.2d 789 (1998).

Delegation to private organization of power of appointment to public office is unconstitutional. *Rogers v. Medical Ass’n*, 244 Ga. 151, 259 S.E.2d 85 (1979).

County commissioners act as trustees for taxpayers. — County commissioners, in selling county property, act as fiduciaries or trustees for the taxpayers and citizens of the county, and it is their duty in making a sale of such property to do everything reasonably within their power to obtain the best possible price. *DeKalb County v. Wilson*, 217 Ga. 566, 124 S.E.2d 273 (1962).

School board officials related to school employees. — Neither this paragraph nor the Education Code (O.C.G.A. § 20-1-1 et seq.) presume that elected school board officials whose family members are employed by the local school system act in violation of their public duty merely by participating in decisions affecting school operations. *Ianicelli v. McNeely*, 272 Ga. 234, 527 S.E.2d 189 (2000).

Removal of local school board members. — Whether characterized as setting a qualification for continued service on the local board in the extraordinary circumstance of an imminent loss of accreditation, or whether characterized as providing for removal for malfeasance, misfeasance, or nonfeasance in office, O.C.G.A. § 20-2-73 was held by the Geor-

gia Supreme Court to be a permissible exercise of the legislative power to provide for the removal for cause of members of local boards. *DeKalb County Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 751 S.E.2d 827 (2013).

Standard for public trustee. — This paragraph forbids a mayor to take a contract which it is the mayor's duty to supervise. *Mayor of Macon v. Huff*, 60 Ga. 221 (1878); *Bates v. Bigby*, 123 Ga. 727, 51 S.E. 717 (1905).

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955).

Legislator representing client against state. — The Constitution prohibits a legislator from representing a client, for the legislator's own financial gain, in any civil transaction or matter wherein the State of Georgia shall be an opposing party. Such proscriptions of law are not confined to legislators who are lawyers, but extend to every public officer. *Georgia Dep't of Human Resources v. Sistrunk*, 249 Ga. 543, 291 S.E.2d 524 (1982).

Allocation of a portion of the fines and forfeitures collected in this state to the Peace Officers' Annuity and Benefit Fund is not a violation of this paragraph because of the possibility that peace officers will institute prosecutions for the sole purpose of building the fund, as public officers are presumed to do their duty. *Cole v. Foster*, 207 Ga. 416, 61 S.E.2d 814 (1950).

Legislator may represent clients before state agencies. — Ga. Const. 1983, Art. I, Sec. II, Para. I does not prohibit a legislator, who is an attorney, from representing clients before a state administrative agency when no fee is charged for the services rendered. *Georgia State Bd. of Pharmacy v. Lovvorn*, 255 Ga. 259, 336 S.E.2d 238 (1985).

City Recorder of Commerce representing client against other public

officials. — The City Recorder of Commerce, as a public officer of the City of Commerce, was prohibited as attorney and for the attorney's own financial gain from initiating or defending a lawsuit on behalf of another which sought to defeat the official public actions of other trustees of the people — specifically, the mayor and two city councilmen of the City of Commerce — and a motion to disqualify the attorney should have been granted. *Stephenson v. Benton*, 250 Ga. 726, 300 S.E.2d 803 (1983).

Billboard advertising. — Trial court properly determined that the billboard advertising statute, O.C.G.A. § 32-6-75.3(j), did not violate the trustees clause because the trustees clause did not apply because the city's challenges to the statute did not involve a public officer reaping personal financial gain at the expense of the public. *City of Columbus v. Ga. Dep't of Transp.*, 292 Ga. 878, 742 S.E.2d 728 (2013).

Cited in *City of Macon v. Georgia Power Co.*, 171 Ga. 40, 155 S.E. 34 (1930); *Curtis v. Town of Helen*, 171 Ga. 256, 155 S.E. 202 (1930); *Von Schmidt v. Noland Co.*, 176 Ga. 784, 169 S.E. 11 (1933); *National Fin. Co. v. Citizens Loan & Sav. Co.*, 184 Ga. 619, 192 S.E. 717 (1937); *Moyers v. State*, 186 Ga. 446, 197 S.E. 846 (1938); *De Berry v. City of La Grange*, 62 Ga. App. 74, 8 S.E.2d 146 (1940); *McRae v. Boykin*, 73 Ga. App. 67, 35 S.E.2d 548 (1945); *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221 (1949); *Cole v. Foster*, 207 Ga. 416, 61 S.E.2d 814 (1950); *Cox v. Peters*, 208 Ga. 498, 67 S.E.2d 579 (1951); *Barge v. Camp*, 209 Ga. 38, 70 S.E.2d 360 (1952); *Goodwin v. Allen*, 89 Ga. App. 187, 78 S.E.2d 804 (1953); *Moore v. Wells*, 212 Ga. 446, 93 S.E.2d 731 (1956); *Jones v. Mayor of Athens*, 105 Ga. App. 86, 123 S.E.2d 420 (1961); *Raif v. State*, 109 Ga. App. 354, 136 S.E.2d 169 (1964); *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975); *Bradley v. Tenneco Oil Co.*, 146 Ga. App. 161, 245 S.E.2d 862 (1978); *Chandler v. Miller*, 952 F. Supp. 804 (N.D. Ga. 1994).

OPINIONS OF THE ATTORNEY GENERAL

Member of governmental authority may not be lessee or tenant of authority. — In view of the provisions of Ga. L. 1950, pp. 152 and 156, this paragraph, and the common law, any person who is a lessee or tenant of a governmental authority under a lease or rental agreement which that person originally executed, or which has been assigned or transferred to that individual, could not hold a position as a member of that authority so long as that person remained a lessee or tenant of the authority or had any interest in such lease or rental agreement. 1978 Op. Att’y Gen. No. U78-18.

Conflict of interest exists whenever state Representative acts as attorney at law in proceeding against state regardless of whether a fee is charged for the service. 1981 Op. Att’y Gen. No. U81-52.

Representative’s arguing for client against state is inconsistent with responsibility of public officer. — When a Representative argues for a client against the state, the power entrusted to the Representative by the people is wielded against its source on behalf of the client. This misuse of the Representative’s power is a breach of fiduciary duty and is inconsistent with constitutional responsibility of public officers under this paragraph. 1981 Op. Att’y Gen. No. U81-52.

Legislator conflict of interest. — A legislator/lawyer may represent a client before a state regulatory agency until such time as the lawyer’s duty to the client demands that the lawyer advocate a position, on behalf of the client, which is different from the position taken by the state agency. 1983 Op. Att’y Gen. U83-6.

Legislator’s performance of legal or contract work for city or county. — There is no per se conflict of interest if a member of the General Assembly also serves as either a city or county attorney or performs contract work for a city or county within that legislator’s district. 1984 Op. Att’y Gen. No. U84-34.

County commissioner conflict of interest. — The chair of a board of county commissioners cannot sell groceries to the county when the nature of that contract

would require the chair to judge the chair’s own continual performance, notwithstanding the use of a competitive sealed bid in awarding the contract. 1983 Op. Att’y Gen. No. U83-8.

Applicability to Regional Development Center board. — A Regional Development Center’s authority to contract with a nonprofit corporation is limited by the conflict of interest provisions in O.C.G.A. § 50-8-36. 1992 Op. Att’y Gen. No. 92-1.

Commission member conflict of interest. — The Housing Trust Fund for the Homeless Commission’s policy of having a member disclose the member’s involvement and abstain from voting when the member is involved with an organization that applies to the Commission for funding is insufficient to relieve the conflict of interest. 1992 Op. Att’y Gen. No. 92-15.

Appearance of impropriety. — Even though O.C.G.A. § 45-10-25 potentially could authorize an attorney member of the State Ethics Commission to transact business with the Commission, Ga. Const. 1983, Art. I, Sec. II, Para. I, and O.C.G.A. § 45-10-3 counsel against such a transaction as it could give rise to an appearance of impropriety if not an actual conflict of interest. 2002 Op. Att’y Gen. No. 2002-4.

Service by public officers in private associations. — Although serving as an officer in a private association may not involve any pecuniary gain, a servant of the people should guard against undertaking a position which could cause conflicting loyalties. 1990 Op. Att’y Gen. No. 90-25.

State Board of Funeral Service inspectors appointed pursuant to O.C.G.A. Ch. 18, T. 43 are not prohibited by state law from holding appointed or elected office in private associations of funeral service practitioners. However, serving as an officer in such private association could create an appearance of impropriety by competing loyalties which may be owed to the association and to the board. 1990 Op. Att’y Gen. No. 90-25.

Member of legislator’s law firm as registered agent for client. — A legislator must exercise the legislator’s duties

in such a way that the legislator's loyalty is not divided and the legislator does not use the public's trust to promote the legislator's own personal financial gain. Thus, although no statute expressly prohibits a member of the legislator's law firm from acting as a registered agent during the tenure as a member of the General Assembly, such activity could in fact create a constitutional conflict of interest. 1991 Op. Att'y Gen. No. U91-4.

Representation by lawyer/legislator. — Lawyer/legislator may represent

the legal interests of a Georgia company on matters in other states, including political consulting and the drafting of legislation. However, even if there may not be a per se conflict of interest, a lawyer/legislator must always vigilantly guard against such conflicts developing depending upon the facts and circumstances of each situation, especially when matters arise involving the lawyer/legislator's own actions in the consideration of legislation within the General Assembly. 2009 Op. Att'y Gen. No. U2009-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 16 Am. Jur. 2d, Constitutional Law, § 5 et seq.

ALR. — Bias or interest of administrative officer sitting in zoning proceeding as

necessitating disqualification of officer or affecting validity of zoning decision, 4 ALR6th 263.

Paragraph II. Object of government.

The people of this state have the inherent right of regulating their internal government. Government is instituted for the protection, security, and benefit of the people; and at all times they have the right to alter or reform the same whenever the public good may require it.

1976 Constitution. — Art. I, Sec. II, Para. II.

Cross references. — Procedure for amending Constitution of Georgia, Ga. Const. 1983, Art. X, Sec. I.

Law reviews. — For comment on *Rogers v. Medical Ass'n*, 244 Ga. 151, 259 S.E.2d 85 (1979), invalidating Georgia

statute requiring Governor's appointments to Composite State Board of Medical Examiners be made solely from nominees submitted by state medical society as an unconstitutional delegation of legislative authority to a private organization, see 29 Emory L.J. 1183 (1980).

JUDICIAL DECISIONS

Delegation to private organization of power of appointment to public office is unconstitutional. *Rogers v. Medical Ass'n*, 244 Ga. 151, 259 S.E.2d 85 (1979).

The Atlanta City Council could not constitutionally delegate its subpoena power, the power to punish by contempt, and the power to require sworn testimony before a court reporter, to a purely private, advisory group, and an attempt by the city

council to do so is void. *Atlanta Journal v. Hill*, 257 Ga. 398, 359 S.E.2d 913 (1987).

Cited in *Williams v. Fears*, 110 Ga. 585, 35 S.E. 699, 50 L.R.A. 685 (1900); *Mayor of Americus v. Perry*, 114 Ga. 871, 40 S.E. 1004, 57 L.R.A. 230 (1902); *Lambert v. Norton*, 119 Ga. 351, 46 S.E. 433 (1904); *Green v. City of Atlanta*, 162 Ga. 641, 135 S.E. 84 (1926); *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

OPINIONS OF THE ATTORNEY GENERAL

Submission to electorate of constitutional amendments. — Amendments to state Constitution can only be submitted to electorate in accordance with the method set forth in the Constitution,

which requires that there must be a concurrence in the amendment by two-thirds of each House of the General Assembly. 1962 Op. Att'y Gen. p. 34.

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, § 214 et seq.

fire departments as interference with local self-government, 100 ALR 1078; 141 ALR 903.

ALR. — Statute relating to municipal

Paragraph III. Separation of legislative, judicial, and executive powers.

The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.

1976 Constitution. — Art. I, Sec. II, Para. IV.

Cross references. — Enforcement of separation of powers by criminal action, § 16-10-9.

Law reviews. — For article, "Delegation in Georgia Local Government Law," see 7 Ga. St. B.J. 9 (1970). For article, "Regulation of the Legal Profession — Judicial or Legislative?," see 10 Ga. St. B.J. 589 (1974). For article, "Selected Oddities in Georgia Municipal Law," see 9 Ga. L. Rev. 783 (1975). For annual survey of constitutional law, see 35 Mercer L. Rev. 73 (1983). For annual survey of administrative law, see 38 Mercer L. Rev. 17 (1986). For article, "Federal and State 'State Action': The Undercritical Embrace of a Hypercriticized Doctrine," see 24 Ga. L. Rev. 327 (1990). For survey of 1995 Eleventh Circuit cases on administrative law, see 47 Mercer L. Rev. 675 (1996). For article, "Campbell v. Georgia: Mandatory Minimum Sentencing Survives Separation of Power Attacks, Remaining a Viable Option for the Legislature in Its War on Crime," see 17 Ga. St. U.L. Rev. 637

(2001). For article, "The Status of Administrative Agencies under the Georgia Constitution," see 40 Ga. L. Rev. 1109 (2006).

For comment on Georgia Bar Ass'n v. Lawyers Title Ins. Co., 222 Ga. 657, 151 S.E.2d 718 (1966), discussing constitutional permissibility of legislative definition of practice of law and suggesting solutions to unauthorized practice of law, see 18 Mercer L. Rev. 486 (1967). For comment on Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969) as to the constitutionality of the "State Bar Act" (§§ 15-19-30 through 15-19-34), see 21 Mercer L. Rev. 355 (1969). For comment discussing judicial unification of the bar in light of Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969), see 6 Ga. St. B.J. 325 (1970). For comment on Rogers v. Medical Ass'n, 244 Ga. 151, 259 S.E.2d 85 (1979), invalidating Georgia statute requiring Governor's appointments to Composite State Board of Medical Examiners be made solely from nominees submitted by state medical society as an unconstitutional delegation of legislative authority to a private organization, see 29 Emory L.J. 1183 (1980).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

LEGISLATIVE POWERS

JUDICIAL POWERS

EXECUTIVE POWERS

General Consideration

Intent to assure independence of branches. — The Constitution provided for a separate existence, distinct functions, and absolute independence of the three coordinate branches of the state government — the executive, legislative, and judicial. *Holliman v. State*, 175 Ga. 232, 165 S.E. 11 (1932).

This paragraph is designed to preserve inviolate the separation of the legislative and the judicial branches of the government, and to assure to each independence in the sphere of its own functions. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 364, 133 S.E.2d 374 (1963).

Separation to be strictly enforced. — While the line of demarcation separating the legislative, judicial, and executive powers may sometimes be difficult to establish, and for this reason each of the three coordinate branches of government frequently invades the province of the others, it is nevertheless essential to the very foundation of the system of government that the mandate of the Constitution be strictly enforced. *McCutcheon v. Smith*, 199 Ga. 685, 35 S.E.2d 144 (1945).

No separation of powers violation. — The trial court's order revoking a probationer's probation did not violate the separation of powers doctrine under Ga. Const. 1983, Art. I, Sec. II, Para. III, as the probationer's release resulted from an administrative error, and there was no evidence of any executive department finding that the probationer had fully served an imposed sentence in confinement based on a good-time allowance or otherwise. *Clark v. State*, 287 Ga. App. 176, 651 S.E.2d 106 (2007).

Effect of violation of separation of powers. — When an Act cannot be sustained as a whole because it violates the separation of powers principle, the courts

will uphold it in part if it is reasonably certain that to do so would correspond with the main intent and purpose which the General Assembly sought to accomplish and if, after the unconstitutional part is stricken, there remains enough to accomplish that purpose. *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975).

Separation cannot be total. — This paragraph attempts a separation of the three departments of government, which from the nature of things cannot be total. *Beall v. Beall*, 8 Ga. 210 (1850); *Johnson v. Jackson*, 99 Ga. 389, 27 S.E. 734 (1896).

Complete separation not necessarily intended. — Although the separation of powers is fundamental to the constitutional form of government, it does not follow that a complete separation is desirable or was intended. *In re Pending Cases*, 234 Ga. 264, 215 S.E.2d 473 (1975).

Three departments of government are not kept wholly separate in the Georgia Constitution. *In re Pending Cases*, 234 Ga. 264, 215 S.E.2d 473 (1975).

While the Constitution declares that the three departments of government shall be separate and distinct, this separation is not and from the nature of things cannot be total. *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975).

While the departments of government must be kept separate and distinct, it is impossible to draw a mathematical line by which every action can be exactly classified; and there are some matters which do not inherently and essentially appertain to one department of government rather than to another. *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975).

Separation of powers principle is sufficiently flexible to permit practical arrangements in a complex government. *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975).

O.C.G.A. § 42-8-29 did not violate the constitutional principle of separation of

powers, as a probation supervisor had a duty to make the supervisor's findings and report regarding an alleged probation revocation in writing to the court with the supervisor's recommendation; not unlike a district attorney, the probation supervisor was an employee of the Department of Corrections, within the executive branch of state government, and was charged with providing the trial court with information relevant to pending criminal proceedings over which the court alone exercised judicial authority. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

Each branch to protect its functions from invasion by other branches. — The judicial branch doubtless invades the legislative field more frequently than does the legislative branch the judicial field, but it is the duty of each to zealously protect its function from invasion of the others. The legislature has ample power to prevent attempted judicial legislation. Likewise, the judiciary has the power to prevent judicial functions by the legislature, and the welfare of the state demands that it exercise this power when necessary. *McCutcheon v. Smith*, 199 Ga. 685, 35 S.E.2d 144 (1945).

Paragraph applicable only to state functions. — This paragraph, providing for separation of legislative, executive, and judicial powers, applies only to state functions, and not to municipal functions. *Shipman v. Johnson*, 89 Ga. App. 620, 80 S.E.2d 717 (1954).

No application to municipal officers. — This paragraph has no application to municipal officers created by the legislature. *Ford v. Mayor of Brunswick*, 134 Ga. 820, 68 S.E. 733 (1910).

Police officer's probable cause determination. — By acting on probable cause to believe a crime was being committed, a law enforcement officer was not called upon to exercise the legislative function of defining what constituted a crime, but the executive branch function of enforcing the law; accordingly, O.C.G.A. § 40-6-395(a) was not an unconstitutional delegation of legislative authority. *Harbuck v. State*, 280 Ga. 775, 631 S.E.2d 351 (2006).

Separation of branches is sufficient reason to treat branches differently. — The basic principle of separation of the

three branches of government alone is sufficient to satisfy the requirement of a reasonable basis for legislation treating one or all of the separate branches differently. *Stoner v. Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974).

Person in one branch may investigate another branch. — This constitutional provision does not prohibit a person in the executive branch of the government or a person in the legislative branch of the government from investigating the official conduct of any person performing duties in any branch of the government. *Dean v. Bolton*, 235 Ga. 544, 221 S.E.2d 20 (1975).

Legislative members of commission may not perform executive functions. — The fact that legislative members of a commission may be performing some functions that are appropriate to the legislative branch of the government does not alter the fact that they, as members of a commission, must also perform functions that are exclusively within the province of the executive branch and this is what the Constitution prohibits. *Murphy v. State*, 233 Ga. 681, 212 S.E.2d 839 (1975).

Legislators may appoint nonlegislators to executive commissions. — The mere appointment, by a member of the legislative branch, of a nonlegislator to an executive commission, such as the State Campaign and Financial Disclosure Committee, is not a simultaneous discharge of duties and functions against which the constitutional doctrine of separation of powers is directed. *Caldwell v. Bateman*, 252 Ga. 144, 312 S.E.2d 320 (1984).

Applicability to county governments. — The County Building Authority Act, although designating the chairman of the board of commissioners as one of the members of the authority, was not unconstitutional under Ga. Const. 1983, Art. I, Sec. II, Para. III, which does not apply to county governments. *Building Auth. v. State*, 253 Ga. 242, 321 S.E.2d 97 (1984).

Georgia Law 1973, p. 3640, which amends the Act creating the Cobb County board of commissioners to provide that the chairman and each member of the board of commissioners and the chairman and each member of the planning and

General Consideration (Cont'd)

zoning commission fully disclose any interest in any land sought to be rezoned, is not unconstitutional inasmuch as the doctrine of separation of powers applies only to the state and not to municipalities or to county governments. *Tendler v. Thompson*, 256 Ga. 633, 352 S.E.2d 388 (1987).

Failure to point out wherein an Act alleged to be violative of this paragraph is repugnant to and in conflict with the provision presents no question of judicial determination. *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939).

Juvenile court jurisdiction statute does not violate the separation of powers doctrine of the state constitution, nor does it violate the due process and equal protection provisions of the federal and state constitutions. *Bishop v. State*, 265 Ga. 821, 462 S.E.2d 716 (1995); *Murphy v. State*, 267 Ga. 100, 475 S.E.2d 590 (1996).

Prosecutor's decision to bring an action in superior rather than juvenile court does not violate the separation of powers doctrine, because the initial option to select a forum when concurrent jurisdiction exists belongs to the litigant, and it is neither judicial, legislative, or executive power. *Chapman v. State*, 259 Ga. 592, 385 S.E.2d 661 (1989).

Jurisdiction over sentencing cannot be legislated away. — Trial court properly ruled that O.C.G.A. § 17-10-6, which authorized the Georgia Sentence Review Panel to review and reduce sentences, was unconstitutional as the Georgia General Assembly does not have the constitutional authority to divest the trial courts of Georgia of their traditional jurisdiction over sentencing by creating a quasi-appellate tribunal (such as the Panel) to review and alter the otherwise lawful sentences imposed by those trial courts. *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008).

O.C.G.A. § 17-10-16, the life-without-parole statute, does not violate separation of powers because it imposes legislative restrictions on the Board of Pardons and Paroles to grant parole. *Freeman v. State*, 264 Ga. 27, 440 S.E.2d 181 (1994).

Mandatory minimum sentences. — O.C.G.A. § 17-10-6.1, imposing manda-

tory minimum sentences in certain cases, does not violate the separation of powers doctrine in that the legislature acted within constitutional bounds in establishing minimum and maximum punishment and in eliminating judicial discretion in sentencing certain violent offenders. *Campbell v. State*, 268 Ga. 44, 485 S.E.2d 185 (1997).

The statute governing the punishment for serious violent offenders, O.C.G.A. § 17-10-6.1, does not violate the separation of powers doctrine of the state constitution. *Byrd v. State*, 236 Ga. App. 485, 512 S.E.2d 372 (1999).

O.C.G.A. § 17-10-7, prescribing punishment of repeat offenders, does not violate the separation of powers doctrine of the state constitution. *Brabham v. State*, 240 Ga. App. 506, 524 S.E.2d 1 (1999).

Reapportionment. — Because Act 444, 2002 Ga. Laws 149, does not impermissibly encroach on the power of the executive branch to control litigation, but instead is a proper assertion of legislative power to determine reapportionment, it does not violate the separation of powers doctrine. *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003).

Cited in *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248 (1848); *Hilliard v. Doe*, 7 Ga. 172 (1849); *Eve v. State*, 21 Ga. 50 (1857); *Robison v. Beall*, 26 Ga. 1 (1858); *Walker v. Whitehead*, 43 Ga. 538 (1871); *Georgia R.R. v. Smith*, 70 Ga. 694 (1883); *Clayton v. Calhoun*, 76 Ga. 270 (1886); *Johnson v. Jackson*, 99 Ga. 389, 27 S.E. 734 (1896); *Bowen v. Clifton*, 105 Ga. 490, 30 S.E. 788 (1898); *Neal v. State*, 104 Ga. 509, 30 S.E. 858, 69 Am. St. R. 175, 42 L.R.A. 190 (1898); *Phinizy v. Eve*, 108 Ga. 360, 33 S.E. 1007 (1899); *Carroll v. Wright*, 131 Ga. 728, 63 S.E. 260 (1908); *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909); *Daniel v. Persons*, 137 Ga. 826, 74 S.E. 260 (1912); *Norman v. Rehberg*, 12 Ga. App. 698, 78 S.E. 256 (1913); *Mayor of Americus v. Perry*, 114 Ga. 871, 40 S.E. 1004, 57 A.L.R. 230 (1920); *Clements v. Bostwick*, 158 Ga. 906, 124 S.E. 719 (1924); *City Council v. Thomas*, 159 Ga. 435, 126 S.E. 144, 39 A.L.R. 1317 (1924); *Felton v. Bennett*, 163 Ga. 849, 137 S.E. 264 (1927); *Morgan v.*

Lowry, 168 Ga. 723, 149 S.E. 37 (1929); Johnson v. State, 169 Ga. 814, 152 S.E. 76 (1930); Horne v. State, 170 Ga. 638, 153 S.E. 749 (1930); Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796 (1932); Board of Comm'rs v. Massachusetts Bonding Ins. Co., 175 Ga. 584, 165 S.E. 828 (1932); Southern Ry. v. Wehunt, 177 Ga. 440, 170 S.E. 380 (1933); McDonald v. Georgia Fed'n of Labor, 178 Ga. 313, 173 S.E. 662 (1933); Georgia Power Co. v. City of Decatur, 179 Ga. 471, 176 S.E. 494 (1934); Sutton v. Adams, 180 Ga. 48, 178 S.E. 365 (1934); Madronah Sales Co. v. Wilburn, 180 Ga. 837, 181 S.E. 173 (1935); Ramsey v. Hamilton, 181 Ga. 365, 182 S.E. 392 (1935); DeKrasner v. Boykin, 54 Ga. App. 29, 186 S.E. 701 (1936); Johnson v. Walls, 185 Ga. 177, 194 S.E. 380 (1937); Freeney v. Pape, 185 Ga. 1, 194 S.E. 515 (1937); Moyers v. State, 186 Ga. 446, 197 S.E. 846 (1938); State Bd. of Educ. v. County Bd. of Educ., 190 Ga. 588, 10 S.E.2d 369 (1940); Town of McIntyre v. Scott, 191 Ga. 473, 12 S.E.2d 883 (1940); Gernatt v. Huie, 192 Ga. 729, 16 S.E.2d 587 (1941); Feagin v. Freeney, 192 Ga. 868, 17 S.E.2d 61 (1941); Lawson v. City of Moultrie, 194 Ga. 699, 22 S.E.2d 592 (1942); DeJarnette v. Hospital Auth., 195 Ga. 189, 23 S.E.2d 716 (1942); Steward v. Peerless Furn. Co., 70 Ga. App. 236, 28 S.E.2d 396 (1943); Mayor of Savannah v. Savannah Distrib. Co., 202 Ga. 559, 43 S.E.2d 704 (1947); Sheffield v. State Sch. Bldg. Auth., 208 Ga. 575, 68 S.E.2d 590 (1952); McFarlin v. Shirley, 209 Ga. 794, 76 S.E.2d 1 (1953); Martin v. Baldwin, 215 Ga. 293, 110 S.E.2d 344 (1959); South-Eastern Underwriters Ass'n v. Cravey, 216 Ga. 599, 118 S.E.2d 471 (1961); Rochester Capital Leasing Corp. v. Christian, 109 Ga. App. 818, 137 S.E.2d 518 (1964); Howard v. Housing Auth., 220 Ga. 640, 140 S.E.2d 880 (1965); Undercofler v. Swint, 111 Ga. App. 117, 140 S.E.2d 894 (1965); Turmon v. Department of Pub. Safety, 222 Ga. 843, 152 S.E.2d 884 (1967); Campbell v. Farmer, 223 Ga. 605, 157 S.E.2d 276 (1967); Maddox v. Coogler, 224 Ga. 806, 165 S.E.2d 158 (1968); Crumley v. Head, 225 Ga. 246, 167 S.E.2d 651 (1969); Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969); Douglas County v. Abercrombie, 226 Ga. 39, 172 S.E.2d 419 (1970); Pye v. State

Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970); DOT v. Hardin, 231 Ga. 359, 201 S.E.2d 441 (1973); Hawkins v. State, 130 Ga. App. 426, 203 S.E.2d 622 (1973); Fuller v. State, 232 Ga. 581, 208 S.E.2d 85 (1974); Harmon v. State, 235 Ga. 329, 219 S.E.2d 441 (1975); Rich v. State, 237 Ga. 291, 227 S.E.2d 761 (1976); State v. Andrews, 240 Ga. 531, 242 S.E.2d 153 (1978); Leonard v. State, 146 Ga. App. 439, 246 S.E.2d 450 (1978); Gunn v. State, 244 Ga. 51, 257 S.E.2d 538 (1979); Sanders v. State, 151 Ga. App. 590, 260 S.E.2d 504 (1979); Vaughn v. State, 160 Ga. App. 283, 287 S.E.2d 277 (1981); Johns v. State, 160 Ga. App. 535, 287 S.E.2d 617 (1981); Charron v. State Bd. of Pardons & Paroles, 253 Ga. 274, 319 S.E.2d 453 (1984); Snelling v. State, 176 Ga. App. 192, 335 S.E.2d 475 (1985); Hirsh v. City of Atlanta, 261 Ga. 22, 401 S.E.2d 530 (1991); State v. Tyson, 273 Ga. 690, 544 S.E.2d 444 (2001); DeKalb County Sch. Dist. v. Ga. State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827 (2013); Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014).

Legislative Powers

Exclusive power of legislative department. — The legislative department is invested with the exclusive power to say what the law is. Northside Manor, Inc. v. Vann, 219 Ga. 298, 133 S.E.2d 32 (1963).

Legislature to act as check on other branches. — The legislature has power to serve as a check upon the executive and judicial departments, and this function is properly performed by enactment of laws. If the legislature wishes to have the law other than what the judiciary construes it to be, it has the power and duty to so write it within the limits of the Constitution. Bedingfield v. Parkerson, 212 Ga. 654, 94 S.E.2d 714 (1956).

Legislature has no constitutional power to construe or alter judgments. Northside Manor, Inc. v. Vann, 219 Ga. 298, 133 S.E.2d 32 (1963).

Legislature cannot put limitations on discharge of judicial functions. — It is not within the power of the General Assembly, by any exercise of its legitimate legislative functions, to impose limitations and restrictions upon the discharge of purely judicial functions. Holliman v.

Legislative Powers (Cont'd)

State, 175 Ga. 232, 165 S.E. 11 (1932).

Judicial review of legislative actions limited. — If in the exercise of power to enact laws, the General Assembly merely fails to observe certain rules of internal procedure, the judiciary would not be authorized to review such action, and the same would be true as to any action of the officers of that body within the sphere of their jurisdiction. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

Elections belong to the political branch of the government and are beyond the control of judicial power. It is for the political power of the state, within the limits of the Constitution, to provide the manner in which elections shall be held, and until the courts are empowered to act, by the Constitution or legislative enactment, they must refrain from interference. *Kinman v. Monk*, 179 Ga. 132, 175 S.E. 458 (1934).

Expenses of discharging legislative duties. — The judicial department of the government cannot interfere with any provision made by the legislative branch of the government which the General Assembly may deem to be necessary as expenses in discharging its duties of legislation. *Speer v. Martin*, 163 Ga. 535, 136 S.E. 425 (1927).

Code Revision Commission within legislative authority. — Composition of Code Commission did not violate this paragraph, as the work of the Commission, comprised of ten legislators and five members of the State Bar, was within the sphere of legislative authority. *Harrison Co. v. Code Revision Comm'n*, 244 Ga. 325, 260 S.E.2d 30 (1979).

Legislator may not be appointed to governing body of administrative agency. — The legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality. *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975).

A legislator who participates as a member of the governing body of a public

corporation such as the World Congress Center Authority is performing executive functions in violation of this paragraph. *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975).

Promulgation of executive branch rules and legislative oversight thereof. — O.C.G.A. § 31-6-21.1 does not violate the separation of powers doctrine simply because it enables the Department of Community Health to promulgate and adopt regulations pursuant to a delegated power; the statute does not invest the legislature with executive power, nor does it invest the executive with legislative power. Nor could it be said that the statute runs afoul of enactment, bicameralism, and presentment provisions, as the statute allows for the adoption of rules consistent with legislation, but it does not enable the department to make laws. *Albany Surgical, P.C. v. Ga. Dep't of Cmty. Health*, 278 Ga. 366, 602 S.E.2d 648 (2004).

Delegation permitted. — O.C.G.A. § 20-2-690.1 did not unconstitutionally delegate power to the General Assembly as the delegation was permissible and was accompanied by sufficient guidelines that directed the State Board of Education, in promulgating policies and regulations, to take into consideration sickness and other emergencies that may arise. *Pitts v. State*, 293 Ga. 511, 748 S.E.2d 426 (2013).

Dram Shop Act did not invade judiciary's province. — Widow's wrongful death action against a bar that served alcohol to her husband for 8 hours, and who then died in a one-vehicle crash, was barred by the Dram Shop Act, O.C.G.A. § 51-1-40, which barred claims by consumers of alcohol; § 51-1-40 did not violate the separation of powers clause, Ga. Const. 1983, Art. I, Sec. II, Para. III, because the legislature had the authority to enact legislation codifying the common law. *Dion v. Y.S.G. Enters.*, 296 Ga. 185, 766 S.E.2d 48 (2014).

Judicial Powers

Dividing line between courts and legislature. — In the dividing line of power between these coordinate branches, construction belongs to the courts, legislation to the legislature. *Parks v. State*, 212

Ga. 433, 93 S.E.2d 663 (1956); *Northside Manor, Inc. v. Vann*, 219 Ga. 298, 133 S.E.2d 32 (1963); *Modern Homes Constr. Co. v. Burke*, 219 Ga. 710, 135 S.E.2d 383 (1964).

Courts cannot add a line to the law, nor can the legislature enlarge or diminish a law by construction. *Northside Manor, Inc. v. Vann*, 219 Ga. 298, 133 S.E.2d 32 (1963); *Modern Homes Constr. Co. v. Burke*, 219 Ga. 710, 135 S.E.2d 383 (1964).

O.C.G.A. § 17-6-1(g), precluding a trial court from granting an appeal bond to defendant, who had been convicted of child molestation and aggravated child molestation, did not violate the separation of powers provision of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. II, Para. III, because there was no constitutional right to an appeal bond, so the system under which prisoners were allowed to be released on bond pending an appeal was a legislative function, and the legislature's establishment of the parameters of such bonds did not invade the province of the judiciary. *Getkate v. State*, 278 Ga. 585, 604 S.E.2d 838 (2004).

Court to determine the law. — Determining the meaning of the Constitution, which is binding upon everyone, is the exclusive function of the courts in the adjudication of cases properly brought before them for decision. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

It is the prerogative of the judiciary to determine what the law is, and the responsibility of the legislature to declare what the law shall be. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 364, 133 S.E.2d 374 (1963).

Court not to concern itself with legislative actions. — By this paragraph, the judiciary cannot modify, amend, or repeal legislative action, nor concern itself with the wisdom of it. That is a field in which only the legislative department may work. *Sirota v. Kay Homes, Inc.*, 208 Ga. 113, 65 S.E.2d 597 (1951).

Delegation of legislative power to courts forbidden. — The basic principle embodied in the separation of powers doctrine is that the legislature cannot dele-

gate legislative power to the courts. This does not mean, however, that the legislature is forbidden from conferring power on the courts to ascertain whether the statutory requirements for dissolution of a municipal charter have been satisfied in particular cases. *Harrell v. Courson*, 234 Ga. 350, 216 S.E.2d 105 (1975).

Authority to administer justice efficiently and completely. — When the Constitution declares that the legislative, judicial, and executive powers shall forever remain separate and distinct, it thereby invests those officials charged with the duty of administering justice according to law with all necessary authority to efficiently and completely discharge those duties the performance of which is by the Constitution committed to the judiciary, and to maintain the dignity and independence of the courts. *Lovett v. Sandersville R.R.*, 199 Ga. 238, 33 S.E.2d 905 (1945).

Exclusive power to construe laws. — By the Constitution, courts are invested with the exclusive ultimate power to construe laws. *Northside Manor, Inc. v. Vann*, 219 Ga. 298, 133 S.E.2d 32 (1963).

Unless construction unnecessary. — When the language of a municipal code section is plain, unambiguous, and positive, and is not capable of two constructions, no court has a right to construe it to mean anything other than what it declares, and this rule precludes the courts from construing it according to what is supposed to be the legislative intent. *Sirota v. Kay Homes, Inc.*, 208 Ga. 113, 65 S.E.2d 597 (1951).

Legislative direction of judicial construction invalid. — It is not in the power of the legislature, under this paragraph, to enact, in any way, that the law was so and so at any past time. *Crawford v. Ross*, 39 Ga. 44 (1869).

In enacting a local civil service law, the legislature was performing a legislative function, and in construing the meaning of that Act, the Supreme Court was performing a judicial function, thus by that decision the meaning of the Act was judicially determined and fixed. Consequently, a later Act which was literally a legislative construction of the earlier Act, which was directly in conflict with its

Judicial Powers (Cont'd)

meaning as judicially determined, was unconstitutional since the legislature attempted a judicial function. *McCutcheon v. Smith*, 199 Ga. 685, 35 S.E.2d 144 (1945).

An Act which does not purport to amend any existing law and amounts only to an effort on the part of the legislature to perform a judicial function in violation of this paragraph, by directing the judiciary concerning the construction which it should place upon the law. *Brinkley v. Dixie Constr. Co.*, 205 Ga. 415, 54 S.E.2d 267, answer conformed to, 79 Ga. App. 583, 54 S.E.2d 510 (1949).

When a court adjudicates that a petition alleges no cause of action, whether rightly or erroneously, that becomes the law of the case, and neither the legislature nor the judiciary can disregard that ruling. *Northside Manor, Inc. v. Vann*, 219 Ga. 298, 133 S.E.2d 32 (1963).

Effect of legislative construction of law. — A legislative exposition of doubtful laws may be harmless. *Wilder v. Lumpkin*, 4 Ga. 208 (1848).

A legislative exposition of a doubtful law is the exercise of a judicial power, and if it interferes with no vested rights, impairs the obligation of no contract, and is not in conflict with the primary principles of our social compact, it is in itself harmless, and may be admitted to retroactive efficiency. If, however, rights have grown up under even a law of somewhat ambiguous meaning, then the universal rule of the system applies. That rule is, the courts declare what the law is, and the legislature declares what the law shall be. *Northside Manor, Inc. v. Vann*, 219 Ga. 298, 133 S.E.2d 32 (1963).

Legislature may establish rules of evidence. — This paragraph does not deny the legislature the power to establish rules of evidence. *Banks v. State*, 124 Ga. 15, 52 S.E. 74 (1905).

Legislature may not set time limit for application for writ of certiorari. — The attempt of the General Assembly to regulate the practice upon application for writ of certiorari by setting a time limit is an invasion of the prerogative of the judiciary which is not sanctioned by the Con-

stitution. *Holliman v. State*, 175 Ga. 232, 165 S.E. 11 (1932).

Supreme Court's approval of a local court rule providing that civil actions seeking primarily money damages up to \$25,000 or in an unspecified amount would be referred to compulsory but non-binding arbitration did not abridge the rights of any litigants or conflict with any federal or state constitutional provision or Georgia statute. *Davis v. Gaona*, 260 Ga. 450, 396 S.E.2d 218 (1990).

For discussion of legislature's exercise of jurisdiction over rules of procedure and practice in the courts, in conjunction with the Supreme Court, see *Gordy v. Dunwody*, 210 Ga. 810, 83 S.E.2d 7 (1954).

Discretion in sentencing may be limited. — In the absence of legislation, the judiciary cannot exercise discretion in fixing the quantum of punishment to be inflicted upon criminals, because such power is not one which inheres in the judicial department. It is therefore within the power of the legislature to direct the punishment to be prescribed for second offenders, and to leave no discretion to the trial judge. *Knight v. State*, 243 Ga. 770, 257 S.E.2d 182 (1979).

The power to create crimes and to prescribe punishment therefore is legislative, the judge is a mere agent of the law and the judge has no discretion except as is given to the judge. *Knight v. State*, 243 Ga. 770, 257 S.E.2d 182 (1979).

Minimum sentences made mandatory by statute do not violate the separation of powers provision of the Georgia Constitution. *Paras v. State*, 247 Ga. 75, 274 S.E.2d 451 (1981).

Response to juror's question concerning functions of another governmental branch. — When a question is propounded by a juror that involves the functions of a separate and distinct branch of the government, the jury should be told that such matters cannot be the subject of any instruction by the court. *Thompson v. State*, 203 Ga. 416, 47 S.E.2d 54 (1948).

It is improper for a judge in a trial of a person charged with murder to state or intimate what action could be taken in the future by a separate and distinct branch

of the government. *Thompson v. State*, 203 Ga. 416, 47 S.E.2d 54 (1948).

No legislative control over granting new trials. — This paragraph constitutes an insuperable barrier to any legislative control or interference with the courts in the exercise of their powers to grant new trials. *CTC Fin. Corp. v. Holden*, 221 Ga. 809, 147 S.E.2d 427 (1966).

Nonjudicial powers may not be imposed on court. — Under the separation of powers doctrine, nonjudicial functions may not be imposed on a constitutional court. The duties or functions which the legislature may not transfer to the judiciary have been characterized as either legislative or executive. Their descriptive classification is not, however, the significant point. The vice lies in the fact that the duties or functions sought to be conferred upon the courts lie beyond the scope of judicial power. *Bentley v. Chastain*, 242 Ga. 348, 249 S.E.2d 38 (1978).

If the legislature cannot impose upon the courts the administrative duty or function of making an initial discretionary decision, it cannot do so by the fiction of an appeal de novo which requires the court to adjudicate upon administrative rather than judicial considerations. *Bentley v. Chastain*, 242 Ga. 348, 249 S.E.2d 38 (1978).

Issue of search warrant. — Judge who had not served as deputy sheriff for approximately eight years at the time the search warrant in question was issued was not disqualified to issue warrant. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

Mere personal associations with police officers, without more, do not disqualify a magistrate from issuing a search warrant. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

A judge who also serves as a county coroner is not per se disqualified from issuing a search warrant in the judge's capacity as ex officio justice of the peace. *Tabb v. State*, 250 Ga. 317, 297 S.E.2d 227 (1982).

Authority of superior court to order expert evaluation of defendant. — Superior court of the county in which defendant was convicted of murder had

authority, on defendant's motion for new trial, to order an expert evaluation of defendant, who was incarcerated beyond the boundaries of the county in which the court sat. *Zant v. Brantley*, 261 Ga. 817, 411 S.E.2d 869 (1992).

Delegation of sentencing authority. — Statutory provision authorizing district attorney to move for sentence reduction in drug trafficking cases does not violate separation of powers clause, as such provision does not prohibit a defendant from filing such a motion or the court from proceeding under the statute sua sponte. *Brugman v. State*, 255 Ga. 407, 339 S.E.2d 244 (1986).

Enforcement of child support. — O.C.G.A. § 19-6-32, the mandatory income deduction statute for enforcing child support, does not violate the separation of powers doctrine. *Georgia Dep't of Human Resources v. Word*, 265 Ga. 461, 458 S.E.2d 110 (1995).

Municipal court. — Because a municipal court is a municipal office discharging strictly municipal functions, O.C.G.A. § 36-32-2(a) does not violate the separation of powers doctrine of Ga. Const. 1983, Art. I, Sec. II, Para. III, and the city was authorized to require the judge to reinstate the contract between the county and the private probation services company. *Ward v. City of Cairo*, 276 Ga. 391, 583 S.E.2d 821 (2003).

2010 amendment to the Local Option Sales Tax Act, O.C.G.A. § 48-8-89(d)(4), violates separation of powers doctrine. — To the extent the 2010 amendment to the Local Option Sales Tax Act (LOST), O.C.G.A. § 48-8-89(d)(4), permits judicial resolution of the issue of whether LOST should be renewed and the governing bodies of the special district should be required to levy and collect the tax, the amendment violates the separation of powers doctrine of Ga. Const. 1983, Art. I, Sec. II, Para. III. *Turner County v. City of Ashburn*, 293 Ga. 739, 749 S.E.2d 685 (2013).

Executive Powers

Administrative agency's powers are distinct from the legislative and judicial powers established in the Georgia Constitution. *Bentley v. Chastain*, 242 Ga.

Executive Powers (Cont'd)

348, 249 S.E.2d 38 (1978).

Delegation of powers from General Assembly. — The General Assembly may delegate certain powers to the executive branch of government in order to carry out the law as enacted by the General Assembly. *Sundberg v. State*, 234 Ga. 482, 216 S.E.2d 332 (1975).

The nondelegation doctrine is rooted in the principle of separation of powers, in that the integrity of the tripartite system of government mandates that the General Assembly not divest itself of the legislative power granted to it by Ga. Const. 1983, Art. III, Sec. I, Para. I. *DOT v. City of Atlanta*, 260 Ga. 699, 398 S.E.2d 567 (1990).

Delegation must be made with sufficient guidelines. — When a delegation of power to an executive official is made with sufficient guidelines, the official's exercise of the delegated power does not violate Ga. Const. 1983, Art. I, Sec. II, Para. III. *DOT v. City of Atlanta*, 260 Ga. 699, 398 S.E.2d 567 (1990).

Judicial review of administrative decisions limited. — The only judicial review of administrative decisions authorized is that inherent in the power of the judiciary: whether the agency acted beyond the discretionary powers conferred upon it, abused its discretion, or acted arbitrarily or capriciously with regard to an individual's constitutional rights. *Bentley v. Chastain*, 242 Ga. 348, 249 S.E.2d 38 (1978).

Trial court lacked jurisdiction to deal with an executive branch function until there had been an exhaustion of administrative remedies; accordingly, the trial court properly granted summary judgment to the industrial loan commissioner on the commissioner's claim that the loan companies were not entitled to declaratory relief on their claim that the commissioner lacked jurisdiction over their practice of using an out-of-state bank to make their loans through the loan companies since the commissioner had not ruled on whether that practice was permissible. *USA Payday Cash Advance Ctrs. v. Oxendine*, 262 Ga. App. 632, 585 S.E.2d 924 (2003).

Administrative board may not determine and assess attorney's fees. —

A section authorizing an administrative board to include attorney's fees in an execution against a defaulting receiver is unconstitutional in that the determination of what attorney's fees incurred are reasonable and the assessment of such fees are judicial functions and cannot be delegated to an administrative official. *Massachusetts Bonding & Ins. Co. v. Floyd County*, 178 Ga. 595, 173 S.E. 720 (1934).

Parole conditions. — Trial court erred by requiring the defendant to waive the defendant's Fourth Amendment right as a condition of parole since any attempt by a court to impose its will over the Executive Department by attempting to impose as a part of a criminal sentence conditions operating as a prerequisite of or becoming automatically effective in the event of a subsequent parole of the defendant by the State Board of Pardons and Parole would be a nullity and constitute an exercise of power granted exclusively to the executive. *Stephens v. State*, 207 Ga. App. 645, 428 S.E.2d 661 (1993).

Habeas court erroneously addressed a defendant's challenge to a parole condition that banned the defendant from all counties in the State of Georgia but one as the habeas court's attempt to control the parole condition was a violation of the constitutional provision regarding the separation of powers since the Board of Pardons and Paroles had executive power regarding the terms and conditions of paroles. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. denied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

Approval of taking of municipal property. — Statutes granting the Commission on the Condemnation of Public Property the power to approve the taking of municipal property do not amount to an improper delegation of legislative power and do not violate separation-of-powers principles. *DOT v. City of Atlanta*, 260 Ga. 699, 398 S.E.2d 567 (1990).

Promulgation of executive branch rules and legislative oversight thereof. — O.C.G.A. § 31-6-21.1 does not violate the separation of powers doctrine simply because the statute enables the

Department of Community Health to promulgate and adopt regulations pursuant to a delegated power; the statute does not invest the legislature with executive power, nor does the statute invest the executive with legislative power. Nor could it be said that the statute runs afoul

of enactment, bicameralism, and presentment provisions, as the statute allows for the adoption of rules consistent with legislation, but it does not enable the department to make laws. *Albany Surgical, P.C. v. Ga. Dep't of Cmty. Health*, 278 Ga. 366, 602 S.E.2d 648 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Claim of power to act in derogation of the separation of powers theory must be based on the Constitution itself before it is to be recognized as existent. 1979 Op. Att'y Gen. No. 79-36.

Member of political committee not public officer. — An officer, member, or employee of a political committee is not a "public officer." 1965-66 Op. Att'y Gen. No. 66-181.

Combination of judicial, legislative, and executive officers on commission. — If a commission does not exercise executive, legislative, or judicial powers of the state, this paragraph does not prohibit the combination of judicial, legislative, or executive officers in its composition. 1975 Op. Att'y Gen. No. 75-142.

Justices of the peace may be legislators. — Those persons who are justices of the peace are also eligible to membership in the General Assembly. This does not violate the separation of powers doctrine contained in the Constitution. 1974 Op. Att'y Gen. No. U74-92.

Member of General Assembly may not serve as an appointed judge pro tem of the Recorder's Court of Chatham County. 1983 Op. Att'y Gen. No. U83-58.

Member of the General Assembly cannot serve simultaneously as a juvenile court judge. 1984 Op. Att'y Gen. No. U84-46.

Legislator may not perform functions of State Board of Postsecondary Vocational Education by direct employment or other contractual arrangement. 1988 Op. Att'y Gen. No. 88-11.

Service of judges on advisory council to Department of Human Resources. — The uncompensated services of juvenile and superior court judges on the advisory council to the Department of Human Resources would meet the letter as well as the spirit of both statutory and

constitutional provisions relating to separation of powers. 1963-65 Op. Att'y Gen. p. 320.

Membership on Constitutional Amendments Publication Board. — Contracting for publication of proposed amendments is not an executive function, therefore the presence of the Speaker of the House on the Constitutional Amendments Publication Board does not conflict with this paragraph. Because the unique and sole function of the Constitutional Amendments Publication Board is to submit the constitutional amendments to the people, by proper publication, members of both the executive and legislative branches may serve on the Board. 1974 Op. Att'y Gen. No. 74-127.

Presence of legislative members on Outdoor Advertising Citizen's Advisory Council should not offend this paragraph, due to the advisory nature of the body. 1981 Op. Att'y Gen. No. 81-75.

Member of the General Assembly may serve on a county planning commission. 1997 Op. Att'y Gen. No. U97-11.

Solicitors of municipal court. — Solicitors of the municipal court are not within the judicial branch of state government for purposes of Ga. Const. 1983, Art. I, Sec. II, Para. III, prohibiting one person from simultaneously exercising the functions of more than one of three branches of state government. 1991 Op. Att'y Gen. No. U91-4.

Fiscal officers of appellate courts. — The appellate courts may designate their fiscal officers to handle their payrolls under procedures satisfactory to the appellate courts and the Office of Planning and Budget. However, in the establishment of these procedures, the Office of Planning and Budget, as an arm of the executive department of state government, must be ever mindful of the delicate

balance of power between the executive and the judiciary, founded upon the constitutional principle of the separation of powers. 1971 Op. Att'y Gen. No. 71-100.

Administrative agency may not include legislator. — The "Geo. L. Smith II Georgia World Congress Center Act" is invalid to the extent that membership on the authority created thereby includes officers of the legislative branch of state government, violating this paragraph. 1974 Op. Att'y Gen. No. 74-109.

Court contract for private probation services. — Should a state court, as a separate governmental entity, attempt to contract for private probation services on its own, it is possible that such an agreement would violate the separation of powers provision. 1989 Op. Att'y Gen. No. U89-8.

Court reporter cannot be employed by worker's compensation board. — A

court reporter may not hold simultaneous employment with the State Board of Workers' Compensation and a superior court or state court. 1983 Op. Att'y Gen. No. 83-56.

Member of General Assembly may not serve as municipal court judge. — While the "separation of powers" doctrine does not apply when the issues relate solely to municipal officials utilizing municipal powers, it does apply when it concerns a municipal court judge exercising state judicial powers. Because of that, the exercise of those state judicial powers by a legislator would be a violation of the constitutional prohibition against a member of one branch exercising the powers of another branch of government. Therefore, a member of the Georgia General Assembly may not serve as a municipal court judge. 2014 Op. Att'y Gen. No. U2014-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, §§ 237, 238.

C.J.S. — 16 C.J.S., Constitutional Law, § 272 et seq.

ALR. — Validity and effect of provisions limiting the power of courts to declare a statute unconstitutional, 15 ALR 331; 66 ALR 1466.

Power of judiciary to compel Legislature to make apportionment of representatives or election districts as required by Constitution, 46 ALR 964.

Conclusiveness of governor's decision in removing officers, 52 ALR 7; 92 ALR 998.

Power of legislation respecting admission to bar, 144 ALR 150.

Constitutionality of statute fixing time

within which court or judge shall or shall not act, 168 ALR 1125.

Validity of delegation to private persons or organizations of power to appoint or nominate to public office, 97 ALR2d 361.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part, 73 ALR3d 474.

Validity of a state statute imposing mandatory sentence or prohibiting granting of probation or suspension of sentence for narcotics offenses, 81 ALR3d 1192.

Automobiles: validity and construction of legislation authorizing revocation or suspension of operator's license for "habitual," "persistent," or "frequent" violations of traffic regulations, 48 ALR4th 367.

Paragraph IV. Contempts.

The power of the courts to punish for contempt shall be limited by legislative acts.

1976 Constitution. — Art. I, Sec. II, Para. VI.

Cross references. — Limits to contempt power of courts, §§ 5-6-13, 15-1-4, 15-2-8, and 38-2-1048. Power of courts to

punish for contempt generally, § 15-9-34. Juvenile court, § 15-11-62. Refusal to testify treated as contempt, § 24-5-507. Failure to deliver ward's property, § 29-2-80.

Law reviews. — For article, "Jury Tri-

als in Contempt Cases," see 20 Ga. B.J. 297 (1957). For article, "Contempt of

Court in Georgia," see 23 Ga. St. B.J. 66 (1987).

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This paragraph confers no power to define a contempt. *Bradley v. State*, 111 Ga. 168, 36 S.E. 630, 78 Am. St. R. 157, 50 L.R.A. 691 (1900); *In re Fite*, 11 Ga. App. 665, 76 S.E. 397 (1912).

Paragraph only gives power to prescribe punishment. — This paragraph does not confer authority to define contempts, but only the power to prescribe the punishment after conviction. *Cobb v. State*, 187 Ga. 448, 200 S.E. 796, answer conformed to, 59 Ga. App. 695, 2 S.E.2d 116 (1939).

Power to punish contempts is inherent in every court of record. *Cobb v. State*, 187 Ga. 448, 200 S.E. 796, answer conformed to, 59 Ga. App. 695, 2 S.E.2d 116 (1939); *Wood v. State*, 103 Ga. App. 305, 119 S.E.2d 261 (1961), rev'd on other grounds, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

Power is not limited by legislative inaction. — The failure of the legislature to limit the punishment for contempt does not destroy the power. *Swafford v. Berrong*, 84 Ga. 65, 10 S.E. 593 (1889).

Contempt powers not limited by constitutional liberties. — The inherent power of the courts to punish any publication calculated to interfere with the administration of justice is not restricted by the constitutional guaranties of liberty of the press, for liberty of the press is subordinate to the independence of the judiciary and the proper administration of justice. *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78 (1953).

Due process, freedom of speech, and equal protection clauses of the Constitution of the United States do not bar punishment for contempt of court. *Wood v. State*, 103 Ga. App. 305, 119 S.E.2d 261 (1961), rev'd on other grounds, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

Contempt power not limited by free speech. — Punishment for contempt of court is not prevented by the constitutional guaranty of freedom of speech, since contempt of court is an abuse of the liberty of speech. *Wood v. State*, 103 Ga.

App. 305, 119 S.E.2d 261 (1961), rev'd on other grounds, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

Contempt power not limited by statute. — Former Code 1933, § 24-105 (see now O.C.G.A. § 15-1-4), insofar as it sought to limit the jurisdiction of a constitutional court to punish contempts to certain specified acts, was not binding upon such courts. They may go beyond the provisions of the statute in order to preserve and enforce their constitutional powers by treating as contempts acts which clearly invade them. *Cobb v. State*, 187 Ga. 448, 200 S.E. 796, answer conformed to, 59 Ga. App. 695, 2 S.E.2d 116 (1939); *Wood v. State*, 103 Ga. App. 305, 119 S.E.2d 261 (1961), rev'd on other grounds, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

If the court is created by the Constitution, the legislature cannot, without express constitutional authority, define what are contempts, and declare that the court shall have jurisdiction over no acts except those specified. *Cobb v. State*, 187 Ga. 448, 200 S.E. 796, answer conformed to, 59 Ga. App. 695, 2 S.E.2d 116 (1939); *Wood v. State*, 103 Ga. App. 305, 119 S.E.2d 261 (1961), rev'd on other grounds, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

No authority to award attorney's fees. — Trial court does not have authority to award attorney's fees as punishment for contempt. *Ragsdale v. Bryan*, 235 Ga. 58, 218 S.E.2d 809 (1975).

Attorney fees are not awardable in conjunction with a citation for criminal contempt. *Rolleston v. Cherry*, 237 Ga. App. 733, 521 S.E.2d 1, cert. denied, 528 U.S. 1046, 120 S. Ct. 580, 145 L. Ed. 2d 482 (1999).

Contempt punishment improper when act related to another court. — A rule for contempt, based on a series of newspaper articles, is fatally defective when the publications complained of were true, related to a matter in another court and in no wise referred to the court issu-

ing the rule when they could not have obstructed or impaired the administration of justice in the court. *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78 (1953).

Cited in *Pullen v. Cleckler*, 162 Ga. 111,

132 S.E. 761 (1926); *Brooks v. Sturdivant*, 177 Ga. 514, 170 S.E. 369 (1933); *Alred v. Celanese Corp. of Am.*, 205 Ga. 371, 54 S.E.2d 240 (1949); *In re Pruitt*, 249 Ga. 190, 288 S.E.2d 208 (1982).

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Paragraph applicable only to punishment. — General Assembly is permitted by this paragraph to limit punishment for contempt, and this express grant of power to the General Assembly has been found applicable only to punishment and not to elimination of the judicial exercise of criminal contempt powers by the courts. 1979 Op. Att’y Gen. No. 79-36.

This power granted to the General Assembly is applicable to the prescribing of punishment after conviction only and may

not be used to negate the inherent power of the courts to declare acts or deeds criminally contumacious. 1979 Op. Att’y Gen. No. 79-36.

Statute providing for forbearance from punishment could be enacted. — There appears to be no reason why a general statute providing for grants by the General Assembly of forbearance from punishment arising from contempt adjudication could not be enacted under this paragraph. 1979 Op. Att’y Gen. No. 79-36.

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contempt, § 1 et seq.

C.J.S. — 17 C.J.S., Contempt, § 1 et seq.

ALR. — Limitations statute applicable to criminal contempt proceedings, 38 ALR2d 1131.

Right to counsel in contempt proceedings, 52 ALR3d 1002.

Attorney’s failure to attend court, or tardiness, as contempt, 13 ALR4th 122.

Intoxication of witness or attorney as contempt of court, 46 ALR4th 238.

Validity and construction of state court’s order precluding publicity or comment about pending civil case by counsel, parties, or witnesses, 56 ALR4th 1214.

Contempt: state court’s power to order indefinite coercive fine or imprisonment to exact promise of future compliance with court’s order — anticipatory contempt, 81 ALR4th 1008.

Paragraph V. What acts void.

Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.

1976 Constitution. — Art. I, Sec. II, Para. VIII.

Cross references. — Jurisdiction of Supreme Court to determine constitutionality of laws, Ga. Const. 1983, Art. VI, Sec. VI, Para. II.

Law reviews. — For article, “Selected Oddities in Georgia Municipal Law,” see 9 Ga. L. Rev. 783 (1975). For article, “The Georgia Bill of Rights: Dead or Alive?,” see 34 Emory L.J. 341 (1985).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DETERMINATION OF CONSTITUTIONALITY

1. IN GENERAL

2. PRESUMPTIONS

3. PROCEDURE

General Consideration

This paragraph is mandatory. Board of Comm'rs v. Mayor of Americus, 141 Ga. 542, 81 S.E. 435 (1914).

Duty of courts to declare unconstitutional Acts invalid. — It is the duty of the courts to declare invalid all legislative Acts which violate the Constitution, and this court has repeatedly held invalid municipal ordinances which deal with matters covered by the general law. Jenkins v. Jones, 209 Ga. 758, 75 S.E.2d 815 (1953).

No valid claim can be based upon an Act of the legislature which contravenes the Constitution. Such Acts are by the state Constitution declared void, and it is made the duty of the judiciary to declare them so. International Bus. Machs. Corp. v. Evans, 213 Ga. 333, 99 S.E.2d 220 (1957); Guhl v. Davis, 242 Ga. 356, 249 S.E.2d 43 (1978).

Power is inherent in court. — The power to test an Act by comparison with the Constitution is one inherently residing in the courts, and it is unnecessary for the Act itself to recite such power. Coleman v. Board of Educ., 131 Ga. 643, 63 S.E. 41 (1908).

Unconstitutional statute is inoperative. — A legislative Act of a general nature, and intended to have uniform operation throughout the state, duly adjudicated to be unconstitutional and inoperative, cannot be given effect in any part or subdivision of the state or of any county. Wellborn v. Estes, 70 Ga. 390 (1883); Green v. Hutchinson, 128 Ga. 379, 57 S.E. 353 (1907).

The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Grayson-Robinson Stores, Inc. v. Oneida, Ltd., 209 Ga. 613, 75 S.E.2d 161, cert. denied, 346 U.S. 823, 74 S. Ct. 39, 98 L. Ed. 348 (1953).

Paragraph indicative of supreme power of judiciary. — Whether or not this provision has reference solely to laws enacted by the legislature, it is indicative

of the supreme power of the judiciary in its field of construction. Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883 (1947).

Paragraph applies to ordinances. — Generally, a municipal ordinance passed in pursuance of express legislative authority is a law within the meaning of the Constitution. Jenkins v. Jones, 209 Ga. 758, 75 S.E.2d 815 (1953).

Construction of O.C.G.A. § 48-5-2(3) regarding fair market value of property with local constitutional amendment. — Trial court properly determined that no conflict existed between a local constitutional amendment (LCA) and O.C.G.A. § 48-5-2(3) because the statute focused on the market-determined value of property on the actual date the property was acquired, rather than the property's value as much as a year later and was entirely consistent with the LCA, which froze the ad valorem tax value of homestead property in the county at the property's fair market value at the start of the year after a homestead exemption was allowed or after ownership of the property changed. Columbus Bd. of Tax Assessors v. Yeoman, 293 Ga. 107, 744 S.E.2d 18 (2013).

Cited in Boston v. Cummins, 16 Ga. 106, 60 Am. Dec. 717 (1854); Wright v. Southwestern R.R., 64 Ga. 783 (1880); Howell v. State, 71 Ga. 224, 51 Am. R. 259 (1883); Dougherty v. Boyt, 71 Ga. 484 (1883); Scoville v. Calhoun, 76 Ga. 263 (1886); Fullington v. Williams, 98 Ga. 807, 27 S.E. 183 (1896); Cutcher v. Crawford, 105 Ga. 180, 31 S.E. 139 (1898); Epping v. City of Columbus, 117 Ga. 263, 43 S.E. 803 (1903); Griffin v. Sanborn, 127 Ga. 17, 56 S.E. 71 (1906); Hall v. Tarver, 128 Ga. 410, 57 S.E. 720 (1907); Sawyer v. City of Blakely, 2 Ga. App. 159, 58 S.E. 399 (1907); Butts County v. Jackson Banking Co., 129 Ga. 801, 60 S.E. 149, 121 Am. St. R. 244, 15 L.R.A. (n.s.) 567 (1907); Coleman v. Board of Educ., 131 Ga. 643, 63 S.E. 41 (1908); Clark v. Eve, 134 Ga. 788, 68 S.E. 598 (1910); Hammond v. Clark, 136 Ga. 313, 71 S.E. 479, 38 L.R.A. (n.s.) 77 (1911); Strickland v. State, 137 Ga. 1,

General Consideration (Cont'd)

72 S.E. 260, 36 L.R.A. (n.s.) 115, 1913B Ann. Cas. 323 (1911); *White v. Mayor of Forsyth*, 138 Ga. 753, 76 S.E. 58 (1912); *McWilliams v. Smith*, 142 Ga. 209, 82 S.E. 569 (1914); *Cutsinger v. City of Atlanta*, 142 Ga. 555, 83 S.E. 263, 1915B L.R.A. 1097, 1916C Ann. Cas. 280 (1914); *Dorsey v. Wright*, 150 Ga. 321, 103 S.E. 591 (1920); *Ross v. Jones*, 151 Ga. 425, 107 S.E. 160 (1921); *Jones v. State*, 151 Ga. 502, 107 S.E. 565 (1921); *Smith v. City of Atlanta*, 161 Ga. 769, 132 S.E. 66, 54 A.L.R. 1001 (1926); *Speer v. Martin*, 163 Ga. 535, 136 S.E. 425 (1927); *Roberson v. Roberson*, 165 Ga. 447, 141 S.E. 306 (1928); *Taliaferro County v. Edwards*, 171 Ga. 289, 155 S.E. 180 (1930); *Southern Cotton Oil Co. v. Raines*, 171 Ga. 154, 155 S.E. 484 (1930); *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930); *Threatt v. American Mut. Liab. Ins. Co.*, 173 Ga. 350, 160 S.E. 379 (1931); *Von Schmidt v. Noland Co.*, 176 Ga. 784, 169 S.E. 11 (1933); *Toole v. Anderson*, 177 Ga. 814, 171 S.E. 714 (1933); *De Kalb County v. Grice*, 179 Ga. 458, 175 S.E. 804 (1934); *McCaffrey v. State*, 183 Ga. 827, 189 S.E. 825 (1937); *Elder v. Home Bldg. & Loan Ass'n*, 188 Ga. 113, 3 S.E.2d 75 (1939); *Black v. Jones*, 190 Ga. 95, 8 S.E.2d 385 (1940); *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947); *Price v. State*, 202 Ga. 205, 42 S.E.2d 728 (1947); *Mayor of Savannah v. Harvey*, 87 Ga. App. 122, 73 S.E.2d 260 (1952); *Cox v. GE Co.*, 211 Ga. 286, 85 S.E.2d 514 (1955); *Frankel v. Cone*, 214 Ga. 733, 107 S.E.2d 819 (1959); *Williams v. State*, 217 Ga. 312, 122 S.E.2d 229 (1961); *Baggett Transp. Co. v. Barnes*, 108 Ga. App. 68, 132 S.E.2d 229 (1963); *Calhoun v. State Hwy. Dep't*, 223 Ga. 65, 153 S.E.2d 418 (1967); *Brissette v. Munday*, 115 Ga. App. 131, 153 S.E.2d 606 (1967); *First Nat'l Bank v. Rowley*, 224 Ga. 440, 162 S.E.2d 294 (1968); *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 403, 162 S.E.2d 333 (1968); *Warren v. Walton*, 231 Ga. 495, 202 S.E.2d 405 (1973); *Cadle v. State*, 136 Ga. App. 232, 221 S.E.2d 59 (1975); *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979); *Sikes v. Candler County*, 247 Ga. 115, 274 S.E.2d 464 (1981).

Determination of Constitutionality**1. In General**

Duty of court to declare Act unconstitutional. — When the conflict between a statute and the Constitution is plainly apparent, the Constitution places upon the courts the duty and responsibility of holding the Act invalid. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

When an Act of the legislature is clearly in conflict with the Constitution, it is the duty of the Supreme Court to declare it so. *Davis v. Board of Educ.*, 203 Ga. 44, 45 S.E.2d 429 (1947).

Constitutional decision not made if decision on merits can be reached. — Inquiry will not be made into the constitutionality of a statute involved in a proceeding before the court, if a decision of the merits can be reached without reference thereto. *Western & Atl. R.R. v. Gray*, 172 Ga. 286, 157 S.E. 482, appeal dismissed, 283 U.S. 811, 51 S. Ct. 654, 75 L. Ed. 1428 (1931).

Court confined to settled principles of law in deciding constitutional question. — An Act cannot be declared void on the ground that it is contrary to the principles of justice and equity. *Gray v. McLendon*, 134 Ga. 224, 67 S.E. 859 (1910).

In determining constitutional questions, like others, the courts are not permitted to concern themselves with the wisdom of an Act, or to apply or obtrude the personal views of the judges as to such matters, but are confined to settled principles of law. *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938); *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947).

Constitution prevails over conflicting law. — When there is a variance between an Act of the General Assembly and a constitutional provision, the constitutional provision prevails. *Whitman v. State*, 96 Ga. App. 730, 101 S.E.2d 621 (1957).

Conflict must be plain and palpable. — To authorize the court to set aside a statute as repugnant to the Constitution, the conflict must be plain and palpable. *Wright v. City of Atlanta*, 50 Ga. App.

244, 177 S.E. 753 (1934); *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938); *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947).

The Supreme Court will not declare an Act of the legislature unconstitutional unless the conflict between the Act and the Constitution is clearly manifest. *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Before an Act of the legislature will be declared unconstitutional, the conflict between the Act and the fundamental law must be clear and palpable. *Davis v. Board of Educ.*, 203 Ga. 44, 45 S.E.2d 429 (1947).

The violation must be clear and unequivocal. *Wellborn v. Estes*, 70 Ga. 390 (1883).

Law in its formative state cannot be declared void. *Clayton v. Calhoun*, 76 Ga. 270 (1886).

2. Presumptions

Constitutionality is favored. — It is a general rule governing the validity and construction of ordinances that their constitutionality is favored and courts are reluctant to declare an ordinance unconstitutional. *Hart v. Columbus*, 125 Ga. App. 625, 188 S.E.2d 422 (1972).

Presumptions are made in favor of constitutionality. — Since the legislature is bound by the Constitution, and the members of the legislature are sworn to maintain it, all presumptions are in favor of the constitutionality of an Act of the legislature. *Wright v. City of Atlanta*, 50 Ga. App. 244, 177 S.E. 753 (1934); *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938); *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947); *Flynn v. State*, 209 Ga. 519, 74 S.E.2d 461 (1953).

Every presumption will be made in favor of the constitutionality of an Act of the legislature. *Davis v. Board of Educ.*, 203 Ga. 44, 45 S.E.2d 429 (1947).

Reasonable construction to preserve constitutionality must be adopted. — If a reasonable construction can be placed upon a statute which will preserve its constitutionality, it is the duty of the courts to adopt such construction. *Turman v. Cargill & Daniel*, 54 Ga. 663 (1875); *Cutsinger v. City of Atlanta*, 142

Ga. 555, 83 S.E. 263, 1915B L.R.A. 1097, 1916C Ann. Cas. 280 (1914); *Bennett v. Wheatley*, 154 Ga. 591, 115 S.E. 83 (1922); *Atlantic Loan Co. v. Peterson*, 181 Ga. 266, 182 S.E. 15 (1935).

Court will not declare law unconstitutional in doubtful case. — Supreme Court will not set aside a solemn Act of the legislature in a doubtful case. *Wright v. City of Atlanta*, 50 Ga. App. 244, 177 S.E. 753 (1934); *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947); *Davis v. Board of Educ.*, 203 Ga. 44, 45 S.E.2d 429 (1947); *Flynn v. State*, 209 Ga. 519, 74 S.E.2d 461 (1953).

Vague and uncertain attacks on constitutionality will not stand. — Since all presumptions favor the constitutionality of an Act of the legislature, it is a grave matter for the courts to set aside as being void an Act of that coordinate department of government, and vague, uncertain, and indefinite attacks on such Acts will not be considered. *Flynn v. State*, 209 Ga. 519, 74 S.E.2d 461 (1953).

3. Procedure

Constitutionality is a question of law for the court, and not a question of fact for a jury. *Guhl v. Davis*, 242 Ga. 356, 249 S.E.2d 43 (1978).

The duty to determine the constitutionality of a legislative enactment is vested in the judges, not the jury. *Guhl v. Davis*, 242 Ga. 356, 249 S.E.2d 43 (1978).

In order to raise a question as to constitutionality of a law, at least three things must be shown: (1) the statute, or particular part or parts of a statute which the party would challenge must be stated or pointed out with fair precision; (2) the provision of the Constitution which it is claimed has been violated must be clearly designated; and (3) it must be shown wherein the statute, or some designated part of it, violated some constitutional provision. *Flynn v. State*, 209 Ga. 519, 74 S.E.2d 461 (1953).

Constitutional attack must be clear and definite. — The Supreme Court will not pass upon the constitutionality of a statute when the particular provisions of the Constitution alleged to have been offended by the statute are not clearly des-

Determination of**Constitutionality (Cont'd)****3. Procedure (Cont'd)**

ignated. *Williams v. McIntosh County*, 179 Ga. 735, 177 S.E. 248 (1934).

Until a clear, definite, and specific attack is made upon the constitutionality of an Act as a whole, or upon the constitutionality of a specifically pointed out part or parts of it, the Supreme Court will decline to deal with its validity. *Flynn v. State*, 209 Ga. 519, 74 S.E.2d 461 (1953).

Pleading must point out the part of the Constitution violated. *Jones v. Oemler*, 110 Ga. 202, 35 S.E. 375 (1900).

When the charge was made that an ordinance was void for violating specified constitutional provisions, without stating wherein it violated the provisions, it was too indefinite to invoke a ruling that the ordinance was unconstitutional. *Curtis v. Town of Helen*, 171 Ga. 256, 155 S.E. 202 (1930).

Unless the attack under this paragraph specifies the statute and provisions of the Constitution violated, the Supreme Court will not rule upon the issues. *Morris v. State*, 200 Ga. 471, 37 S.E.2d 345 (1946).

Constitutional question must be first raised in trial court. — The constitutionality of an Act must be raised in the lower court. *Savannah, Fla. & W. Ry. v. Hardin*, 110 Ga. 433, 35 S.E. 681 (1900); *Anderson v. State*, 2 Ga. App. 1, 58 S.E. 401 (1907); *Griggs v. State*, 130 Ga. 16, 60 S.E. 103 (1908).

Before a reviewing court is authorized to pass upon the constitutionality of an Act of the General Assembly, it must appear that the question was made or presented in the court below and was passed upon by the trial judge. *Borough of Atlanta v. Reynolds*, 43 Ga. App. 516, 159 S.E. 607 (1931).

A constitutional question will not be decided by the Supreme Court in the absence of the question being raised in the trial court. *Morris v. State*, 200 Ga. 471, 37 S.E.2d 345 (1946).

The constitutionality of no law can be drawn in question for the first time in a motion for new trial, and the fact that the laws were declared unconstitutional pending appeal does not require a different result. *Konscol v. Konscol*, 151 Ga. App. 696, 261 S.E.2d 438 (1979), cert. denied, 449 U.S. 875, 101 S. Ct. 218, 66 L. Ed. 2d 97 (1980).

Exceptions to a judgment can present no constitutional question. *Cohen v. State*, 7 Ga. App. 5, 65 S.E. 1096 (1909); *Johnson v. Ware*, 135 Ga. 365, 69 S.E. 481 (1910).

Motion for new trial contending that a verdict is contrary to law can present no constitutional question. *Hill v. State*, 112 Ga. 400, 37 S.E. 441 (1900).

Declaring portion of Act invalid. — If sections, provisions, sentences, or phrases of a legislative Act can be stricken therefrom without destroying the general legislative scheme, courts should strike them, if necessary to preserve the constitutionality of the Act, and leave the remainder thereof intact. *Bennett v. Wheatley*, 154 Ga. 591, 115 S.E. 83 (1922).

Unless invalid portion too connected to general scheme of Act. — Part of an Act may be so connected with the general legislative scheme embodied in the Act, that it cannot be so stricken. *Futrell v. George*, 135 Ga. 265, 69 S.E. 182 (1910); *Zachry v. Mayor of Harlem*, 138 Ga. 195, 75 S.E. 4 (1912).

Effect of severability clause. — A severability clause does not change the rule that in order for one part of a statute to be upheld as severable when another is stricken as unconstitutional, they must not be mutually dependent on one another. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

Court of appeals may refuse to certify improper proceedings. *Tooke v. State*, 4 Ga. App. 495, 61 S.E. 917 (1908); *Parker-Hensel Eng'r Co. v. Schuler*, 7 Ga. App. 396, 66 S.E. 1038 (1910); *Logue v. Hancock County*, 8 Ga. App. 208, 68 S.E. 866 (1910).

RESEARCH REFERENCES

Am. Jur. 2d. — 16 Am. Jur. 2d, Constitutional Law, § 113 et seq. 72 Am. Jur. 2d,

States, Territories, and Dependencies, § 40.

Paragraph VI. Superiority of civil authority.

The civil authority shall be superior to the military.

1976 Constitution. — Art. I, Sec. II, Para. V.

Cross references. — Quartering soldiers, U.S. Const., amend. 3.

Law reviews. — For note, “Rethinking

the Role and Regulation of Private Military Companies: What the United States and United Kingdom Can Learn from Shared Experiences in the War on Terror,” see 39 Ga. J. Int’l & Comp. L. 445 (2011).

Paragraph VII. Separation of church and state.

No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.

1976 Constitution. — Art. I, Sec. II, Para. X.

Cross references. — Religious and political freedom, U.S. Const., amend. 1. Tax exemptions generally, Ga. Const. 1983, Art. VII, Sec. II, Paras. I through IV. Tax

exemptions, for religious organizations, §§ 48-5-41 and 48-8-3.

Law reviews. — For article, “Religious Liberty Law and the States,” see 3 Ga. St. U.L. Rev. 19 (1987).

JUDICIAL DECISIONS

This paragraph forbids the union of church and state, or any political division thereof. *Collum v. State*, 109 Ga. 531, 35 S.E. 121 (1900).

This paragraph applies to municipalities. *Bennett v. City of LaGrange*, 153 Ga. 428, 112 S.E. 482, 22 A.L.R. 1312 (1922).

City charter relieving sectarian institutions from payment of pavement assessments is invalid. *Mayor of Savannah v. Richter*, 160 Ga. 177, 127 S.E. 148 (1925).

“Religious sect” defined. — See *Bennett v. City of LaGrange*, 153 Ga. 428, 112 S.E. 482, 22 A.L.R. 1312 (1922).

Religious grave markers may be erected in public graveyard. — Erection and maintenance of religiously symbolic grave markers in a public graveyard in compliance with the religious sentiments of known descendants does not conflict with this provision or the First Amendment to the U.S. Constitution. *Birdine v. Moreland*, 579 F. Supp. 412 (N.D. Ga. 1983).

County invitational practice. — County commission’s sectarian invocation

practice did not offend the Separation Clause of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec. II, Para. VII, because the complaining county residents and taxpayers did not describe how the cost of time spent arranging for a speaker and the cost of stamps were taken in aid of any sect or sectarian institution and did not show any pecuniary benefit, either direct or indirect, conferred by the county upon such groups or that any religious organization received financial assistance from the county for promotion and advancement of its theological views. *Bats v. Cobb County*, 410 F. Supp. 2d 1324 (N.D. Ga. 2006), *aff’d*, 547 F.3d 1263 (11th Cir. 2008).

Arms-length agreement between public school and church. — Arms-length agreement by public school system with a church to lease space from the church to alleviate an overcrowding problem at one of its elementary schools did not violate the Establishment Clause of the Georgia Constitution because the payments made under the lease did not constitute giving monetary aid to the church. *Taetle v. Atlanta Indep. Sch. Sys.*, 280 Ga. 137, 625 S.E.2d 770 (2006).

Cited in Trustees of First Methodist Episcopal Church v. City of Atlanta, 76 Ga. 181 (1886); City of Atlanta v. First Presbyterian Church, 86 Ga. 730, 13 S.E. 252, 12 L.R.A. 852 (1891); Reid v. State,

116 Ga. App. 640, 158 S.E.2d 461 (1967); Bradfield v. Hospital Auth., 226 Ga. 575, 176 S.E.2d 92 (1970); Franklin County v. Fieldale Farms Corp., 270 Ga. 272, 507 S.E.2d 460 (1998).

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This paragraph is intended to have a stronger application than the First Amendment to the United States Constitution. 1960-61 Op. Att’y Gen. p. 349.

Statutory provisions deemed constitutional. — The “respect for the creator” portion of the character education program authorized by O.C.G.A. § 20-2-145 and the provision of O.C.G.A. § 50-3-4.1 allowing display of the motto “In God We Trust” in public do not violate the separation of church and state provisions of either the state or federal Constitution. 2000 Op. Att’y Gen. No. 00-9.

Contract for goods or services between public and sectarian schools unconstitutional. — Supreme Court of this state would consider unconstitutional a contract for goods or services between a public elementary or secondary school and a nonpublic sectarian school. 1969 Op. Att’y Gen. No. 69-125.

Expenditure of funds for prison chapels. — State Board of Corrections (now Board of Offender Rehabilitation) can expend state funds for the employment of chaplains and the construction and maintenance of chapels in the various prison branches and can legally permit religious organizations to conduct services in such chapels. 1960-61 Op. Att’y Gen. p. 361.

Use of prison labor to gratuitously clear and maintain church grounds and cemeteries violates constitutional limitations on separation of church and state. 1960-61 Op. Att’y Gen. p. 349.

Contract between a county and the Y.M.C.A. to furnish recreational facilities would violate this paragraph. 1969 Op. Att’y Gen. No. 69-136.

Funds for transporting children to schools. — County board of education may not expend public school funds to transport children to schools other than those operated by the public school system. 1945-47 Op. Att’y Gen. p. 222.

Entirely federally funded plan to provide resources to private schools.

— So long as Title II of the Elementary and Secondary Education Act of 1965 is wholly financed by the federal government and no state matching funds are involved, the State Board of Education may lawfully administer a state plan even though it contemplates the providing of school library resources, textbooks, and other printed instructional materials for the use of students and teachers in private as well as public schools. 1965-66 Op. Att’y Gen. No. 65-4.

Applicability to State authority. — Ga. Const. 1983, Art. I, Sec. II, Para. VII applies to the Georgia Residential Finance Authority in the distribution of any funds received from the settlement of litigation, its status as a state authority notwithstanding. 1988 Op. Att’y Gen. No. 88-2.

Funds from settlement of litigation. — Funds received by the State of Georgia pursuant to the settlement of litigation are public funds and subject to Ga. Const. 1983, Art. I, Sec. II, Para. VII. 1988 Op. Att’y Gen. No. 88-2.

Teaching about Bible in public schools. — Use of public funds to teach Bible courses may be held to constitute “aid” to a particular religion, i.e., Christianity, if appropriate instruction regarding other religions is not included or if the instruction is not offered in a neutral and objective manner. 1999 Op. Att’y Gen. No. 99-16.

Allowing sectarian organization to generate income through use of school property under a lease arrangement at less than the fair market rental rate would violate the “indirect aid” language of Ga. Const. 1983, Art. I, Sec. II, Para. VII. 1988 Op. Att’y Gen. No. U88-20.

Sectarian organization providing after-school program. — County school system can contract with a sectarian or-

ganization to provide after-school programs for its students if the arrangement does not involve a flow of public or school funds from the school system to the sectarian organization. 1988 Op. Att'y Gen. No. U88-6.

Reading Challenge Program grants. — Grants to sectarian schools from the Department of Education for purposes of the Reading Challenge Program are prohibited by Ga. Const. 1983, Art. I, Sec. II, Para. VII. 2000 Op. Att'y Gen. No. 2000-5.

Georgia Residential Finance Authority may lend general reserve funds to religiously-motivated housing sponsor which charges in-kind interest, provided the funds are not encumbered or derived from the public treasury,

the authority's own purpose is secular and nondiscriminatory, the program in fact is financially sound and secular, and it can be monitored without entanglement. 1988 Op. Att'y Gen. No. 88-15.

When Christmas display in capitol unconstitutional. — Presenting a nativity scene as a part of a planned Christmas program in the capitol rotunda, or leaving an unattended display of a Menorah in front of the capitol would be in violation of the Georgia Constitution and the establishment clause of the United States Constitution. However, a Menorah candlelighting ceremony conducted by private citizens in front of the capitol would not violate the Constitution of the United States or the Georgia Constitution. 1990 Op. Att'y Gen. No. 90-38.

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, § 432 et seq.

C.J.S. — 16A C.J.S., Constitutional Law, § 857.

ALR. — Contract to pay for services or reimburse expenditures as within constitutional inhibition of aid to sectarian institutions, 22 ALR 1319; 55 ALR 320.

Constitutionality of statute providing school bus service for pupils of parochial or private schools, 168 ALR 1434.

Public payment of tuition, scholarship, or the like, as respects sectarian school, 81 ALR2d 1309.

Validity, under state constitution and laws, of issuance by state or state agency of revenue bonds to finance or refinance construction projects at private religious-affiliated colleges or universities, 95 ALR3d 1000.

Paragraph VIII. Lotteries and nonprofit bingo games.

(a) Except as herein specifically provided in this Paragraph VIII, all lotteries, and the sale of lottery tickets, and all forms of pari-mutuel betting and casino gambling are hereby prohibited; and this prohibition shall be enforced by penal laws.

(b) The General Assembly may by law provide that the operation of a nonprofit bingo game shall not be a lottery and shall be legal in this state. The General Assembly may by law define a nonprofit bingo game and provide for the regulation of nonprofit bingo games.

(c) The General Assembly may by law provide for the operation and regulation of a lottery or lotteries by or on behalf of the state and for any matters relating to the purposes or provisions of this subparagraph. Proceeds derived from the lottery or lotteries operated by or on behalf of the state shall be used to pay the operating expenses of the lottery or lotteries, including all prizes, without any appropriation required by law, and for educational programs and purposes as hereinafter pro-

vided. Lottery proceeds shall not be subject to Article VII, Section III, Paragraph II; Article III, Section IX, Paragraph VI(a); or Article III, Section IX, Paragraph IV(c), except that the net proceeds after payment of such operating expenses shall be subject to Article VII, Section III, Paragraph II. Net proceeds after payment of such operating expenses shall be separately accounted for and shall be specifically identified by the Governor in his annual budget presented to the General Assembly as a separate budget category entitled "Lottery Proceeds" and the Governor shall make specific recommendations as to educational programs and educational purposes to which said net proceeds shall be appropriated. In the General Appropriations Act adopted by the General Assembly, the General Assembly shall appropriate all net proceeds of the lottery or lotteries by such separate budget category to educational programs and educational purposes. Such net proceeds shall be used to support improvements and enhancements for educational programs and purposes and such net proceeds shall be used to supplement, not supplant, non-lottery educational resources for educational programs and purposes. The educational programs and educational purposes for which proceeds may be so appropriated shall include only the following:

(1) Tuition grants, scholarships, or loans to citizens of this state to enable such citizens to attend colleges and universities located within this state, regardless of whether such colleges or universities are operated by the board of regents, or to attend institutions operated under the authority of the Department of Technical and Adult Education;

(2) Voluntary pre-kindergarten;

(3) One or more educational shortfall reserves in a total amount of not less than 10 percent of the net proceeds of the lottery for the preceding fiscal year;

(4) Costs of providing to teachers at accredited public institutions who teach levels K-12, personnel at public postsecondary technical institutes under the authority of the Department of Technical and Adult Education, and professors and instructors within the University System of Georgia the necessary training in the use and application of computers and advanced electronic instructional technology to implement interactive learning environments in the classroom and to access the state-wide distance learning network; and

(5) Capital outlay projects for educational facilities;

provided, however, that no funds shall be appropriated for the items listed in paragraphs (4) and (5) of this subsection until all persons eligible for and applying for assistance as provided in paragraph (1) of this subsection have received such assistance, all approved

pre-kindergarten programs provided for in paragraph (2) of this subsection have been fully funded, and the education shortfall reserve or reserves provided for in paragraph (3) of this subsection have been fully funded.

(d) On and after January 1, 1995, the holding of raffles by nonprofit organizations shall be lawful and shall not be prohibited by any law enacted prior to January 1, 1994. Laws enacted on or after January 1, 1994, however, may restrict, regulate, or prohibit the operation of such raffles. (Ga. Const. 1983, Art. 1, § 2, Para. 8; Ga. L. 1991, p. 2035, § 1/HR 7; Ga. L. 1994, p. 2024, § 1/SR 107; Ga. L. 1998, p. 1686/SR 529.)

1976 Constitution. — Art. I, Sec. II, Para. XI.

Cross references. — Definition of “lottery,” § 16-12-20. Illegality of lotteries, §§ 16-12-22, 16-12-25, and 16-12-26.

Editor’s notes. — The constitutional amendment (Ga. L. 1991, p. 2035, § 1) which revised this Paragraph to provide that the General Assembly may enact legislation providing for the operation and regulation of a lottery by or on behalf of the state and providing for distribution of proceeds was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

The constitutional amendment (Ga. L. 1994, p. 2024, § 1) which added subparagraph (d) was approved by a majority of the qualified voters voting at the general election held on November 8, 1994.

The constitutional amendment (Ga. L. 1998, p. 1686) which substituted the present provisions of subsection (c) for the former provisions which read: “The General Assembly may by law provide for the operation and regulation of a lottery or lotteries by or on behalf of the state and for any matters relating to the purposes or provisions of this subparagraph. Proceeds derived from the lottery or lotteries operated by or on behalf of the state shall be used to pay the operating expenses of the lottery or lotteries, including all prizes, without any appropriation required by law, and for educational programs and purposes as hereinafter provided. Lottery proceeds shall not be subject to Article VII, Section III, Paragraph II; Article III,

Section IX, Paragraph VI(a); or Article III, Section IX, Paragraph IV(c), except that the net proceeds after payment of such operating expenses shall be subject to Article VII, Section III, Paragraph II. Net proceeds after payment of such operating expenses shall be separately accounted for and shall be specifically identified by the Governor in his annual budget presented to the General Assembly as a separate budget category entitled ‘Lottery Proceeds’ and the Governor shall make specific recommendations as to educational programs and educational purposes to which said net proceeds shall be appropriated. In the General Appropriations Act adopted by the General Assembly, the General Assembly shall appropriate all net proceeds of the lottery or lotteries by such separate budget category to educational programs and educational purposes as specified by the General Assembly.” was approved by a majority of the qualified voters voting at the general election held on November 3, 1998.

Law reviews. — For article, “The Georgia Bill of Rights: Dead or Alive?” see 34 Emory L.J. 341 (1985). For article on resolutions proposing to amend this paragraph, see 23 Ga. St. U.L. Rev. 1 (2006).

For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970).

For comment on *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967), see 2 Ga. L. Rev. 132 (1967).

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Intent of “bingo amendment.” — The bingo amendment is intended to allow only nonprofit organizations to benefit from bingo, and to the extent bingo proceeds are diverted from nonprofit groups this intent has been frustrated. *St. John’s Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

Use of “shall be legal” prevents general prohibition of bingo. — Legislature in the use of the phrase “shall be legal” in this paragraph, instead of some other phrase which would more clearly delineate the power of the legislature to regulate legal bingo, has prevented the prohibition of bingo in general, and the hindering of the operation of bingo games, and to this extent the police power has been circumscribed. But this does not mean that the state’s police power has been emasculated so that the legislature is without power to outlaw abuses of the right to operate bingo games. *St. John’s Melkite Catholic Church v. Commissioner of Revenue*, 240 Ga. 733, 242 S.E.2d 108 (1978).

Three ingredients are necessary to constitute a lottery or gift enterprise — prize, chance, and consideration. *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967).

Consideration as an ingredient of a prohibited lottery or gift enterprise is shown when there is present, in the actual working of the sales promotion scheme, a

class of persons who, in addition to receiving or being entitled to chances on prizes, supply consideration for all the chances in bulk by purchasing whatever the promoter is selling, whether the purchasers were required to do so or not under the wording of the promoter’s rules. *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967).

Test of a lottery is in its working rather than in its wording. *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967).

Games were not improper “casino gambling.” — Certain games involving the purchase of lottery tickets did not fall within the definition of improper “casino gambling” and the creation and operation of the games was a lawful exercise of the authority of the Georgia Lottery Corporation. *Jackson v. Georgia Lottery Corp.*, 228 Ga. App. 239, 491 S.E.2d 408 (1997).

“Closed participation” gift scheme illegal. — A “closed participation” gift enterprise scheme — that is, one which is open only to patrons purchasing goods, services, or whatever the promoter is trying to push by the scheme — is illegal and contrary to public policy. *Boyd v. Piggly Wiggly S., Inc.*, 115 Ga. App. 628, 155 S.E.2d 630 (1967).

Cited in *Smith v. City of Albany*, 97 Ga. App. 731, 104 S.E.2d 488 (1958); *Midway Youth Football Ladies Auxiliary, Inc. v. Strickland*, 449 F. Supp. 418 (N.D. Ga. 1978).

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Bonus or rebate is not lottery. — Granting bonus or rebate to customer who subsequently provides for additional sales of product is not a lottery which would be illegal. 1962 Op. Att’y Gen. p. 447.

Bingo statute effective even after constitutional change. — If a statute is enacted pursuant to a specific constitutional provision, and the Constitution is later modified, the statute nevertheless continues to be effective, unless it conflicts with the new constitutional provision; therefore, the Bingo Act, Ga. L. 1977, p. 1164 (see now O.C.G.A. § 16-12-50 et

seq.), remains effective to authorize the Revenue Department to license and regulate certain nonprofit bingo games after the effective date of the 1978 amendment to this paragraph. 1978 Op. Att’y Gen. No. 78-87.

Educational programs. — The use of lottery proceeds for educational programs and educational purposes is authorized by the Georgia Constitution; however, it was not the intent of the General Assembly that the Georgia Student Finance Commission comply with the Fair and Open Grants Act, O.C.G.A. § 28-5-120 et seq.,

in administering the HOPE Scholarship, Hope Grant, and other state scholarship

and grant programs. 2002 Op. Att’y Gen. No. 2002-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Gambling, § 1 et seq.

C.J.S. — 54 C.J.S., Lotteries, § 1 et seq.

ALR. — Scheme for advertising or stimulating legitimate business as a lottery, 57 ALR 424; 103 ALR 866; 109 ALR 709; 113 ALR 1121.

Constitutionality of statute which affirmatively permits certain forms of betting or gambling, 85 ALR 622.

Coin-operated or slot machines as lottery, 101 ALR 1126.

“Numbers (or number) game” or “policy game” as a lottery, 105 ALR 305.

Punchboard as a lottery, 163 ALR 1279.

Promotion schemes of retail stores as criminal offense under antigambling law, 29 ALR3d 888.

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling, 42 ALR3d 663.

Paragraph IX. Sovereign immunity and waiver thereof; claims against the state and its departments, agencies, officers, and employees.

(a) The General Assembly may waive the state’s sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for the making, handling, and disposition of actions or claims against the state and its departments, agencies, officers, and employees, upon such terms and subject to such conditions and limitations as the General Assembly may provide.

(b) The General Assembly may also provide by law for the processing and disposition of claims against the state which do not exceed such maximum amount as provided therein.

(c) The state’s defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies.

(d) Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

(e) Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

(f) No waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution. (Ga. Const. 1983, Art. 1, § 2, Para. 9; Ga. L. 1982, p. 2546, § 1/SR 340; Ga. L. 1990, p. 2435, § 1/HR 777.)

1976 Constitution. — Art. VI, Sec. V, Para. I.

Cross references. — Joint purchase of insurance and joint formation of self-insurance programs by boards of education, § 20-2-2001 et seq. Joint purchase of insurance and joint formation of self-insurance programs by municipalities and counties, T. 36, C. 85. Waiver of sovereign immunity in actions for breach of written contracts entered into by the state, any of its departments, etc., § 50-21-1. Georgia Tort Claims Act, § 50-21-20 et seq. Immunity of counties, municipalities, and school districts, Ga. Const. 1983, Art. IX, Sec. II, Para. IX.

Editor's notes. — The constitutional amendment (Ga. L. 1982, p. 2546, § 1) which revised the 1976 Constitution so as to provide sovereign immunity and waivers thereof was ratified at the general election held on November 2, 1982, and was incorporated as part of this paragraph pursuant to Art. XI, Sec. I, Para. V of the 1983 Constitution.

The constitutional amendment (Ga. L. 1988, p. 2121, § 1) which would have revised this paragraph to provide for sovereign immunity and official immunity, to provide for circumstances and procedures for raising such immunity, and to provide the General Assembly with authority to enact related laws, was defeated at the general election on November 8, 1988.

The constitutional amendment (Ga. L. 1990, p. 2435, § 1) which rewrote this paragraph to provide for waiver of sovereign immunity by enactment of a State Tort Claims Act was approved by a majority of the qualified voters voting in the

general election held on November 6, 1990.

Law reviews. — For article, "Injunction Procedure in Georgia," see 13 Ga. B.J. 300 (1951). For article, "Sovereign Immunity in Administrative Law — A New Diagnosis," see 9 J. of Pub. L. 1 (1960). For article advocating the overhaul of the doctrines of official and sovereign immunity, see 29 Mercer L. Rev. 303 (1977). For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982). For survey article on contracts — legislation, see 34 Mercer L. Rev. 71 (1982). For article, "The Georgia Bill of Rights: Dead or Alive?," see 34 Emory L.J. 341 (1985). For annual survey of law of torts, see 38 Mercer L. Rev. 351 (1986). For article, "Georgia Local Government Tort Liability: the 'Crisis' Conundrum," see 2 Ga. St. U.L. Rev. 19 (1986). For article, "The Fall and Rise of Official Immunity," see 25 Ga. St. B.J. 93 (1988). For annual survey on law of torts, see 43 Mercer L. Rev. 395 (1991). For article, "The 1992 Georgia Tort Claims Act," see 9 Ga. St. U.L. Rev. 431 (1993). For article, "Local Government Tort Liability: the Summer of '92," see 9 Ga. St. U.L. Rev. 405 (1993). For article, "Tort Claims Against the State: Georgia's Compensation System," see 32 Ga. L. Rev. 1103 (1998). For annual survey of administrative law, see 57 Mercer L. Rev. 1 (2005). For article, "'Official Immunity' in Local Government Law: A Quantifiable Confrontation," see 22 Ga. St. U.L. Rev. 597 (2006). For article, "Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law," see 57 Mercer L. Rev. 511 (2006). For

survey article on administrative law, see 59 Mercer L. Rev. 1 (2007). For annual survey of administrative law, see 67 Mercer L. Rev. 1 (2015). For survey article on local government law, see 67 Mercer L. Rev. 147 (2015).

For note analyzing sovereign immunity in this state and proposing implementation of a waiver scheme and creation of a court of claims pursuant to this paragraph, see 27 Emory L.J. 717 (1978). For note, “City of Rome v. Jordan: Georgia is a

Public Duty Doctrine Jurisdiction With No Waiver of Sovereign Immunity — A Good ‘Call’ by the Supreme Court,” see 45 Mercer L. Rev. 533 (1993). For note, “Seay v. Cleveland: Resolution of the Ministerial Discretionary Dichotomy,” see 51 Mercer L. Rev. 787 (2000). For note, “Youngblood v. Gwinnett Rockdale Newton Community Service Board: The Sovereign Immunity of State Agencies Under the Georgia Constitution and the Georgia Tort Claims Act,” see 53 Mercer L. Rev. 967 (2002).

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Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. V, Para. I and antecedent provisions, relating to the creation of a state court of claims and incidentally to the reservation of the sovereign immunity of the state, are included in the annotations for this paragraph.

Some of the cases cited below were decided before the 1990 amendment which deleted provisions as to waiver to the extent of liability insurance.

Governmental immunity waived only by Constitution or General Assembly. — Governmental immunity from suit is waived only when so provided by the Constitution or by the express act of the General Assembly. Porter v. Home Indem. Co., 168 Ga. App. 799, 310 S.E.2d 546 (1983).

Georgia Attorney General lacks statutory authority to waive the state’s Eleventh Amendment immunity from suit; only the legislature can authorize a waiver of sovereign immunity. Ramey v. Ga. Dep’t of Corr., 153 F. Supp. 2d 1382 (M.D. Ga. 2001).

Under the Georgia Constitution, sovereign immunity extends to the state and all of its departments, and may be waived

only by a legislative act. DOT v. Watts, 260 Ga. App. 905, 581 S.E.2d 410 (2003).

Constitutionality. — Ga. Const. 1983, Art. I, Sec. II, Para IX does not violate due process and equal protection guarantees. Dollar v. Dalton Pub. Schs., 233 Ga. App. 827, 505 S.E.2d 789 (1998).

For constitutionality of paragraph, see Clark v. State, 240 Ga. 188, 240 S.E.2d 5 (1977).

Constitutionality of provision for governmental immunity of counties. — Amendment providing counties with the shield of governmental immunity was not ineffectual or invalid merely because it was in conflict with existing provisions. Harry v. Glynn County, 269 Ga. 503, 501 S.E.2d 196 (1998).

Constitutionality of statutory scheme for waiver of immunity by state and counties. — The statutory scheme under which plaintiffs having tort claims against the state have the benefit of the broad waiver of sovereign immunity afforded by the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., which does not extend to counties, whereas a county’s waiver of immunity is allowed only to the extent of insurance purchased for negligence arising from the use of a motor vehicle, results in unequal treatment, however, it does not violate due process or equal protection. Woodard v. Laurens

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County, 265 Ga. 404, 456 S.E.2d 581 (1995).

Constitutional immunity of school district. — School district was not an arm of the state for purposes of Eleventh Amendment immunity, even if it was part of the state for purposes of state sovereign immunity. *Lightfoot v. Henry County Sch. Dist.*, 771 F.3d 764 (11th Cir. 2014).

Defense of sovereign immunity is not affirmative defense with respect to which the state has the burden of proof. Indeed, neither counsel for the state nor any of its agencies may, by affirmative action or by failure to plead, waive the defense of governmental immunity. *Kelleher v. State*, 187 Ga. App. 64, 369 S.E.2d 341 (1988).

This paragraph is not nullified by any illegality in its ratification. *Clark v. State*, 142 Ga. App. 272, 235 S.E.2d 614, aff'd, 240 Ga. 188, 240 S.E.2d 5 (1977); *Harry v. Glynn County*, 269 Ga. 503, 501 S.E.2d 196 (1998).

1982 amendment to 1976 Constitution properly substituted as this paragraph. — The sovereign immunity amendment to the 1976 Constitution, 1982 Ga. L., p. 2546, was properly substituted as this paragraph in the 1983 Constitution, Ga. Const. 1983, Art. I, Sec. II, Para. IX. *Pollard v. Board of Regents*, 260 Ga. 885, 401 S.E.2d 272 (1991).

By virtue of adoption of this paragraph, doctrine of state sovereign immunity now has constitutional status and cannot be abrogated or modified by the Supreme Court. *Clark v. State*, 240 Ga. 188, 240 S.E.2d 5 (1977).

Immunity rule. — The immunity rule as it has heretofore existed in this state cannot be abrogated or modified by the Supreme Court. *Sheley v. Board of Pub. Educ.*, 233 Ga. 487, 212 S.E.2d 627 (1975).

The doctrine of sovereign immunity was given constitutional status by the 1974 amendment to this paragraph, and applies to any "suit" involving claims for "injury" or "damage" against the state unless and until there is a waiver by act of the General Assembly. *Echols v. DeKalb County*, 146 Ga. App. 560, 247 S.E.2d 114 (1978).

Doctrine of sovereign immunity is vested with constitutional status and applies to any action against the state unless there is an express statutory waiver of sovereign immunity. *National Distrib. Co. v. DOT*, 157 Ga. App. 789, 278 S.E.2d 648 (1981).

Doctrine of sovereign immunity is not bar to enforcement of constitutional rights. *C.F.I. Constr. Co. v. Board of Regents of Univ. Sys.*, 145 Ga. App. 471, 243 S.E.2d 700, cert. dismissed, 242 Ga. 96, 249 S.E.2d 613 (1978).

Violation of constitutional right of citizen must by necessary implication raise cause of action in favor of citizen unless some means of redress other than suit has been afforded by the legislature. *C.F.I. Constr. Co. v. Board of Regents of Univ. Sys.*, 145 Ga. App. 471, 243 S.E.2d 700, cert. dismissed, 242 Ga. 96, 249 S.E.2d 613 (1978).

No waiver for independent contractors. — Corporations and independent contractors doing business with the state are not included within the Georgia Tort Claims Act's (GTCA's), O.C.G.A. § 50-21-22(7), definition of employee, thus, the state is immune from liability if the tort was committed by a third party and under the GTCA, the Georgia Department of Transportation's sovereign immunity has not been waived for the negligence committed by independent contractors. *Ga. DOT v. Wyche*, 332 Ga. App. 596, 774 S.E.2d 169 (2015).

In a suit wherein a construction worker for an independent contractor working on a state highway project was killed, the trial court erred by denying the Georgia Department of Transportation's (DOT's) motion to dismiss because whether the plaintiff's claims were characterized as either claims that the DOT negligently approved the independent contractor's paving project or negligently inspected the project, the claims were barred under the doctrine of sovereign immunity. *Ga. DOT v. Wyche*, 332 Ga. App. 596, 774 S.E.2d 169 (2015).

Changes in immunity rule and extent of such changes are now solely within domain of General Assembly. *Sheley v. Board of Pub. Educ.*, 233 Ga. 487, 212 S.E.2d 627 (1975).

Generally, the state and its political subdivisions are protected by the doctrine of sovereign immunity in the performance of governmental functions; this paragraph provides for waiver of immunity of the state from suit as is now or may hereafter be provided by Act of the General Assembly. *National Distrib. Co. v. DOT*, 157 Ga. App. 789, 278 S.E.2d 648 (1981).

State courts have primary interest in adjudicating immunity claims. — Court abstained sua sponte under 28 U.S.C. § 1334(c)(1) and dismissed a Chapter 11 debtor's complaint against a county and various officials because, inter alia, only state law claims were raised; the issues were merely "related to" a case under Title 11, and accordingly were treated as described in 28 U.S.C. § 157(c)(1); the parties had a right to a jury trial; and issues of state sovereign immunity were raised under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c), which the state had a primary interest in adjudicating. *Old Augusta Dev. Group, Inc. v. Effingham County (In re Old Augusta Dev. Group, Inc.)*, No. 10-4094, 2011 Bankr. LEXIS 2587 (Bankr. S.D. Ga. May 16, 2011).

Only by express consent of state can the state be made amenable to suit and such consent is a matter of legislative grace, the extension of a privilege to which citizens have no right. *Sikes v. Candler County*, 247 Ga. 115, 274 S.E.2d 464 (1981).

Statutory waiver of sovereign immunity as matter of grace may be granted, withdrawn, or restricted at will of legislature. *Sikes v. Candler County*, 247 Ga. 115, 274 S.E.2d 464 (1981).

Waiver provisions of Ga. Const. 1983, Art. I, Sec. II, Para. IX are prospective from their effective date. *Wilmoth v. Henry County*, 251 Ga. 643, 309 S.E.2d 126 (1983); *Holloway v. Rogers*, 181 Ga. App. 11, 351 S.E.2d 240 (1986).

This provision is self-executing, and, as of the provision's effective date in 1983, it results in an automatic waiver by a municipality of the defense of sovereign immunity to the extent of any applicable general liability insurance coverage car-

ried by the municipality, despite the language in O.C.G.A. § 36-33-1(a) limiting that section's effect to litigation pending after July 1, 1986. *Brockman v. Burnette*, 184 Ga. App. 66, 360 S.E.2d 655 (1987) (decided prior to 1990 amendment).

Withdraw of waiver of immunity prior to 1991 amendment. — If a cause of action accrues before the effective date of the 1991 amendment to Ga. Const. 1983, Art. I, Sec. II, Para. IX, withdrawal of the waiver of sovereign immunity remains effective regardless of whether the action was filed before or after the effective date of the amendment; *Donaldson v. Dep't of Transp.*, 414 S.E.2d 638 (1992), is no longer controlling in light of *Curtis v. Bd. of Regents*, 416 S.E.2d 510 (1992). *McElmurray v. Augusta-Richmond County*, 274 Ga. App. 605, 618 S.E.2d 59 (2005).

1991 amendment applicable to action arising after January 1, 1991. — The 1991 amendment to Ga. Const. 1983, Art. I, Sec. II, Para. IX, extending sovereign immunity "to the state and all of its departments and agencies," governed an action which arose on September 1, 1991, and was filed on November 24, 1992. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

The 1991 amendment extending sovereign immunity "to the state and all of its departments and agencies" includes county-wide school districts created pursuant to Ga. Const. 1983, Art. VIII, Sec. V, Para. I and O.C.G.A. § 20-2-50. *Coffee County Sch. Dist. v. Snipes*, 216 Ga. App. 293, 454 S.E.2d 149 (1995).

For application of 1991 amendment, see *Rawls v. Bulloch County Sch. Dist.*, 223 Ga. App. 234, 477 S.E.2d 383 (1996).

1991 amendment does not apply retroactively. — The 1991 amendment to Ga. Const. 1983, Art. I, Sec. II, Para. IX, eliminating the insurance waiver, under which sovereign immunity in tort actions was waived to the extent that the state agencies or employees were covered by insurance, is not to be applied retroactively. *Brown v. Hall County*, 262 Ga. 172, 416 S.E.2d 90 (1992).

When an action was filed before the effective date of the 1991 amendment to Ga. Const. 1983, Art. I, Sec. II, Para. IX,

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the amended provision did not apply. *Vannostran v. Mountainside Bldrs. Inc.*, 262 Ga. 172, 416 S.E.2d 89 (1992).

The 1991 amendment has prospective effect only and does not act to withdraw any waiver of sovereign immunity for actions pending on January 1, 1991, the amendment's effective date. *Donaldson v. DOT*, 262 Ga. 49, 414 S.E.2d 638 (1992).

Since a plaintiff filed suit two months prior to January 1, 1991, the date the amendment to Ga. Const. 1983, Art. I, Sec. II, Para. IX became effective, the amendment did not apply, and the Department of Transportation waived its sovereign immunity to the extent of its available insurance. *Bob v. Scruggs Co.*, 204 Ga. App. 375, 419 S.E.2d 100, cert. denied, 204 Ga. App. 921, 419 S.E.2d 100 (1992).

Although the complaint was filed after the effective date of the constitutional amendment, since the cause of action accrued before January 1, 1991, the waiver of any existing defense of sovereign immunity was not withdrawn. *Dozier v. Clayton County Hosp. Auth.*, 206 Ga. App. 62, 424 S.E.2d 632 (1992).

Trial court erred in granting a school board's motion for summary judgment as to an injured party's personal injury claim based on sovereign immunity as: (1) the trial court applied the wrong version of Ga. Const. 1983, Art. I, Sec. II, Para. IX(e), which was amended, prospectively, after the accident; (2) the applicable version of Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) was in effect at the time of the accident in 1990; and (3) the parties agreed that an insurance policy would have constituted a waiver of the board's sovereign immunity, which implied that a policy existed; the case was remanded so that the trial court could reconsider its decision in light of the correct law and any insurance policy. *Hart v. Appling County Sch. Bd.*, 266 Ga. App. 300, 597 S.E.2d 462 (2004).

Complaint filed prior to amendment's effective date. — The trial court's dismissal of the negligence action alleging breach of contract in the death of plaintiff's spouse based on sovereign immunity was reversed when the plaintiff filed a complaint prior to the effective date

of the 1990 amendment to Ga. Const. 1983, Art. I, Sec. II, Para. IX. These provisions do not withdraw any waiver of sovereign immunity for actions pending on the amendment's effective date of January 1, 1991. At the time of this action, the Board of Regents maintained a self-insurance program that provided liability insurance for board employees and under the constitutional provision then in effect, the board waived sovereign immunity to the extent of the liability insurance provided. *Wilson v. Board of Regents*, 262 Ga. 413, 419 S.E.2d 916 (1992).

Liability for actions accruing before effective date. — In an action brought against a local school board for the wrongful death of a child struck and killed by an automobile, since the fatal accident occurred prior to the effective date of subsection (a) of Ga. Const. 1983, Art. I, Sec. II, Para. IX, January 1, 1983, the board members' defense of sovereign immunity was not waived. *Hill v. McClure*, 171 Ga. App. 588, 320 S.E.2d 562 (1984).

Construction of duplicative constitutional grants of sovereign immunity. — Since the authority to waive the sovereign immunity of the state, and concomitantly that of the counties of the state, is given to the General Assembly by Ga. Const. 1983, Art. I, Sec. II, Para. IX, it was not necessary for the people to give an identical authority of waiver to the General Assembly by Ga. Const. 1983, Art. IX, Sec. II, Para. IX. However, this duplicative grant does not render the two provisions inconsistent and does not indicate an intent that the Article I provision would not reserve sovereign immunity to counties. *Toombs County v. O'Neal*, 254 Ga. 390, 330 S.E.2d 95 (1985).

The 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX, extending sovereign immunity to all state departments and agencies regardless of any insurance, did not divest the General Assembly of authority under Ga. Const. 1983, Art. IX, Sec. II, Para. IX, to waive the immunity of counties based on motor vehicle liability insurance; therefore, the amendment did not abrogate the provisions of O.C.G.A. § 33-24-51 and a county's governmental immunity was waived

to the extent of liability insurance purchased. *Daniels v. Decatur County*, 212 Ga. App. 378, 441 S.E.2d 790 (1994).

The term “governmental immunity,” as used in O.C.G.A. § 33-24-51, is synonymous with “sovereign immunity” and does not encompass both “sovereign” and “official” immunity. Thus, the waiver of immunity provided by the statute is not in conflict with Ga. Const. 1983, Art. I, Sec. II, Para. IX since it provides both a waiver of sovereign immunity and the extent of such waiver, i.e., the extent of liability insurance coverage. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

Construction with O.C.G.A. §§ 9-4-7(c) and 50-13-10(a). — Georgia Court of Appeals disagreed that the “may be determined” language in O.C.G.A. § 50-13-10(a) was evidence that the statute was but one of several methods by which to challenge the validity of an agency rule and that O.C.G.A. § 9-4-7(c), as well as case authority, impliedly contemplated the legitimacy of challenges to agency rules outside the purview of the Administrative Procedure Act, O.C.G.A. § 50-13-1 et seq. *Live Oak Consulting, Inc. v. Dep’t of Cmty. Health*, 281 Ga. App. 791, 637 S.E.2d 455 (2006).

Construction of O.C.G.A. § 50-21-24. — In order for state policy decisions related to the provision of emergency services not to be directly or indirectly put on trial, the Supreme Court of Georgia construed O.C.G.A. § 50-21-24(6), an exception to the waiver of sovereign immunity, to provide complete protection of the policy-making decisions in providing police and fire services from judicial review, as such construction accomplished a balance between the inherently unfair and inequitable results from the strict application of sovereign immunity and the need to limit the state’s exposure to tort liability that the General Assembly expressed as its goal in O.C.G.A. § 50-21-21. *Ga. Forestry Comm’n v. Canady*, 280 Ga. 825, 632 S.E.2d 105 (2006).

State immunity in federal court. — Although the state has waived the state’s sovereign immunity in state court to the extent the state agencies or employees were covered by insurance, Ga. Const. 1983, Art. I, Sec. II, Para. IX cannot be

read as waiving the state’s Eleventh Amendment immunity in federal court. *Hobbs v. Georgia DOT*, 785 F. Supp. 980 (N.D. Ga. 1991), aff’d in part and vacated in part on other grounds, 999 F.2d 1526 (11th Cir. 1993).

Authority of state courts over federally-based claims against state officers and employees. — The 1990 amendment addresses only the immunity defense of state officers and employees to state-based claims, not the authority of the state’s courts to hear federally-based claims against state officers and employees. Thus, the amendment cannot be construed as removing subject matter jurisdiction over federal civil rights claims from the courts of Georgia. *Turner v. Giles*, 264 Ga. 812, 450 S.E.2d 421 (1994), cert. denied, 514 U.S. 1108, 115 S. Ct. 1959, 131 L. Ed. 2d 851 (1995).

The courts of this state have subject matter jurisdiction over federally-based claims against state officers and employees and the consequent authority to rule on the merits of any defense that might be raised by the state officers and employees. *Turner v. Giles*, 264 Ga. 812, 450 S.E.2d 421 (1994), cert. denied, 514 U.S. 1108, 115 S. Ct. 1959, 131 L. Ed. 2d 851 (1995).

Whoever contracts with the state trusts to the good faith of the state, unless the state sees fit to disrobe itself of its sovereignty. *C.F.I. Constr. Co. v. Board of Regents of Univ. Sys.*, 145 Ga. App. 471, 243 S.E.2d 700, cert. dismissed, 242 Ga. 96, 249 S.E.2d 613 (1978).

County waiver of immunity in employment contracts. — Trial court erred in denying a county’s motion for summary judgment because under the clear terms of the County Code, overtime-exempt fire captains, after being promoted to the rank of captain, were not entitled to use compensatory time accrued more than a year earlier and they were not entitled to receive payment for their unused compensatory time as there was no written contract that promised them compensation for such time, thus, there was no waiver of the county’s sovereign immunity. *DeKalb County v. Kirkland*, 329 Ga. App. 262, 764 S.E.2d 867 (2014).

Rule permitting action against local government for constitutional

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question not applicable to state. — The rule which permits a citizen and taxpayer to maintain an action against a municipality or county to test the constitutionality of an ordinance or statute cannot be applied by analogy to a suit against the state, the latter being a sovereign power and not subject to suit without its consent. *Ramsey v. Hamilton*, 181 Ga. 365, 182 S.E. 392 (1935).

Standing to seek reformation of liability contract. — In certifying certain questions to the Georgia Supreme Court, the federal Court of Appeals concluded that it is an open question of Georgia law whether a person injured by a municipality has a beneficial interest in the municipality's liability contract sufficient to provide standing to seek reformation. *Florida Int'l Indem. Co. v. City of Metter*, 952 F.2d 1297 (11th Cir. 1992).

Immunity extends to counties. — Builder's contractual and quasi-contractual claims against a county and county officials for an interest in a sewer pumping station were properly dismissed by the trial court because the claims were barred by sovereign immunity as there was no written contract to enforce. *Layer v. Barrow County*, 297 Ga. 871, 778 S.E.2d 156 (2015).

Cited in *Hight v. Burden*, 180 Ga. App. 716, 350 S.E.2d 471 (1986); *Price v. DOT*, 182 Ga. App. 353, 356 S.E.2d 45 (1987); *Ostuni Bros. v. Fulton County Dep't of Pub. Works*, 184 Ga. App. 406, 361 S.E.2d 668 (1987); *Poss v. Georgia Regional Hosp.*, 676 F. Supp. 258 (S.D. Ga. 1987); *Cooper v. Swofford*, 258 Ga. 143, 368 S.E.2d 518 (1988); *Kurtz v. Williams*, 188 Ga. App. 14, 371 S.E.2d 878 (1988); *Jarrett v. Butts*, 190 Ga. App. 703, 379 S.E.2d 583 (1989); *Rogers v. Sharpe*, 206 Ga. App. 353, 425 S.E.2d 391 (1992); *Winchester Constr. Co. v. Miller County Bd. of Educ.*, 821 F. Supp. 697 (M.D. Ga. 1993); *Newsome v. Webster*, 843 F. Supp. 1460 (S.D. Ga. 1994); *Deaton v. Department of Cors.*, 212 Ga. App. 612, 443 S.E.2d 8 (1994); *Miller v. Georgia Ports Auth.*, 217 Ga. App. 876, 460 S.E.2d 100 (1995); *Christensen v. State*, 219 Ga. App. 10, 464 S.E.2d 14 (1995); *Northwest Ga. Regional*

Hosp. v. Wilkins, 220 Ga. App. 534, 469 S.E.2d 786 (1996); *Miller v. Department of Pub. Safety*, 221 Ga. App. 280, 470 S.E.2d 773 (1996); *Keenan v. Plouffe*, 267 Ga. 791, 482 S.E.2d 253 (1997); *Smith v. Little*, 234 Ga. App. 329, 506 S.E.2d 675 (1998); *Seay v. Cleveland*, 270 Ga. 64, 508 S.E.2d 159 (1998); *Maughon v. Bibb County*, 160 F.3d 658 (11th Cir. 1998); *Phillips v. Walls*, 242 Ga. App. 309, 529 S.E.2d 626 (2000); *Department of Veterans Servs. v. Robinson*, 244 Ga. App. 878, 536 S.E.2d 617 (2000); *Ga. Dep't of Human Res. v. Coley*, 247 Ga. App. 392, 544 S.E.2d 165 (2000); *Price v. State*, 250 Ga. App. 872, 553 S.E.2d 194 (2001); *Sylvester v. DOT*, 252 Ga. App. 31, 555 S.E.2d 740 (2001); *Conley v. Dawson*, 257 Ga. App. 665, 572 S.E.2d 34 (2002); *Johnson v. Ga. Dep't of Human Res.*, 278 Ga. 714, 606 S.E.2d 270 (2004); *EHCA Cartersville, LLC v. Turner*, 280 Ga. 333, 626 S.E.2d 482 (2006); *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 3:07-CV-084 (CDL), 2008 U.S. Dist. LEXIS 32116 (M.D. Ga. Apr. 18, 2008); *Bd. of Regents v. Canas*, 295 Ga. App. 505, 672 S.E.2d 471 (2009), overruled on other grounds, *Rivera v. Washington*, 2016 Ga. LEXIS 248 (Ga. 2016); *Romano v. Ga. Dep't of Corr.*, 303 Ga. App. 347, 693 S.E.2d 521 (2010); *Nelson v. Bd. of Regents of the Univ. Sys. of Ga.*, 307 Ga. App. 220, 704 S.E.2d 868 (2010); *Laskar v. Bd. of Regents of the Univ. Sys. of Ga.*, 320 Ga. App. 414, 740 S.E.2d 179 (2013); *Hartley v. Agnes Scott College*, 295 Ga. 458, 759 S.E.2d 857 (2014); *Effingham County v. Roach*, 329 Ga. App. 805, 764 S.E.2d 600 (2014), overruled on other grounds, *Rivera v. Washington*, 2016 Ga. LEXIS 248 (Ga. 2016); *Considine v. Murphy*, 297 Ga. 164, 773 S.E.2d 176 (2015).

Waiver

Specific waiver of immunity to provide limited time to file a claim. — Trial court did not err in granting the motion by the state transportation department to dismiss on the ground that sovereign immunity barred the claimant's personal injury claim against the state because the claimant did not timely file the claimant's notice of claim, as required by O.C.G.A. § 50-21-26(a), and substan-

tial compliance was not sufficient to meet that statute's requirement of proper notice; since the claimant did not timely file the claimant's notice of claim, the trial court was not permitted to consider the claimant's claim because the state only waived its sovereign immunity to the extent of providing a limited time to file a claim against the state, and since the claimant did not meet that requirement the trial court lacked subject matter jurisdiction to entertain the claim. *Williams v. Ga. DOT*, 275 Ga. App. 88, 619 S.E.2d 763 (2005).

When waiver occurs. — The operation of the waiver occurs at the time the action arises, not at the time the allegedly negligent act was committed. *Ethridge v. Price*, 194 Ga. App. 82, 389 S.E.2d 784 (1989), cert. denied, 194 Ga. App. 82, 389 S.E.2d 784 (1990).

Trial court properly granted summary judgment to an applicant for university employment as to the issue of finding a valid and written contract, thus finding that the state's sovereign immunity was waived; however, summary judgment was reversed, as jury issues remained as to: (1) whether the university Board of Regents breached the contract; (2) whether university officials violated an implied duty to use their best efforts to secure the Board's approval of the applicant's appointment, whether the officials acted in bad faith when they withdrew the appointment, and whether the officials were solely responsible for the failure of the Board to vote on the appointment; and (3) whether the applicant's alleged misconduct rendered the continued pursuit of the appointment impossible or impracticable, and whether the applicant ratified the withdrawal of the appointment. *Board of Regents of the Univ. Sys. v. Doe*, 278 Ga. App. 878, 630 S.E.2d 85 (2006).

Immunity not waived by removal to federal court. — When plaintiffs, a gun advocacy group and one of the group's members, and a church and the pastor, sought a declaratory judgment that O.C.G.A. § 16-11-127, regulating possession of weapons in a place of worship, violated their First Amendment right to the free exercise of religion, although defendant State of Georgia may have waived

the state's immunity by removing the case to federal court, the state's underlying sovereign immunity against the claims remained and the state was immune from suit. *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), aff'd, 687 F.3d 1244 (11th Cir. Ga. 2012).

No legislative act providing for waiver found. — Plaintiff employee did not show that defendant school system waived its immunity, Ga. Const. 1983, Art. I, Sec. II, Para. IX(e), because plaintiff pointed to no legislative act providing for a waiver. In addition, because defendant superintendent was a state employee whose alleged tort was committed while acting within the scope of the defendant's employment, the defendant also was entitled to immunity under O.C.G.A. § 50-21-25(a). *Polite v. Dougherty County Sch. Sys.*, No. 07-14108, 2008 U.S. App. LEXIS 17128 (11th Cir. Aug. 11, 2008) (Unpublished).

O.C.G.A. § 45-1-4 waives sovereign immunity. — Appellate court properly interpreted O.C.G.A. § 45-1-4 as creating an express waiver of sovereign immunity by prohibiting a public employer from retaliating against its employees, defining a public employer, and providing remedies available to an employee upon a successful retaliation claim being established. *Colon v. Fulton County*, 294 Ga. 93, 751 S.E.2d 307 (2013), overruled on other grounds, *Rivera v. Washington*, 2016 Ga. LEXIS 248 (Ga. 2016).

Equity claims against the state have not been waived by statute. *Dollar v. Olmstead*, 232 Ga. App. 520, 502 S.E.2d 472 (1998).

Reliance on waiver. — A waiver of sovereign immunity cannot be withdrawn after a suit is filed in reliance on that waiver. *Hiers v. City of Barwick*, 262 Ga. 129, 414 S.E.2d 647 (1992).

Nuisance exception. — The 1990 constitutional amendment eliminating the insurance waiver provision and substituting a Tort Claims Act, O.C.G.A. § 50-21-20 et seq., waiver did not conflict with the nuisance exception to sovereign immunity and a municipality can be liable for creating or maintaining a nuisance which constitutes a danger to life and health or a taking of property. *City of*

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Thomasville v. Shank, 263 Ga. 624, 437 S.E.2d 306 (1993).

Trial court properly denied a city's motion to dismiss based on sovereign immunity because the landowners asserted that the damage from the city's drainage system amounted to an unlawful taking of their property for which sovereign immunity has been waived. City of Greensboro v. Rowland, 334 Ga. App. 148, 778 S.E.2d 409 (2015), cert. denied, 2016 Ga. LEXIS 154 (Ga. 2016).

No actions may be filed against a county without express statutory authority, except to the extent of any waiver of immunity provided in the Constitution and such waiver or qualification of immunity as is now or may hereafter be provided by Act of the General Assembly. Duffield v. DeKalb County, 242 Ga. 432, 249 S.E.2d 235 (1978).

County's participation in an interlocal risk management plan constituted liability insurance for the purpose of waiving the county's sovereign immunity to the extent of the plan's coverage. Gilbert v. Richardson, 264 Ga. 744, 452 S.E.2d 476 (1994).

Even though the 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX eliminated the language under which O.C.G.A. § 36-85-20 was found unconstitutional void, the revision did not resurrect the statute and, accordingly, the statute provided no basis for finding a county's participation in an interlocal risk management plan was not a waiver of sovereign immunity. The county's purchase of such insurance agreement constituted the purchase of insurance under O.C.G.A. § 33-24-51(b) and the county waived its sovereign immunity to the extent of such coverage; reversing in part, Gilbert v. Richardson, 211 Ga. App. 795, 440 S.E.2d 684 (1994). Gilbert v. Richardson, 264 Ga. 744, 452 S.E.2d 476 (1994).

County's "risk management fund" for the investigation and defense of tort claims was a self-insurance plan constituting liability insurance which waived sovereign immunity within the meaning of the former provisions of Ga. Const. 1983, Art. I, Sec. II, Para. IX and O.C.G.A.

§ 33-24-51. Mims v. Clanton, 222 Ga. App. 657, 475 S.E.2d 662 (1996).

County's purchase of a general liability insurance policy for purposes of the waiver of sovereign immunity was authorized by Ga. Const. 1983, Art. I, Sec. II, Para. IX and an accident involving the operation of a back hoe owned by the county was covered by the policy. Crider v. Zurich Ins. Co., 222 Ga. App. 177, 474 S.E.2d 89 (1996).

In a negligence action by a student against a school system and physical education teacher, the system and teacher were entitled to the defense of sovereign immunity, and there was no waiver of immunity by the mere existence of the system's liability insurance policy. Crisp County Sch. Sys. v. Brown, 226 Ga. App. 800, 487 S.E.2d 512 (1997).

In a wrongful death action against the Georgia Department of Corrections and state and county officials, the admitted existence of liability insurance did not amount to a waiver of sovereign immunity. Bontwell v. Department of Cors., 226 Ga. App. 524, 486 S.E.2d 917 (1997).

In an arrestee's 42 U.S.C. § 1983 suit against a lead pursuit deputy and the supervisor for using excessive force to stop the arrestee's car during a high-speed chase, a county was not entitled to immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) from liability for negligence because the county waived its immunity pursuant to O.C.G.A. § 33-24-51(b) by purchasing liability insurance coverage to cover the negligence of county employees arising from the use of a motor vehicle. Harris v. Coweta County, No. 3:01-CV-148-WBH, 2003 U.S. Dist. LEXIS 27348 (N.D. Ga. Sept. 25, 2003).

In a worker's suit alleging negligence on the part of a county with regard to the county allegedly failing to properly instruct and supervise the worker in the use of a portable tar kettle machine, the trial court erred by granting the county's motion for a judgment on the pleadings based on sovereign immunity as the worker sufficiently alleged that the machine was a vehicle as contemplated by O.C.G.A. § 33-24-51, which established a waiver of sovereign immunity if the county had purchased liability insurance to cover dam-

ages and injuries arising from the use of motor vehicles under the county's management. *Hewell v. Walton County*, 292 Ga. App. 510, 664 S.E.2d 875 (2008).

Waiver through furnishing insurance. — Although O.C.G.A. § 45-9-5 expresses a legislative intent that sovereign immunity of the state is not to be waived through the furnishing of insurance authorized by O.C.G.A. § 45-9-4, the language of this provision of the constitution forces the court to reach a contrary result. *Price v. DOT*, 257 Ga. 535, 361 S.E.2d 146 (1987) (decided prior to 1990 amendment).

When negligence in performing official acts is covered by liability insurance, the officers' official immunity is waived to the extent to which this coverage will pay for the claims asserted. *Swofford v. Cooper*, 184 Ga. App. 50, 360 S.E.2d 624, *aff'd*, 258 Ga. 143, 368 S.E.2d 518 (1987) (decided prior to 1990 amendment).

While sovereign immunity is waived by a county to the extent of the county's liability coverage under an insurance agreement, the existence and amount of the coverage is not a proper subject for jury consideration. *Early County v. Fincher*, 184 Ga. App. 47, 360 S.E.2d 602, *cert. denied*, 184 Ga. App. 909, 360 S.E.2d 602 (1987) (decided prior to 1990 amendment).

When insurance coverage is obtained by a government entity, the government entity waives its sovereign immunity to the extent of such insurance coverage; however, when the plain terms of the policy provide that there is no coverage for the particular claim, the policy does not create a waiver of sovereign immunity as to that claim. *Dugger v. Sprouse*, 257 Ga. 778, 364 S.E.2d 275 (1988) (decided prior to 1990 amendment).

The mere purchase of liability insurance does not automatically waive sovereign immunity. Rather, sovereign immunity is waived only when the insurer of a state entity satisfies a claim under the coverage provided. If payment is not required under the contract, and bad faith has not been shown, there is no waiver of immunity. *Ward v. Bulloch County*, 258 Ga. 92, 365 S.E.2d 440 (1988) (decided prior to 1990 amendment).

Case was remanded to the trial court to

allow the parties to perfect the record on the issue of insurance coverage which could constitute a waiver of sovereign immunity. *Carter v. Fulton-DeKalb County Hosp. Auth.*, 209 Ga. App. 384, 433 S.E.2d 433 (1993).

Because there was no evidence of record that a city maintained liability insurance that would cover the occurrences forming the basis of the developers' claims, there was no waiver of the city's sovereign immunity pursuant to O.C.G.A. § 36-33-1(a); thus, sovereign immunity was a viable defense as to the city and the city officials acting in their official capacities. *Wendelken v. JENK LLC*, 291 Ga. App. 30, 661 S.E.2d 152 (2008).

In determining if a county waived the county's sovereign immunity through the voluntary purchase of liability insurance under the second sentence of O.C.G.A. § 33-24-51(b), a trial court erred in considering the definition of "motor vehicle" provided in O.C.G.A. § 36-92-1; rather, "any motor vehicle" was defined as a vehicle that was capable of being driven on the public roads that was covered by a liability insurance policy purchased by the county. *Glass v. Gates*, 311 Ga. App. 563, 716 S.E.2d 611 (2011), *aff'd*, 291 Ga. 350, 729 S.E.2d 361 (2012).

County purchase of liability insurance. — The doctrine of sovereign immunity applies to all state department and agencies, including counties, regardless of the purchase of liability insurance. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 470 S.E.2d 479 (1996).

Private liability insurance of public official. — A teacher's private liability insurance did not result in a waiver of sovereign immunity available to the teacher as an agent of the school district; a negligence action against the teacher was barred by official immunity as there was no waiver by the school district. *Parker v. Wynn*, 211 Ga. App. 78, 438 S.E.2d 147 (1993).

Purchase of insurance by government employees. — In action against a school principal and teacher accruing prior to the 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX, official immunity enjoyed by the defendants was not waived by their individual

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purchase of liability insurance through their professional associations. *Guthrie v. Irons*, 211 Ga. App. 502, 439 S.E.2d 732 (1993), disapproved in part, *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

In a personal injury action against a county when the county's liability insurance policy did not pay unless the insured's obligation exceeded a floor of \$250,000, and the policy provided a ceiling of \$750,000 per occurrence, immunity was waived only to the extent of the available insurance coverage. *Mims v. Clanton*, 215 Ga. App. 665, 452 S.E.2d 169 (1994), cert. denied, 1995 Ga. Lexis 404 (1995).

Trial court erred in dismissing the farmers' tort claims based on sovereign immunity as the date that an action was filed did not determine whether the 1991 amendment to Ga. Const. 1983, Art. I, Sec. II, Para. IX controlled; as a truck was used for spreading sewage sludge on the farmers' property, damages resulting from the spreading of the sludge from the truck were injuries arising by reason of use of the truck for purposes of O.C.G.A. § 33-24-51(b). *McElmurray v. Augusta-Richmond County*, 274 Ga. App. 605, 618 S.E.2d 59 (2005).

County's maintenance of a reserve fund for the purpose of paying claims and the payment of claims therefrom did not constitute a self-insurance plan so as to defeat its right to assert sovereign immunity. *Tillman v. Mastin*, 216 Ga. App. 3, 453 S.E.2d 85 (1994).

Establishment of general liability trust fund waived immunity. — Establishment of comprehensive general liability trust fund for Department of Public Safety employees, covering negligence in performance of official acts, constituted a waiver of sovereign immunity to the extent of the available insurance in the case of an accident resulting from a high-speed chase by police. *Martin v. Georgia Dep't of Pub. Safety*, 257 Ga. 300, 357 S.E.2d 569 (1987), cert. denied, 484 U.S. 998, 108 S. Ct. 685, 98 L. Ed. 2d 638 (1988) (decided prior to 1990 amendment).

Umbrella liability policy, together with trust fund created by hospital, con-

stituted "liability insurance protection" within the meaning of Ga. Const. 1983, Art. I, Sec. II, Para. IX and therefore acted as a waiver of sovereign immunity. Nothing in the constitution or the statutes requires that governmental entities elect commercial insurance coverage rather than self-insurance or a combination of self-insurance and commercial insurance in order to waive sovereign immunity. *Litterilla v. Hospital Auth.*, 262 Ga. 34, 413 S.E.2d 718 (1992).

Entering into contractual obligation no waiver of immunity without written proof of the contract. — The mere activity of the state or one of its political subdivisions in entering into an otherwise valid contractual obligation with one of its citizens is not an implied waiver of its cloak of immunity. *C.F.I. Constr. Co. v. Board of Regents of Univ. Sys.*, 145 Ga. App. 471, 243 S.E.2d 700, cert. dismissed, 242 Ga. 96, 249 S.E.2d 613 (1978).

Trial court improperly denied summary judgment to the Board of Regents since the plaintiff failed to present sufficient evidence to establish the existence of a written contract between the parties; therefore, the Board's sovereign immunity was not waived. *Bd. of Regents of the Univ. Sys. of Ga. v. Winter*, 331 Ga. App. 528, 771 S.E.2d 201 (2015), overruled on other grounds, *Rivera v. Washington*, 2016 Ga. LEXIS 248 (Ga. 2016).

Waiver with regard to contracts did not apply to university course catalog. — Waiver of the state's sovereign immunity with regard to contracts in writing did not apply to permit a state university student to assert breach of contract by suspending the student for theft, since the university's undergraduate catalog, which expressly stated that it was informational rather than contractual, did not constitute a contract that could be breached. *Carr v. Bd. of Regents of the Univ. Sys.*, No. 07-10126, 2007 U.S. App. LEXIS 22715 (11th Cir. Sept. 24, 2007) (Unpublished).

No waiver of immunity in oral contracts. — Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) provides governmental defendants with sovereign immunity unless the immunity has been specifically waived. Even though sovereign immunity has

been waived for the breach of any written contract, O.C.G.A. § 50-21-1, there has been no such waiver for oral contracts. *Soloski v. Adams*, 600 F. Supp. 2d 1276 (N.D. Ga. 2009).

Unsigned contract document did not waive sovereign immunity. — Computer contractor that had an unsigned copy of an agreement and an invoice for services rendered failed to show that the contractor had a signed agreement with a state agency for purposes of the state's waiver of immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c). The contractor's claims for unjust enrichment were also barred by sovereign immunity. *Ga. Dep't of Cmty. Health v. Data Inquiry, LLC*, 313 Ga. App. 683, 722 S.E.2d 403 (2012).

Waiver via contract. — Trial court properly denied the Georgia Department of Corrections' (GDOC's) motion for summary judgment on sovereign immunity grounds because the GDOC waived sovereign immunity by entering into a contract with the roofing company and the doctrine of equitable subrogation gave the roofing company's surety the ability to step into the shoes of the roofing company and file suit against the GDOC once the surety incurred liability and paid the obligations of the surety's principal under the bond. *State Dep't of Corr. v. Developers Sur. & Indem. Co.*, 324 Ga. App. 371, 750 S.E.2d 697 (2013).

Arbitration award against county not barred by immunity. — Dismissal of the law clerks' motion to confirm an arbitration award in the clerks' favor on the clerks' group-pay grievance against a county due to alleged pay disparity was not warranted as the back pay award was not barred by the doctrine of sovereign immunity; accordingly, there was no manifest disregard of the law by the arbitrator. *Fulton County v. Lord*, 323 Ga. App. 384, 746 S.E.2d 188 (2013).

Waiver of immunity for design claims did not waive immunity for inspection claims. — Dismissal of an injured couple's claims against the DOT to the extent the claims were based on a theory of negligent inspection of the county-owned area in which the accident occurred was proper under O.C.G.A.

§ 50-21-24(8); the waiver of immunity with respect to design claims under § 50-21-24(10) did not extend to waive immunity for inspection claims. *Diamond v. DOT*, 326 Ga. App. 189, 756 S.E.2d 277 (2014).

Corporations and independent contractors doing business with the state are not included within the Georgia Tort Claims Act's (GTCA's), O.C.G.A. § 50-21-22(7), definition of employee, thus, the state is immune from liability if the tort was committed by a third party and under the GTCA, the Georgia Department of Transportation's sovereign immunity has not been waived for the negligence committed by independent contractors. *Ga. DOT v. Wyche*, 332 Ga. App. 596, 774 S.E.2d 169 (2015).

Application of Tort Claims Act

Tort Claims Act not exclusive means for legislature to waive immunity. — Considering the 1991 amendment as a whole, sovereign immunity is waived by any legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver; thus, the enactment of the Tort Claims Act, O.C.G.A. § 50-21-20 et seq., was but one of the ways the legislature could constitutionally waive sovereign immunity. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

No legislative intent to withdraw sovereign immunity. — The 1991 constitutional amendment, when viewed in light of the Georgia Tort Claims Act, O.C.G.A. § 51-21-20 et seq., that was passed under its authority, does not evidence any intent by the legislature to withdraw the waiver of sovereign immunity, rather, the apparent intent of the amendment and the Tort Claims Act enacted under its authority is to redraw and redefine the terms of the state's waiver of sovereign immunity. *Curtis v. Board of Regents of the Univ. Sys.*, 262 Ga. 226, 416 S.E.2d 510 (1992).

Trial court did not err in dismissing the spouse's wrongful death claim against the county based on sovereign immunity because O.C.G.A. § 46-5-131(a) did not strictly meet the criteria for statutory waiver of sovereign immunity. *Marshall v.*

Application of Tort Claims Act (Cont'd)

McIntosh County, 327 Ga. App. 416, 759 S.E.2d 269 (2014).

Venue under the Tort Claims Act. — The enactment of O.C.G.A. § 50-21-28, the venue provision of the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., was a valid exercise of the General Assembly's authority pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX. *Campbell v. Department of Cors.*, 268 Ga. 408, 490 S.E.2d 99 (1997).

Exclusion of counties and school districts. — Ga. Const. 1983, Art. I, Sec. II, Para. IX, provided that counties and other political subdivisions of the State of Georgia were absolutely immune from suit for tort liability, unless that immunity was specifically waived pursuant to an Act of the General Assembly which specifically provided that sovereign immunity was waived and the extent of such waiver, and the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., provided for a limited waiver of the state's sovereign immunity for the torts of its officials and employees. However, the Act expressly excluded counties and school districts from the waiver, O.C.G.A. § 50-21-22(5); because plaintiff failed to identify any legislative Act that waived the immunity of defendant county or school district, the county defendants were immune from suit on plaintiff's state law claims. *McDaniel v. Fulton County Sch. Dist.*, 233 F. Supp. 2d 1364 (N.D. Ga. 2002).

Highway design exception. — Decedent was killed when the taxi in which the decedent was riding spun out of control on a rain-slick interstate highway and hit a tree. Assuming arguendo that the Georgia Department of Transportation (DOT) was immune from a negligence suit under O.C.G.A. § 50-21-24 for a city employee's negligent inspection of the taxi's tires, expert testimony that the tree's proximity to the highway may have violated generally accepted engineering standards rendered the DOT liable under § 50-21-24(10), the design standards exception. *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

Slip and fall on sidewalk. — Trial court did not err by dismissing a pedestri-

an's slip and fall claims against the Georgia Department of Transportation (GDOT) based on the bar of sovereign immunity because GDOT's specific decision to forego routine inspections, repairs, or maintenance of sidewalks within a state right-of-way as a result of prioritizing maintenance activities based on budgetary constraints fell under the discretionary function exception. *Hagan v. Ga. DOT*, 321 Ga. App. 472, 739 S.E.2d 123 (2013).

Actions motivated by intent or malice. — Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., provided immunity from liability for torts committed during a state employee's performance of official duties without regard to intent or malice. Therefore, despite evidence that two university officials' actions in locking a suspended professor out of the professor's office and laboratory were motivated by malice and ill-intent, the officials were entitled to immunity under the Act. *Edmonds v. Bd. of Regents*, 302 Ga. App. 1, 689 S.E.2d 352 (2009), cert. denied, No. S10C0824, 2010 Ga. LEXIS 437 (Ga. 2010).

DOC did not waive immunity by allowing counties to house state prisoners. — County that housed state inmates in the county's prison under O.C.G.A. § 42-5-53 functioned as an independent contractor for which the state did not waive sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., and the county employees who were allegedly negligent in their handling of an inmate did not fall within the GTCA's definition of state officer or employee, O.C.G.A. § 50-21-22(7); therefore, the State Department of Corrections was entitled to be dismissed from the inmate's suit based on sovereign immunity. *Ga. Dep't of Corr. v. James*, 312 Ga. App. 190, 718 S.E.2d 55 (2011), overruled by *Rivera v. Washington*, 2016 Ga. LEXIS 248 (Ga. 2016).

Officials and Their Functions

Action against officer or agent of state not permitted. — No citizen and taxpayer, as such, has the right to initiate in the citizen's own behalf, without the consent of the state, an action against a

state officer in the officer's official capacity, to enjoin and restrain the officer from acting under a statute which is alleged to be unconstitutional and void; such an action being in effect an action against the state itself. *Ramsey v. Hamilton*, 181 Ga. 365, 182 S.E. 392 (1935).

Any action against an officer or agent of the state, in the officer's or agent's official capacity, in which a judgment can be rendered controlling the action or property of the state in a manner not prescribed by statute, is an action against the state and cannot be maintained without its consent. *Hennessy v. Webb*, 245 Ga. 329, 264 S.E.2d 878 (1980).

Agent of state cannot be made party to action. — The state cannot be made a party defendant in an action in any court, except by consent of the proper authorities; nor can this be done so as to affect the rights of the state by making the agent of the state, appointed by its authorities, a party; and any judgment against such agent cannot affect the rights of the state, or affect its position. *Ramsey v. Hamilton*, 181 Ga. 365, 182 S.E. 392 (1935).

Based on O.C.G.A. § 9-2-61, an arrestee's excessive force claim against a sheriff's major in the major's individual capacity was revived after a voluntary dismissal but assuming that the complaint alleged actual malice under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), as to the major's conduct, the tort claim had to be brought against the state under O.C.G.A. § 50-21-25(b); however, the state did not waive the state's sovereign immunity under O.C.G.A. § 50-21-23(b) for such claim to be brought in federal court. *Jude v. Morrison*, 534 F. Supp. 2d 1365 (N.D. Ga. 2008).

Scope of immunity granted public official. — In Georgia, the distinction between a ministerial and a discretionary act, and therefore the scope of the immunity granted a public official in any given situation, turns upon the specific character of the complained-of act, not the more general nature of the job. *Miree v. United States*, 490 F. Supp. 768 (N.D. Ga. 1980).

The term "official functions," as used in subsection (d) of Ga. Const. 1983, Art. I, Sec. II, Para. IX, means any act performed

within a public officer's or employee's scope of authority, including both ministerial and discretionary acts. No immunity is provided for ministerial acts negligently performed or for ministerial or discretionary acts performed with malice or an intent to injure; however, consistent with prior law, immunity is provided for the negligent performance of discretionary acts. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

Pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), a police officer's fingerprinting of a plaintiff, in a way that caused the plaintiff's body to be pulled against the officer's body, was sufficient to support a state law assault and battery claim; officer's motion for summary judgment on grounds of official immunity was properly denied. *Hicks v. Moore*, 422 F.3d 1246 (11th Cir. 2005).

The term "actual malice" as it is used in the context of official immunity requires a deliberate intention to do wrong and excludes any liability for injuries or damages if officers and employees act with implied malice in the performance of their official functions. *Morrow v. Hawkins*, 266 Ga. 390, 467 S.E.2d 336 (1996). But see *Parker v. State*, 270 Ga. 256, 507 S.E.2d 744 (1998), overruled on other grounds, 287 Ga. 881, 700 S.E.2d 394 (2010).

"Ill will" is itself not enough to establish actual malice; rather, ill will must also be combined with the intent to do something wrongful or illegal. *Adams v. Hazelwood*, 271 Ga. 414, 520 S.E.2d 896 (1999).

Acting with implied malice will not deny a defendant an official immunity defense. *Coffey v. Brooks County*, 231 Ga. App. 886, 500 S.E.2d 341 (1998).

Actual malice of officer. — In an action against a police officer for injuries sustained in a collision with a patrol car, summary judgment for the officer was proper because the officer was exercising the officer's discretion in deciding to pursue a suspected stolen car and, therefore, was liable only if the officer acted "with actual malice or with actual intent to cause injury." *Williams v. Solomon*, 242 Ga. App. 807, 531 S.E.2d 734 (2000).

Actual malice of officer not shown. — Because the plaintiff did not establish

Officials and Their Functions (Cont'd)

that the sheriff's deputies possessed "a deliberate intention to do wrong" sufficient to satisfy the actual malice standard to fit the exception to the deputies' official immunity from liability, the plaintiff's tort claims were properly dismissed on summary judgment; contrary to the plaintiff's assertion, actual malice could not be inferred from the facts of the warrantless arrest. *Bashir v. Rockdale County*, 445 F.3d 1323 (11th Cir. 2006).

Violation of police manual did not make decision ministerial act.

— Georgia Court of Appeals properly held that a county police officer was entitled to summary judgment on the officer's claim of official immunity as the officer's violations of a county police manual did not change the officer's discretionary decision to engage in a high-speed chase into a ministerial act; the bumping of a fleeing suspect's car did not constitute a deliberate intention to do wrong so as to satisfy the actual malice requirement of Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) since: (1) in a prior case, an officer did not act with a deliberate intent to do wrong in violating a state law; (2) although the officer bumped the fleeing vehicle during a high-speed chase on the interstate system of a major city, which might be considered reckless, actual malice required more than reckless conduct; and (3) the officer did not intend to physically harm the suspect or any bystander. *Phillips v. Hanse*, 281 Ga. 133, 637 S.E.2d 11 (2006).

Suit in official capacity. — Plaintiff's state-law tort claims against a police chief, two police officers, and a county were barred by the doctrine of sovereign immunity, Ga. Const. 1983, Art. I, Sec. II, Para. IX(e), since the individual defendants were sued in their official capacities, and there was no statutory waiver of immunity as required by O.C.G.A. § 36-1-4. *Payne v. Dekalb County*, 414 F. Supp. 2d 1158 (N.D. Ga. 2004).

Immunity if acts done within scope of authority and without wilfulness, fraud, malice, or corruption. — Under sovereign immunity principles, a public officer or employee acting within the scope of the employee's authority and engaged

in discretionary as opposed to ministerial functions is entitled to immunity from suit, provided the acts complained of are done within the scope of the officer's authority and without wilfulness, fraud, malice, or corruption. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992); *Teston v. Collins*, 217 Ga. App. 829, 459 S.E.2d 452 (1995).

Since at the time the sheriff terminated certain deputies, a county sheriff believed with some justification that the sheriff had the authority to hire and fire deputies, and there was no evidence that the sheriff acted with malice or intent to injure the deputies when the sheriff refused to rehire them, the sheriff was entitled to official immunity from their claims for tortiously interfering with employment contracts. *Aspinwall v. Herrin*, 879 F. Supp. 1227 (S.D. Ga. 1994).

An officer who, in the performance of the officer's official duties, shoots another in self-defense is shielded from tort liability by the doctrine of official immunity. *Kidd v. Coates*, 271 Ga. 33, 518 S.E.2d 124 (1999).

Although a county police officer's actions in seeking arrest warrants may have been misguided, because there was no evidence that the actions were taken with actual malice, the officer was protected by official immunity as a police officer, and the officer's motion for summary judgment was properly granted. *Todd v. Kelly*, 244 Ga. App. 404, 535 S.E.2d 540 (2000).

Without proof by the administrator of the decedent inmate's estate that any actions undertaken by the county officers and employees sued for wrongful death amounted to wilfulness, malice, or corruption, they were entitled to official immunity as a matter of law; further, any failure to adopt other or additional requirements as to their policies of supervision and training in dealing with a suicidal inmate did not amount to wilfulness, malice, or corruption. *Middlebrooks v. Bibb County*, 261 Ga. App. 382, 582 S.E.2d 539 (2003).

Off duty officer had authority to arrest for crimes committed in the officer's presence, and this authority extended outside of the officer's jurisdiction; because the

officer's belief that the arrestee was driving drunk was reasonable, the arrest was justifiable, and since the arrestee failed to show that the officer acted with actual malice or intent to injure, the officer was entitled to official immunity in a suit brought by the arrestee. *Delong v. Domenici*, 271 Ga. App. 757, 610 S.E.2d 695 (2005).

Officer was performing a discretionary act when the officer concluded that a person was driving recklessly and under the influence in a fatal traffic accident; since there was no evidence that the officer acted with actual malice, summary judgment in favor of the officer and a county in a suit brought by the person against the officer and the county, based on the filing of criminal charges which were later dropped, was proper. *Tant v. Purdue*, 278 Ga. App. 666, 629 S.E.2d 551 (2006).

Because two police officers were performing an official discretionary function when they arrested a former arrestee, and the former arrestee failed to show that the officers acted with the intent to do something wrong or illegal, both officers were entitled to official immunity pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(d). *Carroll v. Henry County*, 336 B.R. 578 (N.D. Ga. 2006).

Deputy did not show entitlement to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) as to the claims of false arrest and malicious prosecution because plaintiff offered evidence tending to show that the deputy violated Ga. Const. 1983, Art. I, Sec. I, Para. XXIII and O.C.G.A. § 51-7-20; thus, there were material fact issues precluding summary judgment. *Jordan v. Mosley*, 487 F.3d 1350 (11th Cir. 2007).

City officials were entitled to summary judgment to the extent developers asserted claims against them in their personal capacities because the evidence was insufficient to create a jury issue on whether they acted with actual malice as required for official immunity pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) where the developers pointed to no specific evidence in the record to support the characterization of the officials' actions. *Wendelken v. JENK LLC*, 291 Ga. App. 30, 661 S.E.2d 152 (2008).

In an action alleging, inter alia, assault and false arrest, three police officers were entitled to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) because the officers' conduct in arresting plaintiff arrestee for disorderly conduct was based on a discretionary act and was not shown to be based on actual malice; the arrestee had used expletives in telling the officers to leave the arrestee's home after the officers executed an arrest warrant for the arrestee's fiancé, and there were children who heard the offensive language outside the arrestee's home. *Selvy v. Morrison*, 292 Ga. App. 702, 665 S.E.2d 401 (2008).

Public official protected from liability in performance of discretionary duties. — A discretionary act is generally characterized as one which is the result of personal discretion or judgment. A ministerial act, on the other hand, requires merely the execution of a specific duty arising from fixed or designated facts. A public official is protected from liability in the performance of discretionary duties, whereas ministerial acts are committed at the official's own risk. *Miree v. United States*, 490 F. Supp. 768 (N.D. Ga. 1980).

The court found that the plaintiff was entitled to official immunity as to the student's state law claims because the facts of this case may demonstrate that the assistant principal acted with gross indifference or reckless disregard of the student's rights in the strip search of the student but did not amount to "actual malice" as interpreted by the Georgia Supreme Court. *D.H. v. Clayton County Sch. Dist.*, 52 F. Supp. 3d 1261 (N.D. Ga. 2014).

Immunity of school officials conducting strip search. — School officials lacked reasonable individualized suspicion to strip search a middle school student in the search for drugs; thus, the official was not entitled to qualified immunity since the strip search was not reasonable at its inception. *D.H. v. Clayton County Sch. Dist.*, 52 F. Supp. 3d 1261 (N.D. Ga. 2014).

Discretionary duties found. — In a personal injury action against a county, sheriff, and deputy sheriff, arising from an automobile collision which occurred when the deputy was on an emergency

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call, since the deputy was performing an official discretionary function, the deputy was immune from personal liability under the 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994); *Tkacik v. Chriss*, 247 Ga. App. 86, 543 S.E.2d 392 (2000).

Police officer's decision to pursue a car in response to reports that it had eluded police and under a reasonable perception that it could be stolen was discretionary. *Morgan v. Barnes*, 221 Ga. App. 653, 472 S.E.2d 480 (1996).

School officials' actions in monitoring activities associated with a school sponsored carnival were discretionary rather than ministerial. *Larkins v. Cobb County Sch. Dist.*, 225 Ga. App. 387, 484 S.E.2d 10 (1997).

Detective who sought an arrest warrant against an arrestee for simple battery was properly granted summary judgment in the arrestee's subsequent lawsuit for, inter alia, false arrest, because, pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), the detective, as a county employee, was immune from liability since the decision to seek an arrest warrant was a discretionary act and there was no evidence that the detective acted with actual malice, even if the arrestee was correct that the detective could have performed a better and more thorough investigation before seeking an arrest warrant. *Anderson v. Cobb*, 258 Ga. App. 159, 573 S.E.2d 417 (2002).

As a student's personal injury damages claims against three school employees were based on the employees negligent failure to supervise the student when the student was with a non-party, and that such failure allegedly led to the student being molested by the third-party, the supervisory decisions made were discretionary acts requiring personal deliberation and judgment; hence, any reliance on O.C.G.A. § 19-7-5 did not provide a basis for civil liability against the employees for a negligent breach of a ministerial duty, and the student's claims were barred by the doctrine of official immunity as a matter of law. *Reece v. Turner*, 284 Ga. App. 282, 643 S.E.2d 814 (2007).

Officers, who shot and killed a fleeing suspected felon armed with a knife, were entitled to official immunity because it was a discretionary act, during pursuit a bystander twice identified the suspect, and the suspect slashed a knife at one officer, posing an immediate threat of physical violence. *Williams v. Boehrer*, No. 12-14534, 2013 U.S. App. LEXIS 18742 (11th Cir. Sept. 10, 2013) (Unpublished).

In an arrest for driving under the influence, the arrestee's false imprisonment claim failed because the officer was entitled to official immunity since the officer was performing a discretionary act when the officer arrested the arrestee; the arrestee's general allegations of malice did not overcome official immunity. *Bannister v. Conway*, 2013 U.S. Dist. LEXIS 152569 (N.D. Ga. Oct. 23, 2013).

When a police dog attacked the plaintiff's son, the officer's motion for summary judgment on the ground of official immunity was improperly denied because the officer, who was a dog handler for the police department, did not act with malice or an intent to injure anyone when the officer failed to secure the police dog outside the officer's home; and the duties that the officer was alleged to have violated were not ministerial ones because, although the duties reflected in the statute regarding the restraint of vicious or dangerous animals and a county ordinance might be definite, they required an exercise of personal deliberation and judgment about what was reasonable regarding the restraint of the police dog. *Eshleman v. Key*, 297 Ga. 364, 774 S.E.2d 96 (2015), overruled on other grounds, *Rivera v. Washington*, 2016 Ga. LEXIS 248 (Ga. 2016).

Discretionary act calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. *Miree v. United States*, 490 F. Supp. 768 (N.D. Ga. 1980).

The decision to permit a patient to leave a mental hospital for home visitation is indisputably a discretionary act and is precisely the type of governmental decision that discretionary immunity was designed to protect from tort litigation by

after-the-fact review. *Swofford v. Cooper*, 184 Ga. App. 50, 360 S.E.2d 624, *aff'd*, 258 Ga. 143, 368 S.E.2d 518 (1987).

Contention that a stop sign at a county road had become obscured by tree limbs and that procedures established by county employees for removing such obstructions were inadequate, alleged negligence in the performance of a discretionary act, and the trial court properly granted summary judgment in favor of the employees. *Woodard v. Laurens County*, 265 Ga. 404, 456 S.E.2d 581 (1995).

Probation officer was immune from liability for actions of a probationer because the officer's supervision of the probationer was a discretionary act. *Georgia Dep't of Cors. v. Lamaine*, 233 Ga. App. 271, 502 S.E.2d 766 (1998).

The school principal's task of making decisions requiring the means used to supervise school children and the teacher's task to monitor, supervise, and control students are both discretionary actions protected by the doctrine of official immunity. *Kelly v. Lewis*, 221 Ga. App. 506, 471 S.E.2d 583 (1996); *Payne v. Twiggs County Sch. Dist.*, 232 Ga. App. 175, 501 S.E.2d 550 (1998).

The general task imposed on a school principal to monitor, supervise, and control the movement of students during a change in classes is a discretionary action protected by official immunity. *Crisp County Sch. Dist. v. Pheil*, 231 Ga. App. 139, 498 S.E.2d 134 (1998).

The supervision of a prisoner work detail is a discretionary function by virtue of which the supervisor is entitled to official immunity. *Parrish v. State*, 270 Ga. 878, 514 S.E.2d 834 (1999), reversing *Simmons v. Coweta County*, 229 Ga. App. 550, 494 S.E.2d 362 (1997).

Operation of a police department, including the degree of training and supervision to be provided its officers, is a discretionary governmental function of the municipality as opposed to a ministerial, proprietary, or administratively routine function. *Carter v. Glenn*, 249 Ga. App. 414, 548 S.E.2d 110 (2001).

Sheriff's deputies and the police officers were entitled to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), as their failure to provide

cardio-pulmonary resuscitation (CPR) to the son of the parents was discretionary, and no malice was shown; the Georgia Peace Officer Standards and Training Act, O.C.G.A. § 35-8-1 et seq., and the departments for which the officers and deputies worked did not require them to maintain CPR certification or to carry CPR equipment and they were not certified to perform CPR, and, even if the deputies and officers moved people away who were trying to help the son, this did not show malice, as they were concerned the persons might harm the son. *Daley v. Clark*, 282 Ga. App. 235, 638 S.E.2d 376 (2006).

Discretionary act found. — Deputy was entitled to immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX after the deputy collided with a third party while pursuing a suspect; although the deputy was not responding to a bona fide emergency and another deputy was in position to intercept the suspect, the guidelines governing the deputy called for termination of pursuit "by decision of pursuing officer." *Morgan v. Causey*, 910 F. Supp. 651 (M.D. Ga. 1996).

Teacher's grasping student's face to get the student's attention fell within the teacher's discretionary tasks of monitoring, supervising and controlling students in the teacher's class, and no liability could attach to the teacher's actions unless the teacher acted with actual malice. *Daniels v. Gordon*, 232 Ga. App. 811, 503 S.E.2d 72 (1998).

Police officers' conduct, arresting and subduing a fleeing suspect, clearly constituted a discretionary act. Therefore, unless plaintiff could show that the officers acted with actual malice or with the intent to injure the suspect, the officers were immune from liability. *Garrett v. Unified Gov't of Athens-Clarke County*, 246 F. Supp. 2d 1262 (M.D. Ga. 2003).

Because a mayor's failure to execute a contract was an act of discretion, and an association and a taxpayer did not assert that the mayor acted with actual malice or actual intent to cause injury or that any damages flowed to the city from that failure, pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), the complaint was properly dismissed. *Common Cause/Ga. v. City of Atlanta*, 279 Ga. 480, 614 S.E.2d 761 (2005).

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Ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. *Miree v. United States*, 490 F. Supp. 768 (N.D. Ga. 1980).

Negligent performance of ministerial duty. — Removal of a tree which fell across a road was a ministerial duty of a county road superintendent, not a discretionary one; thus, a suit against the superintendent based on the superintendent's failure to act to remove a fallen tree was not barred by official immunity. *Lincoln County v. Edmond*, 231 Ga. App. 871, 501 S.E.2d 38 (1998).

In a wrongful death and nuisance suit wherein the victim was killed while traveling in a taxicab on a state highway, and the taxicab had passed a mandatory city inspection the day prior, the trial court erred in granting summary judgment to the city inspector on the basis of official immunity as the inspector's act of inspecting the tires on the taxicab was a ministerial function since the inspector was required to check for minimum tread depth and complete the inspection checklist before passing the vehicle as safe, which were simple, absolute, and definite tasks of a ministerial nature. As a result, the inspector was not entitled to official immunity and it was for the jury to determine if the inspector performed the tasks negligently. *Heller v. City of Atlanta*, 290 Ga. App. 345, 659 S.E.2d 617 (2008), *aff'd*, *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

Decedent was killed when the taxi in which the decedent was riding spun out of control on a rain-slick road and hit a tree. The city employee who cleared the taxi for use on the roads was not shielded from liability by the doctrine of official immunity because: (1) inspection of tires was a ministerial act; (2) the employee did nothing to verify whether the taxi's badly worn tires had the legally required minimum amount of $\frac{2}{32}$ inch of tread on them under O.C.G.A. § 40-8-74(e)(1); and (3) the employee had no "discretion" to ignore this minimum legal requirement. *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

In a parent's wrongful death action, a trial court erred in granting a county road superintendent summary judgment on the ground that the superintendent was entitled to official immunity because the superintendent conceded that the superintendent had actual knowledge of water pouring across a road one hour before a decedent's fatal accident, and the superintendent's knowledge of the hazardous condition on the road gave rise to a ministerial duty to take remedial action; the superintendent had discretion in the manner in which the superintendent took remedial action, but the notice the superintendent received of the dangerous condition on the road triggered a ministerial duty to act, and whether the superintendent breached such a duty was an issue for a jury to decide. *Barnard v. Turner County*, 306 Ga. App. 235, 701 S.E.2d 859 (2010).

Ministerial duty created by traffic policy. — While the act of a county traffic department that established a policy for handling complaints about safety or traffic conditions in the first place was discretionary, the acts of following the established policy of writing up the complaint and investigating it were ministerial. *Wanless v. Tatum*, 244 Ga. App. 882, 536 S.E.2d 308 (2000).

Ministerial duty not created by criminal statute. — Hazing statute, O.C.G.A. § 16-5-61, did not transform the discretionary policing functions of school officials into a ministerial duty to enforce that law. *Caldwell v. Griffin Spalding County Bd. of Educ.*, 232 Ga. App. 892, 503 S.E.2d 43 (1998).

Ministerial duty created by Family Violence Act. — Officers' duty to investigate a report of family violence pursuant to O.C.G.A. § 17-4-20.1(c) was ministerial, and, accordingly, official immunity did not apply, as such immunity was only applicable to performance of discretionary functions, unless those functions were undertaken with malice or intent to cause injury pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(d). *Meagher v. Quick*, 264 Ga. App. 639, 594 S.E.2d 182 (2003).

Tax commissioner immune to action for damages for failure to give notice. — Property owner's claim for

damages based on a county tax commissioner's failure to properly send notices required by O.C.G.A. §§ 9-13-13, 48-3-3, 48-3-9(a), and 48-4-1, was barred by sovereign immunity; O.C.G.A. §§ 15-13-2 and 48-5-137 did not render the tax commissioner liable as an ex-officio sheriff because the notices did not constitute a "false return" or legal neglect to make a "proper return". *Raw Properties, Inc. v. Lawson*, 335 Ga. App. 802, 783 S.E.2d 161 (2016).

Failure of sheriff to perform ministerial duty did not cause death. — Grant of summary judgment in favor of the sheriff in a wrongful-death action brought by the decedent's spouse was appropriate under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c) because the majority of the acts complained of were discretionary. To the extent that certain acts were ministerial, the sheriff's alleged failure to perform those acts did not cause the decedent's death. *Butler v. Carlisle*, 299 Ga. App. 815, 683 S.E.2d 882 (2009), cert. denied, No. S10C0052, 2010 Ga. LEXIS 155 (Ga. 2010).

County sheriff office employees liability for suicide. — In a wrongful death action arising from the suicide death of an inmate, the trial court erred by granting summary judgment in favor of one of three county sheriff office employees based on official immunity because there was conflicting evidence about whether the one employee was notified of the suicide watch order, triggering the duties created by policies applicable to that employee. *Hill v. Jackson*, No. A15A1778, 2016 Ga. App. LEXIS 187 (Mar. 24, 2016).

Jury question existed as to whether police patrol was ministerial or discretionary act. — In a wrongful death suit brought after a patrol car driven by a sheriff's deputy struck and killed the decedent, there was a jury issue as to whether the deputy's patrol of the area was a ministerial or discretionary act. *Nichols v. Prather*, 286 Ga. App. 889, 650 S.E.2d 380 (2007), cert. denied, 2007 Ga. LEXIS 766 (Ga. 2007).

Liability of governmental entity under doctrine of respondeat superior. — The official immunity of a public employee does not protect a governmental

entity from liability under the doctrine of respondeat superior. Thus, a county may be liable for a county employee's negligence in performing an official function to the extent the county has waived sovereign immunity. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

In a personal injury action against a county, sheriff, and deputy sheriff, arising from an automobile collision which occurred when the deputy was on an emergency call, even though the deputy was performing an official discretionary function and was immune from personal liability, the sheriff could not claim the benefit of the deputy's official immunity defense, but the deputy was entitled to the benefit of the county's sovereign immunity defense, except to the extent of liability insurance purchased by the county. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

Sovereign immunity bars injunctive relief against the state at common law. — Sovereign immunity bars injunctive relief against the state at common law, and therefore, *IBM Corp. v. Evans*, 265 Ga. 215 (453 S.E.2d 706) (1995) is overruled by the Georgia Supreme Court. *Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 755 S.E.2d 184 (2014).

Georgia Supreme Court finds *IBM Corp. v. Evans*, 265 Ga. 215 (453 S.E.2d 706) (1995) unsound because: (1) the clear language of the Georgia Constitution authorizes only the Georgia General Assembly to waive sovereign immunity; (2) the Constitution does not provide for an exception; (3) the Court mischaracterizes a waiver; and (4) cases the Court relies on either predated the incorporation of sovereign immunity into the Georgia Constitution or ignored the impact thereof. *Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 755 S.E.2d 184 (2014).

Injunctive relief against state or official acting outside scope of lawful authority. — An action by a company against a state department and the commissioner thereof, in the commissioner's official capacity, to enjoin the department from awarding a contract to a competitor of the company or to have the department

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re-bid the contract was not barred by sovereign immunity. *IBM Corp. v. Georgia Dep't of Admin. Servs.*, 265 Ga. 215, 453 S.E.2d 706 (1995).

Failure to name responsible personnel. — Parents of deceased mental health facility patient not only had the burden of establishing that the Department of Human Resources (DHR) waived sovereign immunity by obtaining liability insurance protection, but their failure to name the department personnel allegedly responsible for the negligence within the applicable limitations periods warranted summary judgment in favor of DHR. *Georgia Dep't of Human Resources v. Poss*, 263 Ga. 347, 434 S.E.2d 488 (1993).

Sheriff's responsibility for rape by deputy. — Arrestee's 42 U.S.C. § 1983 suit against a county sheriff, alleging that she was raped by a deputy at the county jail, failed as a matter of law because the sheriff was entitled to official immunity for the state law claims brought against the sheriff in the sheriff's individual capacity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d); hiring and supervision of employees was a discretionary governmental function of the county as opposed to a ministerial, proprietary, or administratively routine function. *Boyd v. Nichols*, 616 F. Supp. 2d 1331 (M.D. Ga. 2009).

In a suit based on the actions of a deputy sheriff at a courthouse security checkpoint, official immunity barred the plaintiff attorney's battery claim under the Georgia Constitution because the summary judgment evidence did not show actual malice or intent to cause injury. *West v. Davis*, 767 F.3d 1063 (11th Cir. 2014).

Officer not entitled to summary judgment on official immunity. — In a suit involving an arrest, an officer was not entitled to summary judgment based on official immunity as to the arrestee's state law claims because the officer's statements, the officer's justifications for the arrest, and the orientation of the parties just before the arrest could support a jury's reasonable inference that the officer deliberately intended to wrongfully arrest or commit battery against the arrestee.

Turner v. Jones, No. 209-013, 2011 U.S. Dist. LEXIS 119437 (S.D. Ga. Oct. 17, 2011).

Officer entitled to immunity for arrest. — In a driver's action for false imprisonment, the officer was entitled to official immunity because the act of arresting the driver was discretionary and the driver could not overcome the officer's immunity defense by showing that the officer acted with malice or an intent to injure. *Watkins v. Latif*, 323 Ga. App. 306, 744 S.E.2d 860 (2013).

Officer entitled to immunity for trespass. — Nothing in the record suggested that the deputies acted with actual malice since the deputies consistently stated that the deputies entered the trailer due to exigent circumstances, a burglary, and their assessment was not baseless; the residents did not raise a genuine dispute of material fact about the presence of actual malice, and the deputies were entitled to official immunity as a matter of law. *Black v. Wigington*, 811 F.3d 1259 (11th Cir. 2016).

Physicians employed by state medical college. — Two physicians were entitled to official immunity in a medical malpractice suit brought against the physicians by the parents of a newborn infant injured by the medical team's failure to ensure the child was adequately oxygenated during intubation because the physicians were acting within the scope of the physicians' state employment at the Medical College of Georgia in rendering the medical care at issue. However, the effect of recognizing official immunity does not necessarily leave the injured plaintiff without recourse as, while official immunity relieves the state employee of personal liability, the injured plaintiff may still seek relief against the state government entity for which the state officer or employee was acting, pursuant to the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., specifically O.C.G.A. §§ 50-21-23 and 50-21-25(b). *Shekhawat v. Jones*, 293 Ga. 468, 746 S.E.2d 89 (2013).

Georgia Supreme Court overrules *Keenan v. Plouffe*, 267 Ga. 791, 482 S.E.2d 253 (1997) and holds that the analysis of a physician's official immunity under the

Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., shall proceed exclusively on the basis of whether the physician was acting within the scope of the physician's state employment in performing the treatment that is the subject of the malpractice action. *Shekhawat v. Jones*, 293 Ga. 468, 746 S.E.2d 89 (2013).

Application

State authority is not state or state agency. — A state authority is not the state, nor a part of the state, nor an agency of the state; it is a mere creature of the state, having distinct corporate entity. *Cox Enters., Inc. v. Carroll City/County Hosp. Auth.*, 247 Ga. 39, 273 S.E.2d 841 (1981).

Whether immunity barred personal injury suit had to be determined. — Appellate court erred by affirming the grant of the individual defendants' motion to dismiss in a personal injury suit involving a pedestrian falling at a high school because whether official immunity barred the action was a fact-specific inquiry that had not been definitively answered since limited discovery had been undertaken. *Austin v. Clark*, 294 Ga. 773, 755 S.E.2d 796 (2014).

Immunity extends to counties. — The state is immune to suit for any cause of action unless that immunity is expressly waived by constitutional provision or legislative enactment. That immunity extends to counties, as subdivisions of the state. *James v. Richmond County Health Dep't*, 168 Ga. App. 416, 309 S.E.2d 411 (1983).

In a negligence action against a county, the county's motion for summary judgment was granted on the basis of Ga. Const. 1983, Art. IX, Sec. II, Para. IX (sovereign immunity) and Ga. Const. 1983, Art. I, Sec. II, Para. IX (waiver of sovereign immunity to the extent of liability insurance coverage) not applying to counties. *Bliss v. Cobb County*, 599 F. Supp. 233 (N.D. Ga. 1984) (decided prior to 1990 amendment).

Under Ga. Const. 1983, Art. I, Sec. II, Para. IX, sovereign immunity is extended to the counties of the State of Georgia. *Toombs County v. O'Neal*, 254 Ga. 390, 330 S.E.2d 95 (1985); *DOT v. Land*, 181

Ga. App. 94, 351 S.E.2d 470 (1986), rev'd on other grounds, 257 Ga. 657, 362 S.E.2d 372 (1987).

The provisions of Ga. Const. 1983, Art. I, Sec. II, Para. IX apply to counties. *Curtis v. Cobb County*, 254 Ga. 673, 333 S.E.2d 595 (1985).

The Constitution of Georgia extends sovereign immunity to counties and their instrumentalities as well. *Culberson v. Fulton-DeKalb Hosp. Auth.*, 201 Ga. App. 347, 411 S.E.2d 75, cert. denied, 201 Ga. App. 905, 411 S.E.2d 75 (1991).

The 1991 amendment's extension of sovereign immunity to the state and its departments and agencies also applies to counties. *Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994).

A county is not liable for nuisance claims arising from personal injuries or wrongful death. *Coffey v. Brooks County*, 231 Ga. App. 886, 500 S.E.2d 341 (1998).

Sovereign immunity applies to counties and protects county employees who are sued in their official capacities. *Banks v. Happoldt*, 271 Ga. App. 146, 608 S.E.2d 741 (2004).

Because a county enjoyed sovereign immunity from a pedestrian's negligence and nuisance claims asserted in a personal injury action against the county for its alleged failure to maintain a water meter cover, the trial court properly dismissed the claims. *Rutherford v. DeKalb County*, 287 Ga. App. 366, 651 S.E.2d 771 (2007).

Sheriff's deputy chased a parent who was carrying a baby; the two struggled for the deputy's gun, which discharged, killing the baby. As there was no evidence that the county waived the county's sovereign immunity, the sheriff's department was entitled to summary judgment on an estate's respondeat superior claim. *Russell v. Barrett*, 296 Ga. App. 114, 673 S.E.2d 623 (2009).

County board of elections (BOE) and board members were entitled to sovereign immunity on a candidate's claims that they violated the candidate's rights under the Georgia Constitution and that they conspired to commit fraud against the candidate by attempting to have the candidate's name removed from the ballot in an election for county commissioner; the candidate cited no act of the General As-

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sembly that would permit recovery on the state law claims against the county, the BOE, or the board members in their official capacities. *Johnson v. Randolph County*, 301 Ga. App. 265, 687 S.E.2d 223 (2009).

Trial court correctly ruled that sovereign immunity barred a parent's wrongful claim against a county because the county did not waive the county's sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e); the bar of sovereign immunity neither results in a deprivation of property without just compensation nor constitutes a denial of equal protection or due process under the federal or state constitutions. *Barnard v. Turner County*, 306 Ga. App. 235, 701 S.E.2d 859 (2010).

Sovereign immunity barred the claimants' personal injury and nuisance claims against the members of a county board of commissioners in the commissioners' official capacities because the claimants did not show that the county waived the county's sovereign immunity with regard to the county's operation of a mosquito control helicopter which sprayed one of the claimants with chemicals. *Bd. of Comm'rs v. Johnson*, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

City manager had official immunity. — City manager had official immunity in a defamation case under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) and O.C.G.A. § 36-33-4 since: (1) the city finance director did not show that a statement the city manager made to the media regarding the city manager's concerns in the city finance director's department was outside the scope of the city manager's authority; (2) the city manager did not disclose anything to the city finance director's prospective employer that the prospective employer did not obtain through a Georgia Open Records Act, O.C.G.A. § 50-18-70 et seq., request; and (3) there was no policy that prohibited the city manager from verbally responding in conjunction with the city manager's Open Records Act response. *Smith v. Lott*, 317 Ga. App. 37, 730 S.E.2d 663 (2012).

Municipalities. — Ga. Const. 1983, Art. I, Sec. II, Para. IX, which prior to the

1991 amendment waived immunity to the extent of insurance, applied to municipalities. *Hiers v. City of Barwick*, 262 Ga. 129, 414 S.E.2d 647 (1992).

Municipalities do not come within the ambit of the 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX. *City of Thomaston v. Bridges*, 264 Ga. 4, 439 S.E.2d 906 (1994).

Sovereign immunity applied to city. — In an action arising out of an arrest, despite the way the arrestee was treated, the trial court properly dismissed a complaint against a county, and granted summary judgment on the same complaint against a city, on sovereign immunity grounds and due to a failure by the arrestee to show that the immunity had been waived. *Scott v. City of Valdosta*, 280 Ga. App. 481, 634 S.E.2d 472 (2006).

When officers arrested a decedent who died shortly after the arrest, a city which employed one of the officers could not be held liable because: (1) the city was immune from claims involving police work unless the city waived that immunity; and (2) it was not shown that the city waived immunity. *Hoyt v. Bacon County*, No. 509-026, 2011 U.S. Dist. LEXIS 7330 (S.D. Ga. Jan. 26, 2011).

Quantum meruit unavailable against county and officials. — Former employee, seeking employment compensation against a board of education, a school system, a principal, and a Superintendent, made no allegations of negligence, malice, or intent with respect to the claims for quantum meruit, and a trial court properly entered summary judgment dismissing those claims. *Harden v. Clarke County Bd. of Educ.*, 279 Ga. App. 513, 631 S.E.2d 741 (2006).

Waiver and damages for invalid state regulation. — There is no express constitutional right to recover damages against the state based upon the invalidity or unconstitutionality of the rules and regulations promulgated and implemented by its departments and agencies. Accordingly, unless and until there is a waiver of the doctrine of sovereign immunity as provided in Ga. Const. 1983, Art. I, Sec. II, Para. IX, the judiciary is compelled to hold that the victims of such state rules and regulations have no viable

state claim for damages and that they must be relegated to the express remedies which do exist, such as initiation of a declaratory judgment action pursuant to O.C.G.A. § 50-13-10. *State Bd. of Educ. v. Drury*, 263 Ga. 429, 437 S.E.2d 290 (1993).

No right to damages based upon invalidity of rules and regulations. — There is no express constitutional right to recover damages against the state based upon the invalidity or unconstitutionality of the rules and regulations promulgated and implemented by its departments and agencies. *State Bd. of Educ. v. Drury*, 263 Ga. 429, 437 S.E.2d 290 (1993).

County's failure to maintain road. — County officials were protected from liability with regard to a personal injury and wrongful death suit arising from an alleged failure of the county to maintain a road, because sovereign immunity protected the county officials from any liability with regard to an alleged failure to maintain, which was a discretionary function. *Banks v. Happoldt*, 271 Ga. App. 146, 608 S.E.2d 741 (2004).

No liability for defective bridges. — There is no language in O.C.G.A. § 32-4-41 specific enough to waive sovereign immunity and make a county liable for the county's defective bridges. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 470 S.E.2d 479 (1996).

Department of Transportation employees. — Department of Transportation employees are immune from suit for negligence in federal court under the Eleventh Amendment since the state has waived its sovereign immunity and not the state's Eleventh Amendment immunity. *Thorne v. Littlefield Constr. Co.*, (M.D. Ga. 1992).

County personnel issues. — Employee was not entitled to damages arising out of a violation of O.C.G.A. § 9-11-65(b) in obtaining a temporary restraining order (TRO) against the employee as the county had sovereign immunity and the county manager and the county attorney had sovereign immunity in their official capacities; the county manager and the county attorney had official immunity in their individual capacities as obtaining the TRO was a discretionary action that they undertook to protect the public and

workplace safety after they were advised of the employee's actions. *Wallace v. Greene County*, 274 Ga. App. 776, 618 S.E.2d 642 (2005).

No waiver of immunity in providing health insurance to state employee. — Public school teacher's putative class action against the state arising out of unilateral changes made by the Georgia Department of Community Health to the State Health Benefits Plan, resulting in increased copayments and no decrease in premiums, was barred by sovereign immunity; there was no signed, written contract between the parties, and an implied contract could not form the basis for a waiver of sovereign immunity. *Ga. Dep't of Cmty. Health v. Neal*, 334 Ga. App. 851, 780 S.E.2d 475 (2015).

Wrongful termination of state employee with contract. — In a claim for wrongful termination when a former state employee alleges the existence of a contract, state officials are not entitled as a matter of law to a judgment on the basis of sovereign immunity. *Parrish v. State*, 184 Ga. App. 195, 361 S.E.2d 57 (1987).

Paramedic employed by county was entitled to official immunity because of any negligence on the paramedic's part arising during the performance of the paramedic's official duties; the county's purchase of insurance did not affect immunity since the action was based on the paramedic's misdiagnosis or choice of treatment and did not "arise from the use of a motor vehicle." *Harry v. Glynn County*, 269 Ga. 503, 501 S.E.2d 196 (1998).

Driver of emergency response vehicles. — Under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), the county emergency rescue vehicle driver was immune from liability after the driver was accused of negligently colliding with the decedent's vehicle, because the damages arose from the driver's discretionary action, the decision to rush to the scene of an accident. *Anderson v. Barrow County*, 256 Ga. App. 160, 568 S.E.2d 68 (2002).

In a tort action for personal injuries and property damage arising from an auto collision filed against a city and its police officer, the trial court properly granted summary judgment to the officer, given

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that the officer was engaged in a discretionary function of responding to an emergency situation at the time the accident at issue occurred. *Weaver v. City of Statesboro*, 288 Ga. App. 32, 653 S.E.2d 765 (2007), cert. denied, 2008 Ga. LEXIS 221 (Ga. 2008).

Investigatory stops. — Sovereign immunity extended by the Georgia Constitution to the state and its departments and agencies also applied to Georgia counties, as well as the consolidated government of the City of Columbus and Muscogee County, the Muscogee County sheriff, and the sheriff's deputies; consequently, sovereign immunity barred the Georgia state law claims asserted against the consolidated government and the sheriff and deputies in their official capacities by a vehicle's occupants that the deputies subjected to an investigatory stop. *Beaulah v. Muscogee County Sheriff's Deputies*, 447 F. Supp. 2d 1342 (M.D. Ga. 2006), vacated, in part, 2008 U.S. Dist LEXIS 11020 (M.D. Ga. 2008).

In an action in which the plaintiff landowners filed suit against the defendant county alleging trespass, negligence and negligence per se, and violation of the landowners' riparian rights, in connection with the county's recreational development of its adjoining property, the county was entitled to sovereign immunity because there was no showing by the landowners that the county had waived sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX and O.C.G.A. § 36-1-4. *Carney v. Gordon County*, No. 4:06-CV-36-RLV, 2006 U.S. Dist. LEXIS 82634 (N.D. Ga. Sept. 12, 2006).

Law enforcement not entitled to immunity when actual malice used in application of excessive force. — When a taser was used on an arrestee standing with hands in the air at least four feet off the ground in a tree, officers were not entitled to official immunity as to the arrestee's state law claims at the motion to dismiss stage because the complaint alleged actual malice under Georgia law. *Harper v. Perkins*, No. 11-14416, 2012 U.S. App. LEXIS 4064 (11th Cir. Feb. 29, 2012) (Unpublished).

Sheriff's department. — Sheriff's deputy chased a parent who was carrying a baby; the two struggled for the deputy's gun, which discharged, killing the baby. As the deputy's decision to pursue the parent was a discretionary act, and there was no evidence the deputy acted with malice or intent to injure, the deputy had qualified immunity from suit under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d); therefore, an estate's claim against the sheriff's department was properly dismissed. *Russell v. Barrett*, 296 Ga. App. 114, 673 S.E.2d 623 (2009).

Sheriff's deputy chased a parent who was carrying a baby; the two struggled for the deputy's gun, which discharged, killing the baby. As operation of the sheriff's department was a discretionary governmental function, and there was no evidence of malice, the sheriff and the department were entitled to sovereign immunity on an estate's claims of failing to instruct, train, and supervise. *Russell v. Barrett*, 296 Ga. App. 114, 673 S.E.2d 623 (2009).

Because there was no evidence that deputies acted with actual malice towards the decedent when they arrested and transferred the decedent to jail instead of the hospital, official immunity protected the sheriff and the deputies with respect to plaintiffs' state law claims. *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291 (11th Cir. 2009).

Sheriff's deputy entitled to qualified immunity. — A sheriff's deputy chased a parent who was carrying a baby; the two struggled for the deputy's gun, which discharged, killing the baby. As the deputy's decision to pursue the parent was a discretionary act, and there was no evidence the deputy acted with malice or intent to injure, the deputy had qualified immunity from suit under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d); therefore, an estate's negligence and assault and battery claims against the deputy were properly dismissed. *Russell v. Barrett*, 296 Ga. App. 114, 673 S.E.2d 623 (2009).

Record supported a district court's decision granting summary judgment in favor of sheriff's deputies in an action an arrestee filed under 42 U.S.C. § 1983 alleging, inter alia, that the deputies vio-

lated the arrestee's constitutional rights by procuring an arrest warrant without probable cause and using excessive force during an illegal arrest; the arrestee did not show that the officers who were sued violated clearly established law, and the officers had qualified immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX because the officers acted within the scope of the officers' authority. *Smith v. Mercer*, No. 13-13776, 2014 U.S. App. LEXIS 13597 (11th Cir. July 14, 2014) (Unpublished).

Immunity extends to school boards. — The 1991 amendment extending sovereign immunity "to the state and all of its departments and agencies" includes school boards. *Davis v. Dublin City Bd. of Educ.*, 219 Ga. App. 121, 464 S.E.2d 251 (1995).

In an action against a school board and school principal for injuries to a student who tripped and fell through a glass door at the school entrance, the board was entitled to sovereign immunity and the principal to official immunity for injuries sustained as a result of the negligent performance of discretionary official acts. *Davis v. Dublin City Bd. of Educ.*, 219 Ga. App. 121, 464 S.E.2d 251 (1995).

The trial court properly granted summary judgment to a county school board and its superintendent in a parents negligence action arising out of an attack on school grounds that injured their child, as the board and the superintendent presented sufficient evidence that a school safety plan was in place at the elementary school at the time the child was attacked, entitling the board and the superintendent to official immunity barring the parents' negligence claims. *Leake v. Murphy*, 284 Ga. App. 490, 644 S.E.2d 328 (2007), cert. denied, 2007 Ga. LEXIS 671 (Ga. 2007).

County school district was immune from liability for a student's state tort claims arising out of the use of a Facebook photo of the student in a bikini in an internet security presentation pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX(e). *Chaney v. Fayette County Pub. Sch. Dist.*, 977 F. Supp. 2d 1308 (N.D. Ga. 2013).

Immunity extends to Board of Regents. — Lower courts properly dis-

missed the foreign college students' declaratory judgment action seeking in-state tuition because the suit against the University System of Georgia's Board of Regents was barred by sovereign immunity and waiver did not apply. *Olvera v. Univ. Sys. of Georgia's Bd. of Regents*, 298 Ga. 425, 782 S.E.2d 436 (2016).

Immunity extends to county boards of education. — For purposes of Ga. Const. 1983, Art. I, Sec. II, Para. IX, a county board of education is included within the definition of "the state and any of its departments and agencies." *Thigpen v. McDuffie County Bd. of Educ.*, 255 Ga. 59, 335 S.E.2d 112 (1985).

A county board of education, unlike the school district which it manages, is not a body corporate and does not have the capacity to sue or be sued. This rule was not changed by the 1983 adoption of this provision or its 1990 amendment. *Cook v. Colquitt County Bd. of Educ.*, 261 Ga. 841, 412 S.E.2d 828 (1992).

When a former member of a parent-teacher student association asserted false arrest, defamation, and other claims, the claims against an education board and a superintendent in the superintendent's official capacity were properly dismissed because the member failed to show that the board waived sovereign immunity. *Reeves v. Wilbanks*, No. 12-16611, 2013 U.S. App. LEXIS 20204 (11th Cir. Oct. 3, 2013) (Unpublished).

School district's claim for disgorgement of funds against State Board of Education was disallowed, as it amounted to an action for money had and received or for unjust enrichment, and such actions are barred by sovereign immunity. *Bulloch County Sch. Dist. v. Ga. Dep't of Educ.*, 324 Ga. App. 691, 751 S.E.2d 495 (2013).

Recreational Property Act did not waive official immunities. — Although finding that official immunity shielded a county employee from liability for injuries suffered by a child when that child fell from a swing on county property that the employee previously inspected, and that sovereign immunity shielded the county, the trial court nonetheless erred in concluding that the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., waived

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these immunities, as: (1) implied waivers of governmental immunity were not to be favored; (2) the employee was entitled to official or qualified immunity, which could not be waived; and (3) even assuming a partial waiver of sovereign and official immunity through enactment of the Act, no evidence was presented that the employee acted wilfully and the defect complained about by the child's mother was apparent to those using the property. *Norton v. Cobb*, 284 Ga. App. 303, 643 S.E.2d 803 (2007), cert. denied, 2007 Ga. LEXIS 634 (Ga. 2007).

Insurers Rehabilitation and Liquidation Act. — Provisions of the Insurers Rehabilitation and Liquidation Act, O.C.G.A. § 33-37-1 et seq., allowing the trial court to review and audit the state's conduct as receiver, did not waive the state's sovereign immunity with respect to amounts that were improperly charged to a liquidated insurer's estate, and the state was not required to repay such amounts. *State of Ga. v. Sun States Ins. Group, Inc.*, 332 Ga. App. 197, 770 S.E.2d 43 (2015).

School districts. — Neither the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., nor any other act of the General Assembly, has waived the sovereign immunity of county-wide school districts. *Teston v. Collins*, 217 Ga. App. 829, 459 S.E.2d 452 (1995).

Sovereign immunity extends to school districts under the 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX, and the legislature has not provided for a waiver of such immunity. *Bitterman v. Atkins*, 217 Ga. App. 652, 458 S.E.2d 688 (1995).

Claims of student's mother against a school district and employees for breach of fiduciary duties and invasion of privacy were barred by the doctrine of sovereign immunity. *Wellborn v. DeKalb County Sch. Dist.*, 227 Ga. App. 377, 489 S.E.2d 345 (1997).

In regard to a personal injury action arising from an accident involving a school bus, the school district waived sovereign immunity to the extent it was covered by liability insurance. *Coffee County Sch. Dist. v. King*, 229 Ga. App. 143, 493 S.E.2d 563 (1997).

Trial court properly dismissed a parent's tort claims against the school district and its employees, as they were immune from suit and excluded from the limited waiver provision under both O.C.G.A. §§ 50-21-22(5) and 50-21-23(a). Moreover, none of the alleged acts showed the malicious, wilful, or wanton conduct necessary to overcome that immunity. *Chisolm v. Tippens*, 289 Ga. App. 757, 658 S.E.2d 147 (2008), cert. denied, 129 S. Ct. 576, 172 L.Ed.2d 431 (2008).

Sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) extended to a county school district. *Foster v. Raspberry*, No. 4:08-CV-123(CDL), 2009 U.S. Dist. LEXIS 65419 (M.D. Ga. July 29, 2009).

Trial court erred in denying a school district's motion to dismiss a contractor's action seeking restitution because recovery was precluded under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c) to the extent that the restitution claim sought compensation for work that was not contemplated by the parties' multi-year contract. *Greene County Sch. Dist. v. Circle Y Constr., Inc.*, 308 Ga. App. 837, 708 S.E.2d 692 (2011).

School official's liability in hazing incident. — Proof of actual malice by school officials in connection with injuries received by a student in a hazing incident was not sufficient to show that officials were not entitled to immunity. *Caldwell v. Griffin Spalding County Bd. of Educ.*, 232 Ga. App. 892, 503 S.E.2d 43 (1998).

Immunity extends to school district employees. — Parents, who were sued in their personal capacities for actions taken within the scope of their duties as employees of the school district, are entitled to summary judgment on the basis of official immunity. *Coffee County Sch. Dist. v. Snipes*, 216 Ga. App. 293, 454 S.E.2d 149 (1995).

An appellate court's reversal of a grant of judgment on the pleadings to defendants, the members of a school board of education, a school principal, the assistant principal, and a clinic nurse in their individual capacities, was in error in a negligence suit brought by the parents of a student who was assaulted by another student; the mandated action set forth in

O.C.G.A. § 20-2-1185 on the part of a school to create a safety plan was a discretionary duty rather than a ministerial duty, and while O.C.G.A. § 20-2-1184 establishes Georgia's public policy concerning the need to report timely to the appropriate authorities the identity of students who commit certain proscribed acts on school grounds, the statute did not create a civil cause of action for damages in favor of a victim or anyone else for the purported failure to report timely. *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54 (2007).

Sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) extended to employees of a county school district, who were sued in their official capacities. *Foster v. Raspberry*, No. 4:08-CV-123(CDL), 2009 U.S. Dist. LEXIS 65419 (M.D. Ga. July 29, 2009).

Trial court erred in denying the county school district employees' motion to set aside a default judgment entered against the employees under O.C.G.A. § 9-11-55(b) in the parents' wrongful death action because, while the employees were sued in both the employees' official and individual capacities, the parents' wrongful-death suit arose from actions the employees took in the employees' official capacities as employees of the school, and thus, the trial court erred as a matter of law in finding that the entry of the default judgment barred the employees from being able to assert that official immunity protected the employees from the parents' wrongful death action; official immunity is not a mere defense but rather an entitlement not to be sued that must be addressed as a threshold matter before a lawsuit may proceed. *Cosby v. Lewis*, 308 Ga. App. 668, 708 S.E.2d 585 (2011).

In a personal injury suit, the plaintiff failed to point to any evidence from which a trier of fact could infer that the conduct of the two teachers in organizing and conducting the tug-of-war contest constituted a simple, absolute, and definite act that required merely the execution of a specific duty; to the contrary, pretermittting whether one of the teachers was acting in the teacher's capacity as an employee or as a parent volunteer, the evidence was undisputed that the teach-

ers exercised personal judgment and acted on the facts presented in a way not specifically directed by the school district; thus, the trial court did not err in concluding that the teachers were engaged in discretionary rather than ministerial activities. *Davis v. Brantley County Sch. Dist.*, 334 Ga. App. 684, 780 S.E.2d 60 (2015).

Immunity extended to Ohio school district, board of education, and teacher. — In an action arising from injuries to a student while on a school band trip, Ohio defendants including a school district, board of education, and teacher had sovereign and official immunity from negligence liability. *Holbrook v. Executive Conference Ctr., Inc.*, 219 Ga. App. 104, 464 S.E.2d 398 (1995).

Preparation of school safety plan is discretionary, not ministerial, duty. — The mandated action set forth in O.C.G.A. § 20-2-1185 with regard to every public school preparing a school safety plan is a discretionary duty rather than a ministerial duty; by so deciding, the Supreme Court of Georgia determined that the holding in *Leake v. Murphy*, 274 Ga. App. 219 (2005) was incorrect and such holding is overruled. *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54 (2007).

Stone Mountain Memorial Association. — Stone Mountain Memorial Association is a state department or agency for purposes of Ga. Const. 1983, Art. I, Sec. II, Para. IX and, accordingly, a former inmate was required to file an ante litem notice in accordance with the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., for asserting the inmate's negligence claim; as the inmate failed to file such required notice, the trial court's grant of summary judgment to the Association pursuant to O.C.G.A. § 9-11-56(c) was proper. *Gay v. Ga. Dep't of Corr.*, 270 Ga. App. 17, 606 S.E.2d 53 (2004).

Ports Authority immune. — The Georgia Ports Authority is a state "department or agency" that is entitled to the defense of sovereign immunity but which may be liable for the torts of state officers and employees because of the state's waiver of immunity in the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq. *Miller v. Georgia Ports Auth.*, 266 Ga. 586, 470 S.E.2d 426 (1996).

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State court decision holding that the Georgia Ports Authority was immune did not apply to a longshoreman's personal injury claim against the Authority, which was governed by admiralty law, as the longshoreman was injured while on a ship in navigable waters performing traditional maritime functions, and did not determine whether the Authority was immune as an "arm of the state," under the Eleventh Amendment. *Hines v. Ga. Ports Auth.*, 278 Ga. 631, 604 S.E.2d 189 (2004).

Action to restrain Regents of University System not permissible. — Action seeking to restrain the payment of certain funds to the Regents of the University System, and their receipt and use of the funds, against state officers in their official capacity, and not as individuals committing any trespass upon the petitioners, is in effect an action against the state without its consent, and the action cannot be maintained. *Ramsey v. Hamilton*, 181 Ga. 365, 182 S.E. 392 (1935).

Sovereign immunity applies to Board of Regents. — The Board of Regents is the state agency vested with the governance, control, and management of the University System of Georgia and therefore, the board is an agency of the state to which sovereign immunity applies. *Wilson v. Board of Regents*, 262 Ga. 413, 419 S.E.2d 916 (1992).

Because Georgia had not waived the state's Eleventh Amendment immunity, the federal district court lacked jurisdiction to decide the student's breach of contract claim against the board of regents. *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012).

Trial court erred by finding that a university board waived sovereign immunity in a breach of contract suit brought by a student because the court erroneously relied upon an unauthenticated copy of the student code of conduct, which was not signed by either party; thus, since no written contract existed wherein the board waived sovereign immunity, the board was entitled to summary judgment on the student's breach of contract claims. *Bd. of Regents of the Univ. Sys. of Ga. v. Barnes*, 322 Ga. App. 47, 743 S.E.2d 609 (2013).

Board of Regents of the University System of Georgia was immune from a suit by employees of a contractor who provided a forged payment bond to the Board; the maintenance contract was not for "public works construction" as defined in O.C.G.A. § 36-91-2(12); therefore, the provisions for payment bonds in O.C.G.A. §§ 13-10-62 and 13-10-63 did not apply. Further, the Board had no duty to investigate the information presented on the face of the payment bond. *Bd. of Regents of the Univ. Sys. of Ga. v. Brooks*, 324 Ga. App. 15, 749 S.E.2d 23 (2013).

No genuine issues of material fact existed as to whether subsequent communications with retirement employees or officials modified the settlement agreement providing for an employee's early retirement from a university because the notes and email correspondence did not constitute signed, contemporaneous agreements demonstrating an intent to modify the settlement agreement, thus, the employee could not avoid the bar of sovereign immunity possessed by the board of regents. *Carroll v. Bd. of Regents of the Univ. Sys. of Ga.*, 324 Ga. App. 598, 751 S.E.2d 421 (2013).

Trial court did not err in finding that sovereign immunity barred the action because the court correctly treated the policies of the Board of Regents regarding non-citizen eligibility for in-state tuition as falling outside the waiver of sovereign immunity found in O.C.G.A. § 50-13-10; thus, the students did not meet the students' burden of showing that the policies at issue were agency rules adopted pursuant § 50-13-10's waiver, rather than interpretive rules exempt from § 50-13-10. *Olvera v. Univ. Sys. of Georgia's Bd. of Regents*, 331 Ga. App. 392, 771 S.E.2d 91 (2015).

Regents' immunity not waived. — Board of Regents' immunity under the doctrine of sovereign immunity was not waived where hospital records, including a "consent to care" form, upon which a patient's action was based, did not constitute a written contract. *Board of Regents v. Tyson*, 261 Ga. 368, 404 S.E.2d 557 (1991).

Department of Revenue. — The Georgia Department of Revenue is a state

entity, entitled to Eleventh Amendment immunity from suit in federal court. *Miles v. Georgia Dep't of Revenue*, 797 F. Supp. 987 (S.D. Ga. 1992).

Sales tax refund. — Electrical membership corporation lacked associational standing to seek a sales tax refund on behalf of its members/patrons, as it was a non-taxpayer acting in a representative capacity and there was a very limited waiver of sovereign immunity provided by O.C.G.A. § 48-2-35 which did not extend to non-taxpayers; further, the waiver of sovereign immunity of Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) was to be strictly construed, and even a taxpayer was prohibited from bringing a refund action on behalf of other taxpayers similarly situated, pursuant to O.C.G.A. § 48-2-35. *Sawnee Elec. Mbrshp. Corp. v. Ga. Dep't of Revenue*, 279 Ga. 22, 608 S.E.2d 611 (2005).

Georgia Lottery Corporation. — The Georgia Lottery Corporation is not a state “agency” entitled to the defense of sovereign immunity under the facts and law of an action brought to have certain lottery games declared illegal and unconstitutional. *Jackson v. Georgia Lottery Corp.*, 228 Ga. App. 239, 491 S.E.2d 408 (1997).

Georgia Lottery Corporation (GLC) is entitled to assert sovereign immunity as a bar to a suit under Ga. Const. 1983, Art. I, Sec. II, Para. IX, and the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., because under the Georgia Lottery for Education Act, O.C.G.A. § 50-27-1 et seq., the purpose, function, and management of the GLC are indelibly intertwined with the state in a manner that qualifies the GLC for the protection of sovereign immunity as a state instrumentality; thus, the GLC must be classified as an instrumentality of the state to which sovereign immunity applies. *Kyle v. Ga. Lottery Corp.*, 290 Ga. 87, 718 S.E.2d 801 (2011).

Hospital authorities. — Ga. Const. 1983, Art. I, Sec. II, Para. IX does not require courts to construe the “sue and be sued” language of O.C.G.A. § 31-7-75, governing functions and powers of hospital authorities, as a waiver of sovereign immunity. *Howard v. Liberty Mem. Hosp.*, 752 F. Supp. 1074 (S.D. Ga. 1990).

Hospital was entitled to sovereign immunity for any judgment in a medical malpractice action in excess of the hospital's liability insurance. *Howard v. Liberty Mem. Hosp.*, 752 F. Supp. 1074 (S.D. Ga. 1990) (decided prior to 1990 amendment).

Hospital authorities established pursuant to the Hospital Authorities Law are entitled to the defense of governmental immunity except to the extent there has been a waiver under the state constitution. *Hospital Auth. v. Litterilla*, 199 Ga. App. 345, 404 S.E.2d 796 (1991).

Hospital authority's receipt of funds from two counties in general support of an indigent treatment program did not divest the authority or its hospital of their character as county agencies or instrumentalities so as to waive sovereign immunity. *Culberson v. Fulton-DeKalb Hosp. Auth.*, 201 Ga. App. 347, 411 S.E.2d 75, cert. denied, 201 Ga. App. 905, 411 S.E.2d 75 (1991).

Hospital authorities, because they are neither the state nor a department or agency of the state, are not entitled to the defense of sovereign immunity. *Thomas v. Hospital Auth.*, 264 Ga. 40, 440 S.E.2d 195 (1994); *Randolph County Hosp. Auth. v. Johnson*, 215 Ga. App. 283, 450 S.E.2d 318 (1994).

Immunity of a physician at a state medical college. — Two physicians, who were faculty members at the Medical College of Georgia Children's Medical Center, did not establish in a medical malpractice action that the physicians were entitled to qualified immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) and O.C.G.A. § 50-21-25(b), because the child whom the physicians treated at the center was a private-pay patient. Notwithstanding the physicians' official duties as faculty members, when they acted as physicians, the physicians' primary duty was to the child, rather than to the State of Georgia. *Jones v. Allen*, 312 Ga. App. 762, 720 S.E.2d 1 (2011).

Physician, who was a second-year fellow at the Medical College of Georgia Children's Medical Center's Graduate Medical Education Program, was entitled to official immunity in a medical malpractice action under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) and O.C.G.A. § 50-21-25(b).

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because the physician, who provided followup medical treatment to a child, was operating under the general supervision of an attending physician who was a faculty member and an employee of the Medical College of Georgia. *Jones v. Allen*, 312 Ga. App. 762, 720 S.E.2d 1 (2011).

Employees of the state mental hospital were entitled to immunity from claims by patients arising from the administration of antipsychotic drugs. *Hightower by Dehler v. Olmstead*, 959 F. Supp. 1549 (N.D. Ga. 1996).

Employees of Department of Family and Children Services. — Caseworker and supervisor in the Department of Family and Children Services acted within the scope of their official duties in the placement and supervision of children in a foster home and, thus, were entitled to official immunity. *Miracle by Miracle v. Spooner*, 978 F. Supp. 1161 (N.D. Ga. 1997).

Departments of Human Resources and Juvenile Justice. — Trial court, in a wrongful death suit, erred by denying the motions of the Georgia Department of Human Resources and the Georgia Department of Juvenile Justice to dismiss and for a directed verdict, following the death of a juvenile the agencies placed in a corporate child care institution, as the two agencies were immune from suit under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., and there was no waiver of sovereign immunity by the state. *Ga. Dep't of Human Res. v. Johnson*, 264 Ga. App. 730, 592 S.E.2d 124 (2003).

The immunity granted to agencies under the Community Services Act, O.C.G.A. § 42-8-71(d), promotes a public policy that was not superseded or repealed by implication by the 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX providing for the waiver of the state's sovereign immunity or by the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., which was enacted pursuant to the amendment. *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

Immunity extends to community service boards. — Considering the pub-

lic purpose for which they were created, a community service board is a "state department or agency" entitled to raise the defense of sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX. *Youngblood v. Gwinnett Rockdale Newton Cmty. Serv. Bd.*, 273 Ga. 715, 545 S.E.2d 875 (2001).

Because community service boards are agencies or departments of the state, the legislature acted unconstitutionally when it ignored Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) and the express terms of the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., by enacting O.C.G.A. § 37-2-11.1(c)(1) so as to denominate these newly created state agencies or departments as unclassified public entities to be accorded the same immunity as counties. *Youngblood v. Gwinnett Rockdale Newton Cmty. Serv. Bd.*, 273 Ga. 715, 545 S.E.2d 875 (2001).

Ga. Const. 1983, Art. I, Sec. II, Para. IX, which sets forth the Georgia constitution's limits on waiving sovereign immunity, were inapplicable to the inquiry of whether a community service board was an arm of the state entitled to Eleventh Amendment immunity since nothing in the state constitutional provision suggested that it limited the legislature's ability to create different governmental entities, like counties and municipalities. *Johnson v. Ogeechee Behavioral Health Servs.*, 479 F. Supp. 2d 1357 (S.D. Ga. 2007).

Community Service Act. — When a decedent fell off a sanitation truck while performing court-ordered community service, sovereign immunity barred a wrongful death claim against a county under the Community Service Act, O.C.G.A. § 42-8-70 et seq.; O.C.G.A. § 42-8-71(d) does not specifically provide either that sovereign immunity is waived or the extent of the waiver, as required by Ga. Const. 1983, Art. I, Sec. II, Para. IX, and the court cannot read such a waiver into the act. *DeKalb State Court Prob. Dep't v. Currid*, 287 Ga. App. 649, 653 S.E.2d 90 (2007), *aff'd*, *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

County did not waive sovereign immunity under O.C.G.A. § 42-8-71(d) of the

Community Service Act, O.C.G.A. § 42-8-70 et seq., in a wrongful death action because the plain language did not expressly waive sovereign immunity and the extent of any waiver was not expressed; thus, both prongs of the constitutional test under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) were not met. *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

Failure to provide medical care. — In a parent's wrongful death action, the trial court erred in denying a county's motion for summary judgment because O.C.G.A. § 42-5-2 did not waive the county's sovereign immunity for claims based on failure to provide medical care; § 42-5-2 does not provide an express waiver, and nothing in the statute can be read to imply a waiver. *Gish v. Thomas*, 302 Ga. App. 854, 691 S.E.2d 900 (2010).

Provision of medical care to inmates is ministerial act. — Providing adequate medical attention for inmates is a ministerial act by the sheriff, because medical care is a fundamental right and is not discretionary; thus, such act is not subject to either sovereign immunity or official immunity. Since the plaintiff's contention was that it was the failure to provide adequate medical care that created liability and not the choice of treatment by the health care provider, sovereign and official immunity did not apply. *Cantrell v. Thurman*, 231 Ga. App. 510, 499 S.E.2d 416 (1998).

Prison officials. — Trial court incorrectly denied a prison official's motion for summary judgment on the estate administrators' state causes of action, following the death of an inmate who overdosed on Tylenol, because the administrators failed to prove that the official was acting outside the scope of the person's official duties or employment; consequently, even if the official acted with malice or intent to injure the decedent, the official was immune from liability on the administrators' state law claims against the official. *Minor v. Barwick*, 264 Ga. App. 327, 590 S.E.2d 754 (2003).

Inmates. — County was not entitled to sovereign immunity in an estate's claim arising from the death of an inmate because the county had bought the type of

insurance defined in O.C.G.A. § 33-24-51; the estate claimed that the inmate's death resulted from an officer's negligent supervision of the inmate's actions in maintaining a tractor by trying to replace a tire. The policy covered negligence for autos, the tractor was an auto under the statute and the policy, and the policy covered maintenance of a covered auto, which included changing a tire. *McDuffie v. Coweta County*, 299 Ga. App. 500, 682 S.E.2d 609 (2009).

Assuming, without deciding, that the defendant deputies were performing discretionary acts during the incident alleged in a plaintiff inmate's complaint such that the standard of liability was malice or intent to injure, the plaintiff alleged sufficient facts to meet that standard. The plaintiff sufficiently alleged malice or intent to injure on the defendants' part by accusing the defendants of beating the plaintiff while handcuffed because the plaintiff refused to make the plaintiff's bed, and the defendants therefore were not entitled to official immunity, pursuant to Ga. Const. 1983, Art. I, Sec. II, Para. IX, at the dismissal stage in the litigation. *Muckle v. Robinson*, No. 2:12-CV-0061-RWS, 2013 U.S. Dist. LEXIS 8675 (N.D. Ga. Jan. 22, 2013).

Georgia Supreme Court finds that the care of inmates in the custody of a municipal corporation is a governmental function for which sovereign immunity has not been waived. *City of Atlanta v. Mitcham*, 296 Ga. 576, 769 S.E.2d 320 (2015).

Parole board immune. — The defense of sovereign immunity applies to a complaint against the parole board and its former chairman acting in the chairman's official capacity. *Mosier v. State Bd. of Pardons & Paroles*, 213 Ga. App. 545, 445 S.E.2d 535 (1994), cert. denied, 5 U.S. 1040, 115 S. Ct. 1409, 131 L. Ed. 2d 295 (1995).

No waiver for parole board. — When a prisoner alleged racial discrimination with respect to the policies, practice, and racial balance of the parole board, but the district court granted summary judgment in favor of the parole board on the grounds that it was entitled to sovereign immunity pursuant to the Eleventh Amendment, it was held that the Georgia Constitution, in

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subsection (a) of Ga. Const. 1983, Art. I, Sec. II, Para. IX, specifically states that “[s]overeign immunity extends to the state and all of its departments and agencies,” and although this same provision of the constitution waives sovereign immunity in circumstances in which liability insurance protection has been provided, as there was nothing in the record indicating that liability insurance had been provided to the parole board or that the waiver was applicable, the district court was affirmed. *Fuller v. Georgia State Bd. of Pardons & Paroles*, 851 F.2d 1307 (11th Cir. 1988) (decided prior to 1990 amendment).

Claim for attorney fees in criminal case barred. — There is no statutory or constitutional basis for the award of attorney fees in a criminal action; in fact, sovereign immunity barred a criminal defendant’s claim for attorney fees when the charge against the defendant was dismissed on speedy trial grounds. *Bennett v. State*, 210 Ga. App. 337, 436 S.E.2d 40 (1993).

Violation of Civil Rights Act. — When a governing body has worked a constitutional deprivation of a citizen pursuant to an impermissible or corrupt policy which is intentional and deliberate, a cause of action is accrued against the governing body and its employees under the federal Civil Rights Act in spite of the doctrine of sovereign immunity. *City of Cave Spring v. Mason*, 252 Ga. 3, 310 S.E.2d 892 (1984).

State did not waive immunity by enacting O.C.G.A. § 38-2-279. — State employee allegedly terminated for military service could not recover against the state under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and O.C.G.A. § 38-2-279(e). The employee’s claim under USERRA was barred by U.S. Const., amend. 11, and the claim under § 38-2-279 was barred by sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e). *Anstadt v. Bd. of Regents of the Univ. Sys. of Ga.*, 303 Ga. App. 483, 693 S.E.2d 868 (2010), cert. denied, No. S10C1291, 2010 Ga. LEXIS 713 (Ga. 2010).

State not vicariously liable for negligence of employees. — In a negligence action against the state, the Department of Human Resources, and a state hospital, that accrued prior to the 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX, defendants could not be held vicariously liable so as to invoke coverage of the Liability Trust Fund covering employees of the department and, thus, sovereign immunity was not waived respecting the death of plaintiff’s son, allegedly caused by the department’s employees whom plaintiffs failed to identify or name as defendants. *Davis v. State*, 211 Ga. App. 285, 439 S.E.2d 40 (1993).

Negligent failure to maintain building is tort action. — Action against a county for negligent failure to maintain a county building sounded in tort, not contract, and therefore, there was no waiver of sovereign immunity. *Burton v. DeKalb County*, 209 Ga. App. 638, 434 S.E.2d 82 (1993).

Damage of home due to police action. — Trial court properly dismissed an insurance company’s suit for inverse condemnation against a county because the insured’s home was damaged during the exercise of police power and, thus, did not fall within the waiver of sovereign immunity set forth in Ga. Const. 1983, Art. I, Sec. II, Para. IX(e). *Amica Mut. Ins. Co. v. Gwinnett County Police Dep’t*, 319 Ga. App. 780, 738 S.E.2d 622 (2013).

Consequential damages for water meter leakage. — The plaintiff in a federal civil rights action had an adequate state law tort remedy, consequently, the plaintiff was not deprived of the plaintiff’s rights without due process of law when a water meter leaked, the county did not repair the meter, water flowed onto a nearby road and froze, and the plaintiff’s car skidded on the ice and collided with another car, causing extensive injuries, notwithstanding the fact that the county and its officers were immune from suit for negligence. *Rittenhouse v. DeKalb County*, 764 F.2d 1451 (11th Cir. 1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986).

Release of stolen property to wrong party. — The state may assert its immunity from suit in an action brought pursu-

ant to O.C.G.A. § 17-5-50, relating to disposition of stolen property, to recover a sum which the state has improperly released to another party. *State v. Collins*, 171 Ga. App. 225, 319 S.E.2d 84 (1984).

Recovery for implied contracts and under eminent domain precluded. — Because one can now sue the state on an express contract, this viability of a claim on an express contract precludes recovery on an implied contract theory and under an eminent domain theory. *DOT v. Fru-Con Constr. Corp.*, 206 Ga. App. 821, 426 S.E.2d 905 (1992).

Sovereign immunity barred a conventional quiet title action against the state, which was immune from suit under O.C.G.A. § 23-3-40. Sovereign immunity was not applicable to an in rem quiet title action against all the world under O.C.G.A. § 23-3-60 as such an action was against the underlying property itself. *TDGA, LLC v. CBIRA, LLC*, 298 Ga. 510, 783 S.E.2d 107 (2016).

Breach of contract claim barred. — A claim for breach of contract brought by a homeowner against a county after a sewer line flooded part of the home was barred by sovereign immunity since there was no written contract; furthermore, the claim, even though couched in contract, sounded in tort and was, also, barred by sovereign immunity. *Merk v. DeKalb County*, 226 Ga. App. 191, 486 S.E.2d 66 (1997).

The plaintiff's claim for back pay was barred by sovereign immunity, notwithstanding the plaintiff's contention that the claim arose out of an employment contract with the defendant county, since the mere acceptance by the plaintiff of a written offer of employment for an indefinite term did not create an enforceable written contract. *Waters v. Glynn County*, 237 Ga. App. 438, 514 S.E.2d 680 (1999).

Ex contractu action not barred. — Highway construction contractor's action against the Department of Transportation based on design errors and omissions and on the department's breach of certain implied contractual obligations was ex contractu and was not barred by sovereign immunity. *DOT v. APAC-Georgia, Inc.*, 217 Ga. App. 103, 456 S.E.2d 668 (1995), cert. denied, 1995 Ga. Lexis 825 (1995).

Surety on a public contract, after assist-

ing the contractor in completing the project, stood in the place of the contractor and was subrogated to the contractor's right of action for breach of contract against the Georgia Department of Corrections; under Ga. Const. 1983, Art. I, Sec. II, Para. IX(c), the state waived sovereign immunity for contracts. *State Dep't of Corr. v. Developers Sur. & Indem. Co.*, 295 Ga. 741, 763 S.E.2d 868 (2014).

Ultra vires contract not enforceable under quantum meruit theory of recovery. — Appellate court erred by holding that an environmental engineering company could recover against a city on its quantum meruit claim because quantum meruit was not an available remedy against the city since the claim was based on a municipal contract that was ultra vires as it was never approved by city council. *City of Baldwin v. Woodard & Curran, Inc.*, 293 Ga. 19, 743 S.E.2d 381 (2013).

Effect of O.C.G.A. § 32-2-6(a). — Through the enactment of O.C.G.A. § 32-2-6(a), the General Assembly has said that when a cause of action accrues on a public road which is part of the state highway system, suit may be brought against the county (which is merely a political subdivision of the state), but the Department of Transportation shall defend any such suit and be responsible for all damages awarded therein. What the General Assembly has thus done is to prescribe the terms and conditions on which the state consents to be sued, and these terms and conditions did not deprive the plaintiff of any constitutional rights. *Sikes v. Candler County*, 247 Ga. 115, 274 S.E.2d 464 (1981).

Action for taking of private property for public purpose is specifically exempted from jurisdiction of State Court of Claims. *Harrell v. Monroe County*, 147 Ga. App. 685, 250 S.E.2d 20 (1978).

Action for value of private property taken or damaged for public purpose is not either tort or contract; it is simply a constitutional right which the citizen may not be denied. *C.F.I. Constr. Co. v. Board of Regents of Univ. Sys.*, 145 Ga. App. 471, 243 S.E.2d 700, cert. dismissed, 242 Ga. 96, 249 S.E.2d 613 (1978).

Application (Cont'd)

County's immunity regarding tax sale. — Pursuant to O.C.G.A. § 36-1-4 and Ga. Const. 1983, Art. I, Sec. II, Para. IX(e), a county was immune from a lender's suit because the lender pointed to no statute creating a waiver of immunity or any factual scenario warranting a waiver with respect to the lender's claim that the county failed to give it notice of the availability of excess funds following a tax sale as required by O.C.G.A. § 48-4-5. *Bartow County v. S. Dev., III, L.P.*, 325 Ga. App. 879, 756 S.E.2d 11 (2014).

Actual malice not shown. — In a suit by developers against city officials, the officials were entitled to qualified immunity. While the officials might have acted with conscious disregard of the consequences to the developers if the city's water issues with a state agency were not resolved, this did not create a jury issue as to actual malice. *Paul Wendelken v. Jenk*, No. A07A1645; No. A07A1646, 2008 Ga. App. LEXIS 489 (Mar. 18, 2008).

Parent's allegations that a county and a county road superintendent gave false statements and committed acts that were willful, intentional, fraudulent, and reckless were insufficient to state a claim that the superintendent acted with actual malice as that term was used in Ga. Const. 1983, Art. I, Sec. II, Para. IX(d); because the parent did not allege that the superintendent intended to cause a decedent's fatal accident, the parent did not state a claim for actual malice. *Barnard v. Turner County*, 306 Ga. App. 235, 701 S.E.2d 859 (2010).

Factual issue regarding actual malice. — When an investigator added a pawn shop owners' home address to a search warrant without the magistrate judge's approval, the investigator and the sheriff were properly denied summary judgment based on official immunity under Georgia law because there were genuine issues of fact regarding whether the investigator acted with actual malice and whether the sheriff knew of the investigator's actions. *Gordon v. Chattooga County*, No. 12-10818, 2012 U.S. App. LEXIS 13554 (11th Cir. July 3, 2012) (Unpublished).

Law clerks' claim against a county for back pay based on an alleged disparity between their salaries and salaries of other county employees was not barred by the doctrine of sovereign immunity as the claim was based on contract; immunity was specifically waived for an action *ex contractu* for the breach of any written contract. *Fulton County v. Lord*, 323 Ga. App. 384, 746 S.E.2d 188 (2013).

When officers responded to a call reporting a domestic disturbance at a residence, the decedent resisted the officers' attempt to arrest the decedent, and an officer shot and killed the decedent, it was error to grant the shooting officer official immunity as to a wrongful death claim because a jury could find that the officer intentionally shot the decedent after the struggle ended and at a time when the decedent was lying on the floor, unarmed and compliant. *Felio v. Hyatt*, No. 14-15702, 2016 U.S. App. LEXIS 1230 (11th Cir. Jan. 26, 2016) (Unpublished).

OPINIONS OF THE ATTORNEY GENERAL

Department of Offender Rehabilitation employees have qualified immunity. — Department of Offender Rehabilitation (now Corrections) employees, authorized by law to supervise probationers while they are performing approved court-ordered tasks under O.C.G.A. §§ 42-8-71, 42-8-72, and 42-8-73 are performing a governmental function as opposed to a ministerial task, and therefore will not be personally liable for injuries to the probationers sustained while perform-

ing the tasks unless the Department of Offender Rehabilitation (now Corrections) employees' conduct is willful and wanton. 1983 Op. Att'y Gen. No. 83-18.

The potential liability of probation supervisors supervising court-ordered community service by probationers (a discretionary function as opposed to a ministerial duty) is, notwithstanding the waiver of sovereign immunity to the extent of any liability insurance provided, only for conduct which is willful, wanton, or outside

the scope of authority of the supervisor.
1983 Op. Att’y Gen. No. 83-18 (rendered prior to 1990 amendment).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Courts, § 99.

C.J.S. — 81A C.J.S., States, § 541 et seq.

ALR. — Officers or privates in military service as “officers” or “employees” within statute waiving state’s immunity from liability for torts, 129 ALR 911.

Liability for injury or damages resulting from traffic accident on highway involving vehicle in military service, 147 ALR 1431.

Jurisdiction of state court over actions involving patents, 167 ALR 1114.

Tortious breach of contract as within consent to suit against United States or state on contract, 1 ALR2d 864.

Liability for injury from defective condition or improper operation of lift bridge or drawbridge, 90 ALR2d 105.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from design, construction, or failure to warn of narrow bridge, 2 ALR4th 635.

Liability of governmental unit for injuries caused by driver of third vehicle to person whose vehicle had been stopped by police car, 17 ALR4th 897.

Validity and construction of statute or ordinance limiting the kinds or amount of

actual damages recoverable in tort action against governmental unit, 43 ALR4th 19.

Governmental tort liability for failure to provide police protection to specifically threatened crime victim, 46 ALR4th 948.

Official immunity of state national guard members, 52 ALR4th 1095.

Right of insured, precluded from recovering against owner or operator of uninsured motor vehicle because of governmental immunity, to recover uninsured motorist benefits, 55 ALR4th 806.

Governmental tort liability as to highway median barriers, 58 ALR4th 559.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents’ custody, 60 ALR4th 942.

Liability for injury or death allegedly caused by activities of hospital “rescue team”, 64 ALR4th 1200.

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 ALR4th 204.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured, 68 ALR4th 266.

Liability of school or school personnel for injury to student resulting from cheerleader activities, 25 ALR5th 784.

SECTION III.

GENERAL PROVISIONS

- Paragraph
- I. Eminent domain.
 - II. Private ways.

- Paragraph
- III. Tidewater titles confirmed.

Law reviews. — For annual survey on constitutional law, see 36 Mercer L. Rev. 137 (1984).

For note discussing the historical as-

pects and current law concerning the state’s ownership rights in tidelands, see 17 Ga. L. Rev. 851 (1983).

Paragraph I. Eminent domain.

(a) Except as otherwise provided in this Paragraph, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

(b) When private property is taken or damaged by the state or the counties or municipalities of the state for public road or street purposes, or for public transportation purposes, or for any other public purposes as determined by the General Assembly, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law; but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness.

(c) The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders, and the state and its subdivisions may be protected.

(d) The General Assembly may provide by law for the payment by the condemnor of reasonable expenses, including attorney's fees, incurred by the condemnee in determining just and adequate compensation.

(e) Notwithstanding any other provision of the Constitution, the General Assembly may provide by law for relocation assistance and payments to persons displaced through the exercise of the power of eminent domain or because of public projects or programs; and the powers of taxation may be exercised and public funds expended in furtherance thereof.

1976 Constitution. — Art. I, Sec. III, Para. I.

Cross references. — Due process of law and just compensation, U.S. Const., amend. 5; Ga. Const. 1983, Art. I, Sec. I, Para. I; Ga. Const. 1983, Art. III, Sec. VI, Para. III; Ga. Const. 1983, Art. IX, Sec. II, Para. V; T. 22; T. 32, C. 3; and § 44-9-40 et seq.

Law reviews. — For article, "The Tort Liability of Municipalities in Georgia," see 17 Ga. B.J. 456 (1955). For article discussing eminent domain procedure in this country, and advocating reforms focusing on a unified method for condemnation, see 11 Mercer L. Rev. 245 (1960). For article discussing federal liability for pollution abatement in condemnation actions, see

17 Mercer L. Rev. 364 (1966). For article, "Eminent Domain, Police Power and Urban Renewal: Compensation for Interim Depreciation in Land Values," see 7 Ga. L. Rev. 226 (1972). For article discussing this paragraph as a bar to zoning regulations, and advocating the use by the Supreme Court of a balancing analysis in ruling on zoning regulations, see 10 Ga. L. Rev. 53 (1975). For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978). For article surveying recent legislative and judicial developments in zoning, planning and environmental law, see 31 Mercer L. Rev. 89 (1979). For article surveying recent legislative and judicial

developments in Georgia’s real property laws, see 31 Mercer L. Rev. 187 (1979). For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982). For annual survey on real property, see 36 Mercer L. Rev. 285 (1984). For annual survey of law of real property, see 38 Mercer L. Rev. 319 (1986). For article, “Condemning Local Government Condemnation,” see 39 Mercer L. Rev. 11 (1987). For article, “A Critical Review of the Law of Business Loss Claims in Georgia Eminent Domain Jurisprudence,” see 51 Mercer L. Rev. 11 (1999). For survey article on local government law, see 60 Mercer L. Rev. 263 (2008). For article, “Federalization of the Mosquito: Structural Innovation in the New Deal Administrative State,” see 60 Emory L.J. 325 (2010).

For note, “Annexation by Municipalities in Georgia,” see 2 Mercer L. Rev. 423 (1951). For note on computation of compensation for condemned lands where value is enhanced by announcement of proposed improvement, see 15 Mercer L. Rev. 488 (1964). For note, “A Study of the Development and Current Status in Georgia of Inverse Condemnation Suits by a Landowner for Taking by Aerial Flights,” see 2 Ga. St. B.J. 232 (1965). For note discussing meaning of “public use” and analyzing theories of excess condemnation, see 18 Mercer L. Rev. 274 (1966). For note discussing sonic boom damage as governmental taking of property for public use without just compensation, see 2 Ga. L. Rev. 83 (1967). For note, “Regulation and Ownership of the Marshlands: The Georgia Marshlands Act,” see 5 Ga. L. Rev. 563 (1971). For note discussing airport noise as a taking, given in the absence of direct overflight, see 10 Ga. L. Rev. 218 (1975). For note analyzing sovereign immunity in Georgia and proposing

implementation of a waiver scheme and creation of a court of claims pursuant to Ga. Const., Art. VI, Sec. V, Para. I, see 27 Emory L.J. 717 (1978). For note, “Have They Gone ‘Too Far’? An Evaluation and Comparison of 1995 State Takings Legislation,” see 30 Ga. L. Rev. 1061 (1996).

For comment on *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953), see 5 Mercer L. Rev. 323 (1954). For comment on *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953), see 17 Ga. B.J. 117 (1954). For comment on *State Hwy. Dep’t v. Thomas*, 106 Ga. App. 849, 128 S.E.2d 520 (1962), see 14 Mercer L. Rev. 447 (1963). For comment on *Tift County v. Smith*, 107 Ga. App. 140, 129 S.E.2d 172 (1962), rev’d on appeal, 219 Ga. 68, 131 S.E.2d 527 (1963), see 26 Ga. B.J. 195 (1963). For comment on *Hard v. Housing Auth.*, 219 Ga. 74, 132 S.E.2d 25 (1963), see 26 Ga. B.J. 349 (1964). For comment on *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), see 17 Mercer L. Rev. 471 (1966). For comment on *Calhoun v. State Hwy. Dep’t*, 223 Ga. 65, 153 S.E.2d 418 (1967), answer conformed to, 115 Ga. 152, 154 S.E.2d 37 (1967), see 18 Mercer L. Rev. 475 (1967). For comment on *State Hwy. Dep’t v. Owens*, 120 Ga. App. 647, 171 S.E.2d 770 (1969), see 22 Mercer L. Rev. 616 (1971). For comment on *DeKalb County v. Trustees, Decatur Lodge No. 1602*, 242 Ga. 707, 251 S.E.2d 243 (1978), see 31 Mercer L. Rev. 367 (1979). For comment on *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979), see 31 Mercer L. Rev. 375 (1979). For comment, “Just Compensation for Temporary Regulatory Takings: A Discussion of Factors Influencing Damage Awards,” see 35 Emory L.J. 729 (1986).

JUDICIAL DECISIONS

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- GENERAL CONSIDERATION
- CONSTITUTIONALITY OF OTHER PROVISIONS
- EXTENT OF RIGHT OF EMINENT DOMAIN
- LIABILITY OF COUNTIES AND OTHER GOVERNMENTAL ENTITIES
- WHAT IS COMPENSABLE
 - 1. IN GENERAL
 - 2. EXERCISE OF POLICE POWER

3. COMMERCIAL LOSSES
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5. CONSTRUCTION OF JAIL OR PRISON
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10. DAMAGE FROM ROAD CONSTRUCTION OR IMPROVEMENT
11. CONSTRUCTION OF SEWER
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1. IN GENERAL
2. MEASURE OF RECOVERY
3. ATTORNEYS' FEES
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General Consideration

Just and adequate compensation must be first paid before private property is taken or damaged for public purposes. *Wilson v. State Hwy. Dep't*, 85 Ga. App. 907, 70 S.E.2d 535 (1952).

When the state, through any of its agents, takes or damages private property for public purposes, this paragraph lays upon it the imperative duty to first pay just and adequate compensation therefor. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Unlike the Fifth Amendment to the United States Constitution, the Georgia Constitution requires that a governing authority give a property owner just compensation before taking or damaging property. *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994).

Paragraph to be liberally construed. *Mayor of Macon v. Daley*, 2 Ga. App. 355, 58 S.E. 540 (1907).

Paragraph too plain to be misunderstood. *Oliver v. Union P. & W.P.R.R.*, 83 Ga. 257, 9 S.E. 1086 (1889).

Paragraph is self-enforcing and

paramount to all legislative enactments. *Elbert County v. Brown*, 16 Ga. App. 834, 86 S.E. 651 (1915).

This paragraph is all-inclusive and covers taking or damaging of private property whether brought about by action involving proper and diligent construction or taking, or negligent damaging or taking. *Gwinnett County v. Allen*, 56 Ga. App. 753, 194 S.E. 38 (1937); *Richmond County v. Williams*, 109 Ga. App. 670, 137 S.E.2d 343 (1964).

Effect of this paragraph is not to authorize compensation in all cases where property may be injured by public works, but only when the enjoyment of some right of the plaintiff in reference to the plaintiff's property is interfered with, and the property thereby rendered less valuable. *Bibb County v. Green*, 42 Ga. App. 552, 156 S.E. 745 (1931); *Felton Farm Co. v. Macon County*, 49 Ga. App. 239, 175 S.E. 29 (1934).

This paragraph will apply only if property is taken or damaged. *Lindsey v. Guhl*, 237 Ga. 567, 229 S.E.2d 354 (1976).

Before paragraph becomes applicable,

the owner's property must be taken or physically damaged for a public use. *State Hwy. Dep't v. McClain*, 216 Ga. 1, 114 S.E.2d 125 (1960).

Sovereign immunity. — The legislature's and the judiciary's establishment and adherence to the rule of sovereign immunity is not a "taking" of property rights required to be compensated. *Tyson v. Board of Regents*, 212 Ga. App. 550, 442 S.E.2d 9 (1994).

Effect of sovereign immunity. — Since the recovery of just and adequate compensation for private property which is taken for public purposes is itself an express constitutional right, sovereign immunity is not a viable bar to an action to enforce that right. *State Bd. of Educ. v. Drury*, 263 Ga. 429, 437 S.E.2d 290 (1993).

Action for value of private property taken or damaged for public purpose is not, in ordinary parlance, either tort or contract; it is simply a constitutional right which the citizen may not be denied. *C.F.I. Constr. Co. v. Board of Regents of Univ. Sys.*, 145 Ga. App. 471, 243 S.E.2d 700, cert. dismissed, 242 Ga. 96, 249 S.E.2d 613 (1978).

In statutory proceeding where a person may be deprived of property, statute must be strictly pursued. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

Property interest required. — Teachers who were denied renewable teaching certificates under invalidly promulgated regulations were not entitled to recover damages under the taking provision of the state Constitution, since they did not have a property interest in renewable teaching certificates that were never issued to them. *State Bd. of Educ. v. Drury*, 263 Ga. 429, 437 S.E.2d 290 (1993).

Exhausting state procedures as prerequisite to Fifth Amendment claim. — When the plaintiff failed to file an inverse condemnation claim in the state court and when the federal court had not ruled on the inverse condemnation claim the plaintiff filed therein, the plaintiff's Fifth Amendment takings claim was not ripe for adjudication. *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994).

In an action in which the plaintiff landowners filed suit against the defendant

county alleging a taking under the Fifth Amendment, and inverse condemnation under Ga. Const. 1983, Art. I, Sec. III, Para. 1, in connection with the county's recreational development of its adjoining property, because the landowners had failed to avail themselves of Georgia's inverse condemnation procedure, the Fifth Amendment takings claim was premature, and the county motion for partial judgment on the pleadings was granted. *Carney v. Gordon County*, No. 4:06-CV-36-RLV, 2006 U.S. Dist. LEXIS 82634 (N.D. Ga. Sept. 12, 2006).

When statutory remedy not exclusive. — When the statutory remedy, however broad it may be, cannot be initiated by the owner of the land, and the condemner alone can put it into operation but fails to do so, the statutory remedy is not exclusive, and the owner may resort to an action at common law. To construe the statute otherwise would render it unconstitutional. *Housing Auth. v. Savannah Iron & Wire Works, Inc.*, 90 Ga. App. 150, 82 S.E.2d 244 (1954).

Supreme Court is without jurisdiction of action to recover damages for taking and injuring private property for public use, and the mere fact that the Constitution, under this paragraph, forbids such injury to or taking of private property without just and adequate compensation being first paid therefor in no wise makes a constitutional question for decision by such court. *Mayor of Athens v. Gamma Delta Chapter House Corp.*, 208 Ga. 392, 67 S.E.2d 111 (1951).

The term "property" is a very comprehensive one and is used not only to signify things real and personal owned but to designate the right of ownership and that which is subject to be owned and enjoyed. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966).

The term "property" comprehends not only the thing possessed but also, in strict legal parlance, means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from the use. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966).

Role of equity in providing protection. — If by mistake the constitutional

General Consideration (Cont'd)

protection provided for in Ga. Const. 1945, Art. I, Sec. I, Para. II (see now Ga. Const. 1983, Art. I, Sec. I, Para. II) and Ga. Const. 1945, Art. I, Sec. III, Para. I. (see now Ga. Const. 1983, Art. I, Sec. III, Para. I) is denied the citizen, and it is not voluntarily rectified, courts of equity will command its rectification. *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958).

Inverse condemnation precluded after condemnation proceeding initiated. — An inverse condemnation action cannot be maintained once a condemnation proceeding has been initiated by a condemning authority; that proceeding establishes the exclusive avenue for litigating the issue of just and adequate compensation. *DOT v. Samuels*, 185 Ga. App. 871, 366 S.E.2d 181, cert. denied, 185 Ga. App. 909, 366 S.E.2d 181 (1988).

Evidence sufficient to support jury's verdict that there was no inverse condemnation of business. See *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 168 Ga. App. 202, 308 S.E.2d 547 (1983).

Parameters of preliminary entry. — A prospective condemnor is not required to adhere to condemnation procedures and constitutional provisions for compensation before making a preliminary entry, although it is responsible for all damages which occur during its preliminary entry. The permissible scope of an entry for preliminary survey, inspection and appraisal is, however, necessarily limited by the constitutional restrictions on the taking and damaging of property without just compensation; a taking may not be allowed under the guise of a preliminary survey, and the right of entry does not include the right to make permanent appropriation or cause more than minimal or incidental damage to property. *Oglethorpe Power Corp. v. Goss*, 253 Ga. 644, 322 S.E.2d 887 (1984).

Availability of injunction. — Equity will grant an injunction when damages not properly tendered. *Athens Term. Co. v. Athens Foundry & Mach. Works*, 129 Ga. 393, 58 S.E. 891 (1907).

Time of payment. — The land must be paid for before condemnation when the

Act fails to make a provision therefor. *Town of Poulan v. Atlantic Coast Line R.R.*, 123 Ga. 605, 51 S.E. 657 (1905).

Failure to institute proceedings may constitute waiver of right to payment before condemnation. *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S.E. 312 (1904).

Takings clause inapplicable. — Application of the true up process to the shortfall caused by the bankruptcy of a natural gas limited liability company (LLC) did not violate the takings clauses of U.S. Const., amend. V or Ga. Const. 1983, Art. I, Sec. III, Para. I because after the true up process had operated as intended, and after the fact, a marketer sought to obtain from the government amounts representing the marketer's commercial losses on gas delivered to the LLC's customers, and that was merely a "consequential" loss to the marketer. *MXenergy Inc. v. Ga. PSC*, 310 Ga. App. 630, 714 S.E.2d 132 (2011).

Cited in *Austin v. Augusta Term. Ry.*, 108 Ga. 671, 34 S.E. 852 (1899); *Rogers v. Toccoa Power Co.*, 161 Ga. 524, 131 S.E. 517, 44 ALR 534 (1926); *Smith v. Floyd County*, 36 Ga. App. 554, 137 S.E. 646 (1927); *State Hwy. Bd. v. Baxter*, 167 Ga. 124, 144 S.E. 796 (1928); *Brown v. City of Atlanta*, 167 Ga. 416, 145 S.E. 855 (1928); *Habersham County v. Cornwall*, 38 Ga. App. 419, 144 S.E. 55 (1928); *City of Atlanta v. Hines*, 39 Ga. App. 499, 147 S.E. 416 (1929); *Floyd County v. Fincher*, 169 Ga. 460, 150 S.E. 577 (1929); *Georgia Pub. Serv. Comm'n v. Saye & Davis Transf. Co.*, 170 Ga. 873, 154 S.E. 439 (1930); *MacDougald Constr. Co. v. Bass Canning Co.*, 42 Ga. App. 533, 156 S.E. 628 (1931); *Fauss v. McConnell*, 172 Ga. 444, 157 S.E. 625 (1931); *Montgomery & Atlanta Freight Lines v. Georgia Pub. Serv. Comm'n*, 175 Ga. 826, 166 S.E. 200 (1932); *Pike County v. Matthews*, 49 Ga. App. 152, 174 S.E. 642 (1934); *Holland v. Whitfield County*, 54 Ga. App. 453, 188 S.E. 288 (1936); *Harrison v. State Hwy. Dep't*, 183 Ga. 290, 188 S.E. 445 (1936); *Perkerson v. State Hwy. Bd.*, 56 Ga. App. 316, 192 S.E. 475 (1937); *Warren v. Georgia Power Co.*, 58 Ga. App. 9, 197 S.E. 338 (1938); *State Hwy. Bd. v. Bridges*, 60 Ga. App. 240, 3 S.E.2d 907 (1939); *Botts v.*

Southeastern Pipe-Line Co., 190 Ga. 689, 10 S.E.2d 375 (1940); Brooks County v. Elwell, 63 Ga. App. 308, 11 S.E.2d 82 (1940); Habersham County v. Knight, 63 Ga. App. 720, 12 S.E.2d 129 (1940); City of Albany v. Lippitt, 191 Ga. 756, 13 S.E.2d 807 (1941); Hall v. State Hwy. Bd., 66 Ga. App. 190, 17 S.E.2d 291 (1941); Elder v. City of Winder, 201 Ga. 511, 40 S.E.2d 659 (1946); State Hwy. Dep't v. Parker, 75 Ga. App. 237, 43 S.E.2d 172 (1947); Southern v. Cobb County, 78 Ga. App. 58, 50 S.E.2d 226 (1948); Pilgreen v. City of Atlanta, 204 Ga. 710, 51 S.E.2d 655 (1949); Cannon v. City of Macon, 81 Ga. App. 310, 58 S.E.2d 563 (1950); Moore v. Baker, 85 Ga. App. 234, 68 S.E.2d 911 (1952); Kitchens v. Jefferson County, 85 Ga. App. 902, 70 S.E.2d 527 (1952); Allen v. City of Atlanta, 86 Ga. App. 476, 71 S.E.2d 871 (1952); Almon v. Terrell County, 89 Ga. App. 403, 79 S.E.2d 430 (1953); Mayor of Savannah v. Moses Rogers Hous. Corp., 91 Ga. App. 32, 84 S.E.2d 488 (1954); City of Thomson v. Davis, 92 Ga. App. 216, 88 S.E.2d 300 (1955); O.K., Inc. v. State Hwy. Dep't, 213 Ga. 666, 100 S.E.2d 906 (1957); United States of Am. v. Ivie, 163 F. Supp. 138 (N.D. Ga. 1957); Dougherty County v. Hamilton, 99 Ga. App. 468, 108 S.E.2d 886 (1959); Clarke County Sch. Dist. v. Madden, 99 Ga. App. 670, 110 S.E.2d 47 (1959); Kellett v. Fulton County, 215 Ga. 551, 111 S.E.2d 364 (1959); Mitchell v. City of Atlanta, 217 Ga. 202, 121 S.E.2d 764 (1961); City of Atlanta v. Lunsford, 105 Ga. App. 247, 124 S.E.2d 493 (1962); Hill v. Busbia, 217 Ga. 781, 125 S.E.2d 34 (1962); City of Atlanta v. Donald, 221 Ga. 135, 143 S.E.2d 737 (1965); State Hwy. Dep't v. MacDonald, 221 Ga. 312, 144 S.E.2d 363 (1965); Stambaugh v. City of Demorest, 221 Ga. 527, 145 S.E.2d 539 (1965); Veal v. Smith, 221 Ga. 712, 146 S.E.2d 751 (1966); Cato v. Arnold, 222 Ga. 567, 151 S.E.2d 149 (1966); State Hwy. Dep't v. Branch, 222 Ga. 770, 152 S.E.2d 372 (1966); DeKalb County v. McFarland, 223 Ga. 196, 154 S.E.2d 203 (1967); Abercrombie v. Ledbetter-Johnson Co., 116 Ga. App. 376, 157 S.E.2d 493 (1967); Tuggle v. Manning, 224 Ga. 29, 159 S.E.2d 703 (1968); Douglas County v. Abercrombie, 119 Ga. App. 727, 168 S.E.2d 870 (1969); Jones v. Georgia Power

Co., 225 Ga. 510, 169 S.E.2d 810 (1969); Pye v. State Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970); Housing Auth. v. Mercer, 124 Ga. App. 477, 184 S.E.2d 225 (1971); Arnold v. Selected Sites, Inc., 229 Ga. 468, 192 S.E.2d 260 (1972); Hinson v. DOT, 230 Ga. 314, 196 S.E.2d 883 (1973); Taylor v. Georgia Power Co., 129 Ga. App. 89, 198 S.E.2d 701 (1973); Jackson v. McIntosh County, 232 Ga. 712, 208 S.E.2d 813 (1974); Baranan v. Fulton County, 232 Ga. 852, 209 S.E.2d 188 (1974); Andrews v. Department of Transp., 133 Ga. App. 78, 210 S.E.2d 30 (1974); Lee v. W.S. Venable, 134 Ga. App. 92, 213 S.E.2d 188 (1975); Miree v. United States, 526 F.2d 679 (5th Cir. 1976); Perry v. Landmark Fin. Corp., 141 Ga. App. 62, 232 S.E.2d 399 (1977); Pope v. City of Atlanta, 240 Ga. 177, 240 S.E.2d 241 (1977); Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc., 240 Ga. 743, 242 S.E.2d 69 (1978); Lines v. State, 245 Ga. 390, 264 S.E.2d 891 (1980); Newsome v. Richmond County, 246 Ga. 300, 271 S.E.2d 203 (1980); City of Columbus v. Myszka, 246 Ga. 571, 272 S.E.2d 302 (1980); Noe v. Metropolitan Atlanta Rapid Transit Auth., 485 F. Supp. 501 (N.D. Ga. 1980); Smith v. Gwinnett County, 248 Ga. 882, 286 S.E.2d 739 (1982); Baranan v. Fulton County, 250 Ga. 531, 299 S.E.2d 722 (1983); Banks v. Georgia Power Co., 267 Ga. 602, 481 S.E.2d 200 (1997); City of Stockbridge v. Meeks, 283 Ga. App. 343, 641 S.E.2d 584 (2007); Bd. of Comm'rs v. Johnson, 311 Ga. App. 867, 717 S.E.2d 272 (2011).

Constitutionality of Other Provisions

This paragraph suspended prior local Acts permitting the taking of property without compensation. Alexander v. City Council, 134 Ga. 849, 68 S.E. 704 (1910).

For standard for review of constitutionality of state land use regulations, see Pope v. City of Atlanta, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979), commented on in 31 Mercer L. Rev. 375 (1979).

This paragraph is not violated by Ga. L. 1957, p. 387, § 13 (see now O.C.G.A. § 22-2-111), which provides

Constitutionality of Other Provisions (Cont'd)

that the judge of the superior court shall enter judgment condemning the described property sought to be condemned, in rem, and fee simple, to the use of the condemning body upon the payment into the registry of the court of the amount provided for in the award of the special master, since the method of determining what is just and adequate compensation is a matter of legislative discretion, and the method prescribed in that section fully and adequately protects that constitutional right. *Anthony v. State Hwy. Dep't*, 215 Ga. 853, 113 S.E.2d 768 (1960).

Constitutionality of local Act amending charter of Decatur and the ordinances passed thereunder by the municipal authorities ordering the levying of the cost of paving assessment against the street railway company and its property located therein and used by it in the operation of the street-railway system, are not violative of U.S. Const., amend. 15, Ga. Const. 1877, Art. I, Sec. I, Para. III, and Art. I, Sec. I, Para. II (see now Ga. Const. 1983, Art. I, Sec. I, Paras. I and II), and Ga. Const. 1877, Art. I, Sec. III, Para. I (see now Ga. Const. 1983, Art. I, Sec. III, Para. I) when the levying of any assessment for a local public benefit is imposed as a special tax in the exercise of the police power of the state. Neither does it violate Ga. Const. 1877, Art. VII, Sec. I, Para. I (see now Ga. Const. 1983, Art. VII, Sec. III), which provides a uniform system of taxation for the general support of the government. *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930).

Local Act unconstitutional. — The Act of the General Assembly granting to the City of Albany power to regulate garages and filling stations, and other businesses (Ga. L. 1923, p. 412), to license those businesses only in such localities as may be least offensive to the public, and to revoke the license for those businesses when they prove dangerous and injurious to health is in conflict with the due process clause of the Constitution of Georgia as found in Ga. Const. 1877, Art. I, Sec. I, Para. I (see now Ga. Const. 1983, Art. I, Sec. II, Para. I), and is also in conflict with

the Constitution of Georgia as found in Ga. Const. 1877, Art. I, Sec. III, Para. I (see now Ga. Const. 1983, Art. I, Sec. III, Para. I), insofar as that Act is interpreted by the public officials of the City of Albany to authorize a refusal of a permit sought by an owner of property to construct a filling station which conforms in every way to the building regulations of the city. *Reynolds v. Brosnan*, 170 Ga. 773, 154 S.E. 264 (1930).

Child support guidelines are not illegal taking. — Trial court erred in concluding that the Child Support Guidelines, under O.C.G.A. § 19-6-15, resulted in an illegal taking from a parent, by reducing the parent to poverty status, in violation of the Georgia Constitution; the guidelines rather represented the state's efforts to ensure adequate care for children whose parents were divorced or separated. *Ga. Dep't of Human Res. v. Sweat*, 276 Ga. 627, 580 S.E.2d 206, cert. denied, 540 U.S. 966, 124 S. Ct. 432, 157 L. Ed. 2d 310 (2003).

Extent of Right of Eminent Domain

Private property may not be taken for private purpose. *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

Necessity for strict compliance with prerequisites. — The taking of private property for a public use is the exercise of a high power, and before such taking can be constitutionally accomplished all prerequisites must be complied with strictly. *Woodside v. City of Atlanta*, 214 Ga. 75, 103 S.E.2d 108 (1958).

Exercise of right of eminent domain is legislative function and the General Assembly may by law prescribe the procedure for taking private property for public uses. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Right of eminent domain gives legislature control of private property for use of public; provided just compensation be made to the owner therefor and all grantees of land from the state, and their assigns, hold it under this tacit agreement or implied understanding. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Eminent domain cannot be used to restrict legitimate activity in which state has interest. — Governing authority has no right to utilize power of eminent domain under Ga. Const. 1976, Art. I, Sec. III, Para. I (see now Ga. Const. 1983, Art. I, Sec. III, Para. I) and Ga. Const. 1976, Art. III, Sec. VIII, Para. II (see now Ga. Const. 1983, Art. III, Sec. VI, Para. II(b)) in order to restrict a legitimate activity in which the state has an interest. *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

Role of judiciary. — The necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so when the state takes for the state's own purposes. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

The courts may not interfere with the legislative discretion of a condemning body in judging the public need for and amount of property to be taken unless the condemning authority has acted in bad faith or beyond the powers conferred upon it. *City of Atlanta v. First Nat'l Bank*, 246 Ga. 424, 271 S.E.2d 821 (1980).

Delegability of power to agencies. — Since the legislature cannot in every case supervise the condemnation of property for public use, it may confer the power to do so on agencies. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Delegability to public corporation. — Grant of power of eminent domain to public or quasi public corporation held valid. *Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 65 S.E. 844 (1909).

Delegability to foreign corporation. — The grant of the power of eminent domain to a foreign corporation is valid. *Southwestern R.R. v. Southern Atl. Tel. Co.*, 46 Ga. 43, 12 Am. R. 585 (1872).

Condemning authority may not act in bad faith in exercise of right of eminent domain. *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

Private life and health held above public convenience. — The right of pri-

vate convenience, the right of the private citizen to hold and own any particular property, must yield to public convenience and public service whenever and wherever the legislature says yield, and to this extent the right of eminent domain is paramount; but private life and private health are more precious in the eyes of the law than even public convenience. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Applies to all forms of property. — The right of the sovereign in the property of the citizen is hedged by two fundamental safeguards: the taking must be for a public purpose, and it must be attended by just and adequate compensation. This includes every species of property in which the individual has a right of ownership, whether real or personal, corporeal or incorporeal. *Weiner v. Fulton County*, 113 Ga. App. 343, 148 S.E.2d 143, cert. denied, 385 U.S. 958, 87 S. Ct. 393, 17 L. Ed. 2d 304 (1966).

Conferred right of eminent domain can operate only upon the property and never on the person or citizen. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

As property, contracts may be condemned. *DeKalb County v. United Family Life Ins. Co.*, 235 Ga. 417, 219 S.E.2d 707 (1975).

Property dedicated to particular purpose cannot by dedicatee, a municipality, be diverted from that purpose, except under right of eminent domain. *Donalson v. Georgia Power & Light Co.*, 175 Ga. 462, 165 S.E. 440 (1932).

Condemnation proceeding enjoined when not in conformity with charter. — When the charter of a municipality requires the adoption of a valid ordinance as a prerequisite to the condemnation of private property, and such requirement is not complied with prior to the condemnation proceedings, the action will be enjoined. *Marist Soc'y v. City of Atlanta*, 212 Ga. 115, 90 S.E.2d 564 (1955).

Condemning authority not to damage property without taking. — This paragraph allows the condemning authority to "take" a property interest, that is all or part of the fee, upon payment of com-

Extent of Right of Eminent Domain (Cont'd)

compensation; it does not, however, give these authorities the power to damage property without such a taking. *Metropolitan Atlanta Rapid Transit Auth. v. Trussell*, 247 Ga. 148, 273 S.E.2d 859 (1981).

A municipality must compensate a street railway for property taken for building streets. *Mayor of Savannah v. Vernon Shell Rd. Co.*, 88 Ga. 342, 14 S.E. 610 (1892).

Right of railroads to occupy city streets is subject to this paragraph. *Atlanta & W. Point R.R. v. Atlanta, Birmingham & Atl. R.R.*, 125 Ga. 529, 54 S.E. 736 (1906); *Athens Term. Co. v. Athens Foundry & Mach. Works*, 129 Ga. 393, 58 S.E. 891 (1907).

Right of railroad to obtain grant under Ga. L. 1892, p. 37, § 9 (see now O.C.G.A. § 46-8-100(4)), relating to acquisition of right of way, held valid. *Hopkins v. Florida Cent. & Peninsula R.R.*, 97 Ga. 107, 25 S.E. 452 (1895).

Municipality must obtain consent of chartered railroad before it can open street across carrier's lines. *Brunswick & W.R.R. v. Mayor of Waycross*, 94 Ga. 102, 21 S.E. 145 (1894); *Stowe v. Town of Newborn*, 127 Ga. 421, 56 S.E. 516 (1907).

Necessity for condemnation proceedings to subject railroad right of way to public use. — The right of way and tracks of a railroad company cannot be subjected to another and consistent public use, against the consent of the company, except under condemnation proceedings duly authorized. *Central of Ga. Ry. v. Haralson County*, 230 Ga. 217, 196 S.E.2d 392 (1973).

Company must prove right to erect poles. — To justify a company which uses poles and wires in the transmission of electric currents in setting up its poles in the land of a highway, it must show that it has acquired the right to do so, either by consent or condemnation from the owner of the soil. The designation by the municipality of the street where the poles may be set up is not enough. *Donalson v. Georgia Power & Light Co.*, 175 Ga. 462, 165 S.E. 440 (1932).

Right to assess costs of paving streets. — Assessments of costs of paving a street against abutting land are not an exercise of the right of eminent domain. *Speer v. Mayor of Athens*, 85 Ga. 49, 11 S.E. 802 (1890); *Georgia Ry. & Elec. Co. v. City of Atlanta*, 144 Ga. 722, 87 S.E. 1058 (1916); *Walthour v. City of Atlanta*, 157 Ga. 24, 120 S.E. 613 (1923); *City of Bainbridge v. Jester*, 157 Ga. 505, 121 S.E. 798 (1924).

A municipal act which provides that abutting and other property and its owner are responsible for the construction cost of sidewalks and other work done which is necessary does not and cannot give the city authority to either take or damage private property without just and adequate compensation. *City of East Point v. Allison*, 97 Ga. App. 499, 103 S.E.2d 664 (1958).

Cutting down shade trees. — Where shade trees, growing on a strip of land between a sidewalk and a street of the municipality, are located on land which is owned by a person in fee simple, the city has no right to cut down or remove such trees without the consent of the owner, there being no public necessity therefor. *City of Marietta v. Mozley*, 183 Ga. 875, 190 S.E. 34 (1937).

Condemnation to prevent use as hazardous waste facility constituted bad faith. — County acted in bad faith in instituting condemnation proceedings for obvious purpose of preventing land from being used as hazardous waste facility. *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

Authority of General Assembly to provide for prepayment. — This paragraph authorizes, but does not require, the General Assembly to provide for prepayment of an estimated amount against adequate compensation as a condition precedent to the exercise of the right of eminent domain and to provide for disbursement of the amount so prepaid to those entitled thereto. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Right of Department of Transportation to cancel landowner's contract with telegraph company. — When telegraph company has a contract with the

owner whereby it is entitled to establish and maintain its equipment upon the land involved, and the State Highway Department (now Department of Transportation) has knowledge thereof, and its title is expressly made subject thereto, it cannot exercise an option in the contract agreement to cancel it, by canceling a part but not all, and take or damage property therein without first paying therefor. *State Hwy. Dep't v. Western Union Tel. Co.*, 218 Ga. 663, 129 S.E.2d 872 (1963).

Constitutional requirement of compensation not obliterated by federal petroleum marketing practices statute. — The Federal Petroleum Marketing Practices Act, (15 U.S.C. § 2801 et seq.), which regulates petroleum franchise and marketing practices, and which requires that the franchisor “fairly apportion” between itself and a dealer any recovery “if received” by the franchisor for loss of business, concerns franchise and marketing rights only and does not touch upon or obliterate the state constitutional requirement that just and adequate compensation be paid to any condemnee for a property interest, including a leasehold interest. *Simmerman v. DOT*, 167 Ga. App. 383, 307 S.E.2d 4 (1983).

The Department of Transportation may not exercise eminent domain powers over municipally owned property as the legislature has not clearly granted such authority or created a procedure therefor, and as such grant may not be implied from statutory provisions generally establishing a procedure for state agencies to condemn “private property.” *DOT v. City of Atlanta*, 255 Ga. 124, 337 S.E.2d 327 (1985).

County’s use of power to prevent city’s treatment facility improper. — Use of the condemnation process by a county is not within its power and amounts to acting in bad faith when the true reason for the county’s condemnation was to prevent the construction of a public sewage-treatment facility by a local city. *Carroll County v. City of Bremen*, 256 Ga. 281, 347 S.E.2d 598 (1986).

Impairment shared by general public. — Reconstruction of a highway which reduced visibility of landowner’s billboard to traffic did not constitute an unconstitu-

tional taking of property because the impairment was shared by the public in general and was not compensable. *Moreton Rolleston, Jr. Living Trust v. DOT*, 242 Ga. App. 835, 531 S.E.2d 719 (2000).

Survey part of power of eminent domain. — Power company was properly granted declaratory relief and an injunction was properly granted against the property owners who would not permit the power company access to their land to conduct surveys for a planned electrical transmission line because the power company, as the condemning body, had the right to survey and the property owners’ express refusal to allow access presented an actual risk of a breach of the peace that was alleviated by the entry of the declaratory judgment. *Bearden v. Ga. Power Co.*, 262 Ga. App. 550, 586 S.E.2d 10 (2003).

Liability of Counties and Other Governmental Entities

Doctrine of sovereign immunity is not bar to enforcement of constitutional rights. *C.F.I. Constr. Co. v. Board of Regents of Univ. Sys.*, 145 Ga. App. 471, 243 S.E.2d 700, cert. dismissed, 242 Ga. 96, 249 S.E.2d 613 (1978).

Sovereign immunity of Department of Transportation is pierced by constitutional right insofar as required by this paragraph, but no support exists for argument that waiver of sovereign immunity exists for ex contractu action against Department of Transportation which is not predicated upon this paragraph. *National Distrib. Co. v. DOT*, 157 Ga. App. 789, 278 S.E.2d 648 (1981).

Effect of enlargement of scope of paragraph. — Prior to the adoption of the Constitution of 1877, which enlarged the scope of this paragraph, a county, not being suable at common law, and constituting a political subdivision of the sovereign power, could not be sued for damaging private property for public uses. *Bibb County v. Green*, 42 Ga. App. 552, 156 S.E. 745 (1931); *Felton Farm Co. v. Macon County*, 49 Ga. App. 239, 175 S.E. 29 (1934).

County is liable for damage to property under this paragraph. *Smith v. Floyd County*, 85 Ga. 420, 11 S.E. 850 (1890);

Liability of Counties and Other Governmental Entities (Cont'd)

Harris County v. Brady, 115 Ga. 767, 42 S.E. 71 (1902); Fender v. Lee County, 31 Ga. App. 604, 121 S.E. 843 (1924).

A right of action exists against a county for damaging private property for public uses; the liability of counties for damages in all cases being the actual depreciation in the market value of the premises injured. Bibb County v. Green, 42 Ga. App. 552, 156 S.E. 745 (1931).

When right of action arises against county. — When private property is taken or damaged by the authorities of a county, or by their duly authorized servant, for the use of the public, without just compensation being first paid, a right of action arises in favor of the owner of the property, which may be enforced by suit against the county, and the owner is entitled to recover adequate compensation for the property taken or damaged. State Hwy. Bd. v. Ward, 42 Ga. App. 220, 155 S.E. 384 (1930); Page v. Washington County, 48 Ga. App. 791, 173 S.E. 868 (1934).

County enjoyed immunity from negligence and nuisance claims. — Because a county enjoyed sovereign immunity from a pedestrian's negligence and nuisance claims asserted in a personal injury action against the county for its alleged failure to maintain a water meter cover, the trial court properly dismissed the claims; however, a personal injury for purposes of inverse condemnation did not constitute personal property that could be taken. Rutherford v. DeKalb County, 287 Ga. App. 366, 651 S.E.2d 771 (2007).

Installation of competing water system by county. — A county that installs a competing water system is not required to compensate a private water system owner for property loss of its business with customers under the taking clause of the Georgia Constitution when the owner has neither an exclusive franchise to supply water nor a non-compete agreement with the county. Amos Plumbing & Elec. Co. v. Bennett, 261 Ga. 810, 411 S.E.2d 490 (1992).

Constitution provides for waiver of sovereign immunity. — While, as a gen-

eral rule, a county is not liable to suit unless there is a law which in express terms or by necessary implication so declares, yet the appropriate law may be found in this paragraph. Page v. Washington County, 48 Ga. App. 791, 173 S.E. 868 (1934); Gwinnett County v. Allen, 56 Ga. App. 753, 194 S.E. 38 (1937).

Nuisance suits for injunction and damages can be maintained against a county under this paragraph. Therefore, the Constitution provides for a waiver of sovereign immunity when a county creates a nuisance which amounts to an inverse condemnation. Duffield v. DeKalb County, 242 Ga. 432, 249 S.E.2d 235 (1978).

Taking is prerequisite to waiver of sovereign immunity — While this paragraph can be a waiver of sovereign immunity in certain cases involving public works construction contracts, it is not considered to be a waiver unless there has first been a taking. C.W. Matthews Contracting Co. v. DOT, 160 Ga. App. 265, 286 S.E.2d 756 (1981).

Liability to suit when property damaged by county for a public purpose. — Construing together this paragraph and former Code 1933, § 23-1502 (see now O.C.G.A. § 36-1-4), a right of action was afforded against a county for damage to private property for public uses or taking private property for public uses. Consequently, a county was liable to suit at the instance of an individual for damages to the individual's property done by the county for a public purpose. Taylor v. Richmond County, 185 Ga. 610, 196 S.E. 37, answer conformed to, 57 Ga. App. 586, 196 S.E. 303 (1938).

Right to sue county for damages for the taking or damaging of private property is not dependent on any statute, but arises out of this paragraph which applies to counties as well as to individuals. Brooks County v. Elwell, 63 Ga. App. 308, 11 S.E.2d 82 (1940).

A right of action exists against a county for damaging private property for public uses; the liability of counties for damages to property in all cases being the actual depreciation in the market value of the premises injured. Felton Farm Co. v. Macon County, 49 Ga. App. 239, 175 S.E. 29 (1934).

A county can be held liable to the extent of an injury to property, not on the theory that the county is liable, as are other tort-feasors, for the negligent acts and conduct of its agents while acting within the scope of their authority, but for the reason that it cannot, either with or without the guise of contractual authority, damage the property of another for the public use without just and adequate compensation being paid. *Felton Farm Co. v. Macon County*, 49 Ga. App. 239, 175 S.E. 29 (1934).

The right of a property owner to recover against a county for damages to the owners' property because of public improvements is by reason of this paragraph. *Reid v. Gwinnett County*, 242 Ga. 88, 249 S.E.2d 559 (1978).

Lawsuits involving taking or damaging of property under this paragraph may be maintained against counties. *Ingram v. Baldwin County*, 149 Ga. App. 422, 254 S.E.2d 429 (1979).

Acts of omission resulting in failure to take. — Because a developer's Ga. Const. 1983, Art. I, Sec. III, Para. I(a) claim that a county improperly refused to accept subdivision roads rested not on a taking but on an act of omission resulting in a failure to take which had no effect on functionality, no viable claim for inverse condemnation was raised, and the county was entitled to sovereign immunity from the developer's claim. *Rabun County v. Mt. Creek Estates, LLC*, 280 Ga. 855, 632 S.E.2d 140 (2006).

Under this paragraph, cities, counties, and all other public organizations are all upon an equal footing, and there is no reason for holding a county exempt from suits for acts done by it for objects within its legal competency, when a city, for like acts done within its legal competency, would not be exempt. *Richmond County v. Williams*, 109 Ga. App. 670, 137 S.E.2d 343 (1964).

Liability for acts of officers and agents. — Municipalities are liable for the acts of their officers, agents, and servants only: (a) in the performance of any function where a statute specifically provides for such liability; (b) for neglect to perform or improper or unskillful performance of their ministerial duties; (c) for

the performance of their governmental functions where the same amounts to the taking or damaging of private property for public purposes without first making adequate compensation therefor, or the creation of a nuisance dangerous to the life and health of persons because of its proximity to them in the enjoyment of their property. *Stubbs v. City of Macon*, 78 Ga. App. 237, 50 S.E.2d 866 (1948).

Liability for property taken by agent. — County liable for property taken by agent acting under general authority of the officer or officers charged with the management of the county affairs and the work of its public roads. *Dougherty County v. Tift*, 75 Ga. 815 (1885); *Mallory v. Morgan County*, 131 Ga. 271, 62 S.E. 179 (1908); *Elbert County v. Brown*, 16 Ga. App. 834, 86 S.E. 651 (1915).

County liable at suit of owner of equitable title, though project later abandoned. *Fender v. Lee County*, 31 Ga. App. 604, 121 S.E. 843 (1924).

County may levy tax to pay for liability. — A county may be held liable for a diminution in the value of land resulting from the alteration and relocation of a public road passing through it, and the county authorities may lawfully levy a tax to pay such liability. *Hall County v. Smith*, 178 Ga. 212, 172 S.E. 645 (1934).

Effect of damage by Department of Transportation upon county's liability. — A county is liable for the taking or damaging of private property for public purposes under this paragraph, and the fact that the Highway Department (now Department of Transportation) did the alleged damage during a time it was sought by legislative action to relieve counties from furnishing rights of way does not affect the liability in such circumstances. *Gwinnett County v. Allen*, 56 Ga. App. 753, 194 S.E. 38 (1937).

Effect of prior decisions upon ability of citizen to sue state itself. — Whether or not this paragraph has the effect of giving to a citizen the right to sue the state itself in its sovereign capacity for such a claim is not determined by those cases recognizing such a right of suit against the State Highway Board (now State Transportation Board) counties and municipalities, as political divisions of the

Liability of Counties and Other Governmental Entities (Cont'd)

state sovereignty; since in those cases the question turned, not on whether the sovereignty was suable without its consent, but on whether it had given its constitutional or legislative consent to be thus sued. *Florida State Hosp. for the Insane v. Durham Iron Co.*, 194 Ga. 350, 21 S.E.2d 216 (1942).

Right of contractor to sue state. — Sovereign immunity notwithstanding, a contractor has the right to sue the state under this paragraph to collect for labor and materials which the contractor has supplied and which the state has accepted and retained. *Fonda Corp. v. Department of Human Resources*, 147 Ga. App. 226, 248 S.E.2d 528 (1978).

Post-construction non-nuisance damage. — As a matter of law, the post-construction non-nuisance damage done to private property by a single malfunction in the operation of a public works project is not damage which has been done for a “public purpose” within the meaning of Ga. Const. 1983, Art. I, Sec. III, Para. I. *Desprint Servs., Inc. v. DeKalb County*, 188 Ga. App. 218, 372 S.E.2d 488 (1988).

Private property which was flooded as the result of a burst water main, which had been equipped with a new “butterfly” valve in connection with a road construction project undertaken a few weeks earlier by a county was not damaged for the “public purpose” of actually constructing any public works project within the meaning of Ga. Const. 1983, Art. I, Sec. III, Para. I. *Desprint Servs., Inc. v. DeKalb County*, 188 Ga. App. 218, 372 S.E.2d 488 (1988).

Inverse condemnation claim against city failed as matter of law. — Plaintiffs asserted an inverse condemnation claim, alleging that damage to their property caused by a city’s proposed construction of sidewalks deprived the plaintiffs of property without due process in violation of Ga. Const. 1983, Art. I, Sec. III, Para. I(a). This claim failed as a matter of law because the city never began construction on the proposed sidewalk installation project and the city did not interfere with the plaintiffs’ right to use

their property. *Bailey v. City of Atlanta*, 296 Ga. App. 679, 675 S.E.2d 564 (2009).

What is Compensable

1. In General

Prior to the Constitution of 1877 there was no law governing the damaging of property. *City of Atlanta v. Green*, 67 Ga. 386 (1881); *Georgia R.R. & Banking Co. v. Mayor of Union Point*, 119 Ga. 809, 47 S.E. 183 (1904).

If private property is taken or damaged, even by prudent and proper exercise of power conferred by statute, the owner is entitled to just compensation. *City Council v. Lamar*, 37 Ga. App. 418, 140 S.E. 763 (1927); *Bibb County v. Green*, 42 Ga. App. 552, 156 S.E. 745 (1931); *Felton Farm Co. v. Macon County*, 49 Ga. App. 239, 175 S.E. 29 (1934); *Felton v. State Hwy. Bd.*, 51 Ga. App. 930, 181 S.E. 506 (1935); *Dougherty County v. Hornsby*, 94 Ga. App. 689, 96 S.E.2d 326 (1956), aff’d in part and rev’d in part, 213 Ga. 114, 97 S.E.2d 300 (1957); *Johnson v. Burke County*, 101 Ga. App. 747, 115 S.E.2d 484 (1960).

Damages for depreciation of property resulting from physical damage to it are clearly recoverable. *Richmond County v. Williams*, 109 Ga. App. 670, 137 S.E.2d 343 (1964).

Test usually prescribed is whether a private person who committed the same act would be liable for damages. *Peel v. City of Atlanta*, 85 Ga. 138, 11 S.E. 582 (1890); *Howard v. Bibb County*, 127 Ga. 291, 56 S.E. 418 (1907).

Benefit to the public is unnecessary. *Fender v. Lee County*, 31 Ga. App. 604, 121 S.E. 843 (1924).

Taking of property for which compensation must be first paid does not require actual physical taking, but may consist in an interference with the rights of ownership, use, and enjoyment, or any other right incident to property. *Woodside v. City of Atlanta*, 214 Ga. 75, 103 S.E.2d 108 (1958).

Actual damage sustained regardless of whether property taken. — Whether the property is taken or not, if it is damaged by the construction or operation of improvements made for the use of

the public, its owner can recover whatever damage it has actually sustained. *Franklin v. City of Atlanta*, 40 Ga. App. 319, 149 S.E. 326 (1929).

Damage need not be caused by acts amounting to trespass. — The damages that an individual may recover for injuries to the individual's property need not necessarily be caused by acts amounting to a trespass, or by an actual, physical invasion of the individual's real estate, but, if the individual's property be depreciated in value by the individual's being deprived of some right of use or enjoyment growing out of and appurtenant to the estate as the direct consequence of the construction and use of any public improvement, the individual's right of action is complete, and the individual may recover to the extent of the injury sustained. *Dougherty County v. Hornsby*, 213 Ga. 114, 97 S.E.2d 300 (1957); *Johnson v. Burke County*, 101 Ga. App. 747, 115 S.E.2d 484 (1960).

Consequential damage to property is a "taking" entitling owner to compensation. *Wright v. Metropolitan Atlanta Rapid Transit Auth.*, 248 Ga. 372, 283 S.E.2d 466 (1981).

Damages must be special to warrant recovery. — To entitle the plaintiff to recover under this provision the damage alleged to have been sustained must have been special, and not participated in by the general public, and the sole measure of the damage is the difference between the market value of the property before the track was relocated and the value thereof after the track was relocated. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938).

In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with the plaintiff's property, and which gives to it an additional value; and that by reason of such disturbance the plaintiff has sustained a special damage with respect to the property, in excess of that sustained by the public generally. *Dougherty County v. Hornsby*, 213 Ga. 114, 97 S.E.2d 300 (1957); *Johnson v. Burke County*, 101 Ga. App. 747, 115 S.E.2d 484 (1960).

The rights of plaintiffs fall into two

categories: general rights, which they have in common with the public; and special rights, which they hold by virtue of their ownership of property. In order to constitute a taking or damaging of their property, it is the special rights that must have been violated. *Tift County v. Smith*, 219 Ga. 68, 131 S.E.2d 527 (1963).

Damage suffered by condemnee which is different from that suffered by general public in degree only, and not in kind, is not compensable or recoverable. *Dougherty County v. Snelling*, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

"Public purpose" synonymous with "public use." — In order to be compensable under this paragraph the damage to a person's property must have been for a "public purpose" and the words "for public purpose" have been construed as synonymous with "public use." *Johnson v. City of Atlanta*, 117 Ga. App. 586, 161 S.E.2d 399 (1968).

If an incident causing damage is for a "public purpose," which is synonymous with "public use," it amounts to a taking without just and adequate compensation being first paid if the city takes private property without first paying for it. *Pair Dev. Co. v. City of Atlanta*, 144 Ga. App. 239, 240 S.E.2d 897 (1977).

Meaning of term "damage." — Property is damaged in the sense of this paragraph when there is some physical interference with a right of use appertaining to the property. *City of Atlanta v. Dinkins*, 46 Ga. App. 19, 166 S.E. 429 (1932); *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Condemnee is, under this paragraph, entitled to just compensation for every species of property taken or damaged, real or personal, corporeal or incorporeal. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966).

It is not necessary for petitioner to show actual physical taking of the petitioner's land; any interference with any of the petitioner's property rights therein is a taking of the petitioner's land within the inhibition of this paragraph. *Denson v. Chattooga County*, 99 Ga. App.

What is Compensable (Cont'd)**1. In General (Cont'd)**

234, 108 S.E.2d 155 (1959).

Right to damages for inverse condemnation. — The property owner has a right to seek damages against a public authority when such public authority is engaging in some form of inverse condemnation. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

If a public authority does not proceed directly to condemn, the injured citizen nonetheless has a right to compensation under the state Constitution. A cause of action for “inverse condemnation” will lie. *Powell v. Ledbetter Bros.*, 251 Ga. 649, 307 S.E.2d 663 (1983).

Farmers’ inverse condemnation count alleging that a city damaged their land by spreading sewer sludge on the land with toxic elements in concentrations high enough to be considered hazardous waste was properly dismissed as the farmers consented to the city’s spreading of sewer sludge on their land. *McElmurray v. Augusta-Richmond County*, 274 Ga. App. 605, 618 S.E.2d 59 (2005).

It was error to award a developer damages on its inverse condemnation claim because the developer had not shown a compensable taking. Although there was a delay in developing the six lots at issue, the developer was not prevented from marketing and developing its subdivision or from making other uses of the six lots; all required approvals had occurred for the six lots; and the six lots had maintained their value. *Prime Home Props., LLC v. Rockdale County Bd. of Health*, 290 Ga. App. 698, 660 S.E.2d 44 (2008), cert. denied, No. S08C1330, 2008 Ga. LEXIS 685 (Ga. 2008).

Condemnor cannot immunize itself from paragraph. — A condemnor cannot immunize itself from its constitutional obligation to pay compensation for the taking or damaging of property done pursuant to the power of eminent domain. *Fulton County v. Woodside*, 223 Ga. 316, 155 S.E.2d 404 (1967).

This paragraph applies when private property is taken or damaged for public use by State Highway Board

(now State Transportation Board) without just compensation being first paid; and in such a case a right of action arises in favor of the owner of the property, which may be enforced by suit against the State Highway Board. *State Hwy. Bd. v. Ward*, 42 Ga. App. 220, 155 S.E. 384 (1930).

Under its power and discretion in the location, construction, and maintenance of state-aid roads, the State Highway Board (now State Transportation Board) cannot deprive the owners of land abutting thereon of their easement of access without first paying to such owners just and adequate compensation therefor. *Dougherty County v. Hornsby*, 213 Ga. 114, 97 S.E.2d 300 (1957).

Liability exists when work done by independent contractor. — The liability of the defendant city, under this paragraph, to pay for damage to private property resulting from public works is primary and absolute, and it is immaterial that the work may have been done by an independent contractor. *City of Atlanta v. Kenny*, 83 Ga. App. 823, 64 S.E.2d 912 (1951).

Whether former Code 1933, §§ 51-2-4 and 51-2-5) were exhaustive as to exceptions to the rule of nonliability of an employer for the acts of an independent contractor, they must yield to and cannot control the constitutional duty imposed upon a condemnor to pay compensation for the taking or damaging of private property for public purposes whether or not such taking or damaging was done by an independent contractor hired by the condemnor. *Fulton County v. Woodside*, 223 Ga. 316, 155 S.E.2d 404 (1967).

Joint liability for erection of utility poles in railroad right of way. — The power, telephone, and telegraph companies all have the power of eminent domain and could exercise that power to acquire the right to erect their lines upon the railroad’s right of way. That they choose to acquire by contract such right, as against the railroad, does not render the railroad company liable for their alleged failure also to compensate the plaintiff for the taking or damaging of plaintiff’s property by their erection of power and communication lines on the railroad’s right of way.

Tompkins v. Atlantic Coast Line R.R., 89 Ga. App. 171, 79 S.E.2d 41 (1953).

Joint liability of county and State Transportation Board. — When a county and the State Highway Board (now State Transportation Board) joined in damaging private property for the use of the public without first paying adequate compensation, a right of action arose in favor of the owner of the property, and the owner could have brought a joint action against the county and the State Highway Board (now State Transportation Board). *State Hwy. Bd. v. Ward*, 42 Ga. App. 220, 155 S.E. 384 (1930).

Applicability to cutting trees. — When certain trees growing on a space between a sidewalk and street of the defendant municipality were, according to the allegations of the petition (which, on demurrer, must be taken as true), situated and growing on land owned by plaintiff in fee simple, and when such trees were, according to the allegations of the petition, cut down and removed by the municipality without the consent of the owner, a prima-facie right of action arose in the owner's favor for the damage thus sustained. *Baldwin v. City of Dawson*, 41 Ga. App. 90, 151 S.E. 825 (1930).

Applicability to taking for public street purposes. — Payment of just and adequate compensation therefor must always precede the taking of private property, for public street purposes, by a municipal corporation. *Harrison v. City of East Point*, 208 Ga. 692, 69 S.E.2d 85 (1952).

Denial of building permit because of planned condemnation. — When the sole reason for the city's denial of a property owner's permit application for a 14,000 sq. ft. building was its determination that an announced taking would eliminate the parking spaces necessary to accommodate the building, the owner was entitled to compensation, upon proper proof, for the difference between the building the owner could have built but for the direct result of the condemnation and the building the owner was limited to as a direct consequence of the taking, which measured only 10,400 sq. ft. *Lee v. DOT*, 191 Ga. App. 1, 380 S.E.2d 726 (1989).

Must show county authorities responsible. — While this paragraph de-

clares that private property shall not be taken or damaged for public use without just compensation, the taking or damaging referred to must be by some authority empowered by law to do those acts; and before a recovery can be had against a county for taking or damaging private property, it must be shown that the proper authorities of the county were responsible for the taking or damaging, or that they ratified it after the property was so taken or damaged. *McGhee v. Floyd County*, 95 Ga. App. 221, 97 S.E.2d 529 (1957).

Renovation expenses not recoverable as relocation expenses. — When there was evidence of expenses incurred in an extensive renovation of the new premises to which a medical practice had been moved after condemnation, these renovation expenses were not recoverable as relocation expenses by either the doctor or the doctor's corporation and in charging the jury that it could award relocation expenses in an amount such that a condemnee "would be in substantially the same position he was in prior to the taking of his property," the superior court may have fostered the erroneous impression that all or a portion of the nonrecoverable renovation cost could be awarded as recoverable relocation expenses, warranting a new trial. *Metropolitan Atlanta Rapid Transit Auth. v. Funk*, 263 Ga. 385, 435 S.E.2d 196 (1993).

2. Exercise of Police Power

Compensation not required upon exercise of police power. — The provisions of the Constitution of Georgia, prohibiting the taking of private property for a public purpose without compensation, have no relevance to the exercise of the police power by the state or the state's political subdivisions. *Lewis v. DeKalb County*, 251 Ga. 100, 303 S.E.2d 112 (1983) (decided under Ga. Const. 1976, Art. I, Sec. III, Para. I).

Trial court properly dismissed an insurance company's suit for inverse condemnation against a county because the insured's home was damaged during the exercise of police power and, thus, did not fall within the waiver of sovereign immunity set forth in Ga. Const. 1983, Art. I, Sec. II, Para. IX(e). *Amica Mut. Ins. Co. v.*

What is Compensable (Cont'd)**2. Exercise of Police Power (Cont'd)**

Gwinnett County Police Dep't, 319 Ga. App. 780, 738 S.E.2d 622 (2013).

Distinction between use of eminent domain and use of police power is that the former involves the taking of property because it is needed for public use while the latter involves the regulation of the property to prevent its use in a manner detrimental to the public interest. *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979).

The police power or the law of overruling necessity is not controlled by this paragraph which was not designed for, and should not be extended to, such cases. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Municipality may take under police power without paying compensation.

— Under certain circumstances and conditions, a municipality may, acting under its police power for the general welfare of the public, take or use the property of a person or corporation without paying compensation therefor. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

No liability for prosecution of crimes. — The safeguarding of society by the prosecution of crimes against it is a sovereign attribute inherent in all governments, and for mistakes in exercising this sovereign right there can be no liability against the government without its consent. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Uncompensated obedience to regulation enacted for public safety under police power of state is not taking or damaging without just compensation of private property, or of private property affected with a public interest. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Loss suffered from exercise of police power is damnum absque injuria; therefore, an appeal for compensation must be to the public authority, and not to the courts. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

At common law, state might destroy buildings in effort to stop spread of

conflagration under its police power, and the owner was entitled to no compensation. A statutory provision for payment, however, may be provided. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Damages suffered in hunt for murder victim uncompensable. — A suit by the owner for damages to realty occasioned by the law enforcement officers of the state and a county in seeking to locate the body of a murder victim cannot be maintained against the state or the county; the action of the officers was under and pursuant to the police power of the state and its political subdivision. *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

Damage to private car used in police search not compensable. — In a suit against a county seeking a judgment for damage and loss of use of plaintiff's vehicle occurring while the plaintiff was serving as a volunteer member of the county Emergency Management Team, which was assisting the sheriff's office in a nighttime search for a weapon involved in a crime, even if there were a factual issue as to the taking of plaintiff's vehicle, since the right was pursuant to the state's police powers, the plaintiff could not be compensated for it as a matter of law. *Bray v. Houston County*, 180 Ga. App. 166, 348 S.E.2d 709 (1986).

3. Commercial Losses

Damages can be awarded without showing of loss of profit. — Damages for loss of business can be awarded without a showing of loss of profit, provided the loss is not remote or speculative. *DOT v. Hillside Motors, Inc.*, 192 Ga. App. 637, 385 S.E.2d 746, cert. denied, 192 Ga. App. 901, 385 S.E.2d 746 (1989).

Condemnee has right of compensation for damages to the condemnee's business and expenses incident to removing it to a new location which directly resulted from condemnation proceedings. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966).

Moving merchandise. — In a condemnation case when the condemnee is engaged in a business where merchandise is kept on the property being condemned,

the jury may consider the cost of removing such merchandise, not as a separate item of recovery, but as a factor which may illustrate just and adequate compensation. *State Hwy. Dep't v. Robinson*, 103 Ga. App. 12, 118 S.E.2d 289 (1961).

Condemned property must have uniqueness for business. — This paragraph creates a highly practical presumption which says that, as a matter of law, business losses cannot be attributed to condemnation unless the property had some uniqueness for the business. *Metropolitan Atlanta Rapid Transit Auth. v. Ply-Marts, Inc.*, 144 Ga. App. 482, 241 S.E.2d 599 (1978).

Mere business losses when property not unique for business not compensable. — In the absence of a showing of a special or unique value to the owner, mere business losses caused by a partial taking of the land on which a business is located are not a separate element for compensation. Evidence of such losses may be submitted to a jury only to help establish the market value of property taken. *Southwire Co. v. DOT*, 147 Ga. App. 606, 249 S.E.2d 650 (1978).

Must be separate item of recovery. — In a condemnation proceeding, the destruction of an established business is and must be a separate item of recovery. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966).

4. Interference with Right of Ingress and Egress

Interfering with access compensable. — Interfering with access to premises by impeding or rendering difficult ingress or egress, is such taking and damaging as entitles the party injured to compensation under a provision for compensation when property is damaged. *Dougherty County v. Hornsby*, 213 Ga. 114, 97 S.E.2d 300 (1957); *Johnson v. Burke County*, 101 Ga. App. 747, 115 S.E.2d 484 (1960); *Clayton County v. Billups E. Petro. Co.*, 104 Ga. App. 778, 123 S.E.2d 187 (1961); *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

A right of ingress or egress to property may constitute an easement, the impair-

ment of which will render the actor liable for damaging the property although there has been no taking of the property itself. *Mayor of Athens v. Gamma Delta Chapter House Corp.*, 86 Ga. App. 53, 70 S.E.2d 621 (1952).

The State Highway Board (now State Transportation Board) cannot deprive the owners of abutting land of their easement of access without paying to such owners adequate and just compensation therefor. *Johnson v. Burke County*, 101 Ga. App. 747, 115 S.E.2d 484 (1960).

When the plaintiff had enjoyed practically unlimited ingress and egress for almost seven years, conversion of the highway from an unlimited to a limited access one constituted a taking or damaging of private property for public purposes. *Clayton County v. Billups E. Petro. Co.*, 104 Ga. App. 778, 123 S.E.2d 187 (1961).

When a right of way for a limited access road is duly condemned the right of the property owner, through whose lands it passes and divides, to go upon or across such highway is lost. Before such right is taken from the owner the stern mandate of this paragraph must be obeyed. One of the pertinent issues in the condemnation of the right of way for a limited access highway is the value of this very right of access, the right to go upon and across the proposed highway. *State Hwy. Dep't v. Lumpkin*, 222 Ga. 727, 152 S.E.2d 557 (1966).

Every owner of property which abuts upon a street has a property right in the street, as an easement for the purpose of access to the owner's premises, and a deprivation of this private right is prima facie, in the absence of proof of compensation, contrary to law. *Franklin v. City of Atlanta*, 40 Ga. App. 319, 149 S.E. 326 (1929).

Easement of access belonging to owners of land abutting upon a highway is a property right, of which the landowner cannot be deprived upon the ground that the safety of the public traveling upon the highway may be endangered by the exercise of this easement by the abutting landowner, without just and adequate compensation being first paid to the owner. *Dougherty County v. Hornsby*, 213 Ga. 114, 97 S.E.2d 300 (1957).

What is Compensable (Cont'd)**4. Interference with Right of Ingress and Egress (Cont'd)**

Owners of property which abuts a public road have the right to the use and enjoyment of such road in common with all other members of the public, as well as other rights such as ingress and egress which do not belong to the public generally, and these rights exist regardless of whether the fee of the highway is in such owners or not. *State Hwy. Dep't v. Lumpkin*, 222 Ga. 727, 152 S.E.2d 557 (1966).

The right of access, or easement of access, to a public road is a property right which arises from the ownership of land contiguous to a public road, and the landowner cannot be deprived of this right without just and adequate compensation being first paid. *Metropolitan Atlanta Rapid Transit Auth. v. Datry*, 235 Ga. 568, 220 S.E.2d 905 (1975).

To go upon and across the public road is one of the fundamental rights which belong to abutting landowners. *State Hwy. Dep't v. Lumpkin*, 222 Ga. 727, 152 S.E.2d 557 (1966).

One of the rights of a landowner is to pass across a highway from one tract or parcel of the owner's land to another situated on opposite side. *State Hwy. Dep't v. Lumpkin*, 222 Ga. 727, 152 S.E.2d 557 (1966).

Owner not entitled to access at all points along highway. — Although the owner of land abutting upon a highway has the right to use and enjoy the highway in common with other members of the public and has an easement of access to the land abutting upon the highway, which easement of access does not belong to the public generally and which exists whether or not the fee of the highway is in the landowner or not, such owner, however, is not entitled, as against the public, to access to the owner's land at all points in the boundary between it and the highway, if the entire access has not been cut off, and if the owner is offered a convenient access to the owner's property and to improvements thereon, and the owner's means of ingress and egress are not substantially interfered with by the public.

Johnson v. Burke County, 101 Ga. App. 747, 115 S.E.2d 484 (1960).

Rights of owner whose property does not abut on street changed. — If the property is situated within the block in which the change of the street takes place, and a usual, direct, and immediate means of access thereto or egress therefrom is thereby materially impaired or done away with, the property owner may recover of the municipality, although the owner's property does not abut on the street changed. *City of Atlanta v. Dinkins*, 46 Ga. App. 19, 166 S.E. 429 (1932).

Temporary obstruction is not a taking or damaging of property by eminent domain under this paragraph, and the temporary obstruction of right of ingress and egress does not deprive one of one's private property. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

Making road one-way. — City was properly granted summary judgment in an inverse condemnation suit because its change making a road a one-way street did not disturb the direct vehicular access existing from the owners' land to the abutting street; thus, there was no compensable taking, despite the fact that access was less convenient. *Hanson v. City of Roswell*, 262 Ga. App. 671, 586 S.E.2d 341 (2003).

5. Construction of Jail or Prison

This paragraph is not violated by erection of prison by the municipal authorities of a city within the limits thereof. *Long v. City of Elberton*, 109 Ga. 28, 34 S.E. 333 (1899).

Depreciation in property value caused by erection of police barracks or bail in vicinity of a residential area is *damnum absque injuria*. *Evans v. Just Open Gov't*, 242 Ga. 834, 251 S.E.2d 546 (1979).

Equity will not enjoin erection of county jail. *Bacon v. Walker*, 77 Ga. 336 (1886).

No injunction when no property taken. — The Supreme Court will not by interlocutory injunction interfere with the erection of a public work in which no part of the property of the citizen complainant

is actually taken. *Evans v. Just Open Gov't*, 242 Ga. 834, 251 S.E.2d 546 (1979).

6. Interference with Rights of Lessors and Lessees

Holder of rent contract has compensable interest. — The holder of a valid rent contract for realty, though it be for a period of less than five years, has a property right in the leased premises, which is protected by this paragraph; and this is true whether the leasehold interest be taken or damaged by a county, a municipal corporation, or any other public organization. *Waters v. DeKalb County*, 208 Ga. 741, 69 S.E.2d 274 (1952).

Lessee has compensable damages when the lessee entered into a renewal lease after taking by eminent domain but before the original lease expired. *Ellis v. DOT*, 175 Ga. App. 123, 333 S.E.2d 6 (1985).

Termination of a leasehold interest by condemnation is a compensable taking. — Obviously a lessor, for the lessor's protection, may put in the lessor's lease a clause providing that as between the parties the lease is terminated in the event of condemnation, but this does not control Georgia law on the subject of compensability from the condemnor. *Simmerman v. DOT*, 167 Ga. App. 383, 307 S.E.2d 4 (1983) (on motion for rehearing).

Leasehold interest in premises for definite term is property, within meaning of that word as it is employed in this paragraph. *Ammons v. Central of Ga. Ry.*, 215 Ga. 758, 113 S.E.2d 438 (1960).

A tenant, although the tenant has no estate in the land, is the owner of its use for the term of the tenant's rent contract, and can recover damages for any injury to such use resulting from the construction of a duly authorized public improvement. *Waters v. DeKalb County*, 208 Ga. 741, 69 S.E.2d 274 (1952).

Power of lessee to obtain injunction. — The holder of a leasehold or usufructuary interest in land is entitled to enjoin the taking or damaging of the holder's leasehold interest without just and adequate compensation being first paid. *State Hwy. Dep't v. Western Union Tel. Co.*, 218 Ga. 663, 129 S.E.2d 872 (1963).

Factors not necessary for lessee to establish to obtain compensation. —

The "just and adequate" provision of this paragraph requires that property be neither taken nor damaged without just and adequate compensation. A taking of the fixtures and inventory of the lessee need not therefore be established, nor does it preclude a recovery either that all the leased premises were not taken or that the lessee had not exercised the option to purchase at the time. *DeKalb County v. Fulton Nat'l Bank*, 156 Ga. App. 253, 274 S.E.2d 649 (1980).

Diminished rental value for any purpose is no basis for compensation except as to its result, if any, on the general value. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938).

7. Creation of Nuisance

Municipality liable for creation of nuisance. — A municipality, whether exercising its governmental or its ministerial functions, is liable for creating a nuisance which damages property and also hazards health. *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235 (1978).

A county, unlike a municipality, is not generally liable for creating nuisances. *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235 (1978).

Summary judgment was properly granted to a county on an inverse condemnation claim filed by four property owners as the county did not either create or maintain a construction project that allegedly created a nuisance that harmed the owners since a city owned and maintained the nuisance property, the county exercised no control over the properties, and the county could not be deemed to have performed a continuous act that caused the owners' harm; while the county bid out the construction contract, it had no role in designing the plans for the contractor to use on the project or in supervising the contractor's work and the owners did not show that the county official performed any action beyond passing on an inquiry between the Georgia Department of Transportation and the city. *Reidling v. City of Gainesville*, 280 Ga. App. 698, 634 S.E.2d 862 (2006).

What is Compensable (Cont'd)
7. Creation of Nuisance (Cont'd)

If a county causes a nuisance to exist which amounts to a taking of property of one of its citizens for public purposes, the county is liable. *Miree v. United States*, 242 Ga. 126, 249 S.E.2d 573 (1978).

Whatever is done by authority of law, if done as law directs or authorizes, is not a nuisance. *Perkerson v. Mayor of Greenville*, 51 Ga. App. 240, 180 S.E. 22 (1935).

Constitutional basis for recovery for maintenance of continuing nuisance. — When the public authorities properly erect and properly maintain the improvements authorized by law, an action in tort is not maintainable by the owner of damaged property. In such a case, the only right of action maintainable is that conferred by this paragraph, and the recovery permitted is strictly limited to the direct damage inflicted by diminishing the market value of the property damaged. *Southland Coffee Co. v. City of Macon*, 60 Ga. App. 253, 3 S.E.2d 739 (1939).

County liable for diversion of surface water. — The continuous channeling of surface water across property to its damage, amounts to the taking of an easement over the lands, and is in contemplation of this paragraph. *Sheehan v. Richmond County*, 100 Ga. App. 496, 111 S.E.2d 924 (1959).

When a county maintains a continuing nuisance by diverting surface water which causes damage to property, a claim arises in favor of the property owner each time such flooding, siltation, pollution, or other damage occurs, and upon giving the 12-months notice required by former Code 1933, § 23-1602 (see now O.C.G.A. § 36-11-1), such property owner is entitled to recover those damages incurred in the 12 months preceding the giving of the notice. *Reid v. Gwinnett County*, 242 Ga. 88, 249 S.E.2d 559 (1978).

Effect of failure to give notice of continuing nuisance. — A property owner is not barred from recovering for damages for a continuing nuisance, even when notice is not given within 12 months of completion of construction of the road-

way. *Reid v. Gwinnett County*, 242 Ga. 88, 249 S.E.2d 559 (1978).

Liability of Department of Transportation for diversion of surface water. — When the Highway Department (now Department of Transportation) so constructs a concrete outlet-trap that a large increase in the volume of surface water is caused to flow upon and damage the plaintiff's property, this constitutes a damaging and taking of private property for public purposes within the purview of this paragraph. *Sheehan v. Richmond County*, 100 Ga. App. 496, 111 S.E.2d 924 (1959).

Fact that third parties occupy property between highway and plaintiff's property does not affect the plaintiff's right to recover for the damaging and taking of the plaintiff's property. *Sheehan v. Richmond County*, 100 Ga. App. 496, 111 S.E.2d 924 (1959).

8. Personal Injuries

Citizens may not recover from the state for personal injury suffered as a result of state activity, the theory being that the state may not authorize its agents to cause physical injury to any person for public purposes. *Cox Communications, Inc. v. DOT*, 256 Ga. 455, 349 S.E.2d 450 (1986).

No property interest in accessing Georgia Port Authority terminal. — Truck driver's claim that the driver was improperly barred from an authority's terminal was properly dismissed because the driver failed to show that the driver had an enforceable property interest for purposes of due process and eminent domain jurisprudence. *Gambell v. Ga. Ports Auth.*, 276 Ga. App. 115, 622 S.E.2d 464 (2005).

County may not be sued under theory of eminent domain in tort action for personal injury when the county would otherwise be authorized to assert its civil immunity. *Wilmoth v. Henry County*, 251 Ga. 643, 309 S.E.2d 126 (1983).

County is not liable to a father of a minor child injured by negligence of a servant of county in operating a truck, for loss of the services of the child, on the theory that the deprivation of the father of the services is the taking or damaging of property for public use with-

out just compensation, nor would it make any difference that the driver of the truck was employed in repairing a public road. *Born v. Fulton County*, 51 Ga. App. 537, 181 S.E. 106 (1935).

No liability for dangerously installed water meter. — The paving of a walkway along the outer edge of a city park, but within the park, by the municipality in connection with the installation of automobile parking meters so as to leave a water meter projecting above the surface of the paved walkway in a manner dangerous to pedestrians using the walkway amounts to a governmental function in connection with the construction and maintenance of a city park, and the water meter thus situated is not such a nuisance as amounts to the taking or damaging of private property for public purposes without first making adequate compensation therefor. *Stubbs v. City of Macon*, 78 Ga. App. 237, 50 S.E.2d 866 (1948).

9. Interference with Riparian Rights

Owner of nonnavigable stream is protected by this paragraph. *City of Elberton v. Hobbs*, 121 Ga. 750, 49 S.E. 780 (1905); *Howard v. County of Bibb*, 127 Ga. 291, 56 S.E. 418 (1907).

An owner of land to or through which a nonnavigable stream flows has a right to the flow of the water which is equal to the owners' right to the soil which underlies the stream; such a right comes within this paragraph. *Davis v. Cobb County*, 61 Ga. App. 712, 7 S.E.2d 324 (1940).

County liable for halting flow of stream. — When a county, grading a road under contract with the Highway Department (now Department of Transportation), hauls dirt one hundred feet from the right of way and dumps it into a spring on land adjoining plaintiffs' and stops up the spring and cuts off a stream which flowed upon and through plaintiffs' property, it is liable in damages for the difference between the value of the plaintiffs' land before and after the stoppage of the flow of water. *Davis v. Cobb County*, 61 Ga. App. 712, 7 S.E.2d 324 (1940).

Lay opinion testimony on cost to build a bridge. — Trial court did not abuse the court's discretion in excluding, for insufficient foundation, a witness's

opinion testimony concerning the cost to build a bridge over a waterway to cure trusts' lost usage after the condemnation of a ford over the waterway because the proffer the trusts made did not demonstrate pursuant to former O.C.G.A. § 24-9-66 (see now O.C.G.A. § 24-7-701) a basis upon which the witness could have formed the witness's own opinion on the cost to build the bridge apart from the single estimate the witness received; the trusts did not proffer that the witness obtained any other estimates concerning the cost to construct the bridge, spoke to anyone else about that cost, or possessed or sought to obtain any other information about that cost or about the accuracy of the estimate the witness had received. *Martha K. Wayt Trust v. City of Cumming*, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

Evidence concerning the value of stream mitigation credits inadmissible. — Trial court did not err in excluding, as a component of the market value of condemned property, evidence concerning the value of stream mitigation credits that trusts intended to sell in connection with the condemned property because the trusts failed to show how the value of stream mitigation credits was relevant to the sole issue of just and adequate compensation when at the time of the taking, the proposed stream mitigation bank had not yet been created on the condemned property, and no stream mitigation credits had been awarded; no evidence was presented to show that the proposed future use of the property as a stream mitigation bank, or the value of stream mitigation credits it could have generated, had an effect on market value. *Martha K. Wayt Trust v. City of Cumming*, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

10. Damage from Road Construction or Improvement

Lawful taking which results in damages. — When the Highway Department (now Department of Transportation) does what it has right under law to do, but, still damages plaintiff, the Highway Board (now State Transportation Board) is bound to make compensation. *Felton v.*

What is Compensable (Cont'd)**10. Damage from Road Construction or Improvement (Cont'd)**

State Hwy. Bd., 51 Ga. App. 930, 181 S.E. 506 (1935).

Homeowner may sue for direct physical damage. — When there has been direct physical damage to the plaintiff's home resulting from the construction of a highway, a county may be sued therefor under this paragraph and it is not necessary to support the action that any portion of the plaintiff's property be taken or that it abut or touch the highway. *Richmond County v. Williams*, 109 Ga. App. 670, 137 S.E.2d 343 (1964).

Municipalities liable when grade of street changed. — Under this paragraph, municipal corporations are liable for consequential damages resulting to property owners from raising or lowering the grade of streets. *City of Atlanta v. Dinkins*, 46 Ga. App. 19, 166 S.E. 429 (1932).

When a change is made by a municipality in the grade of a street, and the market value of real property abutting thereon is thereby decreased, the owner has a cause of action against the municipality. The measure of damages to abutting property is the difference between the market value of the property before and after the change of the grade. *Harbour v. City of Rome*, 54 Ga. App. 97, 187 S.E. 231 (1936), *aff'd*, 184 Ga. 37, 190 S.E. 364 (1937).

City only indirectly liable for work done to city street by county or state highway department. — A contract or resolution by which a city authorizes the Highway Department (now Department of Transportation) and a county to use and improve a city street for a state highway is not ultra vires or otherwise illegal, and when damage on account of a decrease in the market value of an adjoining lot results from the grading of a street constituting such a highway, or in the necessary grading or leveling of that portion of a street which joins the highway, the city would not be liable on the theory that it was a joint tort-feasor in directing or participating in a nuisance, but such remedy as would lie would exist by virtue of this paragraph. *Perkerson v. Mayor of*

Greenville, 51 Ga. App. 240, 180 S.E. 22 (1935).

Landowners have no compensable interest in traffic pattern. — Adjoining owners of property or operators of businesses on property adjoining a street or highway have no vested interest in the traffic pattern which controlling authorities may provide for the public street from time to time. If they suffer damage when the pattern is changed it is a damage suffered by members of the general public owning property or operating businesses adjacent to a street or highway, and for which there can be no recovery. *Dougherty County v. Snelling*, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

Closing of road not compensable. — The closing of a road abutting a shopping center at the intersection of the road with a state highway was not a compensable taking of property when the business did not lose access to any abutting roadway and still had access to the highway by traveling about one mile. *DOT v. Durpo*, 220 Ga. App. 458, 469 S.E.2d 404 (1996).

Creation of obstruction down road not compensable. — The fact that down the road from plaintiff's farm a dead-end obstruction was created so as to constitute a cul-de-sac, causing inconvenience, does not constitute the taking or damaging of private property for a public purpose so as to require compensation. *Tift County v. Smith*, 219 Ga. 68, 131 S.E.2d 527 (1963).

Joint liability in construction of limited access highway. — While Ga. L. 1955, p. 559 (now repealed) authorizes the cooperation of counties and municipal corporations with the Highway Department (now Department of Transportation) for the purpose of establishing limited access highways, there is nothing in the statute or in the law generally which expressly or by implication makes one of the cooperating governmental entities liable for the unilateral tortious acts of another cooperating governmental entity in a project of this type. *Madden v. Fulton County*, 102 Ga. App. 19, 115 S.E.2d 406 (1960).

Contractual right to traffic signal. — When condemnee had been granted a

contractual right in a deed from the Department of Transportation (DOT) to have a signal near its business location which permitted ease of access to its motel and this signalization was part of the bargain for consideration in a condemnation action between the defendant and the DOT, that contractual right could be condemned by DOT; however, the condemnee was entitled to just and adequate compensation therefor and the trial court did not err in charging the jury the condemnee has a special right to turn left from and into a highway. *DOT v. Consolidated Equities Corp.*, 181 Ga. App. 672, 353 S.E.2d 603 (1987).

Loss of leasehold interest. — When claimant sought to recover loss of an advantageous leasehold interest, as well as moving expenses, after a highway project and related condemnation actions had been halted, and claimant had been advised that no move was required before September 1982 and that written notification would precede a required removal, the claimant's decision to move in August 1982 was by voluntary choice and could not be attributed to an interference by the Department of Transportation with its exclusive rights of ownership, use and enjoyment. Whether the claimant's action was characterized as direct or inverse condemnation, the losses claimed did not result from an exercise of eminent domain. *Josh Cabaret, Inc. v. DOT*, 256 Ga. 749, 353 S.E.2d 346 (1987).

Special damage from temporary construction easement. — If the condemnee can show that the temporary taking of a portion of the condemnee's property for a construction easement caused some special damage to the condemnee's remaining property, other than the general inconvenience, noise, dust, and obstruction caused by the construction process, Ga. Const. 1983, Art. I, Sec. III, Para. I requires that the state pay for any diminished value of the remainder. *Hillman v. DOT*, 257 Ga. 338, 359 S.E.2d 637 (1987).

No compensation for having to drive more circuitous route to reach property. — A property owner sought compensation for an alleged inverse condemnation of the owner's land and dam-

age to the owner's business following certain bridge closings and construction, which did not directly affect access to the owner's property, nor change the ingress to and egress from the owner's business, but did necessitate driving a more circuitous route to reach the owner's property from certain areas. As the owner alleged only that the owner suffered damage to a greater degree than that of others affected by the bridge closings, the owner was not entitled to compensation. *Hendrix v. Department of Transp.*, 188 Ga. App. 429, 373 S.E.2d 264 (1988).

Testimony regarding lost profits. — In an inverse condemnation action based on a temporary taking of leaseholds in connection with highway construction, it was not permissible for the leaseholder to introduce expert testimony as to the loss of business profits and worth for the purpose of proving the value of the leaseholds. *Bill Ledford Motors, Inc. v. DOT*, 225 Ga. App. 548, 484 S.E.2d 510 (1997).

11. Construction of Sewer

Damages caused by constructing a sewer through a private lot must be paid. *Smith v. City of Atlanta*, 92 Ga. 119, 17 S.E. 981 (1893).

When the laying of sewerage pipes on plaintiff's property damaged the plaintiff because of the depreciation of the plaintiff's property as the result of overflow of water from such pipes, the only damages recoverable would be under this paragraph. *Lawrence v. City of La Grange*, 63 Ga. App. 587, 11 S.E.2d 696 (1940).

Sewer as nuisance. — Even though the construction, installation and maintenance of a sewer-drainage system, including that for surface water, is a governmental function, a municipal corporation can nevertheless be held liable with respect to these activities on the theory of nuisance and on the theory of taking or damaging for public purposes without just and adequate compensation being first paid. *Turk v. City of Rome*, 133 Ga. App. 886, 212 S.E.2d 459, *aff'd*, 235 Ga. 223, 219 S.E.2d 97 (1975).

While the power to construct a sewer and drainage system is a governmental function, a county cannot create and maintain such a system as a nuisance

What is Compensable (Cont'd)**11. Construction of Sewer (Cont'd)**

which damages private property without subjecting itself to civil liability. *Ingram v. Baldwin County*, 149 Ga. App. 422, 254 S.E.2d 429 (1979).

Single instance of backup of county sewage system into private home would not be sufficient to create nuisance for which county liability would attach. *Ingram v. Baldwin County*, 149 Ga. App. 422, 254 S.E.2d 429 (1979).

12. Effect of Zoning and Land Use Regulations

Zoning is subject to constitutional prohibition against taking private property without just compensation. *City of Smyrna v. Ruff*, 240 Ga. 250, 240 S.E.2d 19 (1977).

Justification required for zoning classification. — As the individual's right to the unfettered use of the individual's property confronts the police power under which zoning is done, the balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality, or general welfare. Lacking such justification, the zoning may be set aside as arbitrary or unreasonable. *City of Smyrna v. Ruff*, 240 Ga. 250, 240 S.E.2d 19 (1977).

Standard for finding regulation confiscatory. — If the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void. *City of Smyrna v. Ruff*, 240 Ga. 250, 240 S.E.2d 19 (1977).

Mere unlawful attempt to regulate land use not compensable. — An unlawful attempt on the part of the governing authorities to regulate the use of the property of the owner for the owner's own purposes does not constitute a taking within the meaning of this paragraph, and accordingly does not entitle the owner of such property to compensation from the state or its agents, or give the owner any right of action for the injuries sustained. *Davis v. Johnson*, 92 Ga. App. 858, 90 S.E.2d 426 (1955).

Prevention of future uses not compensable. — The police power of the state to zone property to prevent its use for certain purposes in the future, as distinguished from the taking or damaging in respect to a use already in existence, is not open to question, and does not require the payment of any compensation. *National Adv. Co. v. State Hwy. Dep't*, 230 Ga. 119, 195 S.E.2d 895 (1973).

Diminution of value resulting from a zoning classification, in and of itself, does not constitute an unconstitutional deprivation. *Gradous v. Board of Comm'rs*, 256 Ga. 469, 349 S.E.2d 707 (1986).

Denial of an application to rezone lot from residential use to commercial use was not an unconstitutional taking of property without just compensation. *Westbrook v. Board of Adjustment*, 245 Ga. 15, 262 S.E.2d 785 (1980).

Burden of proof on plaintiff. — The plaintiff has the burden of showing that the zoning under attack is so detrimental to the plaintiff, and so insubstantially related to the public health, safety, morality and welfare, as to amount to an unconstitutional "taking," that is, an arbitrary confiscation of the plaintiff's property without compensation by the governing authority. *Hubert Realty Co. v. Cobb County Bd. of Comm'rs*, 245 Ga. 236, 264 S.E.2d 179 (1980).

Rezoning properly required. — When on appeal from denial of a rezoning application, the county's evidence was clearly insufficient to justify its contention that the current zoning classification of plaintiff's property promoted the health, safety, morals, or general welfare of the public, and both the county planner and a county commissioner testified that plaintiff's property was ill-suited to its present zoning classification, the trial court did not err in declaring the zoning classification of plaintiff's property to be unconstitutional and in ordering the board of commissioners to rezone it in a constitutional manner. *Cobb County v. Shapiro*, 251 Ga. 55, 303 S.E.2d 10 (1983).

Rezoning constituting taking. — Rezoning constituted a taking of property when it rendered the property virtually worthless and was done without evaluation of prospective uses for the property, a

study of the possible impact of the property owner's use on neighboring property, or consideration of the effect of the rezoning on the value of the property. *Bickerstaff Clay Prods. Co. v. Harris County*, 89 F.3d 1481 (11th Cir. 1996).

13. Other Losses

Fanciful or speculative damages or sentimental injuries are not elements to be considered as damage to the freehold; neither are results amounting only to inconvenience or discomfort elements of damage in computing to what extent the value of the property has been reduced. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938).

Inconvenience no basis for compensation. — A present inconvenience or affront to esthetic taste in not having the same view is not a basis for recovery in an action for damage to property as provided against by this paragraph. *Brooks County v. Elwell*, 63 Ga. App. 308, 11 S.E.2d 82 (1940).

Damage caused by mere temporary inconvenience due to the construction of the project for which the property was taken is not a proper element for consideration in determining just and adequate compensation for condemned realty. If compensable damages to the property is occasioned by the construction process, the remedy is a separate suit for damages. *Southwire Co. v. DOT*, 147 Ga. App. 606, 249 S.E.2d 650 (1978).

When construction of a public project merely causes personal inconvenience, annoyance, and discomfort to the occupants of property, such property has not been compensably damaged. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

Increased noise and odors may be compensable. — The term property comprehends not only the thing possessed, but also, in strict legal parlance, means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy, and dispose of it; and the corresponding right to exclude others from the use. Therefore, no physical invasion damaging to the property need be shown; only an unlawful interference with the

right of the owner to enjoy the owner's possession; increased noise and odors may result in an inverse condemnation of property by interfering with the use and enjoyment of land and endangering health. *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235 (1978).

Noise, odors, and smoke are compensable in inverse condemnation. *Metropolitan Atlanta Rapid Transit Auth. v. Trussell*, 247 Ga. 148, 273 S.E.2d 859 (1981).

Special damages must be shown. — Absent a showing of special damages, that is, physical damage to property different from that kind suffered by the general public from dust, noise, and debris flowing naturally from any major construction and which affect the general public no compensable damage is shown. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

Elements of inconvenience, resulting from noises of engines, horn blowing, glare of lights and the like from passing traffic on the highway, are not recoverable under this paragraph. *Richmond County v. Williams*, 109 Ga. App. 670, 137 S.E.2d 343 (1964).

No recovery for damage from trains. — Evidence as to vibration of the trains, noise, smoke, cinders, and sparks from passing trains, as a result of relocating the track, causing physical damage to abutting property, would be illustrative of the diminution of the market value of the property, but no recovery could be had therefor under this provision as independent elements of damage. Similarly as to the increased fire hazard, greater danger of being struck by the passing trains, and ingress and egress being interfered with are made more difficult. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938).

Smoke and cinders may be elements of damages. *Atlantic & Birmingham Ry. v. McKnight*, 125 Ga. 328, 54 S.E. 148 (1906).

Moving cables to build hospital not compensable. — When the city required the telephone company to move cables from under street in order to build hospital facilities, that act was not such a

What is Compensable (Cont'd)**13. Other Losses (Cont'd)**

taking as to mandate payment of compensation. *City of Macon v. Southern Bell Tel. & Tel. Co.*, 89 Ga. App. 252, 79 S.E.2d 265 (1953), overruled on other grounds, 161 Ga. App. 452, 288 S.E.2d 705 (1982), commented on in 5 Mercer L. Rev. 323 (1954) and 17 Ga. B.J. 117 (1954).

No compensation for depreciation by operation of public work. — The word “damages,” as used in this paragraph does not require compensation to be paid to the owner of the real property for a depreciation in the value of the owner’s property caused by the lawful operation of a public work. *Evans v. Just Open Gov’t*, 242 Ga. 834, 251 S.E.2d 546 (1979).

Expense of moving residence. — This paragraph allows a condemnee conducting a business enterprise on property which is taken under the power of eminent domain to recover of the condemnor, as independent items, damage to the condemnee’s business caused by the necessity of moving it to another location, and the expense incidental to removal. This concept is not applicable when the taking is simply that of the location of the condemnee’s personal residence, and when the expense of moving is merely a personal expense necessitated by the taking and does not constitute an element of damage to property, either corporeal or incorporeal. *City of Gainesville v. Chambers*, 118 Ga. App. 25, 162 S.E.2d 460 (1968).

Use of right of way by landowners. — Landowners are not entitled to the use of the highway right of way for parking of customers’ vehicles for service or place for private business. *Johnson v. Burke County*, 101 Ga. App. 747, 115 S.E.2d 484 (1960).

No claim upon release of state lien. — The state began proceedings to condemn certain property, pursuant to the provisions of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO) (O.C.G.A. § 16-14-7), but subsequently filed a release of its RICO lien. There was no cognizable claim under the theory that private property was taken or damaged for public purposes without just

and adequate compensation being first paid. The state did not apply any of the property to public use during the period it was in the state’s possession and, even assuming arguendo that the seizure resulted in a violation of state and/or federal constitutional rights, there was no basis upon which the state itself, as opposed to its officers, could be held liable for monetary damages on the basis of it. *Kelleher v. State*, 187 Ga. App. 64, 369 S.E.2d 341 (1988).

Increased water flow through plaintiff’s property caused by the breaching of a dam did not constitute a taking within the meaning of the Constitution. *Lewis v. DeKalb County*, 251 Ga. 100, 303 S.E.2d 112 (1983) (decided under Ga. Const. 1976, Art. I, Sec. III, Para. I).

Damage to building caused by flood waters coming from city streets was an inadvertent event from which no inference could be drawn that the damage was done for a public purpose. *Trussell Servs., Inc. v. City of Montezuma*, 192 Ga. App. 863, 386 S.E.2d 732 (1989).

Comprehensive sign ordinance providing for removal of nonconforming signs effected an unconstitutional taking of private property without just and adequate compensation. *Lamar Adv. of S. Ga., Inc. v. City of Albany*, 260 Ga. 46, 389 S.E.2d 216 (1990).

Facial challenges have no ripeness requirement. — The development association did not show that the tree ordinance had been applied to them in any way, and therefore, raised a facial challenge rather than an “as applied” challenge. Applying these concepts, the development association was not denied all economically viable uses of their property and there was no taking without just compensation. *Greater Atlanta Homebuilders Ass’n v. DeKalb County*, 277 Ga. 295, 588 S.E.2d 694 (2003).

Compensation**1. In General**

Owner entitled to compensation for all damage. — This paragraph is susceptible to no construction except the condemnee is entitled to be compensated for all damage to the condemnee’s prop-

erty and expense caused by the condemnation proceedings. *DOT v. Brooks*, 153 Ga. App. 386, 265 S.E.2d 610 (1980).

Legislature, within certain bounds, prescribes method of determining measure of compensation. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), commented on in 17 Mercer L. Rev. 471 (1966).

What is just and adequate is justiciable question, and only the judiciary can lawfully determine that question. *Calhoun v. State Hwy. Dep't*, 223 Ga. 65, 153 S.E.2d 418 (1967), commented on in 18 Mercer L. Rev. 475 (1967).

Powers of departments of state over owner's right to compensation. — None of the three separate departments of the state — legislative, executive, or judicial — has the power to reduce or abolish the constitutional right of the owner to receive just and adequate compensation for the owner's private property taken for a public use. Only the judiciary can adjudicate the amount of such compensation and what evidence is relevant and admissible for that purpose. *Housing Auth. v. Southern Ry.*, 150 Ga. App. 4, 256 S.E.2d 606 (1979), *aff'd in part, rev'd in part*, 245 Ga. 229, 264 S.E.2d 174 (1980).

Damages decided on case-by-case basis. — Unlike other jurisdictions, Georgia does not statutorily restrict compensable elements of damage in eminent domain proceedings, but instead relies on a system of case-by-case adjudication. *DeKalb County v. United Family Life Ins. Co.*, 235 Ga. 417, 219 S.E.2d 707 (1975).

Condemnor has burden of proving what is just and adequate compensation for property taken. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Burden of proof is on condemnor to show value of property taken and consequential damages to remainder of the property. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Word "damage," as used in this paragraph, is intended to cover any damage, either direct or consequential. *City of Atlanta v. Dinkins*, 46 Ga. App. 19, 166 S.E. 429 (1932).

Compensation for both previous damaging and final taking. — Under this paragraph, a court will award compensation for both a previous damaging and a final taking where both items of recovery are appropriate. *Creel v. City of Atlanta*, 399 F.2d 777 (5th Cir. 1968).

Right of first refusal to acquire real property was not compensable. — Inasmuch as an option does not confer upon the holder an interest in the property, it stands to reason that the possessor of a right of first refusal would not, just by virtue of holding the refusal right, obtain a legally compensable interest in the property itself. *Robinson v. Gwinnett County*, 290 Ga. 470, 722 S.E.2d 59 (2012).

Holders' right of first refusal to acquire real property was not compensable under Ga. Const. 1983, Art. I, Sec. III, Para. I because at the time of the condemnation, the refusal right under the agreement between the executor and the holders was not invoked or sought to be enforced; the condemnation did not trigger the holders' refusal right since it was unrelated to any choice by the executor to market the property, but rather it was a forced and compulsory sale to the condemning authorities, apparently not contemplated in the agreement. *Robinson v. Gwinnett County*, 290 Ga. 470, 722 S.E.2d 59 (2012).

Statutory pre-judgment interest rate not part of "just compensation". — Prejudgment interest rate specified by O.C.G.A. § 32-3-19(c) compensates the condemnee for the use of funds generated in a condemnation action, not for the use of the property condemned; thus, this interest rate is not part of "just compensation," and legislative determination of the rate does not involve improper exercise of a judicial function. *Brooks v. DOT*, 254 Ga. 60, 327 S.E.2d 175 (1985).

Prejudgment interest is not to be included as a portion of "just and adequate compensation" in a condemnation case. *DOT v. Consolidated Equities Corp.*, 181 Ga. App. 672, 353 S.E.2d 603 (1987).

Trial court properly denied a corporation's motion for prejudgment interest in an inverse condemnation case as just and adequate compensation under the eminent domain paragraph of the Georgia Constitution, Ga. Const. 1983, Art. I, Sec.

Compensation (Cont'd)**1. In General (Cont'd)**

III, Para. I, did not include prejudgment interest. *City of Atlanta v. Landmark Envtl. Indus.*, 272 Ga. App. 732, 613 S.E.2d 131 (2005).

Burden of producing evidence may shift to condemnee. — The burden of proving value and damages never shifts from the condemnor, though a burden of producing evidence may arise on the part of the condemnee when the condemnee asserts the greater value or damage. *Glover v. DOT*, 166 Ga. App. 512, 304 S.E.2d 567 (1983).

2. Measure of Recovery

Measure of damages is loss sustained by landowner, taking into consideration all the purposes for which the property is available; generally speaking, the measure of damages is the market value of the property to be taken, and when this would give just and adequate compensation to the owner this rule should be applied. *Housing Auth. v. Holloway*, 63 Ga. App. 485, 11 S.E.2d 418 (1940).

The measure of damages is the pecuniary loss sustained by the owner, taking into consideration all relevant factors. Ordinarily, this loss is represented by the fair market value of the property interest taken, but it may be the fair and reasonable value of the property taken if in fact the market value would not coincide with the actual value thereof. *Housing Auth. v. Savannah Iron & Wire Works, Inc.*, 91 Ga. App. 881, 87 S.E.2d 671 (1955).

Measure of recovery is limited strictly to actual diminution in value of property. *City of Atlanta v. Due*, 42 Ga. App. 797, 157 S.E. 256 (1931).

Damages for depreciation in the market value of property are appropriate in a suit against a municipality for the taking or damaging of property for public use and also in a suit for a permanent and continuing nuisance created by the municipality. *City of La Fayette v. Hegwood*, 52 Ga. App. 168, 182 S.E. 860 (1935).

Where property is taken, under power of eminent domain for a public use, its market value for all purposes for which

the property is available is the true measure of the owner's compensation. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

The measure of damages under this paragraph is the actual depreciation in market value of the premises resulting from the work done and the effect upon the property. *Fulton County v. Baranan*, 240 Ga. 837, 242 S.E.2d 617 (1978).

Just and adequate compensation is defined as fair market value of the property at the time of taking. *DeKalb County v. United Family Life Ins. Co.*, 235 Ga. 417, 219 S.E.2d 707 (1975).

Genuine issues of fact existed as to issue of just compensation. — Trial court erred by granting summary judgment to the Georgia Department of Transportation because there were genuine issues of material fact existing as to just compensation based on the reasonable probability that the sign ordinances would have been amended and the billboard converted to digital and that those changes would have had an appreciable impact on the present market value of the condemnee's property interest. *ADC Invs., LLC v. DOT*, 325 Ga. App. 685, 754 S.E.2d 648 (2014).

Measure of damages is fair market value where there is no showing of any unique value to condemnee over and above market value. *State Hwy. Dep't v. Thomas*, 106 Ga. App. 849, 128 S.E.2d 520 (1962), commented on in 14 Mercer L. Rev. 447 (1963).

Recovery not restricted to market value. — This paragraph does not necessarily restrict the owner's recovery to market value as the term is sometimes used. *Housing Auth. v. Holloway*, 63 Ga. App. 485, 11 S.E.2d 418 (1940).

Compensation may exceed value of land. — If just and adequate compensation to owners of the various interests in a parcel of land being condemned requires that the total compensation exceed the value of the land, this presents no difficulty because, under this paragraph, the jury is not only required to render a verdict for an amount which will justly and adequately compensate the condemnees for the value of the land taken, but also for whatever damages result to the

condemnees from the condemnation proceeding. *State Hwy. Dep't v. Thomas*, 115 Ga. App. 372, 154 S.E.2d 812 (1967).

Which value gives “just and adequate compensation.” — In determining just and adequate compensation, market value and actual value will ordinarily be synonymous; if they are not, that value which will give “just and adequate compensation” is the one to be sought by the jury in rendering its verdict. *State Hwy. Dep't v. Robinson*, 103 Ga. App. 12, 118 S.E.2d 289 (1961).

Just and adequate compensation is the proper measure of damages in a condemnation case, and where the property is shown to have some peculiar value to the condemnee, fair market value may not be the proper method to be used in arriving at a verdict. *Gaines v. City of Gainesville*, 115 Ga. App. 220, 154 S.E.2d 280 (1967).

Fair market value defined. — Fair market value is the price a seller who desires, but is not required, to sell and a buyer who desires, but is not required, to buy, would agree is a fair price, after due consideration of all elements reasonably affecting value. *Wright v. Metropolitan Atlanta Rapid Transit Auth.*, 248 Ga. 372, 283 S.E.2d 466 (1981).

Consideration of actual value. — While market value is the general yardstick in a condemnation proceeding or a suit for compensation in the nature of a condemnation proceeding, there may be circumstances in which market value and actual value are not the same, and in such event the jury may consider the actual value of the land or interest therein appropriated. *State Hwy. Dep't v. Robinson*, 103 Ga. App. 12, 118 S.E.2d 289 (1961).

Actual value. — In an eminent domain proceeding, the “just and adequate compensation” due a condemnee is “the value” of the land taken, plus any consequential damages to the remainder if there is a partial taking, which may not be less than “the actual value” of the property taken or damaged. *Macon-Bibb County Water & Sewerage Auth. v. Reynolds*, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

The undivided fee rule, i.e., the condemnor need only pay the value of the land that was taken, which is then to be divided among the claimants based upon

their respective interests, applies only when the fair market value of the real property taken does, in fact, constitute just and adequate compensation in a particular case. *Fulton County v. Funk*, 266 Ga. 64, 463 S.E.2d 883 (1995).

The undivided fee rule is not contrary to the principle that each condemnee must be paid for what the condemnee lost, not for what the condemnor has gained; the rule merely insures that each condemnee will not be paid more than the condemnee has lost; abrogating *White v. Fulton County*, 264 Ga. 393(1), 444 S.E.2d 734 (1994). *Fulton County v. Funk*, 266 Ga. 64, 463 S.E.2d 883 (1995).

In a total taking of property subject to a leasehold interest, charge to the jury that the amount of just and adequate compensation should “equal the whole—the value of the property” was correct where the valuation evidence dealt only with the fair market value of the property and there was no contention that the property was unique; reversing *Funk v. Fulton County*, 216 Ga. App. 30, 453 S.E.2d 82 (1995). *Fulton County v. Funk*, 266 Ga. 64, 463 S.E.2d 883 (1995).

Damages. — The word “damaged,” has a broader meaning than the word “taken,” and is designed to impose liability on a condemnor for consequential injuries to property which would not otherwise exist. *Macon-Bibb County Water & Sewerage Auth. v. Reynolds*, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Trial court did not err in entering a final judgment on a jury verdict awarding a company and a bank damages in a county's condemnation action because there was no evidence presented of pre-taking damages in anticipation of the taking; the trial court's jury instructions properly explained how the jury was to calculate damages. *Gwinnett County v. Ascot Inv. Co.*, 314 Ga. App. 874, 726 S.E.2d 130 (2012).

Trial court did not commit a manifest abuse of discretion when the court allowed evidence that, as a result of the taking of property, it was no longer feasible to construct student housing because a company and a bank presented expert testimony that the property's value at the time of the taking was affected by the property's prob-

Compensation (Cont'd)**2. Measure of Recovery (Cont'd)**

able future use for student housing. *Gwinnett County v. Ascot Inv. Co.*, 314 Ga. App. 874, 726 S.E.2d 130 (2012).

Department of Transportation not required to abide by federal prohibition of compensation for enhancement. — By requiring the Department of Transportation to be guided by federal law “to the greatest extent practicable” in its condemnation procedures, O.C.G.A. § 32-8-1(b) does not thereby require the department to abide by the federal law’s prohibition of compensation for enhancement by reason of taking and does not affect the judiciary’s power to determine what constitutes just and adequate compensation. *DOT v. White*, 173 Ga. App. 68, 325 S.E.2d 397 (1984).

When jury may consider “just and adequate compensation” same as “fair market value.” — Where the whole property owned is taken, no consequential damages are involved, and the building is not being used by the condemnee and no lease or other factor is involved, there is nothing to require the jury to determine “just and adequate compensation” by any other method other than “fair market value.” *Sutton v. State Hwy. Dep’t*, 103 Ga. App. 29, 118 S.E.2d 285 (1961).

Where there are no circumstances shown that would make any distinction between just and adequate compensation to the condemnees and the fair market value of the property, a charge that compensation should be measured by fair market value is not error. *Gaines v. City of Gainesville*, 115 Ga. App. 220, 154 S.E.2d 280 (1967).

Question for consideration is what owner has lost. — Under this paragraph’s requirement that the condemnee be paid “just and adequate compensation” before the condemnee’s property is taken, the question which properly addresses itself to the jury’s consideration is not “What has the taker gained?” but “What has the owner lost?”. *State Hwy. Dep’t v. Thomas*, 115 Ga. App. 372, 154 S.E.2d 812 (1967).

Owner is to be paid just and adequate compensation for the owner’s

property, that is, value of the property to the owner, not its value to condemnor. *Housing Auth. v. Holloway*, 63 Ga. App. 485, 11 S.E.2d 418 (1940).

If special damage is caused to property, the owner of property is entitled to recover amount of damages which the owner’s property has actually sustained. *Franklin v. City of Atlanta*, 40 Ga. App. 319, 149 S.E. 326 (1929).

Reproduction cost may always be used as factor involved in valuation of property, together with other factors such as depreciation and the nature of the property interest seized, in determining market value. *Housing Auth. v. Savannah Iron & Wire Works, Inc.*, 91 Ga. App. 881, 87 S.E.2d 671 (1955).

Whole damage to property, past, present, and future, must be assessed in one action, the action taking the place of the statutory provision in cases where property is condemned. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938).

All purposes to which property may be put are for consideration in determining its value. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), commented on in 17 *Mercer L. Rev.* 471 (1966).

Compensation when only part of property taken. — In a proceeding to condemn only a portion of a tract of land the only question to be determined by the jury is the amount which the condemnor should pay as just and adequate compensation for the part taken and consequential damages, if any, to the remaining portion of the tract, as such damages may be offset, but not exceeded, by consequential benefits. *Alabama Power Co. v. Chandler*, 217 Ga. 550, 123 S.E.2d 767 (1962).

Compensation for uses other than use at time of condemnation. — Under proper evidence in determining just and adequate compensation for property taken by eminent domain, the jury may consider the value of the property for uses other than that for which it was being used at the time of the condemnation. *State Hwy. Dep’t v. Robinson*, 103 Ga. App. 12, 118 S.E.2d 289 (1961).

Measure of damages when property used for special purpose. — Adequate

compensation for property which the owner has designed for a special use, and of which the owner has been deprived for the public benefit without the owner's consent, may include the cost of the article or its value to the owner for the particular purpose for which the owner designed to use it, or for which it could be used. *Housing Auth. v. Holloway*, 63 Ga. App. 485, 11 S.E.2d 418 (1940).

Whether property is or is not used for a particular purpose does illustrate its peculiar value and often shows its worth to the condemnee in excess of its market value. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), commented on in 17 Mercer L. Rev. 471 (1966).

Anything that actually enhances value of land must be considered in order to meet the demands of this paragraph that the owner be paid before the taking, adequate and just compensation. *DOT v. Arnold*, 154 Ga. App. 502, 268 S.E.2d 775 (1980).

Effect of enhancement of value upon amount of damages. — Where none of the property, or only a part of it, is actually taken for public use, any enhancement of the market value which arises directly from such public improvement and which accrues directly to the particular property remaining may be set off against the gross damage which may be thus occasioned. *Muecke v. City of Macon*, 34 Ga. App. 744, 131 S.E. 124 (1925).

If, at the time the market value of the property sought to be condemned is to be estimated, it is known or anticipated that certain improvements will be made in the locality where the property is situated, and this fact serves to enhance the market value of the property, the owner is entitled to the actual market value as effected by reason of the fact that it is known or anticipated that such improvements will thus be made. This is true, though the projected improvements are to be made by the condemning party. *Hard v. Housing Auth.*, 219 Ga. 74, 132 S.E.2d 25 (1963), commented on in 26 Ga. B.J. 349 (1964).

Knowledge of condemnation prior to making improvements. — Court did not err in restricting counsel from examining witnesses on their knowledge of con-

demnation prior to making improvements. *State Hwy. Dep't v. Owens*, 120 Ga. App. 647, 171 S.E.2d 770 (1969), commented on in 22 Mercer L. Rev. 616 (1971).

Knowledge of condemnation at purchase. — In a condemnation proceeding, the trial court did not abuse the court's discretion in denying the lessees' motion in limine to exclude evidence that the lessees and the lessor knew of the possible condemnation when the lessees sold the property to the lessor because the Georgia Department of Transportation (DOT) sought to use the evidence to discredit the estimate the lessees and lessor made of the property's market value at the time of the taking by challenging the use of the sale as a factor in reaching that estimate used in that way, the evidence of the knowledge of a possible condemnation would bear, at least indirectly, on the question of the just and adequate compensation due the condemnees. *CNL APF Partners, LP v. DOT*, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

Value to owners of separate interests in property. — Where there are separate interests to be condemned, the jury, in arriving at just and adequate compensation, is not only authorized but required to consider the value which the thing taken has to the respective owners of the interests being condemned. *State Hwy. Dep't v. Thomas*, 115 Ga. App. 372, 154 S.E.2d 812 (1967).

Damages must be limited to tract affected. — In proceedings for condemnation of land, the just compensation which the landowner is entitled to receive for the owner's lands, and damages thereto, must be limited to the tract, a portion of which is actually taken. *Southwire Co. v. DOT*, 147 Ga. App. 606, 249 S.E.2d 650 (1978).

Enhancement of market value due to public knowledge of impending improvements may be considered in determining the amount of compensation for purposes of this paragraph. *DeKalb County v. Fulton Nat'l Bank*, 156 Ga. App. 253, 274 S.E.2d 649 (1980).

When evidence authorizes charge on consequential benefits. — Where the condemnee introduces much evidence to show that, because of the condemna-

Compensation (Cont'd)**2. Measure of Recovery (Cont'd)**

tion, it would be required to expend certain amounts on fences, screening hedges, and grading, and thus would be consequentially damaged, and there is no evidence as to any consequential benefits resulting from the improvement, the evidence does not authorize a charge on consequential benefits. *Garden Parks v. Fulton County*, 88 Ga. App. 97, 76 S.E.2d 31 (1953).

Cost of particular property. — In some instances one might not be justly compensated for the taking of one's property unless one was awarded an amount adequate to repay the cost of the particular property or to replace just such property as was taken from that person. *Housing Auth. v. Holloway*, 63 Ga. App. 485, 11 S.E.2d 418 (1940).

No change in right of access. — Because a plat, which was incorporated into a deed as a representation of the land conveyed to the DOT as a right of way, did not change the rights of access conveyed in the deed, the trial court properly determined that the plat did not convey access rights to a highway; thus, the trial court properly granted summary judgment to the owner in the DOT's subsequent eminent domain action. *DOT v. Meadow Trace, Inc.*, 274 Ga. App. 267, 617 S.E.2d 246 (2005), *aff'd*, 280 Ga. 720, 631 S.E.2d 359 (2006).

Damages not affected when property received as gift. — The value of the property damaged is not affected by the fact that it was purchased at a lower price, or received as a gift. *Elbert County v. Brown*, 16 Ga. App. 834, 86 S.E. 651 (1915).

Jurors are not absolutely bound to accept as correct opinions or estimates of witnesses as to value of property, though uncontradicted by other testimony, but have the right to consider the nature of the property involved, together with any other fact or circumstance properly within their knowledge, throwing light upon the question, and they may, by their verdict, fix either a lower or a higher value upon the property than that stated in the opinions or esti-

mates of the witnesses. *Southern v. Cobb County*, 78 Ga. App. 58, 50 S.E.2d 226 (1948).

Only if fact finder finds for additional damages does court have right to conduct hearing to determine amount of additional damage. If the fact finder holds against such additional damage for attorney fees and costs of litigation, that phase is ended. *DOT v. Shelkeith, Inc.*, 146 Ga. App. 581, 246 S.E.2d 706, *cert. dismissed*, 242 Ga. 711, 251 S.E.2d 293 (1978).

Introduction of evidence of similar property sales to prove value. — On a question in regard to the value of land sought to be condemned, it is competent to introduce evidence of sales of property similar to that in question, made at or near the time of the taking. *West v. Fulton County*, 95 Ga. App. 320, 97 S.E.2d 785 (1957); *Alabama Power Co. v. Chandler*, 217 Ga. 550, 123 S.E.2d 767 (1962).

Charging jury on fair market value. — This paragraph does not contain any allusion to fair market value as a criterion for determining just and adequate compensation, and it is error to charge the jury explicitly or implicitly in this respect. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), *commented on in* 17 *Mercer L. Rev.* 471 (1966).

It is proper in condemnation proceeding to instruct the jury that they are not concerned with right and necessity of taking, but in fixing the value of the property taken; the charge should not refer to the willingness or unwillingness of the condemnee. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), *commented on in* 17 *Mercer L. Rev.* 471 (1966).

Jury instruction that fictitious "buyer and seller" are condemnor and condemnee. It is error to give jury erroneous conception that fictitious "buyer and seller" referred to in definition of market value are the condemnor and condemnee. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), *commented on in* 17 *Mercer L. Rev.* 471 (1966).

In no case in jury instructions should the condemnor be referred to as buyer who is not obliged to buy and condemnee

as seller who is not compelled to sell, as would be the fictitious buyers and sellers used to determine market price. *Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884 (1966), commented on in 17 Mercer L. Rev. 471 (1966).

Verdict must be supported by evidence. — Where a verdict is returned for an amount larger than is authorized by the evidence adduced by the condemner, that of the condemnee must support the verdict; that is, the condemnee's proof, added to and supplemented by facts appearing from that of the condemner for that purpose must furnish the factual foundation for the verdict rendered by the jury. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Landowners' claim in a condemnation action that O.C.G.A. § 22-2-84.1 was unconstitutional because payment of appellee's attorney fees would diminish the amount of compensation they receive and violate their constitutional right to receive just and adequate compensation was without merit; the method for determining just and adequate compensation was a matter of legislative discretion, the assessment of compensation by a special master satisfied the constitutional requirement of just and adequate compensation for taking property and, by conditioning an appeal to the superior court on the payment of costs, O.C.G.A. § 22-2-84.1 did not violate a property owner's right to receive just and adequate compensation before a taking of the owner's property occurred. *Martin v. Henry County Water & Sewerage Auth.*, 279 Ga. 197, 610 S.E.2d 509 (2005).

3. Attorneys' Fees

Editor's notes. — Some of the cases noted under this heading were decided prior to the 1983 Constitution, which authorizes the General Assembly to provide by law for payment of litigation expenses, including attorneys' fees.

Paragraph does not require award of attorneys' fees. *DeKalb County v. Trustees, Decatur Lodge No. 1602*, 242 Ga. 707, 251 S.E.2d 243 (1978), commented on in 31 Mercer L. Rev. 367 (1979).

Attorneys' fees and expenses are not

embraced within just compensation for land taken by eminent domain. *Bowers v. Fulton County*, 122 Ga. App. 45, 176 S.E.2d 219 (1970), commented on in 17 Mercer L. Rev. 471 (1966); *Georgia Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 936, 101 S. Ct. 1403, 67 L. Ed. 2d 372 (1981).

Award for expenses of expert witnesses not required. — Damages as just and adequate compensation for property taken in the exercise of eminent domain does not include expenses for expert witnesses and legal counsel. *Shelton v. Housing Auth.*, 227 Ga. 824, 183 S.E.2d 353 (1971).

Award determined by value of property. — No provision is made in this paragraph or by statute that authorizes the award of attorneys' fees and expenses of litigation as a part of just compensation, but the award is determined by the value of the property taken or damaged. *Bowers v. Fulton County*, 227 Ga. 814, 183 S.E.2d 347 (1971).

Recovery of attorneys' fees not prohibited. — The recovery of attorneys' fees in an eminent domain case is neither required by this paragraph nor authorized by statute. On the other hand, nothing seems to prohibit such a recovery within the constitutional concepts of due process. *Housing Auth. v. Southern Ry.*, 150 Ga. App. 4, 256 S.E.2d 606 (1979), aff'd in part, rev'd in part, 245 Ga. 229, 264 S.E.2d 174 (1980).

Property owner's appeal permitted by O.C.G.A. § 22-2-100 et seq., does not provide for a constitutional right to jury trial on the issue of just and adequate compensation; therefore, an award of attorney fees under O.C.G.A. § 22-2-84.1(a) does not violate the property owner's constitutional right to receive just and adequate compensation before a taking of the owner's property occurs. *Mayo v. City of Stockbridge*, 285 Ga. App. 58, 646 S.E.2d 79 (2007), cert. denied, No. S07C1279, 2007 Ga. LEXIS 707 (Ga. 2007).

For decisions holding that "just and adequate compensation" includes attorneys' fees, see *White v. Georgia Power Co.*, 237 Ga. 341, 227 S.E.2d 385 (1976), overruled, *DeKalb County v. Trustees, Decatur Lodge No. 1602*, 242 Ga. 707, 251

Compensation (Cont'd)**3. Attorneys' Fees (Cont'd)**

S.E.2d 243 (1978); DOT v. Doss, 238 Ga. 480, 233 S.E.2d 144 (1977); City of Macon v. Mabry, 143 Ga. App. 203, 238 S.E.2d 123 (1977); City of Atlanta v. Atlanta Gas Light Co., 144 Ga. App. 157, 240 S.E.2d 730 (1977); Georgia Power Co. v. Whitmire, 146 Ga. App. 29, 245 S.E.2d 324 (1978); City of Atlanta v. Rosebush, 146 Ga. App. 99, 245 S.E.2d 440 (1978); DOT v. Shelkeith, Inc., 146 Ga. App. 581, 246 S.E.2d 706, cert. dismissed, 242 Ga. 711, 251 S.E.2d 293 (1978).

Party in condemnation proceeding acquired no vested right in attorneys' fees awarded to that party through judgment of trial court. DOT v. Kendricks, 244 Ga. 613, 261 S.E.2d 391 (1979).

General Assembly has not provided for jury trial on issue of amount of attorneys' fees and litigation costs. DOT v. Doss, 238 Ga. 480, 233 S.E.2d 144 (1977).

O.C.G.A. § 9-15-14, read in conjunction with Ga. Const. 1983, Art. I, Sec. III, Para. I, permits trial courts to award attorney fees to condemnees in eminent domain cases. DOT v. Woods, 269 Ga. 53, 494 S.E.2d 507 (1998).

4. Consequential and Punitive Damages

Distinction from recovery for actual value. — The condemnee is entitled to be compensated for all damage done to the condemnee's property and expenses caused by the condemnation proceedings. Such damages and expenses are separate and distinct items from the amount to which the condemnee is entitled to recover as the actual value of the condemnee's building. Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966), commented on in 17 Mercer L. Rev. 471 (1966).

There are only two elements of damages to be considered in a condemnation proceeding: first, the market value of the property actually taken; and, second, the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting

of it to the purposes for which it is condemned, including its proper maintenance and operation, and the measure of these consequential damages is the diminution in the market value of the remainder of the property proximately arising from these causes. DOT v. Simon, 151 Ga. App. 807, 261 S.E.2d 710 (1979), aff'd, 245 Ga. 478, 265 S.E.2d 777 (1980).

Consequential damages may be added to but cannot be deducted from the actual value of the part taken. DOT v. Old Nat'l Inn, Inc., 179 Ga. App. 158, 345 S.E.2d 853, cert. vacated, 256 Ga. 315, 349 S.E.2d 748 (1986).

Measure of consequential damages. — Generally speaking, measure of consequential damages is diminution, if any, of market value of property not taken, caused by taking of part which is taken and devoting of it to purposes for which it is condemned. Wright v. Metropolitan Atlanta Rapid Transit Auth., 248 Ga. 372, 283 S.E.2d 466 (1981).

Proper measure of consequential damages to remainder is diminution, if any, in market value of remainder in its circumstance just prior to time of taking compared with its market value in its new circumstance just after time of taking. Wright v. Metropolitan Atlanta Rapid Transit Auth., 248 Ga. 372, 283 S.E.2d 466 (1981).

Because an appraiser could use the cost to cure as a factor in determining the value of the remainder after the taking, and because the appraiser's testimony was sufficient to show consequential damages, the trial court properly denied the motion for a directed verdict by the Department of Transportation; in addition, the trial court properly admitted a surveyor's testimony based on the extensive basis for the testimony, the explanation of discrepancies, and the methodology used. DOT v. Ogburn Hardware & Supply, Inc., 273 Ga. App. 124, 614 S.E.2d 108 (2005).

Consequential damages to untaken property included. — The amount of damages shall include not only the value of the property taken, but shall also compensate for the consequential damage to the remaining property not taken. These consequential damages result from the actions of the state in severing a portion

from the body of the condemnee's land and interfering with the condemnee's use and enjoyment of the remaining property. *State Hwy. Dep't v. Irvin*, 100 Ga. App. 624, 112 S.E.2d 216 (1959).

No authority for recovery of punitive damages. — Since damages recoverable in an action by a property owner whose property is harmed by a county for public purposes is a substitute for damages recoverable in a condemnation action, there is no constitutional or statutory authority for the recovery of punitive damages against a county. *Fulton County v. Baranan*, 240 Ga. 837, 242 S.E.2d 617 (1978).

Damages must arise from condemnation. — If a condemnee is to recover consequential damages to the remainder of the condemnee's property when only a part is taken, it must appear that the damages to the remainder proximately and naturally arose from the condemnation and taking of the condemnee's own property. *DOT v. Simon*, 151 Ga. App. 807, 261 S.E.2d 710 (1979), *aff'd*, 245 Ga. 478, 265 S.E.2d 777 (1980).

Consequential damages to remainder must be sought during proceedings establishing value of land taken.

— Where part of a tract is taken, consequential damages to remainder must be sought, if at all, during proceedings to establish value of land taken. *Wright v. Metropolitan Atlanta Rapid Transit Auth.*, 248 Ga. 372, 283 S.E.2d 466 (1981).

Consequential damages to contiguous tracts of land which have different ownership. Consequential damages cannot be awarded in eminent domain case to contiguous tracts of land which have different ownership from tract in which the taking occurs such as where the condemned property is owned jointly and a contiguous tract is owned in fee by one of the co-owners of the condemned property. *Georgia Power Co. v. Bray*, 232 Ga. 558, 207 S.E.2d 442 (1974).

Though consequential damages to a contiguous tract of land having a different ownership from that in which the taking occurs may be real and may in fact exist, a separate owner's claim for consequential damages to that owner's land contiguous to the tract where the taking occurs can-

not be asserted in a condemnation action. Consequential damages to "the remainder of the tract in which the taking occurs" are the only consequential damages that may be recovered in the condemnation action. *Southwire Co. v. DOT*, 147 Ga. App. 606, 249 S.E.2d 650 (1978); *DOT v. Simon*, 151 Ga. App. 807, 261 S.E.2d 710 (1979), *aff'd*, 245 Ga. 478, 265 S.E.2d 777 (1980).

Burden of proof on condemnor. — The condemnor has the burden of proving whether there has been consequential damage to the remaining property and, if so, how much. *Georgia Power Co. v. Smith*, 94 Ga. App. 166, 94 S.E.2d 48 (1956).

Condemning party is not allowed to introduce evidence of permissive use of land of another in attempts to lessen consequential damages, nor may the condemnee increase in damages by the same means. *Southwire Co. v. DOT*, 147 Ga. App. 606, 249 S.E.2d 650 (1978).

Ownership of other lands without significance. — It is solely by virtue of ownership of the tract invaded that an owner is entitled to incidental damages. The owner's ownership of other lands is without legal significance. *Southwire Co. v. DOT*, 147 Ga. App. 606, 249 S.E.2d 650 (1978).

5. Interests of Lessors and Lessees

All relevant factors must be considered in determining just and adequate compensation, and if the market value of the property does not coincide with the actual fair market value of the property (as compared with others), the value may be the fair and reasonable value of the particular property taken. Anything that enhances the value of the property may be considered, including improvements. These rules apply to leaseholds. *Simmerman v. DOT*, 167 Ga. App. 383, 307 S.E.2d 4 (1983).

Measure of damages for loss of use of leased property. — The correct measure of damage to one holding a leasehold interest in land for over five years is the diminution in the market value of the premises for rent for the remainder of the term of the lease, that is, from the time of the damage till the end of the lease. *Jones v. Richmond County*, 61 Ga. App. 857, 7 S.E.2d 754 (1940).

Compensation (Cont'd)**5. Interests of Lessors and Lessees (Cont'd)**

The correct measure of damages for the loss of use of leased property is the diminution in the market value of the leasehold during the remainder of the unexpired term of the lease, less any rents to be paid by the lessee. *McGhee v. Floyd County*, 95 Ga. App. 221, 97 S.E.2d 529 (1957).

Effect of diminution of rental value.

— While the plaintiff is entitled to recover only for the diminution in the market value of the property and may not recover for any decrease in the rentals, the difference in the rental value of the property before the improvements were begun and after they were completed might be set up as a circumstance tending itself to show a diminution in the value of the property, or to corroborate other evidence to that effect. *Southern Ry. v. Leonard*, 58 Ga. App. 574, 199 S.E. 433 (1938).

When market value insufficient.

— Where a condemnation proceeding is instituted against land which is subject to a lease contract for a term of years, and where, because of the peculiar circumstances of the case, an award of damages measured solely by the fair market value of the land will not likely afford to the condemnees, the lessor and lessee, just and adequate compensation for their respective interests in the land, it is not error for the trial court, in charging the jury, to instruct them that they might find as one item to be considered in arriving at their lump-sum award as damages for the land and interest in the land taken, the fair market value to the lessee of its leasehold interest in the land condemned. *State Hwy. Dep't v. Thomas*, 115 Ga. App. 372, 154 S.E.2d 812 (1967).

Compensation when lessee forced to move. — Where the lessee was the tenant holding an estate for years, having remaining more than a year of the leasehold interest plus an option to purchase which would have been exercised except for the condemnation proceedings, and it was forced to move because the land remaining after the taking was inadequate for the business purposes, the result of

these factors is a total eviction. Accordingly, the lessee was entitled to just and adequate compensation, including moving expenses whether the latter be thought of *eo nomine* or as a negative aspect of the leasehold value. *DeKalb County v. Fulton Nat'l Bank*, 156 Ga. App. 253, 274 S.E.2d 649 (1980).

For decision holding moving expenses for personal property not recoverable as damages per se, see *Housing Auth. v. Savannah Iron & Wire Works, Inc.*, 90 Ga. App. 150, 82 S.E.2d 244 (1954).

Lessee may recover for a partial taking, including the removal of gasoline storage tanks from the land condemned to another part of the same premises. *DeKalb County v. Fulton Nat'l Bank*, 156 Ga. App. 253, 274 S.E.2d 649 (1980).

Evidence of offer of compromise. — In a condemnation proceeding, the trial court did not err in denying the lessees' motion in limine to exclude evidence of an alleged pre-condemnation offer of compromise contained in a letter because the letter, which was sent to an appraiser and not to the Georgia Department of Transportation, was not an inadmissible offer of compromise under former O.C.G.A. § 24-3-37 (see now O.C.G.A. § 24-4-408); no condemnation proceeding was pending when the letter was sent, the terms of the letter sought to persuade against the condemnation of the property, or, alternatively, to ensure that the lessees would receive the full amount that the lessees believed would be the lessees' just and adequate compensation if condemnation occurred, and the letter did not propose a compromise of that amount. *CNL APF Partners, LP v. DOT*, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

Cause of fire relevant to issue of just and adequate compensation. — In a condemnation proceeding, the trial court erred in denying the lessees' motion in limine to exclude evidence of the cause of the fire that damaged the restaurant that was on the real property at issue because evidence concerning the reasons giving rise to the uncertainty in insurance coverage (i.e., the cause of the fire), as opposed to the fact of uncertainty, was not relevant to the issue of just and adequate

compensation. *CNL APF Partners, LP v. DOT*, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

6. Other Items of Recovery

Interest of mortgagee. — If there is no showing in the record that the mortgagee cannot reinvest its funds at an interest rate equivalent to or higher than the interest rate provided for in the mortgage, it has suffered no real damage when the secured property is condemned. *DeKalb County v. United Family Life Ins. Co.*, 235 Ga. 417, 219 S.E.2d 707 (1975).

Mortgagee not entitled to prepayment premium. — In the absence of a provision entitling the mortgagee to the prepayment premium in case of a condemnation of the property, the mortgagee is not entitled to the prepayment premium when such a contingency occurs. *DeKalb County v. United Family Life Ins. Co.*, 235 Ga. 417, 219 S.E.2d 707 (1975).

Measure of damages to abutting property caused by raising grade of street is the difference between the market value of the property before and after the change of the grade. *Mayor of Macon v. Daley*, 2 Ga. App. 355, 58 S.E. 540 (1907).

Measure of damages for obstruction in street. — Where an obstruction in the street interferes with the owner's right to the use of the street, and is authorized by law and is lawfully and not negligently maintained and is permanent in character, and causes a diminution in the value of the property, the owner of the lot may recover, of the person erecting and maintaining the obstruction, damages only in difference between the value of the owner's property before the obstruction was erected and afterwards. *Felton v. State Hwy. Bd.*, 47 Ga. App. 615, 171 S.E. 198 (1933), later appeal, 57 Ga. App. 930, 181 S.E. 506 (1935).

Allegation of interference with access material. — Defendant is liable for any interference with the right of ingress and egress to the petitioner's property, and this allegation would be material in determining any diminution in the market value of the property by reason of such interference. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

Damages from street grading may be proved. — Cost of filling in lots, to raise them to the level of the street, may be proved upon this general question of diminution of the market value. *Williamson v. Mayor of Savannah*, 19 Ga. App. 784, 92 S.E. 291 (1917).

Measure of damages for property taken by erection of dam. — Any damage to, or destruction of, property resulting from exercise of lawful authority of a quasi-public corporation in the conduct of its franchise through the proper erection and proper and prudent operation of a dam, must be compensated for under this paragraph, for which the sole measure of damages is the diminution in the market value of the property thus taken or damaged and not as for a continuing, abatable nuisance, for which the measure of damages is generally stated to be the diminution of the yearly rental value of the property during its existence and within the statute of limitation plus any actual damage sustained, except where it affirmatively appears that because of the existence of the nuisance the property has been rendered permanently useless, even if the nuisance were abated, in which case the measure of damage would be, of necessity, the diminution of the market value of the property. *Warren v. Georgia Power Co.*, 58 Ga. App. 9, 197 S.E. 338 (1938).

Relocation expenses part of just and adequate compensation. — The enactment of O.C.G.A. § 32-8-1 does not alter the fact that relocation expenses, whether awarded judicially or administratively, are still a part of the "just and adequate compensation" guaranteed to condemnees under the Constitution. *DOT v. Gibson*, 251 Ga. 66, 303 S.E.2d 19 (1983).

7. Time at which Value of Land Is Fixed

Date upon which determination of just and adequate compensation is to be made is date of taking. *State Hwy. Dep't v. Calhoun*, 114 Ga. App. 501, 151 S.E.2d 806 (1966), rev'd on other grounds, 223 Ga. 65, 153 S.E.2d 418 (1967).

When private property is condemned for public use the owner is entitled to receive

Compensation (Cont'd)**7. Time at which Value of Land Is Fixed (Cont'd)**

just and adequate compensation as of the date of the taking and not as of the date of the announcement of the taking, and the value of the property should be fixed at the time of its taking. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Legal taking, as opposed to physical appropriation, begins at very moment a proceeding in rem is filed against property by the condemnor, and it is not complete until the land is actually physically transferred to the possession of the condemnor, and all the time between, whether days or years, is time during which the "legal taking" is in progress. *State Hwy. Dep't v. Wilson*, 98 Ga. App. 619, 106 S.E.2d 544 (1958).

Date of return of award of assessors as date of fixing value. — This paragraph does not require prepayment until there is some step in this process of legal taking which may act as a point to determine value, for one cannot pay for that which has no value or an entirely unascertained value. That point arrives in the case when the award of the assessors is returned. *State Hwy. Dep't v. Wilson*, 98 Ga. App. 619, 106 S.E.2d 544 (1958).

Jury not free to determine other date as date of taking. — The jury is not free to determine on the evidence that some date prior to the initiation of condemnation proceedings but after the announcement of the intent to condemn is the date of taking for the purposes of just and adequate compensation. *R.E. Adams Properties, Inc. v. City of Gainesville*, 125 Ga. App. 800, 189 S.E.2d 114 (1972).

Charge held reversible error. — Where the charge instructs the jury to determine consequential damages both "as of the date of taking" and at the time "the improvements are made," and where these times did not coincide, the charge was internally inconsistent and constituted reversible error. *Wright v. Metropolitan Atlanta Rapid Transit Auth.*, 248 Ga. 372, 283 S.E.2d 466 (1981).

Negligent or improper construction following condemnation judg-

ment. — Condemnation judgment precludes subsequent action for consequential damages unless they result from negligent or improper construction. *Wright v. Metropolitan Atlanta Rapid Transit Auth.*, 248 Ga. 372, 283 S.E.2d 466 (1981).

Where there is a physical taking of land, just and adequate compensation for the taking is determined as of the date of taking. *Wright v. Metropolitan Atlanta Rapid Transit Auth.*, 248 Ga. 372, 283 S.E.2d 466 (1981).

Diminution in value of remainder, constituting consequential damages should be measured as of date of taking. *Wright v. Metropolitan Atlanta Rapid Transit Auth.*, 248 Ga. 372, 283 S.E.2d 466 (1981).

Procedure**1. In General**

Effect of death of property owner. — An action against a city by reason of a change in the grade of a street whereby the abutting property is diminished in its market value does not sound in tort, and the right of action does not abate by the death of the property owner before the bringing of the suit, if such action is brought by the legal representative of the owner within the statute of limitations. *Harbour v. City of Rome*, 54 Ga. App. 97, 187 S.E. 231 (1936), *aff'd*, 184 Ga. 37, 190 S.E. 364 (1937).

Jurisdiction. — Because plaintiff landfill developer had not been able to pursue its inverse condemnation claim in state court (action had been removed), the district court lacked jurisdiction over the developer's takings and inverse condemnation claims under the Fifth Amendment to the U.S. Constitution and Ga. Const. 1983, Art. I, Sec. III, Para. I, because plaintiff had not availed itself of the state-law process, its takings and inverse condemnation claims were not ripe for federal court review. *BFI Waste Sys. of N. Am. v. Dekalb County*, 303 F. Supp. 2d 1335 (N.D. Ga. 2004).

Court not required to take judicial notice of independent contractor status. — In a suit by a property owner for damage to the owner's property caused by

highway construction, the requirement that competitive bids be taken on highway maintenance and construction contracts does not require the court to take judicial notice of the fact that the construction was done by an independent contractor. *Richmond County v. Williams*, 109 Ga. App. 670, 137 S.E.2d 343 (1964).

Use of term “fair market value” rather than “fair and reasonable value” in court’s instruction, when referring to property being condemned, was not improper. *Vann v. State Hwy. Dep’t*, 95 Ga. App. 243, 97 S.E.2d 550 (1957).

Condemnee’s liability for interest on difference in amount of judgment.

— When, in a condemnation proceeding under the “three assessor” law as contained in former Code 1933, Chapter 36 (see now O.C.G.A. Title 22), the amount of the final judgment was less than the award made by the assessors, the condemnee was not liable for the payment of interest on the difference in the amount of the award and the judgment except from the date of the judgment. *City of Atlanta v. Lunsford*, 105 Ga. App. 247, 124 S.E.2d 493 (1962).

Department of Transportation’s alleged influence of the county board of commissioners’ zoning decisions against plaintiff was a wrong that could not be redressed in a condemnation proceeding because the final official decision to deny plaintiff’s zoning requests was made by the county board of commissioners, not the DOT, and only the board could be held accountable for those decisions. *DOT v. Poole*, 179 Ga. App. 638, 347 S.E.2d 625 (1986).

2. Nature of Right of Action

Nature of right generally. — Where property has been taken or damaged, for public purposes, by public authorities or a quasi-public corporation, the party injured, may bring one action therefor, within the time required by the statute of limitations, dating from the time of construction, not in tort for a nuisance, but to recover the direct damage inflicted. *Georgia Power Co. v. Moore*, 47 Ga. App. 411, 170 S.E. 520 (1933).

An action may be brought under this paragraph for the mere taking or damag-

ing of real property without just and adequate compensation being first paid; an action sounding in tort may be brought against a municipal corporation for the creation or maintenance of a nuisance, without reference to any question of negligence where danger to health or life is involved; and an action sounding in tort may be brought against a municipal corporation for the creation or maintenance of a nuisance where the defendant is negligent, even though the act was authorized to be done. *Southland Coffee Co. v. City of Macon*, 60 Ga. App. 253, 3 S.E.2d 739 (1939).

When public authorities properly erect and properly maintain improvements authorized by law, the only right of action which is maintainable is that conferred by this paragraph; it does not sound in tort. *Felton v. State Hwy. Bd.*, 51 Ga. App. 930, 181 S.E. 506 (1935).

Independent suit for damages. — There is a broad distinction between the taking by deprivation, i.e., dominion and possession of private property, and the damaging of private property by public construction. In such cases, an independent suit for damages is the proper method to seek recovery for such damages rather than in the condemnation suit. *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (1980).

Effect of allegations of violations of constitutional rights. — The contention in a damage case that the alleged taking of private property for public purposes is in violation of the due process clause of the state (Ga. Const. 1976, Art. I, Sec. I, Para. I [see Ga. Const. 1983, Art. I, Sec. I, Para. I]) and federal (U.S. Const., amend. 14) Constitutions does not make it one that involves the construction of the state and federal Constitutions. *City of Atlanta v. Donald*, 220 Ga. 98, 137 S.E.2d 294 (1964).

Jury instructions relevant to tort action inappropriate. — In a suit to recover compensation for the damaging of real property as the consequence of a public improvement, instructions as to the measure of damages and relevant to a tort action are not appropriate. *Clarke County*

Procedure (Cont'd)**2. Nature of Right of Action (Cont'd)**

Sch. Dist. v. Madden, 99 Ga. App. 670, 110 S.E.2d 47 (1959).

3. Right to Hearing

Constitutional guaranty of trial does not extend to eminent domain proceedings. Oliver v. Union P. & W.P.R.R., 83 Ga. 257, 9 S.E. 1086 (1889).

Notice and hearing not required prior to taking. — Since the necessity for taking private property for a public use is a legislative and not a judicial function, due process does not require notice to the owner nor an opportunity to be heard by the owner before such determination can be made. State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

Owner must have opportunity to be heard on issue of value. — The right of eminent domain underlies and is therefor superior to all rights of private property, and neither notice nor an opportunity to be heard are a prerequisite to the exercise of such power, provided only that the owner have an opportunity, in the course of the condemnation proceeding, to be heard and to offer evidence as to the value of the land taken. State Hwy. Dep't v. Smith, 219 Ga. 800, 136 S.E.2d 334 (1964).

There is no constitutional right to trial by jury in eminent domain cases. DOT v. Doss, 238 Ga. 480, 233 S.E.2d 144 (1977).

4. Limitation of Actions

When action barred by statute of limitations. — Where actual damage results to abutting property and is compensable under this paragraph, an action to recover such damage must be brought within four years from the date the right of action accrues. Southern Ry. v. Leonard, 58 Ga. App. 574, 199 S.E. 433 (1938).

Where the work which resulted in damage to plaintiff's property, for which the plaintiff would have been entitled to recover under this paragraph, was done more than four years previous to the bringing of the action, the suit was barred

by the statute of limitations. Lawrence v. City of La Grange, 63 Ga. App. 587, 11 S.E.2d 696 (1940).

Date of taking. — In determining whether plaintiff filed its inverse condemnation claim within the statute of limitations, the relevant time is the date upon which the taking occurred. Speer v. Miller, 864 F. Supp. 1294 (N.D. Ga. 1994); Southfund Partners v. City of Atlanta, 221 Ga. App. 666, 472 S.E.2d 499 (1996).

Taking by continuous government activity. — In inverse condemnation cases, where there is continuous government activity that damages private property, a "date of stabilization" of the impact is utilized as the date of taking, i.e., such date is measured as the point in time when the damaging activity reached a level which substantially interferes with the owner's use and enjoyment of the owner's property. Hulsey v. DOT, 230 Ga. App. 763, 498 S.E.2d 122 (1998).

Limitation on action for change of street grade. — An action against a street railway for damage caused by changing the street grade must be brought within four years from the time the work is completed for all damages, both past and future. Smith v. Central of Ga. Ry., 22 Ga. App. 572, 96 S.E. 570 (1918); Sheppard v. Georgia Ry. & Power Co., 31 Ga. App. 653, 121 S.E. 868 (1924).

Limitation on inverse condemnation claim based on taking "easement of flight." — Where defendant city, as operator of an airport, demonstrated that there had been no increase in the frequency of planes flying over plaintiff's property or change in the nature of the use of the airspace, and that its "easement of flight" was established more than four years prior to the date on which plaintiff filed its inverse condemnation claim, such claim was barred by the statute of limitations. Speer v. Miller, 864 F. Supp. 1294 (N.D. Ga. 1994).

All claims against county for taking or damaging private property for public uses must be filed within 12 months, and suit thereon for the depreciation in the market value must be instituted within the period of limitations stipulated by the law, and it is not the policy of the law to permit the bringing of suits

against counties from time to time for damages which might result by reason of negligently constructed public improvements constituting a nuisance. *Bibb County v. Green*, 42 Ga. App. 552, 156 S.E. 745 (1931).

5. Sufficiency of Petition

Necessity of allegations of damage.

— In an action for damages to private property instituted under this paragraph and former Code 1933, § 95-1710, allegations showing the nature of the cause, describing the property damaged, and relating the manner in which the property was damaged in the construction of a designated state highway, were proper and necessary to set forth the plaintiff's case. *Bartow County v. Darnell*, 95 Ga. App. 193, 97 S.E.2d 610 (1957).

Necessity of allegation that change made under authority of law. — The constitutional provision or statute under which the county is alleged to be liable need not be specifically referred to, but the petition seeking a recovery for the taking or damaging of property must allege facts which, if proved, entitle the plaintiff to recover, and one of the facts it is necessary to prove is that the alleged change was made under the authority of officers of the county who were empowered by law to do the work complained of in the petition. If this is shown, then the county could not defend on the ground that its taking, in the conduct of its business, was for an unlawful purpose. *McGhee v. Floyd County*, 95 Ga. App. 221, 97 S.E.2d 529 (1957).

Allegations of negligence unnecessary. — While the authority of the city to establish fire stations and appurtenances thereto for the purpose of providing the citizens with fire protection is a governmental function and for mere negligence or errors committed by the officers or employees of the city in performing such function, the city is not liable where the city damages or takes the private property of one as a result of the performance of such governmental functions, a right of action under this paragraph accrues. In such a case, allegations of negligence on the part of the defendants are not necessary and will be treated as surplusage.

City of Atlanta v. Kenny, 83 Ga. App. 823, 64 S.E.2d 912 (1951).

6. Finality of Judgment and Appeal

Effect of right of review. — A judgment cannot be treated as final so long as either of the parties has the right to have the same reviewed by the appellate court; and if it is not so reviewed, it is not final until the appellate court judgment is made the judgment of the trial court. *Dougherty County v. Snelling*, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

Effect of right to file motion for new trial. — No judgment or decree can, under the system, be said to be final until the time prescribed by law in which a motion for a new trial may be made, or a writ of error seeking to set aside such judgment has expired. *Dougherty County v. Snelling*, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

No finality of fixing of compensation until judgment final. — When lands are being condemned for road and street purposes, there is no finality of the fixing and determining of the compensation until the judgment itself becomes final by a failure to appeal within the time provided by law, or upon a final disposition of an appeal from the judgment. *State Hwy. Dep't v. Howard*, 119 Ga. App. 298, 167 S.E.2d 177 (1969).

Condemnation award, upon becoming final, is conclusive as to all damages whether foreseen or not resulting from proper construction. *Fulton County v. Woodside*, 223 Ga. 316, 155 S.E.2d 404 (1967).

Effect of previous award on right of action. — Private property must be negligently taken or damaged for a public purpose in order for the action to prevail against the defense that recovery is barred by a previous condemnation award. *Fulton County v. Woodside*, 223 Ga. 316, 155 S.E.2d 404 (1967).

Payment of compensation prior to moving for new trial. — There is no provision of law requiring the payment of

Procedure (Cont'd)**6. Finality of Judgment and Appeal (Cont'd)**

compensation into the registry of the court which is awarded to a new party for the first time, by a jury on appeal, as a prerequisite to an appeal to this court or the Supreme Court. *State Hwy. Dep't v. Holleman*, 110 Ga. App. 256, 138 S.E.2d 325 (1964).

It is not condition precedent that increased compensation be paid before mov-

ing for new trial or before appealing from judgment on verdict or from denial of new trial. *Dougherty County v. Snelling*, 132 Ga. App. 540, 208 S.E.2d 362 (1974), overruled on other grounds, *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 227 S.E.2d 362 (1976).

For decision holding that payment of increased compensation by condemnor is condition precedent to valid appeal, see *City of Gainesville v. Loggins*, 224 Ga. 114, 160 S.E.2d 374 (1968).

OPINIONS OF THE ATTORNEY GENERAL

Word "property" contained in this paragraph means personal property as well as real estate. 1957 Op. Att'y Gen. p. 141; 1958-59 Op. Att'y Gen. p. 276.

Owner's recovery not restricted to market value. — The provisions in this paragraph and former Code 1933, §§ 36-104 and 36-302 (see now O.C.G.A. §§ 22-1-5 and 22-1-6) as to just and adequate compensation do not necessarily restrict the owner's recovery to market value; the owner is entitled to just and adequate compensation for the owner's property; that is, the value of the property to the owner, not its value to the state. 1958-59 Op. Att'y Gen. p. 271.

No distinction between temporary and permanent relocations. — No distinction can be drawn, as to obligation to pay cost of removal of facilities on right-of-way, between temporary relocations and permanent relocations. 1957 Op. Att'y Gen. p. 132.

Department of Transportation may be liable for damages to private property caused by public improvements without the property adjoining or abutting the highway improvement. 1969 Op. Att'y Gen. No. 69-239; 1969 Op. Att'y Gen. No. 69-397.

Landowner is not entitled to award of damages in condemnation case based upon mere inconvenience and circuity of travel; if the inconvenience adversely affects the market value of the remaining property, and such inconvenience is continuous and a permanent incident of the highway, then such damages may be considered, but only as such

inconveniences affect the market value of the remaining property and not as a separate and independent item of damages. 1969 Op. Att'y Gen. No. 69-50.

Business entitled to moving expenses. — A powder company which is forced to move the location of its place of business because a highway is constructed too near the place of business is entitled to compensation for certain moving expenses. 1957 Op. Att'y Gen. p. 137.

Moving of personal property constitutes compensable damage. — The compulsory moving of personal property against the owner's will, in order to allow construction of roads on real estate acquired after the personal property in question was pledged on that real estate, constitutes "damage" to such personal property within the meaning of this paragraph. 1957 Op. Att'y Gen. p. 141 (see Ga. Const. 1983, Art. I, Sec. III, Para. I).

Measure of damages for moving property. — The measure of the damages in the matter of compulsory removal of personal property would include the transportation items, any "leakage" in transit, and any depreciation in value in transit. 1957 Op. Att'y Gen. p. 141.

Removal of facilities located on railroad right-of-way. — Department of Transportation may bear expense (or that part which is not borne by railroad or United States government) of removal of facilities located on railroad right-of-way. 1957 Op. Att'y Gen. p. 132.

No authorization to pay for removal of telephone line. — The Department of Transportation is not authorized

to pay for the removal of a telephone line of a rural telephone co-operative from a highway right-of-way. 1957 Op. Att'y Gen. p. 139.

Department of Transportation's liability for reducing highway access. — The Department of Transportation is liable for damages to the remaining property from which a right of way was acquired when the damages or diminution in value is a result of change of access or a reduction of access to any particular highway. 1963-65 Op. Att'y Gen. p. 521.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 1 et seq., 7.

C.J.S. — 29A C.J.S., Eminent Domain, § 1 et seq.

ALR. — Right to interest in condemnation proceedings during owner's retention of possession, 32 ALR 98.

Damage to property from proximity of cemetery as "damage" within constitutional provision against taking or damaging property without compensation, 36 ALR 527.

Provision for taking or retaining possession pending appeal in condemnation proceeding, 55 ALR 201.

Right to and measure of compensation for animals or trees destroyed to prevent spread of disease or infection, 67 ALR 208.

Tax on automobile, or on its use, for cost of road or street construction, improvement, or maintenance, 68 ALR 200.

Constitutionality of provisions as to tribunal which shall fix the amount of compensation for taking of property in eminent domain, otherwise than objections that a trial by jury is necessary, 74 ALR 569.

Power to condemn, or authorize the condemnation of, capital stock of a public utility, 81 ALR 1071.

Constitutionality, construction and application of statute authorizing condemnation of property by cross action, 130 ALR 1226.

Compensation for property confiscated or requisitioned during war, 137 ALR 1290; 144 ALR 1506; 147 ALR 1297; 148 ALR 1384; 149 ALR 1451; 149 ALR 1452; 149 ALR 1474; 150 ALR 1417; 150 ALR

Use of inactive railroad right-of-way as trail. — Under ICC procedures, a railroad may enter into an agreement which allows interim trail use of an inactive right-of-way without triggering reversionary interests under state law; absent such agreement, upon approval of abandonment by the ICC, state law determines the nature, scope, and duration of the interest held by the railroad. 1992 Op. Att'y Gen. No. U92-11.

1418; 150 ALR 1480; 151 ALR 1453; 151 ALR 1473; 152 ALR 1450; 154 ALR 1447.

Extraterritorial effect of confiscation of property and nationalization of corporations, 139 ALR 1209.

General governmental policy (distinguished from specific project) as affecting compensation allowable in eminent domain, 167 ALR 502.

Damage to private property caused by negligence of governmental agents as "taking," "damage," or "use" for public purposes, in constitutional sense, 2 ALR2d 677.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes, 16 ALR2d 1113.

Eminent domain: elements and measure of compensation for oil or gas pipeline through private property, 38 ALR2d 788; 23 ALR4th 631.

Municipal power to condemn land for cemetery, 54 ALR2d 1322.

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification, 65 ALR2d 143.

Cost to property owner of moving personal property as element of damages or compensation in eminent domain proceedings, 69 ALR2d 1453.

Admissibility on issue of value of real property of evidence of sale price of other real property, 85 ALR2d 110.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right, 4 ALR3d 1137.

Depreciation in value, from project for which land is condemned, as a factor in fixing compensation, 5 ALR3d 901.

Substitute condemnation: power to condemn property or interest therein to replace other property taken for public use, 20 ALR3d 862.

Propriety and effect, in eminent domain proceedings, of instructions to the jury as to landowner's unwillingness to sell property, 20 ALR3d 1081.

Eminent domain: charging landowner with rent or use value of land where he remains in possession after condemnation, 20 ALR3d 1164.

Right of attorney appointed by court for indigent accused to, and court's power to award, compensation by public, in absence of statute or court rule, 21 ALR3d 819.

Eminent domain: cost of substitute facilities as measure of compensation to state or municipality for condemnation of public property, 40 ALR3d 143.

Abutting owner's right to damages for limitation of access caused by conversion of conventional road into limited-access highway, 42 ALR3d 13.

Measure of damages for condemnation of cemetery lands, 42 ALR3d 1314.

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 ALR3d 1267.

Plotting or planning in anticipation of improvement as taking or damaging of property affected, 49 ALR3d 127.

Traffic noise and vibration from highway as element of damages in eminent domain, 51 ALR3d 860.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain, 58 ALR3d 566.

Loss of liquor license as compensable in condemnation proceeding, 58 ALR3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking, 59 ALR3d 488.

Eminent domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages, 59 ALR3d 534.

Eminent domain: condemnor's liability for costs of condemnee's expert witnesses, 68 ALR3d 546.

Eminent domain: determination of just compensation for condemnation of billboards or other advertising signs, 73 ALR3d 1122.

Admissibility under state law of hospital record relating to intoxication or sobriety of patient, 80 ALR3d 456.

Eminent domain: right to condemn property owned or used by private educational, charitable, or religious organization, 80 ALR3d 833.

Good will as element of damages for condemnation of property on which private business is conducted, 81 ALR3d 198.

Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award, 94 ALR3d 696.

Unsightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding, 97 ALR3d 587.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 ALR4th 765.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 ALR4th 631.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 ALR4th 674.

Eminent domain: compensability of loss of view from owner's property — state cases, 25 ALR4th 671.

Eminent domain: public taking of sports or entertainment franchise or organization as taking for public purpose, 30 ALR4th 1226.

Eminent domain: measure and elements of damages or compensation for

condemnation of public transportation system, 35 ALR4th 1263.

Validity, construction, and application of state relocation assistance laws, 49 ALR4th 491.

Inverse condemnation state court class actions, 49 ALR4th 618.

Court appointment of attorney to represent, without compensation, indigent in civil action, 52 ALR4th 1063.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property, 62 ALR4th 1183.

Eminent domain: compensability of loss of visibility of owner's property, 7 ALR5th 113.

Abutting owner's right to damages for limitation of access caused by traffic regulation, 15 ALR5th 821.

Right to compensation for real property damaged by law enforcement personnel in

course of apprehending suspect, 23 ALR5th 834.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable or noncommercial use, 29 ALR5th 36.

Application of *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), to "Public Use" restrictions in federal and state constitutions takings clauses and eminent domain statutes, 21 ALR6th 261.

Admissibility of hospital records under Federal Business Records, 9 ALR Fed. 457.

Validity of extraterritorial condemnation by municipality, 44 ALR6th 259.

Elements and measure of compensation in eminent domain proceeding for temporary taking of property, 49 ALR6th 205.

Zoning scheme, plan, or ordinance as temporary taking, 55 ALR6th 635.

Paragraph II. Private ways.

In case of necessity, private ways may be granted upon just and adequate compensation being first paid by the applicant.

1976 Constitution. — Art. I, Sec. III, Para. I.

JUDICIAL DECISIONS

This paragraph is not a grant of power to ordinaries (now judges of the probate courts) or county commissioners. Board of Comm'rs v. Harris, 71 Ga. 250 (1883).

Paragraph has no application to private way acquired by prescription. Everedge v. Alexander, 75 Ga. 858 (1885).

Paragraph has no reference to other private ways sections. — A private way, created by necessary implication, was wholly distinct from a private way over the land of a stranger, also provided by former Code 1933, § 85-1401 (see now O.C.G.A. § 44-9-1), from "compulsory purchase and sale through the ordinary (now superior court)" under the procedure of former Code 1933, §§ 83-101 and 83-102 (see now O.C.G.A. § 44-9-40); and consequently this paragraph had no

reference thereto. Calhoun v. Ozburn, 186 Ga. 569, 198 S.E. 706 (1938).

Definition of necessity for purposes of granting private way. — Cases of necessity do not arise except where the way sought to be laid out is absolutely indispensable to the applicant, as a means of reaching the applicant's property. Chattanooga, Rome & S.R.R. v. Philpot, 112 Ga. 153, 37 S.E. 181 (1900); Gaines v. Lunsford, 120 Ga. 370, 47 S.E. 967 (1904).

When property right is taken or vested. — No property right is taken from a property owner, nor vested in a private way petitioner, until after all of the rights have been finally established, the compensation is paid, and the court makes such a "grant" by final judgment. Cline v. McMullan, 263 Ga. 321, 431 S.E.2d 368 (1993).

Cotenancy interests in underlying

fee. — Condemnation of an easement against a party who has a cotenancy interest in the underlying fee is not prohibited as a matter of law, but is permissible in cases in which there is sufficient evidence establishing the “necessity” for acquisition of the easement and the exclusive use thereof. *Benton v. Georgia Marble Co.*, 258 Ga. 58, 365 S.E.2d 413 (1988).

Mining or quarrying. — O.C.G.A. § 44-9-70’s “necessity” standard, which is based upon the successful operation of the applicant’s business of mining or quarrying, is a valid exercise of the General Assembly’s state constitutional authority with respect to the declaration of private ways of necessity. *Benton v. Georgia Marble Co.*, 258 Ga. 58, 365 S.E.2d 413 (1988).

Paragraph III. Tidewater titles confirmed.

The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark, is hereby ratified and confirmed.

1976 Constitution. — Art. I, Sec. III, Para. II.

Cross references. — Rights of owners of land adjacent to or covered by navigable tidewaters, § 44-8-7.

Law reviews. — For article, “Public Rights in Georgia’s Tidelands,” see 9 Ga. L. Rev. 79 (1974). For article discussing *State v. Ashmore*, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976), appearing below, see 12 Ga. St. B.J. 201 (1976).

For note, “Regulation and Ownership of the Marshlands: The Georgia Marshlands Act” (Part 4, Art. 4, Ch. 5, T. 12), see 5 Ga. L. Rev. 563 (1971).

For comment on *State v. Ashmore*, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976), see 10 Ga. L. Rev. 1051 (1976); 27 Mercer L. Rev. 1229 (1976).

JUDICIAL DECISIONS

Ratification of Act effective. — The constitutional ratification in 1945 of former Code 1933, §§ 85-1307, 85-1308, and 85-1309 (see now O.C.G.A. §§ 44-8-6 and 44-8-7), which had been in effect since their enactment and which had not been held to be unconstitutional, was effective and immunized these sections from a later attack. *State v. Ashmore*, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976), commented on in 12 Ga. St. B.J. 201 (1976) and 27 Mercer L. Rev. 1229 (1976).

Paragraph does not extend titles. — Any argument that this paragraph by its own terms extended the titles of landowners adjacent to tidewaters to the low water mark is completely contrary to the intention of the constitutional commission and is untenable. *State v. Ashmore*, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976),

commented on in 12 Ga. St. B.J. 201 (1976) and 27 Mercer L. Rev. 1229 (1976).

Effect of opening phrase. — The phrase: “The Act of the General Assembly approved December 16, 1902, which extends the title . . .” is not self-executing and is neither mandatory nor directory, but is merely for the purpose of identification of the Act being approved. *State v. Ashmore*, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976), commented on in 12 Ga. St. B.J. 201 (1976) and 27 Mercer L. Rev. 1229 (1976).

Whatever rights individual parties may have in the foreshore must be determined under former Code 1933, §§ 85-1307, 85-1308, and 85-1309 (see now O.C.G.A. §§ 44-8-6 and 44-8-7). *State v. Ashmore*, 236 Ga. 401, 224 S.E.2d 334, cert. denied, 429 U.S. 830, 97 S. Ct. 90, 50 L. Ed. 2d 93 (1976), commented on

in 12 Ga. St. B.J. 201 (1976) and 27 Mercer L. Rev. 1229 (1976).

Land registration judgment invalid if state not served. — State is an adjoining landowner in tidelands and must be so named in a petition and served other than by advertisement “To Whom It May Concern,” and a land registration judgment, if granted, would not be binding upon an

adjoining landowner who was not named and served. State v. Bruce, 231 Ga. 783, 204 S.E.2d 106 (1974).

Cited in Caldwell v. Hill, 179 Ga. 417, 176 S.E. 381 (1934); Fulton Bag & Cotton Mills v. Williams, 212 Ga. 783, 95 S.E.2d 848 (1956); Baranan v. State Bd. of Nursing Home Adm’rs, 143 Ga. App. 605, 239 S.E.2d 533 (1977).

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Extent of state’s ownership. — If the state is classed with all of the other owners of tidewater land, the boundaries of its property clearly extend to the low-water mark or encompass generally the entire tidewater bed; but when the state’s unique position as local political sovereign is taken into consideration, its rights of ownership extend far beyond this point for an additional three miles out to sea. 1965-66 Op. Att’y Gen. No. 66-49.

Boundaries of tidewater lands owned by state extend to low-water

mark in contrast to either point of high water or mean water. — See 1965-66 Op. Att’y Gen. No. 66-49.

Owner of marshland not to impede public right of enjoyment. — In the unlikely event that one should establish a title to marshland, such person could not use the property in such a way as to impede the public right of enjoyment thereof unless the grant to the marshland expresses a full relinquishment of all public rights. Position Paper, 3-23-70, 1970 Op. Att’y Gen. p. 279.

SECTION IV.
MARRIAGE

Paragraph
I. Recognition of marriage.

Cross references. — Marriage, T. 19, C. 3.

Law reviews. — For article, “Lochner, Lawrence, and Liberty,” see 27 Ga. St. U.L. Rev. 609 (2011). For article, “Mar-

riage, Death and Taxes: The Estate Planning Impact of Windsor and Obergefell on Georgia’s Same Sex Spouses,” see 21 Ga. St. Bar. J. 9 (Oct. 2015).

Paragraph I. Recognition of marriage.

(a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction

to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship. (Ga. Const. 1983, Art. 1, § 4, Para. 1, approved by Ga. L. 2004, p. 1111, § 1/SR 595.)

Editor's notes. — The constitutional amendment (Ga. L. 2004, p. 1111, § 1) which added Section IV and this Paragraph was approved by a majority of the qualified voters voting at the general election held on November 2, 2004.

Law reviews. — For article, "A Holy Secular Institution," see 58 Emory L.J. 1123 (2009).

For article, "Polygamous Unions? Charting the Contours of Marriage Law's Frontier," see 64 Emory L.J. 1669 (2015). For article, "Why Two In One Flesh? The Western Case for Monogamy Over Polygamy," see 64 Emory L.J. 1675 (2015). For article, "Should Civil Marriage Be Opened

Up to Multiple Parties," see 64 Emory L.J. 1747 (2015). For article, "Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage," see 64 Emory L.J. 1977 (2015). For article, "The Evolution of Plural Parentage Applying Vulnerability Theory to Polygamy and Same Sex Marriage," see 64 Emory L.J. 2047 (2015). For article, "Polygyny and Violence Against Women," see 64 Emory L.J. 1767 (2015).

For comment, "L'Amour for Four: Polygyny, Polyamory, and the State's Compelling Economic Interest in Normative Monogamy," see 64 Emory L.J. 2093 (2015).

JUDICIAL DECISIONS

Constitutionality. — Prohibition against recognizing same-sex unions as entitled to the benefits of marriage was not "dissimilar and discordant" to the objective of reserving the status of marriage and its attendant benefits exclusively to

unions of man and woman; Ga. Const. 1983, Art. I, Sec. IV, Para. I did not violate the multiple-subject matter rule. *Perdue v. O'Kelley*, 280 Ga. 732, 632 S.E.2d 110 (2006).

ARTICLE II.

VOTING AND ELECTIONS

- Section
- I. Method of Voting; Right to Register and Vote.

II. General Provisions.

III. Suspension and Removal of Public Officials.

SECTION I.

METHOD OF VOTING; RIGHT TO REGISTER AND VOTE

- Paragraph

I. Method of voting.

II. Right to register and vote.
- Paragraph

III. Exceptions to right to register and vote.

Paragraph I. Method of voting.

Elections by the people shall be by secret ballot and shall be conducted in accordance with procedures provided by law.

1976 Constitution. — Art. II, Sec. I, Para. I.

Cross references. — Voting by paper ballot generally, § 21-2-280 et seq.

JUDICIAL DECISIONS

Standing to sue. — Election candidate and chairman of county board of elections lacked standing to complain about alleged violations of a voter’s constitutional rights under Ga. Const. 1983, Art. II, Sec. I, Para. I and the fifth amendment to the United States Constitution. *Hammill v. Valentine*, 258 Ga. 603, 373 S.E.2d 9 (1988).

Methods of voting. — Nothing in Ga. Const. 1983, Art. II, Sec. I, Para. I limits voting to some method or methods under which each voter indicates his or her choice or choices on a separate piece of paper issued to him or her for that purpose because it contemplates that the legislature shall provide a method, or methods, of voting at elections in such a way that not even those who count or tabulate the votes will know how any particular voter voted; those portions of direct recording electronic equipment which store

and count the number of votes do not vitiate the nature of elections as “by the people” but simply take the place of ballot boxes and human counters. *Favorito v. Handel*, 285 Ga. 795, 684 S.E.2d 257 (2009).

In an action by a political party challenging the 2006 Photo ID Act, amending O.C.G.A. § 21-2-417, the photo ID requirement for in-person voting was authorized by Ga. Const. 1983, Art. II, Sec. I, Para. I, as a reasonable procedure for verifying that the individual appearing to vote in person was actually the same person who registered to vote. *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 707 S.E.2d 67 (2011).

Cited in *Jones v. Darby*, 174 Ga. 71, 161 S.E. 835 (1931); *Lloyds Am. v. Brown*, 187 Ga. 240, 200 S.E. 292 (1938); *Ledger-Enquirer Co. v. Brown*, 213 Ga. 538, 100 S.E.2d 166 (1957); *Mathew v. Ellis*, 214 Ga. 665, 107 S.E.2d 181 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Elections, §§ 1 et seq., 97 et seq., 191 et seq., 26 Am. Jur. 2d, Elections, § 239 et seq.

Paragraph II. Right to register and vote.

Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people. The General Assembly shall provide by law for the registration of electors.

1976 Constitution. — Art. II, Sec. I, Paras. I, II; Art. II, Sec. II, Para. II.

Cross references. — Right of citizens to vote generally, § 1-2-6. Qualifications of electors generally, § 21-2-16. Residence of person desiring to vote, § 21-2-217. Registration cards, § 21-2-219. Registration requirements, § 21-2-451. False registration, § 21-2-561.

Law reviews. — For article, “The 2011

Randolph W. Thrower Symposium: Judging Politics: Judges as Political Actors, Candidates, and Arbiters of the Political: Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law,” see 61 Emory L.J. 779 (2012). For article, “Reasonable Restrictions on the Franchise: Georgia’s Voter Identification Act of 2006,” see 63 Mercer L. Rev. 1129 (2012).

JUDICIAL DECISIONS

Right of suffrage may be regulated but not taken away. *Stewart v. Cartwright*, 156 Ga. 192, 118 S.E. 859 (1923).

Paragraph a constitutional guaranty of rights of suffrage. — This paragraph amounts to a constitutional guaranty of the rights of suffrage, which, though subject to reasonable regulation, cannot be absolutely denied or taken away. *King v. County Bd. of Educ.*, 174 Ga. 685, 164 S.E. 52 (1932).

Authority of General Assembly to pass registration laws. — This paragraph clearly indicates that the General Assembly is authorized to enact laws for the registration of electors. *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221 (1949), appeal dismissed, 339 U.S. 946, 70 S. Ct. 804, 94 L. Ed. 1361 (1950).

Action in federal court for injunction against state violated eleventh amendment to the United States Constitution. — In an action in which voting rights organizations, as well as individu-

als, sought an injunction to restrain the state from attempting to enforce the photo ID requirement imposed by HB 244, the State of Georgia was the real party in interest, and the plaintiffs’ claim that HB 244 violated two sections of the Georgia Constitution clearly was a cause of action against a state for alleged violations of state law, and was barred by the eleventh amendment. *Common Cause/GA v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

Exclusion of black voters qualified and offering to vote at municipal election rendered it void. *Howell v. Pate*, 119 Ga. 537, 46 S.E. 667 (1904).

No standing to challenge constitutionality. — Plaintiff lacked standing to challenge the constitutionality of the 2006 Photo-ID Act at the time the complaint was filed, and thus the determination that the act violated Ga. Const. 1983, Art. II, Sec. I, Paras. II and III had to be vacated; the plaintiff could have voted in person under O.C.G.A. § 21-2-417 without a

photo identification, as the plaintiff did not contend that the plaintiff lacked any of the forms of non-photo identification allowed to be shown by first-time voters. *Perdue v. Lake*, 282 Ga. 348, 647 S.E.2d 6 (2007).

Right of suffrage is a political right, as compared with a property or civil right. *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221 (1949), appeal dismissed, 339 U.S. 946, 70 S. Ct. 804, 94 L. Ed. 1361 (1950).

Power of General Assembly to prescribe how qualifications determined. — Where the state Constitution provides who shall be entitled to vote, the legislature cannot take from or add to the qualification unless the power is granted expressly or by necessary implication. However, the legislature has a wide latitude in determining how the qualifications required by the Constitution may be determined, provided it does not deny the right of franchise by making the exercise of such right so difficult or inconvenient as to amount to a denial of the right to vote. *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221 (1949), appeal dismissed, 339 U.S. 946, 70 S. Ct. 804, 94 L. Ed. 1361 (1950).

Legislature may prescribe additional grounds of qualification for voters in municipal elections, not inconsistent with those stated in the Constitution. *Harris v. McMillan*, 186 Ga. 529, 198 S.E. 250 (1938).

Fact that citizen who meets one of several tests provided by Constitution had to register or reregister does not deprive the citizen of the citizen's right of suffrage, but is only a reasonable regulation under which the right may be exercised. *Franklin v. Harper*, 205 Ga. 779, 55 S.E.2d 221 (1949), appeal dismissed, 339 U.S. 946, 70 S. Ct. 804, 94 L. Ed. 1361 (1950).

Duties other than mere citizenship to qualify as voter. — Even one who has established citizenship, which is broad enough to include both residence and domicile within a county, must perform other public duties such as registration before one is a qualified voter. *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930).

Neither residence nor domicile, standing alone, furnishes qualifica-

tions for privilege of voting. *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930).

No person whose name appears upon list of registered voters is entitled to vote if that person is otherwise disqualified, as by nonpayment of taxes, nonresidence, etc. *Smith v. Board of Educ.*, 174 Ga. 735, 164 S.E. 41 (1932).

County commissioners have power to pay out of general county funds costs of county registrars in preparing lists of voters. *Howell v. Bankston*, 181 Ga. 59, 181 S.E. 761 (1935).

Allegation of residence not equivalent to allegation of status as voter. — The allegation that defendant is a resident within a city and an independent school district is not the equivalent of an allegation that the defendant is a voter of such independent school district. *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930).

Presence of name on list of registered voters only prima facie evidence of qualification. — While the list of registered voters furnished to the managers of the election by the county registrars absolutely controls them, and while they have no power to allow one to vote whose name is not on the list, or to refuse anyone the right to vote whose name is on the list, this does not require and permit that in the case of a contest the votes of persons otherwise disqualified to vote should be counted; but, on the contrary, such votes should be rejected. Such list of registered voters is only prima facie evidence that they are otherwise qualified to vote. *Smith v. Board of Educ.*, 174 Ga. 735, 164 S.E. 41 (1932).

Requirements of residence in subdivisions such as voting precincts or districts are regulated by statute. *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930).

State has right to close registration lists before election. — A state durational residence requirement for voting is violative of U.S. Const., amend. 14. However, a state has the right to close its registration lists at some time prior to the day of election. This closing is not for the purpose of establishing any durational residence requirement, but for administrative purposes such as purging names, preparing election district voter's lists,

and other similar tasks. *Abbott v. Carter*, 356 F. Supp. 280 (N.D. Ga. 1972).

Refusal to count elector's vote is tantamount to refusal to allow the elector to cast it. *Thompson v. Willson*, 223 Ga. 370, 155 S.E.2d 401 (1967).

Voter cannot be restricted to choice between names on ballot. — Elector has the right to write on the ballot any person the elector wishes to vote for, and cannot be restricted to a choice between those whose names are provided on the ballot. *Thompson v. Willson*, 223 Ga. 370, 155 S.E.2d 401 (1967).

Restriction of power of General Assembly to regulate voting. — While the General Assembly has the power to prescribe the method of exercising the corporate power of a municipality, nevertheless, if it does so by authorizing voting procedures it cannot limit the vote of an elector so as to deprive the voter, of the right to vote. *Thompson v. Willson*, 223 Ga. 370, 155 S.E.2d 401 (1967).

Municipal ordinances requiring registration violate paragraph. — City laws requiring the registration of voters at municipal elections are in conflict with this paragraph. *McMahon v. Mayor of Savannah*, 66 Ga. 217, 42 Am. R. 65 (1880).

Constitutionality of School Superintendent election statute. — The provision in Ga. L. 1919, p. 288, § 147 (see former O.C.G.A. § 20-2-101), which read in part, "provided, if there is in this county one or more independent school systems

not under the supervision of the county superintendent, the voters of such independent system or systems shall not vote in the election for the county superintendent," was not unconstitutional upon the ground that it was in conflict with this paragraph. *Bower v. Avery*, 172 Ga. 272, 158 S.E. 10 (1931).

So much of Ga. L. 1919, p. 288, § 147 (see now O.C.G.A. § 20-2-101) as declared that, "if there is in this county one or more independent school systems not under the supervision of the county superintendent, the voters of such independent system or systems shall not vote in the election for the county superintendent," was not violative of this paragraph. *Olliff v. Hendrix*, 172 Ga. 497, 158 S.E. 11 (1931).

County commissioners have power to pay out of general county funds costs of county registrars in preparing "lists of voters." *Howell v. Bankston*, 181 Ga. 59, 181 S.E. 761 (1935).

Cited in *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930); *Overton v. Gandy*, 170 Ga. 562, 153 S.E. 520 (1930); *Briscoe v. Between Consol. Sch. Dist.*, 171 Ga. 820, 156 S.E. 654 (1931); *Jones v. Darby*, 174 Ga. 71, 161 S.E. 835 (1931); *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943); *Griffin v. Trapp*, 205 Ga. 176, 53 S.E.2d 92 (1949); *Wittke v. Horne's Enters., Inc.*, 118 Ga. App. 211, 162 S.E.2d 898 (1968); *Turner v. Fouche*, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970); *Marchman v. State*, 132 Ga. App. 677, 209 S.E.2d 88 (1974).

OPINIONS OF THE ATTORNEY GENERAL

Registration form requesting racial identification. — Registration to vote may not be conditioned upon an applicant supplying the applicant's race on a registration application, though race may be requested as an optional part of the registration process. 1995 Op. Att'y Gen. No. 95-35.

Question of moving residence one of fact. — Once a person has established one's legal residence under this paragraph, then the question as to whether or

not that person has removed their residence is a question of fact, of which intention is the principal determining factor. 1957 Op. Att'y Gen. p. 129.

Elector cannot be disenfranchised simply by loss of the elector's voter registration card by county officials; an elector whose name appears on an electors' list, and who is not disqualified, must be allowed to vote in future elections. 1973 Op. Att'y Gen. No. 73-58.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Elections, §§ 1 et seq., 50 et seq, 196 et seq. 26 Am. Jur. 2d, Elections, § 239 et seq.

C.J.S. — 29 C.J.S., Elections, § 25 et seq.

ALR. — State voting rights of residents

of federal military establishment, 34 ALR2d 1193.

Validity of absentee voters' laws, 97 ALR2d 218.

Residence of students for voting purposes, 44 ALR3d 797.

Paragraph III. Exceptions to right to register and vote.

(a) No person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence.

(b) No person who has been judicially determined to be mentally incompetent may register, remain registered, or vote unless the disability has been removed.

1976 Constitution. — Art. II, Sec. II, Para. I.

Cross references. — Qualifications of electors generally, § 21-2-216. Removal of electors, § 21-2-231. Effect of pardon, § 42-9-54.

Law reviews. — For article on the

effects of a conviction based on a nolo contendere plea on voting and holding public office, see 13 Ga. L. Rev. 723 (1979). For article, "Reasonable Restrictions on the Franchise: Georgia's Voter Identification Act of 2006," see 63 Mercer L. Rev. 1129 (2012).

JUDICIAL DECISIONS

Constitutionality of disenfranchisement. — Disenfranchisement of persons convicted of crimes of moral turpitude does not violate U.S. Const., amend. 14, sec. 1, because U.S. Const., amend. 14, sec. 2, specifically qualifies equal protection guarantees by recognizing the right of a state to disenfranchise persons "for participation in rebellion or other crime." *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

No standing to challenge constitutionality. — Plaintiff lacked standing to challenge the constitutionality of the 2006 Photo-ID Act at the time the complaint was filed, and thus the determination that the act violated Ga. Const. 1983, Art. II, Sec. I, Paras. II and III had to be vacated; the plaintiff could have voted in person under O.C.G.A. § 21-2-417 without a photo identification, as the plaintiff did not contend that the plaintiff lacked any of the forms of non-photo identification allowed to be shown by first-time voters.

Perdue v. Lake, 282 Ga. 348, 647 S.E.2d 6 (2007).

Action in federal court for injunction against state violated eleventh amendment to the United States Constitution. — In an action in which voting rights organizations, as well as individuals, sought an injunction to restrain the state from attempting to enforce the photo ID requirement imposed by HB 244, the State of Georgia was the real party in interest, and the plaintiffs' claim that HB 244 violated two sections of the Georgia Constitution clearly was a cause of action against a state for alleged violations of state law, and was barred by the eleventh amendment. *Common Cause/GA v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

Compelling state interest. — A state may constitutionally disenfranchise otherwise qualified voters because they have been convicted of a felony, since the state has a compelling interest in protecting the

integrity of its electoral process. *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

State may prohibit idiots and insane persons, as well as those convicted of certain offenses, from participating in elections. *Kronlund v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

No conviction when verdict set aside or subject to being set aside. — If a jury's verdict of guilty has been set aside or is under review and thus subject to being set aside either by motion for new trial, bill of exceptions or other appropriate procedure, there is no conviction within the meaning of this paragraph. *Summerour v. Cartrett*, 220 Ga. 31, 136 S.E.2d 724 (1964).

State may disenfranchise habitual DUI offenders. — Conviction under the habitual DUI offender provision of O.C.G.A. § 40-5-58(c)(2) is a crime of moral turpitude for purposes of Ga. Const.

1983, Art. II, Sec. I. *Jarrard v. Clayton County Bd. of Registrars*, 262 Ga. 759, 425 S.E.2d 874 (1993), overruled on other grounds, *Cook v. Board of Registrars*, 291 Ga. 67, 727 S.E.2d 478 (2012).

Transportation and possession of non-tax-paid liquor is not a crime involving moral turpitude. *Hutto v. Rowland*, 226 Ga. 889, 178 S.E.2d 180 (1970).

Unlawful sale of intoxicating liquors is not a crime involving moral turpitude. *Hutto v. Rowland*, 226 Ga. 889, 178 S.E.2d 180 (1970).

Photo identification requirement. — In an action by a political party challenging the 2006 Photo ID Act, amending O.C.G.A. § 21-2-417, no voter was disenfranchised by the Act and, therefore, the Act did not violate Ga. Const. 1983, Art. II, Sec. I, Para. III. *Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 707 S.E.2d 67 (2011).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

MORAL TURPITUDE

OPINIONS UNDER PRIOR LAW

General Consideration

This paragraph is not concerned with punishment imposed for conviction of crime but rather with conviction itself. 1975 Op. Att'y Gen. No. 75-17.

Conviction rather than fine or imprisonment deprives a person of the person's civil and political rights. 1945-47 Op. Att'y Gen. p. 477.

Necessity of final adjudication of guilt. — The word "conviction," for purposes of this paragraph, refers to an adjudication of guilt which is final. 1974 Op. Att'y Gen. No. 74-26.

Persons awaiting trial are eligible to register and to vote; those who are incarcerated cannot be denied these rights by virtue of their incarceration. 1974 Op. Att'y Gen. No. 74-137.

Effect of conviction outside state. — An individual convicted of a crime involving moral turpitude, in a jurisdiction outside the State of Georgia, is not entitled to

vote in Georgia, so long as such crime is punishable in Georgia by imprisonment. 1976 Op. Att'y Gen. No. 76-92.

Youth committing crime punishable by imprisonment disqualified. — Where a youth has not been imprisoned in a penitentiary but has been committed to the Department of Offender Rehabilitation (now Department of Corrections), if the crime committed is punishable by imprisonment, the disqualification of the right to vote attaches. 1975 Op. Att'y Gen. No. 75-17.

Elector who is convicted of crime of abandonment and receives felony punishment would be disfranchised. 1962 Op. Att'y Gen. p. 124.

Conviction of a misdemeanor does not deprive a person of voting rights. — A person who has been convicted of a misdemeanor involving moral turpitude shall not be prevented from exercising voting rights regardless of whether the

sentence has been completed. 1983 Op. Att'y Gen. No. 83-43.

One can lose one's right to vote and hold public office only upon conviction for a felony involving moral turpitude and can no longer lose these rights by conviction for a misdemeanor. 1983 Op. Att'y Gen. No. 83-33.

A conviction resulting from a nolo contendere plea cannot be used to impose any disability including disqualification from voting, holding public office, and jury service. 1983 Op. Att'y Gen. No. 83-33.

Persons entitled to restoration of rights. — On July 1, 1983, Ga. Const. 1983, Art. II, Sec. I, Para. III shall serve to restore the voting rights of persons who meet the requirements of the provision regardless of when the crime was committed, the person was convicted, or the sentence was completed. 1983 Op. Att'y Gen. No. 83-43.

Restoration of civil rights is not necessary to enable one who has completed one's sentence to register to vote. 1983 Op. Att'y Gen. No. 83-33.

Judicial determination of mental incompetence. — A judge of probate court may, in the course of a proceeding for the appointment of a guardian for an incapacitated adult, judicially determine a person to be mentally incompetent and thereby remove the person's right to vote. 1985 Op. Att'y Gen. No. 85-48.

A separate judicial determination must be made that a person is "mentally incompetent" prior to the removal of a person's right to vote. 1995 Op. Att'y Gen. No. 95-27.

Moral Turpitude

For meaning of the term "moral turpitude," see 1963-65 Op. Att'y Gen. p. 115.

Violations of statutes expressing moral judgment of community. — Any crime constituting intentional violation of statute expressing moral judgment of the community against prohibited conduct would involve moral turpitude. 1968 Op. Att'y Gen. No. 68-352.

Murder as involving moral turpitude. — Murder involves vileness and depravity, for it is the result of an aban-

doned and malignant heart, and is a crime involving moral turpitude. 1948-49 Op. Att'y Gen. p. 291.

Offenses committed by juveniles. — Person convicted of crime before reaching age of 17 loses that person's right to vote if convicted of a crime involving moral turpitude even though the person is committed to the State Department of Human Resources, rather than sentenced to the Board of Corrections. 1975 Op. Att'y Gen. No. 75-17.

All felonies considered as involving moral turpitude. — It is recommended that, for purposes of granting clemency and restoring civil rights, the Board of Pardons and Paroles consider all felonies as involving moral turpitude. 1983 Op. Att'y Gen. No. 83-33.

Drug-related offense. — Generally, a drug-related offense classified as a felony is a felony involving moral turpitude which will remove a person's right to vote, but the right to vote may not be withheld until a conviction becomes final. 1986 Op. Att'y Gen. No. 86-15.

Opinions Under Prior Law

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. II, Sec. II, Para. I and antecedent provisions, relating to the continued disenfranchisement of felony convicts until the granting of a pardon, are included in the annotations for this paragraph. Ga. Const. 1983, Art. II, Sec. I, Para. III now provides for continued disenfranchisement of a felony convict until completion of the sentence.

Serving sentence, by itself, does not restore person's right to vote, but the grant of a pardon will restore a person's right to vote. 1969 Op. Att'y Gen. No. 69-374.

Word "pardoned" as contained in this paragraph must be given no stricter meaning than that traditionally required by law, namely, an act of executive clemency. 1952-53 Op. Att'y Gen. p. 136.

Grant of certificate of good conduct in other state does not restore Georgia right to vote. — One convicted of a felony in another state is deprived of one's right to register and vote in Georgia, and

Opinions Under Prior Law (Cont'd)

the grant of a certificate of good conduct to end disability under the other state's law would not restore one's right to vote in this state; in order to have one's disabilities removed it would be necessary to obtain a pardon from the pardoning power of the other state. 1950-51 Op. Att'y Gen. p. 298.

Order of restoration of civil rights allows voting and holding office. —

The order of restoration of civil rights is no different from a pardon and the order restoring civil rights is sufficient to meet the requirements of this paragraph authorizing persons previously disenfranchised to be allowed to again vote and hold office. 1952-53 Op. Att'y Gen. p. 136.

SECTION II.

GENERAL PROVISIONS

Paragraph

- I. Procedures to be provided by law.
- II. Run-off election.
- III. Persons not eligible to hold office.

Paragraph

- IV. Recall of public officials holding elective office.
- V. Vacancies created by elected officials qualifying for other office.

Paragraph I. Procedures to be provided by law.

The General Assembly shall provide by law for a method of appeal from the decision to allow or refuse to allow any person to register or vote and shall provide by law for a procedure whereby returns of all elections by the people shall be made to the Secretary of State.

1976 Constitution. — Art. II, Sec. II, Paras. III, IV; Art. II, Sec. III, Para. IV; Art. VI, Sec. II, Para. III.

Cross references. — Making of returns to Secretary of State, §§ 21-2-50,

21-2-456, 21-2-496, and 21-2-497. Appeals from decisions denying or allowing registration, § 21-2-228. Secretary of State deemed chief state election official, § 21-2-210.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Elections, § 109 et seq. 26 Am. Jur. 2d, Elections, § 281 et seq.

C.J.S. — 29 C.J.S., Elections, §§ 60 et seq., 319 et seq.

Paragraph II. Run-off election.

A run-off election shall be a continuation of the general election and only persons who were entitled to vote in the general election shall be entitled to vote therein; and only those votes cast for the persons designated for the runoff shall be counted in the tabulation and canvass of the votes cast.

1976 Constitution. — Art. V, Sec. I, Para. IV.

Cross references. — Run-off elections, § 21-2-501.

Paragraph III. Persons not eligible to hold office.

No person who is not a registered voter; who has been convicted of a felony involving moral turpitude, unless that person's civil rights have been restored and at least ten years have elapsed from the date of the completion of the sentence without a subsequent conviction of another felony involving moral turpitude; who is a defaulter for any federal, state, county, municipal, or school system taxes required of such officeholder or candidate if such person has been finally adjudicated by a court of competent jurisdiction to owe those taxes, but such ineligibility may be removed at any time by full payment thereof, or by making payments to the tax authority pursuant to a payment plan, or under such other conditions as the General Assembly may provide by general law; or who is the holder of public funds illegally shall be eligible to hold any office or appointment of honor or trust in this state. Additional conditions of eligibility to hold office for persons elected on a write-in vote and for persons holding offices or appointments of honor or trust other than elected offices created by this Constitution may be provided by law. (Ga. Const. 1983, Art. 2, § 2, Para. 3; Ga. L. 1990, p. 2443, § 1/SR 116; Ga. L. 2002, p. 1500, § 1/HR 126.)

1976 Constitution. — Art. II, Sec. II, Para. I; Art. II, Sec. III, Paras. II, III.

Cross references. — Disqualification for General Assembly, Ga. Const. 1983, Art. III, Sec. II, Para. IV and Art. III, Sec. IV, Para. V. Disabilities to holding office generally, §§ 16-10-9, 21-2-7, 21-2-8, 45-2-1 et seq., 45-5-2, and 45-5-6. Write-in voting in state elections, §§ 21-2-133 and 21-2-358. Rejection of application for voter registration card, § 21-2-222. Oath of public office that officer does not hold any unaccounted for public money, § 45-3-1.

Editor's notes. — The constitutional amendment (Ga. L. 1990, p. 2443, § 1) which rewrote Paragraph III was approved by a majority of the qualified vot-

ers voting at the general election held on November 6, 1990.

The constitutional amendment (Ga. L. 2002, p. 1500, § 1), which revised this paragraph to provide that certain persons who are defaulters for federal, state, or local taxes shall be ineligible to hold any public office in this state was approved by a majority of the qualified voters voting at the general election held November 5, 2002.

Law reviews. — For article on the effects of a conviction based on a nolo contendere plea on voting and holding public office, see 13 Ga. L. Rev. 723 (1979). For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005).

JUDICIAL DECISIONS

Ten year lapse requirement. — A potential candidate who completed the candidate's sentence for conviction of a felony prior to the enactment of the 1990 amendment of Ga. Const. 1983, Art. II, Sec. II, Para. III did not have any vested rights to seek office; eligibility to hold public office is determined by the statutory and constitutional requirements in

effect on the date of the election. *McIntyre v. Miller*, 263 Ga. 578, 436 S.E.2d 2 (1993).

Double jeopardy not violated. — The obvious purpose of the 1990 constitutional amendment is not to impose an additional penalty upon convicted felons, but merely to designate a reasonable ground of eligibility for holding public office in this state; accordingly, a conten-

tion that disqualification would violate the principle of double jeopardy is without merit. *McIntyre v. Miller*, 263 Ga. 578, 436 S.E.2d 2 (1993).

Construction with O.C.G.A. § 21-2-494. — Trial court did not err in finding that O.C.G.A. § 21-2-494 was constitutional, despite an election challenger's claim that it impermissibly allowed the exclusion of votes for write-in candidates and because it did not require that voters be provided with notice that write-in votes for unqualified candidates would not be counted, as: (1) it was undisputed that nine write-in votes were cast for individuals who were not eligible to hold office, as these people did not give proper notice of their intention of candidacy; (2) no voters were disenfranchised; (3) each voter was given the opportunity to vote for the candidate of his or her own choosing; and (4) the legislature properly exercised its power when it limited the counting of write-in votes to votes cast for qualified write-in candidates. *Brodie v. Champion*, 281 Ga. 105, 636 S.E.2d 511 (2006).

Convicted felon is prohibited from running for office of sheriff even though such person might obtain pardon for felony. *Barbour v. Democratic Executive Comm.*, 246 Ga. 193, 269 S.E.2d 433 (1980).

Consideration for plea agreement. — Granting first offender treatment to defendant for crimes for which the defendant could have been barred from seeking office for ten years constituted consideration for a plea agreement. *State v. Barrett*, 215 Ga. App. 401, 451 S.E.2d 82 (1994), rev'd on other grounds, 265 Ga. 489, 458 S.E.2d 620 (1995).

Transportation and possession of non-tax-paid liquor is not crime involving moral turpitude. *Hutto v. Rowland*, 226 Ga. 889, 178 S.E.2d 180 (1970).

Nor is unlawful sale of intoxicating liquors. *Hutto v. Rowland*, 226 Ga. 889, 178 S.E.2d 180 (1970).

No conviction when verdict set aside or subject to being set aside. — If a jury's verdict of guilty has been set aside or is under review and thus subject to being set aside either by motion for new

trial, bill of exceptions or other appropriate procedure, there is no conviction within the meaning of this paragraph. *Summerour v. Cartrett*, 220 Ga. 31, 136 S.E.2d 724 (1964).

Words "public money" (now "public funds") mean money belonging to state. *Morgan v. Crow*, 183 Ga. 147, 187 S.E. 840 (1936).

Power of legislature to provide qualifications for county officers. — Office of county tax assessor and membership in board of county commissioners are not fixed by the constitution, but are creatures of statutes. That being true, the legislature can deal with the subject of qualification and disqualification. *Parks v. Ash*, 168 Ga. 868, 149 S.E. 207 (1929).

Receipt of pardon after quo warranto proceedings started does not remove disability. — Where the right of a county commissioner to hold office is attacked by reason of the commissioner having been convicted of a felony before the commissioner's election, and therefore not a qualified voter or eligible to hold any civil office, the fact that the commissioner received a pardon after the institution of the quo warranto proceedings, but prior to the decision of the trial judge, does not remove the commissioner's ineligibility. *Hulgan v. Thornton*, 205 Ga. 753, 55 S.E.2d 115 (1949).

Appointee to office of ineligible elected official remains for remainder of term of office. — Where a vacancy in the office of county Superintendent of Schools was created by proper order of the board of education suspending the holder of such office, and an appointment was made to fill such vacancy, and thereafter the suspended official became ineligible under the Constitution and laws of this state to hold such office, the appointee would retain the office for the remainder of the term of the former ineligible Superintendent under the provisions of former § 20-2-107. *Parkerson v. Hart*, 200 Ga. 660, 38 S.E.2d 397 (1946).

Temporary suspension of indicted official. — The constitutional provision prohibiting a convicted felon from holding elective office does not preempt the provision in O.C.G.A. § 45-5-6 for the temporary suspension of an elected official in-

dicted for a felony. *Eaves v. Harris*, 258 Ga. 1, 364 S.E.2d 854, appeal dismissed, 487 U.S. 1228, 108 S. Ct. 2889, 101 L. Ed. 2d 924 (1988).

Cited in *Spillers v. State*, 299 Ga. App. 854, 683 S.E.2d 903 (2009).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

PERSONS ELECTED ON WRITE-IN VOTE

General Consideration

This paragraph is not concerned with punishment imposed for conviction of crime but rather with conviction itself. 1975 Op. Att'y Gen. No. 75-17.

Conviction rather than fine or imprisonment deprives a person of the person's civil and political rights. 1945-47 Op. Att'y Gen. p. 477.

Necessity of final adjudication of guilt. — The word "conviction," for purposes of this paragraph refers to an adjudication of guilt which is final. 1974 Op. Att'y Gen. No. 74-26.

Disability does not extend to mere employment. — Even though parolees from the penitentiary and all convicted felons, before pardon, are ineligible for any civil "office," this disability would not extend to mere employment where such employment does not amount to a position of trust. 1968 Op. Att'y Gen. No. 68-35.

For meaning of the term "moral turpitude," see 1963-65 Op. Att'y Gen. p. 115.

Any crime constituting intentional violation of statute expressing moral judgment of the community against prohibited conduct would involve moral turpitude. 1968 Op. Att'y Gen. No. 68-352.

Person who has been convicted of crime involving moral turpitude cannot hold public office in this state. 1962 Op. Att'y Gen. p. 131.

Ten year lapse requirement. — A person seeking to hold any office or appointment of honor or trust in this state must meet the eligibility requirements as set forth in Ga. Const. 1983, Art. II, Sec. II, Para. III, as amended by the 1990 amendment. 1992 Op. Att'y Gen. No. 92-3.

The 1990 amendment, which added the

10 year lapse requirement as an additional qualification to hold office, is applicable to bar a person from holding public office who was convicted of a felony, completed a sentence, and regained that person's civil rights prior to the amendment's effective date when 10 years has not yet elapsed from the date of completion of the sentence. 1992 Op. Att'y Gen. No. 92-3.

Person convicted in federal court of transporting stolen automobile in interstate commerce would be ineligible to hold any civil office. 1962 Op. Att'y Gen. p. 131.

Conviction of crime of "having liquor" does not render person disqualified from holding public office. 1967 Op. Att'y Gen. No. 67-26.

Conviction as disability to hold office of public school trustee. — Construing this paragraph and Ga. L. 1943, p. 185, §§ 20 and 26 (see now O.C.G.A. § 42-9-54), a person who has been convicted of any crime involving moral turpitude and who has not been subsequently pardoned is not eligible to hold the office of trustee for a local public school. 1954-56 Op. Att'y Gen. p. 295.

Effect of plea of nolo contendere on appointment to university teaching position. — Since a plea of nolo contendere may not be raised in another proceeding as a basis for any civil disqualification, the Board of Regents of the University System of Georgia is not legally prohibited from appointing an individual to a teaching position. 1963-65 Op. Att'y Gen. p. 566.

Person convicted of crime before reaching age of 17 loses that person's right to vote if convicted of a crime involving moral turpitude even though the person is committed to the State Department of Human Resources, rather

General Consideration (Cont'd)

than sentenced to the Board of Corrections (now Department of Offender Rehabilitation). 1975 Op. Att'y Gen. No. 75-17.

Registering to vote after qualifying for office. — A candidate who registers to vote only after qualification for office and the closing of the qualification process is not legally qualified to run for office. 1992 Op. Att'y Gen. No. U92-14.

Federal candidate need not be registered voter or resident of election district. — Insofar as they require a candidate for the United States House of Representatives to be a registered voter or to be a resident of the district from which election is sought, Ga. Const. 1983, Art. II, Sec. II, Para. III and O.C.G.A. § 21-2-132 are unenforceable, as the only qualifications a candidate must possess to be eligible to seek the office of United States representative are those enumerated in U.S. Const., art. I, sec. II. 1983 Op. Att'y Gen. No. 83-62.

Conviction as disqualification from position of trust under Board of Regents. — Conviction and sentence for a felony involving moral turpitude does not render an individual ineligible for employment by the Board of Regents unless the position of employment is one which constitutes a position of trust. 1985 Op. Att'y Gen. No. 85-47.

A conviction resulting from a nolo contendere plea cannot be used to impose any disability including disqualification from voting, holding public office, and jury service. 1983 Op. Att'y Gen. No. 83-33.

Completion of sentence does not restore right to hold office or position of trust. — Pardon or restoration of civil rights is necessary to hold any office or appointment of honor or trust, even if the sentence has been completed, if the conviction was for a felony involving moral turpitude. 1983 Op. Att'y Gen. No. 83-33.

Persons Elected on Write-In Vote

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. II, Sec. III, Para. III and antecedent provisions, relat-

ing to specified eligibility requirements for persons elected on write-in votes, are included in the annotations for this paragraph.

Notice of intention of candidacy pursuant to this paragraph includes both giving notice to proper official and publishing notice in prescribed manner. 1972 Op. Att'y Gen. No. 72-151.

Notice of intention need not be given in advance by write-in candidate in special election. 1969 Op. Att'y Gen. No. 69-59.

Applicability to persons seeking justice of the peace and constable offices. — Persons seeking election as write-in candidates for the offices of justices of the peace and constables (both now judge of the magistrate court) at the November general election are required by the Constitution to file their notices with the Secretary of State and comply with the state-wide publication requirement. 1968 Op. Att'y Gen. No. 68-356.

Failure to fill offices by special election. — If no one is elected in a special election, the offices of justice of the peace and constable (both now judge of the magistrate court) must be filled by election rather than appointment. 1969 Op. Att'y Gen. No. 69-59.

Enforcement against write-in primary candidate. — While a "write-in" candidate who has in fact filed a "notice of intention of candidacy" prior to any of the fiscal disclosure report filing dates surrounding the primary must comply with those report requirements occurring after the candidate has become a candidate, and while an individual who "intends" to subsequently become a "write-in" candidate "should" file such reports, the practical consequence is probably that only those reporting dates fixed with respect to the general election can be enforced against a "write-in" candidate. 1976 Op. Att'y Gen. No. 76-22.

How vacancy created by noncompliance with paragraph filled. — Vacancy in office which results from a determination in a quo warranto proceeding that the election for that office failed because of a failure to comply with this paragraph is filled by a special election for that office. 1976 Op. Att'y Gen. No. 76-56.

RESEARCH REFERENCES

C.J.S. — 29 C.J.S., Elections, § 305 et seq. 67 C.J.S., Officers and Public Employees, § 37.

ALR. — Time as of which eligibility or ineligibility to office is to be determined, 88 ALR 812; 143 ALR 1026.

Elections: validity of state or local legislative ban on write-in votes, 69 ALR4th 948.

Paragraph IV. Recall of public officials holding elective office.

The General Assembly is hereby authorized to provide by general law for the recall of public officials who hold elective office. The procedures, grounds, and all other matters relative to such recall shall be provided for in such law.

1976 Constitution. — Art. I, Sec. IV, Para. I.

Cross references. — Recall elections, Ch. 4, T. 21.

JUDICIAL DECISIONS

Constitutionality of procedure for review of recall petition. — The recall “condition” provided in O.C.G.A. § 21-4-6(f) of the Recall Act of 1989 is not unconstitutional as denying an elected official an opportunity for a judicial hearing to determine the truth or falsity of the alleged facts upon which the recall application is based. *Collins v. Morris*, 263 Ga. 734, 438 S.E.2d 896 (1993).

Grounds for recall. — The absence of a specification of grounds for a recall in the Public Officers Recall Act (O.C.G.A. § 21-4-1 et seq.) causes the statute to fall short of that which is required of the General Assembly by Ga. Const. 1983, Art. II, Sec. II, Para. IV and results in a

fatal constitutional infirmity. *Mitchell v. Wilkerson*, 258 Ga. 608, 372 S.E.2d 432 (1988).

No right to solicit in privately-owned shopping malls. — Nothing in the Georgia Constitution or the Recall Act of 1989, either separately or together, establishes a right of private citizens to enter onto privately-owned shopping malls to solicit signatures for a recall petition. *Citizens for Ethical Gov’t, Inc. v. Gwinnett Place Assoc.*, 260 Ga. 245, 392 S.E.2d 8 (1990).

Cited in *DeKalb County Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 751 S.E.2d 827 (2013).

RESEARCH REFERENCES

ALR. — Constitutionality of state and local recall provisions, 13 ALR6th 661.

Paragraph V. Vacancies created by elected officials qualifying for other office.

The office of any state, county, or municipal elected official shall be declared vacant upon such elected official qualifying, in a general primary or general election, or special primary or special election, for another state, county, or municipal elective office or qualifying for the House of Representatives or the Senate of the United States if the term

of the office for which such official is qualifying for begins more than 30 days prior to the expiration of such official's present term of office. The vacancy created in any such office shall be filled as provided by this Constitution or any general or local law. This provision shall not apply to any elected official seeking or holding more than one elective office when the holding of such offices simultaneously is specifically authorized by law. (Ga. Const. 1983, Art. 2, § 2, Para. 4, approved by Ga. L. 1983, p. 972, § 1/HR 30)

Cross references. — Eligibility of members of municipal councils or boards of aldermen for other municipal offices, § 36-30-4.

Editor's notes. — The constitutional

amendment (Ga. L. 1983, p. 972, § 1) adding this Paragraph was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

JUDICIAL DECISIONS

Vacancy created by resignation of superior court judge. — Judgment entered by a judge who was appointed by the chief county magistrate judge upon a request for "assistance" made by the superior court chief judge pursuant to O.C.G.A. § 15-1-9.1, was not void, even though the judge was appointed to fill a vacancy created by the resignation of a superior court judge, which vacancy

should have been filled by the Governor. *Dominguez v. Enterprise Leasing Co.*, 197 Ga. App. 664, 399 S.E.2d 269 (1990).

Retention election of a city solicitor was an "election to the office of a municipal elected official" within the meaning of Ga. Const. 1983, Art. II, Sec. II, Para. V. *Hornsby v. Campbell*, 267 Ga. 511, 480 S.E.2d 189 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Member of General Assembly qualifying as candidate for office of mayor of Atlanta. — Since the term of office of mayor of the City of Atlanta begins more than 30 days prior to the expiration of the term of office for members of the General Assembly and since a member of the General Assembly is not specifically authorized by law to hold both a seat in the Georgia General Assembly and the office of mayor of the City of Atlanta, pursuant to Ga. Const. 1983, Art. II, Sec. II, Para. V, the seat of a member of the Georgia General Assembly would be declared vacant by operation of law upon the member's qualifying to seek the office of mayor of the City of Atlanta. 1985 Op. Att'y Gen. No. U85-33.

Chief magistrate seeking election to city council. — Since the office of member of the City Council of Lincolnton began more than 30 days prior to the expiration of the candidate's office as

Chief Magistrate for Lincoln County and since there was no specific authorization by law permitting a person to hold the offices of magistrate and city councilman simultaneously, the candidate's office as Chief Magistrate for Lincoln County would be declared vacant by operation of law pursuant to Ga. Const. 1983, Art. II, Sec. II, Para. V upon the person qualifying to seek the office of member of the City Council of Lincolnton. 1985 Op. Att'y Gen. No. U85-41.

Chief magistrate who is appointed to office pursuant to local legislation is not subject to the provisions of Ga. Const. 1983, Art. II, Sec. II, Para. V. 1986 Op. Att'y Gen. No. U86-11.

Office of member of a county board of education will be declared vacant by operation of law upon that member qualifying to seek another elected office on the school board if the term of the new office begins more than thirty days prior

to the expiration of the member’s current term of office and the holding of the two offices simultaneously is not specifically authorized by law. 1986 Op. Att’y Gen. No. 86-17.

Local law cannot extend the tenure in office of an elected official who would otherwise immediately vacate that office when qualifying to run for another elected position. 2000 Op. Att’y Gen. No. 2000-3.

Paragraph does not apply to power commissioner who is selected by grand jury. 1988 Op. Att’y Gen. No. U88-17.

Elected soil and water district supervisors. — Elected soil and water district supervisors are elected state officials

and are thus subject to the constitutional provision that their office is vacated when they qualify for another state, county, or municipal office. 1992 Op. Att’y Gen. No. 92-28.

Vacancy created in office of county commissioner as matter of law. — Where a county commissioner has a term of office on the county commission which extends past 30 days after the commencement of the term of office of state senator for which the county commissioner intends to run, the commissioner’s qualifying to run for election to the state senate will create a vacancy in the office of county commissioner as a matter of law. 1990 Op. Att’y Gen. No. U90-9.

SECTION III.

SUSPENSION AND REMOVAL
OF PUBLIC OFFICIALS

Paragraph

I. Procedures for and effect of suspending or removing public officials upon felony indictment.

Paragraph

II. Suspension upon felony conviction.

Paragraph I. Procedures for and effect of suspending or removing public officials upon felony indictment.

(a) As used in this Paragraph, the term “public official” means the Governor, the Lieutenant Governor, the Secretary of State, the Attorney General, the State School Superintendent, the Commissioner of Insurance, the Commissioner of Agriculture, the Commissioner of Labor, and any member of the General Assembly.

(b) Upon indictment for a felony by a grand jury of this state or by the United States, which felony indictment relates to the performance or activities of the office of any public official, the Attorney General or district attorney shall transmit a certified copy of the indictment to the Governor or, if the indicted public official is the Governor, to the Lieutenant Governor who shall, subject to subparagraph (d) of this Paragraph, appoint a review commission. If the indicted public official is the Governor, the commission shall be composed of the Attorney General, the Secretary of State, the State School Superintendent, the Commissioner of Insurance, the Commissioner of Agriculture, and the Commissioner of Labor. If the indicted public official is the Attorney General, the commission shall be composed of three other public officials who are not members of the General Assembly. If the indicted

public official is not the Governor, the Attorney General, or a member of the General Assembly, the commission shall be composed of the Attorney General and two other public officials who are not members of the General Assembly. If the indicted public official is a member of the General Assembly, the commission shall be composed of the Attorney General and one member of the Senate and one member of the House of Representatives. If the Attorney General brings the indictment against the public official, the Attorney General shall not serve on the commission. In place of the Attorney General, the Governor shall appoint a retired Supreme Court Justice or a retired Court of Appeals Judge. The commission shall provide for a speedy hearing, including notice of the nature and cause of the hearing, process for obtaining witnesses, and the assistance of counsel. Unless a longer period of time is granted by the appointing authority, the commission shall make a written report within 14 days. If the commission determines that the indictment relates to and adversely affects the administration of the office of the indicted public official and that the rights and interests of the public are adversely affected thereby, the Governor or, if the Governor is the indicted public official, the Lieutenant Governor shall suspend the public official immediately and without further action pending the final disposition of the case or until the expiration of the officer's term of office, whichever occurs first. During the term of office to which such officer was elected and in which the indictment occurred, if a nolle prosequi is entered, if the public official is acquitted, or if after conviction the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the officer shall be immediately reinstated to the office from which he was suspended. While a public official is suspended under this Paragraph and until initial conviction by the trial court, the officer shall continue to receive the compensation from his office. After initial conviction by the trial court, the officer shall not be entitled to receive the compensation from his office. If the officer is reinstated to office, he shall be entitled to receive any compensation withheld under the provisions of this Paragraph.

(c) Unless the Governor is the public officer under suspension, for the duration of any suspension under this Paragraph, the Governor shall appoint a replacement officer except in the case of a member of the General Assembly. If the Governor is the public officer under suspension, the provisions of Article V, Section I, Paragraph V of this Constitution shall apply as if the Governor were temporarily disabled. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof.

(d) No commission shall be appointed for a period of 14 days from the day the indictment is received. This period of time may be extended by

the Governor. During this period of time, the indicted public official may, in writing, authorize the Governor or, if the Governor is the indicted public official, the Lieutenant Governor to suspend him from office. Any such voluntary suspension shall be subject to the same conditions for review, reinstatement, or declaration of vacancy as are provided in this Paragraph for a nonvoluntary suspension.

(e) After any suspension is imposed under this Paragraph, the suspended public official may petition the appointing authority for a review. The Governor or, if the indicted public official is the Governor, the Lieutenant Governor may reappoint the commission to review the suspension. The commission shall make a written report within 14 days. If the commission recommends that the public official be reinstated, he shall immediately be reinstated to office.

(f) The report and records of the commission and the fact that the public official has or has not been suspended shall not be admissible in evidence in any court for any purpose. The report and record of the commission shall not be open to the public.

(g) The provisions of this Paragraph shall not apply to any indictment handed down prior to January 1, 1985.

(h) If a public official who is suspended from office under the provisions of this Paragraph is not first tried at the next regular or special term following the indictment, the suspension shall be terminated and the public official shall be reinstated to office. The public official shall not be reinstated under this subparagraph if he is not so tried based on a continuance granted upon a motion made only by the defendant. (Ga. Const. 1983, Art. 2, Sec. 3, Para. 1, approved by Ga. L. 1984, p. 1719, § 1/SR 268; Ga. L. 1986, p. 1614, § 1/HR 505)

Editor's notes. — The constitutional amendment (Ga. L. 1984, p. 1719, § 1) which added this Paragraph was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

The constitutional amendment (Ga. L. 1986, p. 1614, § 1) which revised subparagraph (b) by inserting "or by the United States" following "this state" in the first sentence, substituting "initial conviction by the trial court" for "final conviction" in

the third from the last sentence, and adding the last two sentences was approved by a majority of the qualified voters voting at the general election held on November 4, 1986.

The constitutional amendment proposed in Ga. L. 1988, p. 2100, § 1, which would have revised subparagraphs (a) and (b) to delete references to the State School Superintendent and to make stylistic changes, was defeated at the general election on November 8, 1988.

Paragraph II. Suspension upon felony conviction.

Upon initial conviction of any public official designated in Paragraph I of this section for any felony in a trial court of this state or the United States, regardless of whether the officer has been suspended previously under Paragraph I of this section, such public official shall be immedi-

ately and without further action suspended from office. While a public official is suspended from office under this Paragraph, he or she shall not be entitled to receive the compensation from his or her office. If, during the remainder of the elected official's term of office, the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the public official shall be immediately reinstated to the office from which he or she was suspended and shall be entitled to receive any compensation withheld under the provisions of this Paragraph. Unless the Governor is the public official under suspension, for the duration of any suspension under this Paragraph, the Governor shall appoint a replacement official except in the case of a member of the General Assembly. If the public officer under suspension is a member of the Senate or House of Representatives, then a replacement member for the duration of the suspension shall be elected as now or hereafter provided by law, in a manner the same as or similar to the election of a member to fill a vacancy in the General Assembly but to serve only for the duration of the suspension. If the Governor is the public officer under suspension, the provisions of Article V, Section I, Paragraph V of this Constitution shall apply as if the Governor were temporarily disabled. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof. The provisions of this Paragraph shall not apply to any conviction rendered prior to January 1, 1987. (Ga. Const. 1983, Art. 2, Sec. 3, Para. 2, approved by Ga. L. 1986, p. 1614, § 2/HR 505; Ga. L. 2000, p. 2005, § 1/SR 411)

Editor's notes. — The constitutional amendment (Ga. L. 1986, p. 1614, § 2) which added this Paragraph was approved by a majority of the qualified voters voting at the general election held on November 4, 1986.

The constitutional amendment (Ga. L. 2000, p. 2005, § 1), which modified this

Paragraph by inserting "or she" in two places, "or her" in the second sentence, "during the remainder of the elected official's term of office," near the beginning of the third sentence, and adding the fifth sentence, was approved by a majority of the qualified voters voting at the general election held November 7, 2000.

RESEARCH REFERENCES

ALR. — What constitutes conviction within statutory or constitutional provision making conviction of crime ground of

disqualification for, removal from, or vacancy in, public office, 11 ALR5th 52.

ARTICLE III.

LEGISLATIVE BRANCH

Section

- I. Legislative Power.
- II. Composition of General Assembly.
- III. Officers of the General Assembly.
- IV. Organization and Procedure of the General Assembly.
- V. Enactment of Laws.
- VI. Exercise of Powers.
- VII. Impeachments.
- VIII. Insurance Regulation.
- IX. Appropriations.
- X. Retirement Systems.

Law reviews. — For article, “Limiting Animal Law Cases,” see 45 Ga. L. Rev. 1 (2010).
Article III Standing to ‘Accidental’ Plaintiffs: Lessons from Environmental and

SECTION I.

LEGISLATIVE POWER

Paragraph

- I. Power vested in General Assembly.

Paragraph I. Power vested in General Assembly.

The legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives.

1976 Constitution. — Art. III, Sec. I, Para. I.

Cross references. — Separation of legislative, judicial, and executive power, Ga. Const. 1983, Art. I, Sec. II, Para. III. Delegation of legislative powers to municipalities, Ga. Const. 1983, Art. IX, Sec. II, Para. II. Acts changing term of office of incumbent prohibited, § 1-3-11.

Law reviews. — For article, “The Bicameral Principle in State Legislatures,” see 11 J. of Pub. L. 310 (1962). For article tracing the history of municipal annexation, and the General Assembly’s role therein, see 2 Ga. L. Rev. 35 (1967). For article discussing the impact of home rule on local governments, see 4 Ga. St. B.J.

317 (1968). For article discussing the evolution of municipal annexation law in light of Plantation Pipe Line Co. v. City of Bremen, 227 Ga. 1, 178 S.E.2d 868 (1970), see 5 Ga. L. Rev. 499 (1971). For article, “History of the Veto Power in Georgia,” see 8 Ga. St. B.J. 513 (1972). For article analyzing the changing relationship between state and local governments in Georgia in light of “Amendment 19,” see 9 Ga. L. Rev. 757 (1975). For article, “Selected Oddities in Georgia Municipal Law,” see 9 Ga. L. Rev. 783 (1975). For article, “The Status of Administrative Agencies under the Georgia Constitution,” see 40 Ga. L. Rev. 1109 (2006).
For comment on Rogers v. Medical

Ass'n, 244 Ga. 151, 259 S.E.2d 85 (1979), invalidating Georgia statute requiring Governor's appointments to Composite State Board of Medical Examiners be made solely from nominees submitted by

state medical society as an unconstitutional delegation of legislative authority to a private organization, see 29 Emory L.J. 1183 (1980).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DELEGATION OF POWERS

1. IN GENERAL
2. TO LOCAL GOVERNMENTS
3. TO ADMINISTRATIVE AGENCIES

General Consideration

Legislative power of state is vested exclusively in General Assembly. *Southern Coop. Foundry Co. v. Drummond*, 76 Ga. App. 222, 45 S.E.2d 687 (1947).

Only General Assembly has right to legislate and prescribe laws of this state. *Long v. State*, 202 Ga. 235, 42 S.E.2d 729 (1947).

Distinction between legislative and judicial roles. — Legislative power is that which declares what the law shall be; judicial is that which declares what law is, and applies it to past transactions and existing cases; the one makes the law, the other expounds and judicially administers it; the one prescribes a rule of civil conduct, the other interprets and enforces it in a case in litigation. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

Legislature has power to serve as check upon executive and judicial departments, and this function is properly performed by enactment of laws; if the legislature wishes to have the law other than what the judiciary construes it to be, it has the power and duty to so write it within the limits of the Constitution. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Acts void if beyond authority of department. — If any department of the government, including the judiciary, acts beyond the bounds of its authority, such action is without jurisdiction, is unconstitutional, and is void. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

Power to create crimes and to prescribe punishment therefor is legislative. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930).

Legislature determines whether crime a felony. — A crime is a felony or not, according to the penalty fixed by the legislature; and it is not within the province of the courts to help out the legislature. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930).

Legislature can fix determinate term of punishment for infraction of a criminal law; and the judiciary is without authority to exercise any discretion in imposing such penalty. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930).

Power of legislature as to determinate or indeterminate sentences. — All legislation is exclusively within the power of the legislature. This being so, it can prescribe determinate or indeterminate sentences for crime. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930).

Judge imposing indeterminate sentence acts in pursuance of legislative power. — The legislature can authorize the judiciary to impose an indeterminate sentence, and clothe the judge with discretion in fixing the quantum of punishment within the minimum and maximum limits of punishment prescribed by the Act creating the crime. In exercising such power and discretion, the judge acts, not upon any inherent power residing in the judicial department, but in pursuance of power conferred upon the judge by the legislature. *Johnson v. State*, 169 Ga. 814, 152 S.E. 76 (1930).

Authority to create and alter municipal systems of government is

vested in legislature. *Lee v. City of Jesup*, 222 Ga. 530, 150 S.E.2d 836 (1966), cert. denied, 386 U.S. 993, 87 S. Ct. 1307, 18 L. Ed. 2d 337 (1967).

Legislature retains power to adopt entirely new charter. — The power to adopt an entirely new charter cannot be found in either or both of the home rule statutes (Ga. Const. 1976, Art. IX, Sec. III, Para. I [see Ga. Const. 1983, Art. IX, Sec. II, Para. II] and § 36-35-6). Consequently, this legislative power still resides in the General Assembly. *Jackson v. Inman*, 232 Ga. 566, 207 S.E.2d 475 (1974).

Power of Secretary of State to confer with charter applicants. — The Secretary of State could not confer alone or concurrently with the individuals who might apply for a charter. *Eminent Household of Columbian Woodmen v. Thornton*, 134 Ga. 405, 67 S.E. 849 (1910).

Rule of Public Service Commission prescribing penalty valid. — A rule of the Railroad Commission (now Public Service Commission) prescribing a penalty where a carrier fails to furnish cars does not violate the provisions of this paragraph. *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909).

City charter delegating to mayor and council power to extend city limits within given range not unconstitutional. *Bennett v. City of Baxley*, 149 Ga. 275, 99 S.E. 864 (1919).

Adoption of a code, not compilation, is legislative act. *Western & Atl. R.R. v. Young*, 83 Ga. 512, 10 S.E. 197 (1889).

Failure of legislature to observe internal procedure no grounds for review. — If in the exercise of power to enact laws, the General Assembly merely fails to observe certain rules of internal procedure, the judiciary would not be authorized to review such action, and the same would be true as to any action of the officers of that body within the sphere of their jurisdiction. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

Operation of presumption of proper enactment. — A duly enrolled Act, properly authenticated by the regular presiding officers of both houses of the General Assembly, approved by the Governor, and deposited with the Secretary of

State as an existing law, will be conclusively presumed to have been enacted in accordance with constitutional requirements; and it is not permissible to show, by the legislative journals or other records, that it did not receive on its passage a majority vote of all the members elected to each House, or that there was any irregularity in its enactment. *Capitol Distrib. Co. v. Redwine*, 206 Ga. 477, 57 S.E.2d 578 (1950).

Legislative journal and photostatic copies of bill not permissible to impeach Act. — Where a copy of an enrolled Act levying excise taxes on malt beer and wine and purporting to contain the signatures of the Speaker of the House, Clerk of the House, President of the Senate, Secretary of the Senate, and the Governor, is set out and made a part of the amended petition, which seeks to show invalidity upon the contention that a portion of the title was composed and inserted by some method or agency in an irregular manner during the process of its passage, neither the legislative journals nor photostatic copies of the bill are permissible to impeach the Act, because of the conclusive presumption against any irregularity in its enactment; and, accordingly, this court cannot consider violations of the state constitution that are dependent on being so shown. *Capitol Distrib. Co. v. Redwine*, 206 Ga. 477, 57 S.E.2d 578 (1950).

Delegation of power to adopt name after merger of corporations valid. — An Act authorizing a board of directors of a consolidated railroad to adopt for its name "Selma, Rome & Dalton Railroad Company," and to adopt as its charter that of the Alabama & Tennessee River Railroad Company is valid. *Southern Ry. v. Lancaster*, 149 Ga. 434, 100 S.E. 380 (1910).

Cited in *Central Ga. Land & Lumber Co. v. Exchange Bank*, 101 Ga. 345, 28 S.E. 863 (1897); *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930); *Maner v. Dykes*, 52 Ga. App. 715, 184 S.E. 438 (1936); *State Bd. of Educ. v. County Bd. of Educ.*, 190 Ga. 588, 10 S.E.2d 369 (1940); *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E.2d 743 (1943); *Reliable Transf. Co. v. May*, 70 Ga. App. 613, 29 S.E.2d 187 (1944); *Bibb County v. Garrett*, 204 Ga.

General Consideration (Cont'd)

817, 51 S.E.2d 658 (1949); *Atkins v. Manning*, 206 Ga. 219, 56 S.E.2d 260 (1949); *State v. State Toll Bridge Auth.*, 210 Ga. 690, 82 S.E.2d 626 (1954); *Spence v. Rowell*, 213 Ga. 145, 97 S.E.2d 350 (1957); *Russell v. Venable*, 216 Ga. 137, 115 S.E.2d 103 (1960); *Jamison v. City of Atlanta*, 225 Ga. 51, 165 S.E.2d 647 (1969); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969); *Gainer v. Ellis*, 226 Ga. 79, 172 S.E.2d 608 (1970); *Bituminous Cas. Co. v. Renfroe*, 130 Ga. App. 621, 204 S.E.2d 317 (1974); *Harrell v. Courson*, 234 Ga. 350, 216 S.E.2d 105 (1975); *Harmon v. State*, 235 Ga. 329, 219 S.E.2d 441 (1975); *Rich v. State*, 237 Ga. 291, 227 S.E.2d 761 (1976); *Department of Natural Resources v. Padgett*, 146 Ga. App. 121, 245 S.E.2d 480 (1978); *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008).

Delegation of Powers**1. In General**

This paragraph renders void any attempt to delegate legislative powers. *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E.2d 723 (1953).

Attempt by legislature without express constitutional authority to delegate power to make law is violation of this paragraph. *Flynn v. State*, 88 Ga. App. 52, 76 S.E.2d 38 (1953).

Legislative power cannot be delegated except in cases where definite courses are indicated. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Two types of delegation not unconstitutional. — Two types of legislation are not repugnant to the Constitution. First is in cases where after a legislative enactment has plainly set forth the purpose of the legislation and marked its limits, it then provided that designated administrative officers should have power to promulgate rules within the scope of the legislation, designed to fully administer and give effect to that law. The second is in legislation to which a referendum is attached which provided that it would become a law only after having received a favorable vote of the people to be affected.

Phillips v. City of Atlanta, 210 Ga. 72, 77 S.E.2d 723 (1953).

The delegation of the setting of compensation is constitutional where the Constitution is silent as to how compensation is set. *McCray v. Cobb County*, 251 Ga. 24, 302 S.E.2d 563 (1983).

The former Courts of Limited Jurisdiction Compensation Act of 1982, Ga. L. 1982, p. 1737, repealed in its entirety by Ga. L. 1983, pp. 884, 928, did not unlawfully delegate the duty to set the compensation for justices of the peace to a lesser body, in giving this power to the governing authority of each county, since there was no provision in the 1976 Georgia Constitution that the legislature itself must fix the salary for the judicial office in question. *McCray v. Cobb County*, 251 Ga. 24, 302 S.E.2d 563 (1983).

Police officer's probable cause determination. — By acting on a determination of probable cause to believe a crime was being committed, a law enforcement officer was not called upon to exercise the legislative function of defining what constituted a crime, but the executive branch function of enforcing the law; accordingly, O.C.G.A. § 40-6-395(a) was not an unconstitutional delegation of legislative authority. *Harbuck v. State*, 280 Ga. 775, 631 S.E.2d 351 (2006).

2. To Local Governments

Local Act authorizing county officers to establish system of registration for that county violates this paragraph. *Richter v. Chatham County*, 146 Ga. 218, 91 S.E. 35 (1916).

Determination of local operation of statute. — This paragraph does not prevent the legislature from delegating to local authorities the determination of the question whether or not particular legislation should be operative in given counties or localities. *Haney v. Comm'rs of Bartow County*, 91 Ga. 770, 18 S.E. 28 (1893).

Creation of state courts is sovereign state function, and they can be created only by General Assembly; the creation of such courts involves the appointment or the selection of the judges and of the necessary court officers, and this phase of the creation of the court is

likewise a function of the state and cannot be delegated by the General Assembly to a lesser governmental unit, and certainly not to municipal corporations. *City of Atlanta v. Landers*, 212 Ga. 111, 90 S.E.2d 583 (1955).

Attempt to grant municipality power to try state offenses invalid. — The legislature has no power to establish a municipal court, or police court, and make it subordinate to the will of the municipal authorities, and at the same time to confer upon it jurisdiction to try offenses against the state when committed within the limits of the municipal corporation. *City of Atlanta v. Landers*, 212 Ga. 111, 90 S.E.2d 583 (1955).

Power must be granted by general Act. — The power of a municipality to punish as a municipal offense that which is by general law of the state also a state offense must be conferred by a general rather than a special Act of the legislature and the grant of such power must be clearly expressed. The mere authority granted in a municipal charter to enact ordinances for the general welfare is not a sufficient delegation of this authority. Furthermore, the act which the municipality seeks to punish as a municipal offense must be such as affects the peace and good order of the municipality and contain some characterizing ingredient not contained in the state offense. *Gordon v. Green*, 228 Ga. 505, 186 S.E.2d 719 (1972).

Distinction between cases dealing with municipal authority to punish for state offenses. — There is a distinction between an attempt by the legislature to confer upon a municipal court power and authority to punish for a state offense and the delegation in a general Act of authority to the municipality to enact an ordinance making an act which is a criminal offense under the state law a crime under the municipal ordinance and to punish for a violation of the municipal ordinance. *Gordon v. Green*, 228 Ga. 505, 186 S.E.2d 719 (1972).

Delegation of power to pay obligations under Municipal Electric Authority Act not unconstitutional. — Ga. L. 1975, p. 107, § 17 (see now O.C.G.A. § 46-3-129), conferring power on

the fiscal authorities to appropriate funds to pay the obligations under the contracts and to make payments of such funds, does not constitute an unconstitutional delegation of legislative powers. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Delegation of power to set interest rates not unconstitutional. — Ga. L. 1975, p. 107, § 30 (see now O.C.G.A. § 46-3-146), limiting the power of the state to adversely affect the interests of the owners of the Municipal Electric Authority's bonds and notes, does not constitute an unconstitutional delegation of legislative powers in violation of this paragraph, because it does not limit the right of the General Assembly to legislate except to prevent legislation which will impair the contracts with the bond owners. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Validity of delegation of power in housing law. — Neither Ga. L. 1937, p. 210, § 1 et seq. nor Ga. L. 1937, p. 697, § 1 (see now T. 8, Ch. 3, Art. 1, nor T. 8, Ch. 3, Art. 2), delegate to cities and counties powers which are nondelegable legislative powers, in violation of this paragraph. *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938).

Completion of details of county line change delegable. — This paragraph does not prevent the legislature from delegating completion of details in changing a county line to grand juries, county commissioners, local boards, and the like. *Aultman v. Hodge*, 150 Ga. 370, 104 S.E. 1 (1920).

Attempt to delegate power to alter corporate limits invalid. — The matter of fixing municipal corporate limits is strictly legislative, and it was beyond the power of the General Assembly to delegate its exclusive power to alter the corporate limits of a city in the manner provided by the Act (Ga. L. 1946, p. 130) and pursued in reference to the land involved. The statute is therefore unconstitutional and void. *Du Pre v. City of Marietta*, 213 Ga. 403, 99 S.E.2d 156 (1957).

Section authorizing annexation by ordinance unconstitutional. — The 1946 Act (Ga. L. 1946, p. 130; former Code 1933, § 69-901), purporting to authorize

Delegation of Powers (Cont'd)**2. To Local Governments (Cont'd)**

annexation of property within corporate limits of cities by ordinance, is an unconstitutional attempt to delegate legislative powers, and is void. Proceedings under that void Act, undertaking to incorporate the lands within the city, were void and without effect. *Du Pre v. City of Marietta*, 213 Ga. 403, 99 S.E.2d 156 (1957).

Municipality prohibited from annexation during referendum process.

— Trial court properly held that a municipality did not have the authority under O.C.G.A. § 36-36-21 to annex land that the Georgia General Assembly designated for annexation to another municipality, subject to a referendum, before the referendum took place; thus, a city was prohibited from attempting to annex property during the referendum process. *City of Brookhaven v. City of Chamblee*, 329 Ga. App. 346, 765 S.E.2d 33 (2014).

Section granting municipalities power to approve amusement places not unconstitutional. — Act approved March 29, 1937, Ga. L. 1937, p. 624 (now repealed), providing that no person should establish a public dance hall, boxing, or wrestling arena, or amusement place, tourist camps, and barbecue stands, for money or profit, outside the limits of incorporated towns or cities of a certain minimum population without first obtaining the permission of the commissioners or other authority in charge of such counties, was not violative of the due process and equal protection clauses of the state (Ga. Const. 1976, Art. I, Sec. I, Para. I, and Ga. Const. 1976, Art. I, Sec. II, Para. III [see Ga. Const. 1983, Art. I, Sec. I, Para. I, and Ga. Const. 1983, Art. I, Sec. I, Para. II]) and federal (U.S. Const., amend. 14) Constitutions, nor of this paragraph. *Ingram v. State*, 193 Ga. 565, 19 S.E.2d 493 (1942).

Acts empowering county board of commissioners to fix salary of clerk of municipal court were not violative of this section. *Truesdel v. Freeney*, 186 Ga. 288, 197 S.E. 783 (1938).

Attempt to delegate power to fix salary of district attorney invalid. — Local Act that delegates to a grand jury

and an ordinary (now judge of the probate court) authority to fix the salary to be paid the solicitor general (now district attorney) is violative of the state Constitution (Ga. Const. 1976, Art. VI, Sec. XII, Para. II [see Ga. Const. 1983, Art. VI, Sec. VIII, Para. I]) which vests in the General Assembly power to prescribe such salaries, and is violative of this paragraph. *Mosley v. Garrett*, 182 Ga. 810, 187 S.E. 20 (1936).

Removal of local school board members. — Whether characterized as setting a qualification for continued service on the local board in the extraordinary circumstance of an imminent loss of accreditation, or whether characterized as providing for removal for malfeasance, misfeasance, or nonfeasance in office, O.C.G.A. § 20-2-73 was held by the Georgia Supreme Court to be a permissible exercise of the legislative power to provide for the removal for cause of members of local boards. *DeKalb County Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 751 S.E.2d 827 (2013).

3. To Administrative Agencies

The nondelegation doctrine is rooted in the principle of separation of powers, in that the integrity of the tripartite system of government mandates that the General Assembly not divest itself of the legislative power granted to it by Ga. Const. 1983, Art. III, Sec. I, Para. I. *DOT v. City of Atlanta*, 260 Ga. 699, 398 S.E.2d 567 (1990).

No authority to delegate essentially legislative functions to administrative body. — Legislature has no power to delegate to board, or bureau or other administrative body authority to make rules or regulations which are essentially legislative in character. *Southern Coop. Foundry Co. v. Drummond*, 76 Ga. App. 222, 45 S.E.2d 687 (1947).

This paragraph does not prevent legislature from conferring quasi-legislative powers on administrative bodies. *Zuber v. Southern Ry.*, 9 Ga. App. 539, 71 S.E. 937 (1911).

The legislative department of the state will not be permitted to relieve itself by delegation of its powers. It cannot confer on any person or body the power to determine what the law shall be. But this

constitutional inhibition does not prevent the grant of legislative authority to some administrative board or other tribunal to adopt rules, by-laws, or ordinances for its government, or to carry out a particular purpose. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 364, 133 S.E.2d 374 (1963).

This paragraph does not prevent the grant of legislative authority to some ministerial officer, board or other tribunal to adopt rules, by-laws, or other ordinances for its government, or to carry out a particular purpose. Thus, while it is necessary that a law, when it comes from the lawmaking power, shall be complete, still there are many matters as to methods or details which the legislature may refer to some designated ministerial officer or board. *Scoggins v. Whitfield Fin. Co.*, 242 Ga. 416, 249 S.E.2d 222 (1978).

The General Assembly is empowered to enact laws of general application and then delegate to administrative officers or agencies authority to make rules and regulations necessary to effectuate such laws. *DOT v. Del-Cook Timber Co.*, 248 Ga. 734, 285 S.E.2d 913 (1982).

General Assembly may delegate certain powers to executive branch of government in order to carry out law as enacted by General Assembly. *Sundberg v. State*, 234 Ga. 482, 216 S.E.2d 332 (1975).

Delegation must be made with sufficient guidelines. — Where a delegation of power to an executive official is made with sufficient guidelines, the official's exercise of the delegated power does not violate Ga. Const. 1983, Art. I, Sec. II, Para. III. *DOT v. City of Atlanta*, 260 Ga. 699, 398 S.E.2d 567 (1990).

Ministerial officer shall not have power to define application of statute. — A statute will be held unconstitutional as an improper delegation of legislative power if it is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be an infringement of the law, because any statute which leaves the authority to a ministerial officer to define the thing to which the statute is to be applied is invalid. *Howell v. State*, 238 Ga. 95, 230 S.E.2d 853 (1976).

When administrative officers may promulgate rules and regulations. — After a legislative enactment has plainly set forth its provisions and marked its limits, it may then authorize designated administrative officers to promulgate rules and regulations within the scope of the legislation to administer fully and give effect to it. *Crawley v. Seignious*, 213 Ga. 810, 102 S.E.2d 38 (1958); *Gartrell v. McGahee*, 216 Ga. 125, 114 S.E.2d 871 (1960).

Legislature may refer matters of methods or details in carrying out statutory duty. — While it is necessary that a law, when it comes from the lawmaking power, shall be complete, still there are many matters as to methods or details which the legislature may refer to some designated ministerial officer or board. This paragraph, therefore, does not deny to the lawmaking body the necessary resources of flexibility and practicality which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 364, 133 S.E.2d 374 (1963).

Validity of regulations made in conformity with statute. — Where the Constitution expressly gives to the legislature the power to delegate its lawmaking authority (Ga. Const. 1976, Art. IX, Sec. IV, Para. II (15) [see Ga. Const. 1983, Art. IX, Sec. II, Para. IV]), regulations of administrative bodies in conformity with the statute enacted under such express constitutional sanction are valid. *Flynn v. State*, 88 Ga. App. 52, 76 S.E.2d 38 (1953).

State revenue department's regulation regarding malt beverage distribution in Georgia did not violate the Georgia Constitution, as the regulation did not conflict with the constitutional provision empowering the General Assembly to exercise legislative power by creating laws; the regulation was not a new law, but was merely an administrative rule authorized by and consistent with a duly-passed statute. *Ga. Oilmen's Ass'n v. Ga. Dep't of*

Delegation of Powers (Cont'd)**3. To Administrative****Agencies (Cont'd)**

Revenue, 261 Ga. App. 393, 582 S.E.2d 549 (2003).

Rules promulgated by administrative boards must be within framework of the Act creating them and must be designed to accomplish the purpose of the Act. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 364, 133 S.E.2d 374 (1963).

Rule of judicial noninterference. — Boards and commissions may be either legislative or constitutional, and if their powers are set out in the Constitution the courts should not and cannot interfere. *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 204 S.E.2d 457 (1974).

Public Service Commission has power to regulate motortruck freight transportation. — The legislature having given to the Public Service Commission regulatory supervision, as provided in the Acts relating thereto, over motortruck freight transportation for hire by common carriers, and the legislature having power to regulate the operation of motortrucks over the highways of this state, it can enact such laws regulating speed, size, brakes, lights, etc., of such vehicles as tended to promote the general safety of the public in the use of the highways of this state by such vehicles. *Maner v. Dykes*, 55 Ga. App. 436, 190 S.E. 189 (1937).

Courts not to interfere with ratemaking function of Public Service Commission. — Ratemaking is a legislative function which the Constitution has authorized and required the legislature to delegate to the Public Service Commission. To this extent, and to this extent only, the Commission is constitutionally charged as a lawmaking body, and so long as it does not itself act in an unconstitutional manner the courts do not have any right to interfere. *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 204 S.E.2d 457 (1974).

Authorization of examining board to adopt professional examination

valid. — It is not an improper delegation of legislative power to authorize an examining board to determine the nature and character of an examination which will determine the knowledge and competency of persons desiring to follow an occupation which affects the public welfare, or to prescribe what is satisfactory evidence that a person has skillfully engaged in the occupation for a period of five years prior to the person's application. *Jenkins v. Manry*, 216 Ga. 538, 118 S.E.2d 91 (1961).

O.C.G.A. § 43-4-2, providing for examination of architects, is not an unconstitutional delegation of legislative authority. *Wise v. State Bd. for Examination, Qualification & Registration of Architects*, 247 Ga. 206, 274 S.E.2d 544, overruled in part by *Innovative Clinical & Consulting Servs. v. First Nat'l Bank*, 279 Ga. 672, 620 S.E.2d 352 (2005), appeal dismissed, 454 U.S. 882, 102 S. Ct. 76, 70 L. Ed. 2d 73 (1981).

Grant of power to fix milk prices valid. — Under the state Milk Control Act (Ga. L. 1937, p. 247, now repealed), which sufficiently fixed the policy, general rules, and methods by which the milk control board should exercise its functions, the mere vesting of power in the board to find facts after investigation and to fix maximum and minimum prices based thereon did not render the Act violative of this paragraph on the ground that the Act transferred such power to the board. *Bohannon v. Duncan*, 185 Ga. 840, 196 S.E. 897 (1938).

Sections granting power to board of education valid. — Section 14 of Ga. L. 1951, p. 241 and section 11 of Ga. L. 1949, pp. 1406, 1412 (now repealed), are not void upon the ground that they attempt to vest legislative powers in the State Board of Education and offend this paragraph and Ga. Const. 1976, Art. I, Sec. II, Para. IV (see now Ga. Const. 1983, Art. I, Sec. II, Para. III). *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

Adoption of federal method of income calculation no delegation of taxing power. — Where the State Revenue Commission (now Department of Revenue), in assessing the tax against the defendant, merely adopted the federal

method of calculating the defendant's net income under the federal statute as the state's method of accomplishing that result, and properly assessed the tax due to the state as part of the amount which the defendant had paid to the United States, such adoption was not a delegation to the federal authorities of the state's power to tax. *Head v. McKenney*, 61 Ga. App. 552, 6 S.E.2d 405 (1939).

Delegation of power to levy taxes in Agricultural Commodities Promotion Act invalid. — Former Code 1933, Ch. 5-29, which attempted to delegate the power of the General Assembly to levy taxes, was in conflict with Ga. Const. 1976, Art. I, Sec. II, Para. IV (see now Ga. Const. 1983, Art. I, Sec. II, Para. III) and this paragraph and for that reason was unconstitutional. *Campbell v. Farmer*, 223 Ga. 605, 157 S.E.2d 276 (1967).

Authorizing commission to contract for new code not unconstitutional. — A contract authorized by the General Assembly is not a law and where the General Assembly has retained complete control over the contract and its terms by making it contingent on approval by the General Assembly of an appropriation authorizing the commission to formulate the contract was not an unconstitutional delegation of legislative power. *Harrison Co. v. Code Revision Comm'n*, 244 Ga. 325, 260 S.E.2d 30 (1979).

Grant of authority by legislature to State Board of Examiners in Optometry (now State Board of Optometry) to regulate practice of optometry does not violate constitutional standards. *Pearle Optical of Monroeville, Inc. v. Georgia State Bd. of Exmrs. in Optometry*, 219 Ga. 364, 133 S.E.2d 374 (1963).

Unconstitutionality of sections of Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act. — Former Code 1933, §§ 84-6603(s), 84-6604(d), 84-6610(a)(3), and 84-6610(b)(3), enacted by Ga. L. 1976, p. 1440, were unconstitutional, null and void because each and all of said sections

improperly and unlawfully delegate legislative responsibility to the Franchise Practices Commission in violation of this paragraph. *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800, 262 S.E.2d 106 (1979).

Power of revenue commissioner to punish for violations of alcoholic beverage laws. — Unrestrained and unrestricted power by the state revenue commissioner to declare a violation of the commissioner's administrative and policing regulations to be a misdemeanor would offend the Constitution, but applying the limitation contained in former Code 1933, § 58-1069 (see now O.C.G.A. § 3-3-27) that section was not subject to the attacks made upon it. *Glustrom v. State*, 206 Ga. 734, 58 S.E.2d 534 (1950).

Delegation of power to make penal laws not authorized. — Where the legislative power is by express constitutional provision placed in the legislature, such lawmaking body cannot delegate to an administrative body the power to make penal laws concerning conduct not made illegal by the enabling Act. *Flynn v. State*, 88 Ga. App. 52, 76 S.E.2d 38 (1953).

An Act which delegates to an agency the authority to make rules or regulations, the violation of any and all of them constituting a misdemeanor, is an unconstitutional delegation of legislative authority. *Howell v. State*, 238 Ga. 95, 230 S.E.2d 853 (1976).

When regulations can be basis for prosecution. — Agency regulations which can be made the basis of a criminal prosecution are those made in accord, or in harmony, with those things declared to be a crime by the terms and provisions of the Act involved. *Howell v. State*, 238 Ga. 95, 230 S.E.2d 853 (1976).

Approval of taking of municipal property. — Statutes granting the Commission on the Condemnation of Public Property the power to approve the taking of municipal property do not amount to an improper delegation of legislative power and do not violate separation-of-powers principles. *DOT v. City of Atlanta*, 260 Ga. 699, 398 S.E.2d 567 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Delegation of quasi-legislative matters. — While the General Assembly cannot delegate powers, it may confer upon administrative bodies the power to deal in a somewhat legislative way with quasi-legislative matters. 1948-49 Op. Att’y Gen. p. 700.

Constitutionality of Junior College Act. — Ga. L. 1958, p. 47, § 1 (see now O.C.G.A. Art. 4, Ch. 3, T. 20) does not violate this paragraph, Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI), or Ga. Const. 1976, Art. VII, Sec. III, Para. VI (see Ga. Const. 1983, Art. VII, Sec. IV, Para. X). 1963-65 Op. Att’y Gen. p. 100.

No duty or authority is conferred upon Commissioner of Agriculture by Constitution; to the contrary, the express authority is reserved in the General Assembly to prescribe the duties, author-

ity, and salaries of the executive officers. 1958-59 Op. Att’y Gen. p. 4.

Authority of legislature to curtail activities of Commissioner of Agriculture. — The General Assembly does not have the authority to abolish the office of the Commissioner of Agriculture, but it has the authority to curtail the activities of the Commissioner of Agriculture by creating autonomous agricultural services. 1958-59 Op. Att’y Gen. p. 4.

Legislature is only state authority with consent power over federal acquisitions. — Only authority of the state which has power to consent to the acquisition of property within the state by the federal government so as to deprive the state of jurisdiction over the property is the General Assembly. 1945-47 Op. Att’y Gen. p. 49.

RESEARCH REFERENCES

Am. Jur. 2d. — 16 Am. Jur. 2d, Constitutional Law, § 284 et seq. 72 Am. Jur. 2d, States, Territories, and Dependencies, § 38 et seq.

C.J.S. — 16 C.J.S., Constitutional Law, §§ 5 et seq., 283 et seq., 232. 16C C.J.S., Constitutional Law, § 1875 et seq.

ALR. — Constitutionality of legislative delegation of powers to prescribe or vary regulations concerning motor vehicles used on highways, 87 ALR 546.

Power and duty of court where legislature renders constitutional mandate ineffectual by failing to enact statute necessary to make it effective or by repealing or amending statute previously passed for that purpose, 153 ALR 522.

Validity of delegation to private persons or organizations of power to appoint or nominate to public office, 97 ALR2d 361.

Validity of statute establishing or authorizing minimum price schedules for barbers, 54 ALR3d 916.

What constitutes taking of property requiring compensation under takings clause of Fifth Amendment to United States Constitution — Supreme Court cases, 10 ALR Fed. 2d 231.

Construction and application of “public use” restriction in Fifth Amendment’s Takings Clause — United States Supreme Court Cases, 10 ALR Fed. 2d 407.

SECTION II.

COMPOSITION OF GENERAL ASSEMBLY

Paragraph

I. Senate and House of Representatives.

II. Apportionment of General Assembly.

Paragraph

III. Qualifications of members of General Assembly.

IV. Disqualifications.

V. Election and term of members.

Paragraph I. Senate and House of Representatives.

(a) The Senate shall consist of not more than 56 Senators, each of whom shall be elected from single-member districts.

(b) The House of Representatives shall consist of not fewer than 180 Representatives apportioned among representative districts of the state.

1976 Constitution. — Art. III, Sec. II, Para. I; Art. III, Sec. III, Para. I.

Cross references. — Membership and apportionment of General Assembly gen-

erally, § 28-1-1. Apportionment of House of Representatives, § 28-2-1. Apportionment of Senate, § 28-2-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Elections, § 11 et seq.

C.J.S. — 81A C.J.S., States, § 121 et seq.

ALR. — Inequality of population or lack of compactness of territory as invalidating

apportionment of representatives, 2 ALR 1337.

Civil responsibility of member of legislative body for his vote therein, 22 ALR 125.

Paragraph II. Apportionment of General Assembly.

The General Assembly shall apportion the Senate and House districts. Such districts shall be composed of contiguous territory. The apportionment of the Senate and of the House of Representatives shall be changed by the General Assembly as necessary after each United States decennial census.

1976 Constitution. — Art. III, Sec. II, Para. I; Art. III, Sec. III, Para. I.

Cross references. — Membership and apportionment of General Assembly gen-

erally, § 28-1-1. Apportionment of House of Representatives, § 28-2-1. Apportionment of Senate, § 28-2-2.

JUDICIAL DECISIONS

Separation of powers. — Because Act 444, 2002 Ga. Laws 149, does not impermissibly encroach on the power of the executive branch to control litigation, but instead is a proper assertion of legislative power to determine reapportionment, it does not violate separation of powers. *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003).

Frequency of reapportionment. — Senate Bill 386, 2006 General Assembly, was enacted pursuant to the Georgia legislature’s exercise of the discretionary authority granted by Ga. Const. 1983, Art.

III, Sec. II, Para. II as: (1) Ga. Const. 1976, Art. III, Sec. II, Para. II and Ga. Const. 1983, Art. III, Sec. II, Para. II were essentially identical with respect to the frequency of reapportionment; (2) Ga. Const. 1983, Art. III, Sec. II, Para. II required the legislature to reapportion itself at least once after each census if “necessary,” but the exercise was not limited to a once-in-a-decade occurrence; and (3) the frequency of reapportionment between censuses was a matter of unfettered legislative discretion. *Blum v. Schrader*, 281 Ga. 238, 637 S.E.2d 396 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Elections, § 11 et seq.

C.J.S. — 81A C.J.S., States, § 121 et seq.

ALR. — Inequality of population or lack of compactness of territory as invalidating apportionment of representatives, 2 ALR 1337.

Civil responsibility of member of legis-

lative body for his vote therein, 22 ALR 125.

Application of constitutional “compactness requirement” to redistricting, 114 ALR5th 311.

State court jurisdiction over congressional redistricting disputes, 114 ALR5th 387.

Paragraph III. Qualifications of members of General Assembly.

(a) At the time of their election, the members of the Senate shall be citizens of the United States, shall be at least 25 years of age, shall have been citizens of this state for at least two years, and shall have been legal residents of the territory embraced within the district from which elected for at least one year.

(b) At the time of their election, the members of the House of Representatives shall be citizens of the United States, shall be at least 21 years of age, shall have been citizens of this state for at least two years, and shall have been legal residents of the territory embraced within the district from which elected for at least one year.

1976 Constitution. — Art. III, Sec. II, Para. II; Art. III, Sec. III, Para. II.

Cross references. — Disqualifications for office, Ga. Const. 1983, Art. II, Sec. II, Para. III; and Ga. Const. 1983, Art. III, Sec. II, Para. IV. Persons ineligible to hold public office or act as election officials, § 21-2-8. Eligibility requirements of can-

didates, §§ 21-2-132, 21-2-153. Restriction on number of offices for which an individual may be nominated or be a candidate at any one election, § 21-2-136. Qualifications for Representatives, § 28-2-1. Qualifications for Senators, § 28-2-2.

JUDICIAL DECISIONS

Enumerated qualifications not all inclusive. — There is nothing in the Georgia Constitution which limits qualifications of a legislator to those expressed herein. These qualifications and disquali-

fications of legislators are not all inclusive. *Bond v. Floyd*, 251 F. Supp. 333 (N.D. Ga.), rev'd on other grounds, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

OPINIONS OF THE ATTORNEY GENERAL

There is no conflict in being county attorney, and also holding office of State Representative. 1965-66 Op. Att'y Gen. No. 66-271.

Candidate on ballot in special congressional primary may not be permitted to run at same time in general election

for position in Georgia General Assembly. 1982 Op. Att'y Gen. No. U82-30.

Residency requirement for representatives means at least one year immediately preceding election. — The requirement in Ga. Const. 1983, Art. III, Sec. II, Para. III(b) that at the time of

their election, the members of the House of Representatives shall have been legal residents of the territory embraced within the district from which elected for at least one year means for at least one year immediately preceding the election. 1989 Op. Att'y Gen. 89-31.

One-year residency requirement for Representatives must be met by date of election. 1981 Op. Att'y Gen. No. U81-28.

Waiver of durational residency requirement. — There is no authority that would permit the waiver of the Constitution's durational residency requirement. 2001 Op. Att'y Gen. No. U2001-3.

Areas previously included in the district. — Residency requirement for Representatives applies to candidate moving into district from area previously, but no longer, included in district. 1981 Op. Att'y Gen. No. U81-28.

Reapportionment does not alter residency requirement. — Nothing in this paragraph provides an exception to the one-year residency requirement for Representatives due to reapportionment of the district. 1981 Op. Att'y Gen. No. U81-28.

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, States, Territories, and Dependencies, §§ 38 et seq., 57 et seq.

ALR. — Nonregistration as affecting one's qualification to hold public office, 128 ALR 1117.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 ALR3d 1048.

Paragraph IV. Disqualifications.

(a) No person on active duty with any branch of the armed forces of the United States shall have a seat in either house unless otherwise provided by law.

(b) No person holding any civil appointment or office having any emolument annexed thereto under the United States, this state, or any other state shall have a seat in either house.

(c) No Senator or Representative shall be elected by the General Assembly or appointed by the Governor to any office or appointment having any emolument annexed thereto during the time for which such person shall have been elected unless the Senator or Representative shall first resign the seat to which elected; provided, however, that, during the term for which elected, no Senator or Representative shall be appointed to any civil office which has been created during such term.

1976 Constitution. — Art. III, Sec. V, Para. VII.

Cross references. — Disqualification for office generally, Ga. Const. 1983, Art. II, Sec. II, Para. III. Compensation and allowances provided by law, Ga. Const.

1983, Art. III, Sec. IV, Para. VI; and §§ 28-1-8 and 45-7-4. Other offices and compensation which are not allowed, §§ 16-10-9, 28-1-13, 45-7-3, and 45-7-8. Appointments and emoluments allowed, § 45-2-1.

JUDICIAL DECISIONS

Purpose of this paragraph is to prevent use of public office for private gains, or to hold two public offices. *Rowe v. Tuck*, 149 Ga. 88, 99 S.E. 303 (1919).

No one holding any state or federal office is eligible for a seat in either house. *Bond v. Floyd*, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

Election of county officer to General Assembly will not work ouster of county office. *McWilliams v. Neal*, 130 Ga. 733, 61 S.E. 721 (1908).

Speaker of House may be member of Education Authority (Schools). —

Since membership in the School Building Authority (now Education Authority (Schools)) is neither an office to which emoluments are annexed nor a civil office, the appointment of the Speaker of the House of Representatives as a member does not offend this paragraph. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

Cited in *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949); *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975); *In re Inquiry Concerning Judge No. 591*, 250 Ga. 796, 300 S.E.2d 807 (1983).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION
SPECIFIC OFFICERS

General Consideration

Each House of General Assembly has exclusive original jurisdiction to determine qualifications of its members. 1975 Op. Att'y Gen. No. 75-109.

Effect of election to General Assembly or holding state office. — Persons who hold a state office, except justices of the peace (now judge of the magistrate court) and officers of the militia, are ineligible to membership in the General Assembly; but if one, by reason of holding one of the offices not within the above exception, mentioned in this paragraph, at the time of the person's election as a member of the General Assembly, is rendered ineligible to membership in that body, the fact of the person's ineligibility would not work an ouster from the first office, but would only affect the person's right to take a seat as a member of the General Assembly. 1962 Op. Att'y Gen. p. 261.

Person holding another office may not have seat in General Assembly but no prohibition exists as to the person's election to General Assembly while holding such office. 1948-49 Op. Att'y Gen. p. 235.

Candidate on ballot in special congressional primary may not be permit-

ted to run at same time in general election for position in Georgia General Assembly. 1982 Op. Att'y Gen. No. U82-30.

Specific Officers

Former officer of United States Naval Reserve, retired with pay by reason of disability received in service, is eligible as member of General Assembly. 1948-49 Op. Att'y Gen. p. 234.

When city or county officer is state officer. — There is no statute or constitutional provision prohibiting a county officer from serving as a member of the General Assembly and, a solicitor of a city court created under a special Act of the General Assembly could not be a state officer within the meaning of this paragraph. However, if the holder of such office receives any emolument or compensation under said office from the state, it may be held to fall within this paragraph. 1950-51 Op. Att'y Gen. p. 16.

Solicitor of city court would be eligible under this paragraph to hold seat in either house of General Assembly, subject to exceptions as to emolument from the state, and the provisions of Ga. Const. 1976, Art. III, Sec. V, Para. X (see now Ga. Const. 1983, Art. III, Sec. IV, Para. VII), and the other qualifications

necessary to hold public office. 1950-51 Op. Att'y Gen. p. 16).

County commissioner can be member of General Assembly. 1954-56 Op. Att'y Gen. p. 384.

Member of General Assembly can hold office of justice of the peace (now judge of the magistrate court) while member of General Assembly. 1954-56 Op. Att'y Gen. p. 384.

Justice of the peace (now judge of the magistrate court), not being county official, is not barred from holding at same time office of county commissioner. 1962 Op. Att'y Gen. p. 53.

Those persons who are justices of the peace (now judge of the magistrate court) are also eligible to membership in the General Assembly; this does not violate the separation of powers doctrine. 1974 Op. Att'y Gen. No. U74-92.

Member of county board of human resources cannot, at same time, serve as member of General Assembly. 1962 Op. Att'y Gen. p. 260.

There is no prohibition against justice of the peace (now judge of the magistrate court) at same time holding membership on county Democratic executive committee. 1962 Op. Att'y Gen. p. 50.

Member of county board of education may serve as member of General Assembly. 1954-56 Op. Att'y Gen. p. 383; 1962 Op. Att'y Gen. p. 52.

There is no conflict in being county attorney, and also holding office of state Representative. 1965-66 Op. Att'y Gen. No. 66-271.

Being in employ of county school board would not make person ineligible to occupy a seat in General Assembly. 1968 Op. Att'y Gen. No. 68-169.

Members of Georgia Education Authority not state officers. — The Georgia Education Authority is a corporate

body and a distinct entity in and of itself; the members of said authority receive no emolument and such members do not hold an office within the meaning of this paragraph. 1950-51 Op. Att'y Gen. p. 441.

Clerk of superior court cannot lawfully serve as member of General Assembly. 1965-66 Op. Att'y Gen. No. 66-105.

Membership on governing boards of public, nonmunicipal corporations are not civil offices. — Membership on governing boards of public, nonmunicipal corporations, such as ports authority, are not civil offices within contemplation of this paragraph, though such members are clearly fiduciaries of public trust; further, there exists no basis for distinguishing between the term "civil office" as used in § 45-2-1 and as used in this paragraph. 1971 Op. Att'y Gen. No. 71-18.

Juvenile court judge cannot at same time be member of General Assembly. 1962 Op. Att'y Gen. p. 261.

A member of the General Assembly cannot serve simultaneously as a juvenile court judge. 1984 Op. Att'y Gen. No. U84-46.

Legislator's performance of legal or contract work for city or county. — There is no per se conflict of interest if a member of the General Assembly also serves as either a city or county attorney, or performs contract work for a city or county within that legislator's district. 1984 Op. Att'y Gen. No. U84-34.

When nonpayment of taxes is disqualification. — The payment of taxes is not required of any candidate for a state office except that members of the General Assembly may not be seated if in default for taxes; whether candidates for county offices are eligible to run where they are behind with payment of taxes depends upon the office and the legislative Acts relating to that office or officer. 1954-56 Op. Att'y Gen. p. 311.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 57 et seq.

C.J.S. — 67 C.J.S., Officers and Public Employees, § 26 et seq.

ALR. — Physical or mental disability as disqualification or ground of removal or impeachment of public officer, 28 ALR 777.

Time as of which eligibility or ineligibility to office is to be determined, 88 ALR 812; 143 ALR 1026.

One acting under authority of emergency or relief board or administration as civil officer within contemplation of constitutional provision against holding two or more offices at same time, 105 ALR 1237.

Construction and application of constitutional or statutory provision that mem-

ber of Congress or state legislature shall not, during term for which he is elected, be appointed or elected to any civil office which shall have been created or the emoluments of which shall have been increased during the term for which he was elected, 118 ALR 182.

Incompatibility of offices or positions in the military and in the civil services, 147 ALR 1419; 148 ALR 1399; 150 ALR 1444.

Paragraph V. Election and term of members.

- (a) The members of the General Assembly shall be elected by the qualified electors of their respective districts for a term of two years and shall serve until the time fixed for the convening of the next General Assembly.
- (b) The members of the General Assembly in office on June 30, 1983, shall serve out the remainder of the terms to which elected.
- (c) The first election for members of the General Assembly under this Constitution shall take place on Tuesday after the first Monday in November, 1984, and subsequent elections biennially on that day until the day of election is changed by law.

1976 Constitution. — Art. III, Sec. V, Paras. I, II.

Cross references. — Date of election, § 21-2-9. Special elections for members of General Assembly, § 21-2-544.

Editor's notes. — The constitutional

amendment (Ga. L. 1988, p. 2114, § 1) which would have revised subparagraphs (a) and (b) to change the terms of office from two years to four years was defeated at the general election on November 8, 1988.

JUDICIAL DECISIONS

Election is absolutely void when not held at proper time and place by persons qualified to hold it. Smiley v.

Gaskin, 115 Ga. App. 547, 154 S.E.2d 740 (1967).

RESEARCH REFERENCES

C.J.S. — 81A C.J.S., States, § 97 et seq.

SECTION III.

OFFICERS OF THE GENERAL ASSEMBLY

Paragraph
I. President and President Pro Tempore of the Senate.

Paragraph
II. Speaker and Speaker Pro Tempore of the House of Represen-

Paragraph

tatives.

III. Other officers of the two
houses.

Paragraph I. President and President Pro Tempore of the Senate.

(a) The presiding officer of the Senate shall be styled the President of the Senate.

(b) A President Pro Tempore shall be elected by the Senate from among its members. The President Pro Tempore shall act as President in case of the temporary disability of the President. In case of the death, resignation, or permanent disability of the President or in the event of the succession of the President to the executive power, the President Pro Tempore shall become President and shall receive the same compensation and allowances as the Speaker of the House of Representatives. The General Assembly shall provide by law for the method of determining disability as provided in this Paragraph.

1976 Constitution. — Art. III, Sec. IV, Sec. I, Para. III. Election of Senate officers
Para. I. by Senate, § 28-1-3. Powers and duties of

Cross references. — Other elected ex- President and Speaker Pro Tempore,
ecutive officers, Ga. Const. 1983, Art. V, § 28-1-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, States,
Territories, and Dependencies, § 57.

Paragraph II. Speaker and Speaker Pro Tempore of the House of Representatives.

(a) The presiding officer of the House of Representatives shall be styled the Speaker of the House of Representatives and shall be elected by the House of Representatives from among its members.

(b) A Speaker Pro Tempore shall be elected by the House of Representatives from among its members. The Speaker Pro Tempore shall become Speaker in case of the death, resignation, or permanent disability of the Speaker and shall serve until a Speaker is elected. Such election shall be held as provided in the rules of the House. The General Assembly shall provide by law for the method of determining disability as provided in this Paragraph.

1976 Constitution. — Art. III, Sec. IV, ident and Speaker Pro Tempore, § 28-1-6.
Para. II. Procedure for determining disability of

Cross references. — Election of offi- Speaker of House of Representatives,
cers, § 28-1-3. Powers and duties of Pres- § 28-1-6.1.

OPINIONS OF THE ATTORNEY GENERAL

House members not bound by Democratic Party Caucus Rules. — When the membership of the House elects its Speaker, the House members are not le-

gally bound by the Democratic Party Caucus Rules to vote for the nominee of the Caucus. 1992 Op. Att’y Gen. No. U92-17.

Paragraph III. Other officers of the two houses.

The other officers of the two houses shall be a Secretary of the Senate and a Clerk of the House of Representatives.

1976 Constitution. — Art. III, Sec. IV, Para. III.

ate and Clerk of House of Representatives, § 28-3-20 et seq.

Cross references. — Secretary of Sen-

SECTION IV.
ORGANIZATION AND PROCEDURE OF THE
GENERAL ASSEMBLY

Paragraph	Paragraph
I. Meeting, time limit, and adjournment.	VI. Salaries.
II. Oath of members.	VII. Election and returns; disorderly conduct.
III. Quorum.	VIII. Contempts, how punished.
IV. Rules of procedure; employees; interim committees.	IX. Privilege of members.
V. Vacancies.	X. Elections by either house.
	XI. Open meetings.

Paragraph I. Meeting, time limit, and adjournment.

- (a) The Senate and House of Representatives shall organize each odd-numbered year and shall be a different General Assembly for each two-year period. The General Assembly shall meet in regular session on the second Monday in January of each year, or otherwise as provided by law, and may continue in session for a period of no longer than 40 days in the aggregate each year. By concurrent resolution, the General Assembly may adjourn any regular session to such later date as it may fix for reconvening. Separate periods of adjournment may be fixed by one or more such concurrent resolutions.
- (b) Neither house shall adjourn during a regular session for more than three days or meet in any place other than the state capitol without the consent of the other. Following the fifth day of a special session, either house may adjourn not more than twice for a period not to exceed seven days for each such adjournment. In the event either house, after the thirtieth day of any session, adopts a resolution to adjourn for a specified period of time and such resolution and any amendments thereto are not adopted by both houses by the end of the

legislative day on which adjournment was called for in such resolution, the Governor may adjourn both houses for a period of time not to exceed ten days.

(c) If an impeachment trial is pending at the end of any session, the House shall adjourn and the Senate shall remain in session until such trial is completed.

1976 Constitution. — Art. III, Sec. V, Paras. III, VI.

Cross references. — Impeachment, Ga. Const. 1983, Art. III, Sec. VII. Meeting time and place, § 28-1-2.

Editor's notes. — The constitutional

amendment (Ga. L. 1988, p. 2114, § 2) which would have revised subparagraph (a) to change the terms of office from two years to four years, was defeated at the general election on November 8, 1988.

JUDICIAL DECISIONS

Paragraph binding as to time limitation. — Failure on part of either house, or of both, to conform to constitutional requirements relating to adjournment, when attempting to adjourn sine die, will not abrogate or modify the limitation of 60 days (now 40 days) fixed by this paragraph. *Bunger v. State*, 146 Ga. 672, 92 S.E. 72 (1917).

Cited in *Wood v. Arnall*, 189 Ga. 362, 6 S.E.2d 722 (1939); *Smith v. McMichael*, 203 Ga. 74, 45 S.E.2d 431 (1947); *Glustrom v. State*, 206 Ga. 734, 58 S.E.2d 534 (1950); *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595 (1970).

OPINIONS OF THE ATTORNEY GENERAL

General Assembly may meet each year in one regular session of certain number of days but it may prolong that session by adjourning and reconvening at later date. 1968 Op. Att'y Gen. No. 68-69.

Necessity to reintroduce bills. —

Bills introduced at the January session of the General Assembly are required to be reintroduced at the coming session of the General Assembly where there was a lapse of the previous legislative session. 1957 Op. Att'y Gen. p. 155.

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, States, Territories, and Dependencies, § 44 et seq.

C.J.S. — 81A C.J.S., States, § 109 et seq.

ALR. — Power of Legislature or branch thereof as to time of assembling, and length of session, 56 ALR 721.

Paragraph II. Oath of members.

Each Senator and Representative, before taking the seat to which elected, shall take the oath or affirmation prescribed by law.

1976 Constitution. — Art. III, Sec. V, Para. IV.

Cross references. — Generally, U.S. Const., art. VI, cl. 3. Violations of oath,

§ 16-10-1. Oath of General Assembly members, § 28-1-4. Other oaths required, § 45-3-1.

Law reviews. — For comment on Bond

v. Floyd, 251 F. Supp. 333 (N.D. Ga. 1966), appearing below, see 17 Mercer L. Rev. 467 (1966).

JUDICIAL DECISIONS

Authority of legislators to test sincerity of oath. — The oath provisions of the United States (Art. VI, Cl. 2) and Georgia (this paragraph) Constitutions do not violate U.S. Const., amend. 1. But this requirement does not authorize a majority of state legislators to test the sincerity

with which another duly elected legislator can swear to uphold the Constitution. Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966), commented on in 17 Mercer L. Rev. 467 (1966) (decided prior to 1983 Constitution, which provides that oath shall be as prescribed by law).

Paragraph III. Quorum.

A majority of the members to which each house is entitled shall constitute a quorum to transact business. A smaller number may adjourn from day to day and compel the presence of its absent members.

1976 Constitution. — Art. III, Sec. V, Para. V.

JUDICIAL DECISIONS

Cited in Glustrom v. State, 206 Ga. 734, 58 S.E.2d 534 (1950).

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, States, Territories, and Dependencies, § 39.

C.J.S. — 81A C.J.S., States, § 86.

Paragraph IV. Rules of procedure; employees; interim committees.

Each house shall determine its rules of procedure and may provide for its employees. Interim committees may be created by or pursuant to the authority of the General Assembly or of either house.

1976 Constitution. — There was no similar provision in the 1976 Constitution.

Paragraph V. Vacancies.

When a vacancy occurs in the General Assembly, it shall be filled as provided by this Constitution and by law. The seat of a member of either

house shall be vacant upon the removal of such member’s legal residence from the district from which elected.

1976 Constitution. — Art. III, Sec. V, Para. VIII.

Cross references. — Residence requirements of members, Ga. Const. 1983,

Art. III, Sec. II, Para. III; §§ 28-2-1, 28-2-2, and 45-2-4. Special elections to fill vacancies, § 21-2-544.

OPINIONS OF THE ATTORNEY GENERAL

Change of residence by member of General Assembly. — If a current member of the General Assembly moves that member’s permanent residence or domicile outside the current district, the member will have vacated the office as a matter of law. 2001 Op. Att’y Gen. No. U2001-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, §§ 71, 74.

Paragraph VI. Salaries.

The members of the General Assembly shall receive such salary as shall be provided for by law, provided that no increase in salary shall become effective prior to the end of the term during which such change is made.

1976 Constitution. — Art. III, Sec. V, Para. IX; Art. V, Sec. II, Para. III.

Editor’s notes. — The constitutional amendment (Ga. L. 1997, p. 1713) concerning the Georgia Citizens Commission on Compensation of Public Officials was defeated at the general election on November 8, 1998.

Cross references. — Unauthorized compensation, Ga. Const. 1983, Art. III, Sec. VI, Para. VI; and § 45-7-8. Compensation and allowances provided by law, §§ 28-1-8 and 45-7-4. Sanctions for accepting illegal compensation, § 45-7-8.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 339.

C.J.S. — 81A C.J.S., States, § 104 et seq.

ALR. — Right to salary of one illegally elected or appointed to legislature, 7 ALR 1682.

Power to appropriate public money for expenses of legislators not covered by constitutional compensation, 50 ALR 1238; 60 ALR 416.

Constitutional provisions creating an office and forbidding change in compensation during term as appropriation within other constitutional provision forbidding payment of state funds except in pursuance of appropriation, 88 ALR 1054.

Constitutional inhibition of change of officer’s compensation as applicable to allowance for expenses or disbursements, 106 ALR 779.

Paragraph VII. Election and returns; disorderly conduct.

Each house shall be the judge of the election, returns, and qualifications of its members and shall have power to punish them for disorderly behavior or misconduct by censure, fine, imprisonment, or expulsion; but no member shall be expelled except by a vote of two-thirds of the members of the house to which such member belongs.

1976 Constitution. — Art. III, Sec. V, Para. X.

Cross references. — Vacating an office by majority vote for failure to organize emergency session, § 28-1-7. Ethics and Efficiency in Government Act, see Ch. 11,

T. 28. Code of ethics for government service, § 45-10-1.

Law reviews. — For article, "Georgia's New Ethics Laws: A Summary of the Changes Relevant to Lobbyists and Legislators," see 11 Ga. St. B.J. 22 (No. 4, 2005).

JUDICIAL DECISIONS

Each house of General Assembly has exclusive jurisdiction to determine qualifications and eligibility of its members. Fowler v. Bostick, 99 Ga. App. 428, 108 S.E.2d 720 (1959).

The Georgia courts refuse to take jurisdiction over controversies having to do with the qualifications of legislators. Bond v. Floyd, 251 F. Supp. 333 (N.D. Ga.), rev'd on other grounds, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

This paragraph and House rule embodying it are not unconstitutionally vague. Bond v. Floyd, 251 F. Supp. 333 (N.D. Ga.), rev'd on other grounds, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

State legislative body necessarily possesses inherent power of self-protection. Self-protection goes to the process of qualifications as well as expulsion. Bond v. Floyd, 251 F. Supp. 333 (N.D. Ga.), rev'd on other grounds, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

Superior court without jurisdiction to hold Assembly member ineligible.

— Under this paragraph, a judge of the superior court did not have jurisdiction to hold, in quo warranto proceedings, that a member of the General Assembly who had been elected to that position and who had been sworn in as a member, was ineligible or disqualified for membership in that body; and the demurrer (now motion to dismiss) raising the contention that the court was without jurisdiction should have been sustained. Rainey v. Taylor, 166 Ga. 476, 143 S.E. 383 (1928).

Trial court without jurisdiction to hear equitable action to determine election. — The State Senate being vested by this paragraph with exclusive power to adjudge the qualifications of its own members, a trial court has no jurisdiction to entertain equitable action to determine which of two candidates was elected and properly sustained general demurrers (now motions to dismiss) to the petition. Beatty v. Myrick, 218 Ga. 629, 129 S.E.2d 764 (1963).

Cited in State Hwy. Dep't v. Hicks, 115 Ga. App. 703, 155 S.E.2d 689 (1967); DeFee v. Kaley, 119 Ga. App. 538, 167 S.E.2d 758 (1969).

OPINIONS OF THE ATTORNEY GENERAL

Each House of General Assembly has exclusive original jurisdiction to determine the qualifications of its members. 1975 Op. Att'y Gen. No. 75-109.

Judge of superior court lacks juris-

diction to disqualify member who has been sworn. 1962 Op. Att'y Gen. p. 266.

Whether incumbent holds over when senator-elect dies is one of the qualifications to be determined by Senate. 1945-47 Op. Att'y Gen. p. 345.

Person holding another office may not have seat in General Assembly but no prohibition exists as to the person's election to General Assembly while holding such office. 1948-49 Op. Att'y Gen. p. 235.

Eligibility of city court solicitor to hold General Assembly seat. — A solicitor of city court is eligible under Ga.

Const. 1945, Art. III, Sec. VII, Para. I (see now Ga. Const. 1983, Art. III, Sec. II, Para. IV) to hold a seat in either house of the General Assembly, subject to exceptions as to emolument from the state, and the provisions of this paragraph, and the other qualifications necessary to hold public office in this state. 1950-51 Op. Att'y Gen. p. 16.

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, States, Territories, and Dependencies, § 57 et seq.

C.J.S. — 81A C.J.S., States, §§ 94 et seq., 171 et seq.

ALR. — Jurisdiction of courts to deter-

mine election or qualifications of member of legislative body, and conclusiveness of its decision, as affected by constitutional or statutory provision making legislative body the judge of election and qualification of its own members, 107 ALR 205.

Paragraph VIII. Contempts, how punished.

Each house may punish by imprisonment, not extending beyond the session, any person not a member who shall be guilty of a contempt by any disorderly behavior in its presence or who shall rescue or attempt to rescue any person arrested by order of either house.

1976 Constitution. — Art. III, Sec. V, Para. XI.

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contempt, § 191 et seq.

C.J.S. — 81A C.J.S., States, §§ 111, 112.

Paragraph IX. Privilege of members.

The members of both houses shall be free from arrest during sessions of the General Assembly, or committee meetings thereof, and in going thereto or returning therefrom, except for treason, felony, or breach of the peace. No member shall be liable to answer in any other place for anything spoken in either house or in any committee meeting of either house.

1976 Constitution. — Art. III, Sec. V, Para. XII.

JUDICIAL DECISIONS

Similarity to U.S. Constitution. — This paragraph is similar to that in the

Constitution of the United States in regard to Senators and Representatives in

the Congress (U.S. Const., art. I, sec. VI, para. I). Village of N. Atlanta v. Cook, 219 Ga. 316, 133 S.E.2d 585 (1963).

OPINIONS OF THE ATTORNEY GENERAL

Speeding violations. — A member of the Georgia General Assembly is not immune from arrest and prosecution for speeding violations, or any other criminal

offense, by virtue of Ga. Const. 1983, Art. III, Sec. IV, Para. IX. 1985 Op. Att’y Gen. No. U85-50.

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 103 et seq.

C.J.S. — 81A C.J.S., States, § 99.

ALR. — Immunity of public officer from criminal arrest, 1 ALR 1156.

Service of a subpoena as an arrest within constitutional or statutory immunity of members of legislature or others from arrest, 79 ALR 1214.

Governmental control of actions or

speech of public officers or employees in respect of matters outside the actual performance of their duties, 163 ALR 1358.

Defamation: nature and extent of privilege accorded public statements, relating to subject of legislative business or concern, made by member of state or local legislature or council outside of formal proceedings, 41 ALR4th 1116.

Paragraph X. Elections by either house.

All elections by either house of the General Assembly shall be by recorded vote, and the vote shall appear on the respective journal of each house.

1976 Constitution. — Art. III, Sec. V, Para. XIII.

Cross references. — Elections by Gen-

eral Assembly, § 28-1-12. Election of Secretary of Senate and Clerk of House of Representatives, § 28-3-20.

RESEARCH REFERENCES

ALR. — Constitutionality and effect of statute relating to deadlock or tie vote in governmental body, 40 ALR 808.

Paragraph XI. Open meetings.

The sessions of the General Assembly and all standing committee meetings thereof shall be open to the public. Either house may by rule provide for exceptions to this requirement.

1976 Constitution. — There was no similar provision in the 1976 Constitution.

JUDICIAL DECISIONS

Failure to state claim. — To show entitlement under Ga. Const. 1983, Art. III, Sec. IV, Para. XI, plaintiffs were required by O.C.G.A. § 9-11-8(a)(2)(A) to allege that one or more “sessions of the General Assembly” or one more “standing committee meetings there of” was closed to the public. Because the complaint failed

to so allege, it failed to state a claim upon which relief could be granted and, accordingly, a motion to dismiss under O.C.G.A. § 9-11-12(b)(6) should have been granted. *Murphy v. American Civil Liberties Union of Ga., Inc.*, 258 Ga. 637, 373 S.E.2d 364 (1988).

SECTION V.

ENACTMENT OF LAWS

Paragraph	Paragraph
I. Journals and laws.	IX. Advertisement of notice to introduce local legislation.
II. Bills for revenue.	X. Acts signed.
III. One subject matter expressed.	XI. Signature of Governor.
IV. Statutes and sections of Code, how amended.	XII. Rejected bills.
V. Majority of members to pass bill.	XIII. Approval, veto, and override of veto of bills and resolutions.
VI. When roll-call vote taken.	XIV. Jointly sponsored bills and resolutions.
VII. Reading of general bills.	
VIII. Procedure for considering local legislation.	

Law reviews. — For article, “Bill Drafting — Some Guidelines and Pitfalls,” see 2 Ga. St. B.J. 181 (1965).

JUDICIAL DECISIONS

Originating entity for enrolled Acts. — The enrolled Act (Ga. L. 1987, p. 1133) which increased the marriage license fee was not unconstitutional despite the originating entity. A duly enrolled Act, properly authenticated by the regular presiding officers of both houses of the Gen-

eral Assembly, approved by the Governor, and deposited with the Secretary of State as an existing law, will be conclusively presumed to have been enacted in accordance with constitutional requirements. *Collins v. Woodham*, 257 Ga. 643, 362 S.E.2d 61 (1987).

RESEARCH REFERENCES

ALR. — Power of state Legislature to limit the powers of a state constitutional convention, 158 ALR 512.

Legislative adoption of compiled or re-

vised statutes as giving effect to former repealed or suspended provisions included therein, 12 ALR2d 423.

Paragraph I. Journals and laws.

Each house shall keep and publish after its adjournment a journal of its proceedings. The original journals shall be the sole, official records of the proceedings of each house and shall be preserved as provided by law. The General Assembly shall provide for the publication of the laws passed at each session.

1976 Constitution. — Art. III, Sec. VII, Paras. I, II.

Cross references. — Journals and laws to be deposited with Secretary of State, § 28-1-11. Entering the inaugura-

tion of the Governor in the journal, § 45-12-3.

Law reviews. — For article, “Researching Georgia Law,” see 34 Ga. St. U.L. Rev. 741 (2015).

JUDICIAL DECISIONS

Sufficiency of identification of bill. — This paragraph is complied with where a bill is identified by the journal by indicating that conditional requirements were observed. *Carswell v. Wright*, 133 Ga. 714, 66 S.E. 905 (1910).

Operation of presumption of proper enactment. — A duly enrolled Act, authenticated by the presiding officers of both houses of the General Assembly, approved by the Governor and deposited with the Secretary of State as an existing law, is conclusively presumed to have been enacted in accordance with constitutional requirements, and it is not

permissible to show the contrary by extrinsic evidence. *Williams v. MacFeeley*, 186 Ga. 145, 197 S.E. 225 (1938).

Enrolled Act cannot be shown invalid by entries in journals. — An enrolled Act of the legislature, bearing the signature of the officers of both houses, and the approval of the Governor, and deposited with the Secretary of State, cannot be shown to be invalid by reason of entries or lack of entries in the journals of the General Assembly touching the details of its passage. *Williams v. MacFeeley*, 186 Ga. 145, 197 S.E. 225 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 41.

C.J.S. — 82 C.J.S., Statutes, §§ 48, 77, 78.

Paragraph II. Bills for revenue.

All bills for raising revenue, or appropriating money, shall originate in the House of Representatives.

1976 Constitution. — Art. III, Sec. VII, Para. VIII.

Cross references. — Recording votes on appropriations bills, Ga. Const. 1983,

Art. III, Sec. V, Para. VI. Originating resolutions relating to a claim against the state, § 28-5-80.

JUDICIAL DECISIONS

Originating entity for enrolled Acts. — The enrolled Act (Ga. L. 1987, p. 1133) which increased the marriage li-

cense fee was not unconstitutional despite the originating entity. A duly enrolled Act, properly authenticated by the regular pre-

siding officers of both houses of the General Assembly, approved by the Governor, and deposited with the Secretary of State as an existing law, will be conclusively presumed to have been enacted in accordance with constitutional requirements. *Collins v. Woodham*, 257 Ga. 643, 362 S.E.2d 61 (1987).

Cited in *Grizzard v. State Revenue Comm'n*, 177 Ga. 845, 171 S.E. 765 (1933);

Prater v. Larabee Flour Mills Co., 180 Ga. 581, 180 S.E. 235 (1935); *Irons v. Harrison*, 185 Ga. 244, 194 S.E. 749 (1937); *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938); *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953); *State v. State Toll Bridge Auth.*, 210 Ga. 690, 82 S.E.2d 626 (1954); *Schaffer v. Oxford*, 102 Ga. App. 710, 117 S.E.2d 637 (1960).

OPINIONS OF THE ATTORNEY GENERAL

All legislation affecting revenue, either its increase or decrease, must originate in the House of Representatives to be constitutional. 1957 Op. Att'y Gen. p. 156.

Phrase "or appropriating money" refers to funds made available to various departments and agencies for payment of state expenses. 1952-53 Op. Att'y Gen. p. 4.

Bill for spending money for partic-

ular project must originate in House of Representatives, if its purpose is to make available funds to finance the project. 1952-53 Op. Att'y Gen. p. 4.

Bill providing pension plan for judges and solicitors of city courts is not required to originate in House of Representatives, as such a bill is not "appropriating money" in the sense of the Constitution. 1952-53 Op. Att'y Gen. p. 4.

RESEARCH REFERENCES

C.J.S. — 82 C.J.S., Statutes, § 14.

ALR. — Application of constitutional

requirement that bills for raising revenue originate in lower house, 4 ALR2d 973.

Paragraph III. One subject matter expressed.

No bill shall pass which refers to more than one subject matter or contains matter different from what is expressed in the title thereof.

1976 Constitution. — Art. III, Sec. VII, Para. IV.

Law reviews. — For article discussing implications of this paragraph on municipal annexation statutes, see 2 Ga. L. Rev. 35 (1967). For article, "The 1967 Amendments to the Georgia Civil Practice Act (Ch. 11, T. 9) and the Appellate Procedure Act" (Art. 2, Ch. 6, T. 5), see 3 Ga. St. B.J. 383 (1967). For article, "Synopsis of 1968 Amendments to the Appellate Procedure Act (Art. 2, Ch. 6, T. 5) and Georgia Civil Practice Act" (Ch. 11, T. 9), see 4 Ga. St. B.J. 503 (1968). For article, "The Legislative Process in Georgia Local Government Law," see 5 Ga. L. Rev. 1 (1971). For article, "Selected Oddities in Georgia Municipal Law," see 9 Ga. L. Rev. 783 (1975).

For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982). For survey article on local government law, see 34 Mercer L. Rev. 225 (1982). For article, "Federalization of the Mosquito: Structural Innovation in the New Deal Administrative State," see 60 Emory L.J. 325 (2010).

For comment on the constitutionality of Ga. L. 1958, pp. 657, 658; as amended by Ga. L. Ex. Sess., 1964, pp. 16, 17 (§ 53-2-40), reducing the number of required witnesses to a will to two, in light of this paragraph, see 1 Ga. St. B.J. 126 (1964). For comment on *Griffith v. Merrit*, 223 Ga. 562, 157 S.E.2d 23 (1967), appearing below, see 19 Mercer L. Rev. 436 (1968). For comment on *Sams v. Olah*, 225

Ga. 497, 169 S.E.2d 790 (1969) as to the constitutionality of the State Bar Act (Art.

2, Ch. 19, T. 15), see 21 Mercer L. Rev. 355 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PLURALITY OF SUBJECT MATTER

SUFFICIENCY OF CAPTION

1. IN GENERAL
2. USE OF WORDS "AND FOR OTHER PURPOSES"

SPECIFIC LAWS

1. LAWS OF GENERAL APPLICATION
2. PENAL STATUTES
3. AMENDMENTS
4. LOCAL LAWS
5. MUNICIPAL ORDINANCES

General Consideration

Origin of section. — This paragraph was inserted in the Constitution of 1798, and its necessity was suggested by the Yazoo Act. *Savannah v. State ex rel. Green*, 4 Ga. 26 (1848); *Mayor of Macon v. Hughes*, 110 Ga. 795, 36 S.E. 247 (1900).

This paragraph was a reverberation from the shock resulting from passage of an Act that under the caption "for the protection and support of its frontier settlements," a measure disposing of Georgia's western lands, 35,000,000 acres, for \$500,000.00, less than two cents per acre, a territory out of which a few years later the States of Alabama and Mississippi were carved. *Cady v. Jardine*, 185 Ga. 9, 193 S.E. 869 (1937).

Paragraph a Georgia contribution to constitutional law. — This paragraph first appeared in the Constitution of 1798, and before that time no other state had such a provision; it is distinctly a Georgia contribution to constitutional law. *Cady v. Jardine*, 185 Ga. 9, 193 S.E. 869 (1937).

This paragraph is designed for two purposes, first, the prevention of surreptitious legislation typified by the ill-famed "Yazoo Fraud;" and, second, the prevention of "omnibus" bills combining many matters, adverse in their nature, with the view of combining in their favor the advocates of all and thus securing the passage of several measures no one of which could succeed upon its own merits. *Camp v.*

Metropolitan Atlanta Rapid Transit Auth., 229 Ga. 35, 189 S.E.2d 56 (1972).

This constitutional provision was inspired by the "Yazoo Fraud" and embodied in the Constitution to prevent the "smuggling" of undesirable legislation, and to provide that in the future the people would have notice of the contents of proposed legislation. *Briggs v. State*, 80 Ga. App. 664, 56 S.E.2d 802 (1949), overruled on other grounds, *Howell v. State*, 238 Ga. 95, 230 S.E.2d 853 (1976).

Purpose of this provision is to protect the people against covert or surprise legislation. *Bray v. City of E. Point*, 203 Ga. 315, 46 S.E.2d 257 (1948); *Nelson v. Southern Guar. Ins. Co.*, 221 Ga. 804, 147 S.E.2d 424 (1966); *Green v. Bryson*, 223 Ga. 862, 159 S.E.2d 56 (1968).

This paragraph is mandatory upon legislature and not directory, and Acts in violation thereof are void. *McCaffrey v. State*, 183 Ga. 827, 189 S.E. 825 (1937); *Black v. Jones*, 190 Ga. 95, 8 S.E.2d 385 (1940).

This paragraph stands as bar to any legislation which embodies more than one subject matter. *Fields v. Arnall*, 199 Ga. 491, 34 S.E.2d 692 (1945).

Purpose is not to prevent comprehensive legislation. — The purpose of this paragraph is to prevent the passage of a law which is not indicated in a general way in the title of the Act. Its object, therefore, is not to prevent comprehensive, but surreptitious legislation. *Kaigler v. Board of Comm'rs of Rds. & Revenues*,

174 Ga. 849, 164 S.E. 193 (1932).

Construction of paragraph as forbidding comprehensive Acts would be incorrect. — This paragraph is intended to stop the vicious practice of joining in one Act incongruous and unrelated matters; but any construction of it which would interfere with the very commendable policy or practice of incorporating the entire body of statutory law upon one general subject in a single Act, instead of dividing it into a number of separate Acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. *Crews v. Cook*, 220 Ga. 479, 139 S.E.2d 490 (1964); *Lord v. State*, 235 Ga. 342, 219 S.E.2d 425 (1975).

Act which does not specify all of its consequences and effects in its title does not necessarily violate this paragraph. *Upson County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981).

Each proposition submitted to voters should stand or fall upon its own merits, without, on the one hand, receiving any adventitious aid from another and perhaps more popular one, or, on the other hand, having to carry the burden of supporting a less meritorious and popular measure. No voter should be compelled, in order to support a measure which the voter favors, to vote also for a wholly different one which the voter's judgment disapproves, or, in order to vote against the proposition which the voter desires to defeat, to vote also against the one which commends itself to the approval of the voter's judgment. *Wall v. Board of Elections*, 242 Ga. 566, 250 S.E.2d 408 (1978).

Legislature empowered to legislate in one Act upon general subject. — The General Assembly is empowered under this paragraph to legislate in one Act upon a general subject and to embody therein all elements of the general subject, and such an Act is valid. *Fields v. Arnall*, 199 Ga. 491, 34 S.E.2d 692 (1945).

An Act which attempted to annex land alleged to be within the corporate limits of another municipality, explicitly named in the Act, violated this paragraph. The General Assembly is incompetent to amend, repeal, or modify the charters of two separate and distinct municipal corporations

in one Act, and to attempt to do so causes the Act to impermissibly refer to more than one subject matter. *Schneider v. City of Folkston*, 207 Ga. 434, 62 S.E.2d 177 (1950).

An Act whose title referred only to one city, but which also attempted to amend, partially repeal, and nullify the charter of another municipality caused the Act to contain matter different from what was expressed in the title in violation of this paragraph. *Schneider v. City of Folkston*, 207 Ga. 434, 62 S.E.2d 177 (1950).

This paragraph is not applicable to proposals by legislature to amend constitution. *Cooney v. Foote*, 142 Ga. 647, 83 S.E. 537 (1916); *Goolsby v. Stephens*, 155 Ga. 529, 117 S.E. 439 (1923).

Adoption of Code containing Act violating this paragraph waives the defect. *Central of Ga. Ry. v. State*, 104 Ga. 831, 31 S.E. 531 (1898); *Kennedy v. Meara*, 127 Ga. 68, 56 S.E. 243 (1906); *Davis v. Davison*, 160 Ga. 545, 128 S.E. 743 (1925).

Necessity of showing injury from unconstitutional statute. — An attack upon a statute that it contains matter different from that expressed in the title is of necessity limited to the subject area that affects the attacking party since a party who attacks a statute as being unconstitutional must show that the alleged unconstitutional feature of the statute injures that party and so operates as to deprive the party of rights protected by the Constitution. *Lord v. State*, 235 Ga. 342, 219 S.E.2d 425 (1975).

Pleading must specify defect. — An assignment of error must point out the portion of the body of the Act inconsistent with the title, or wherein the Act refers to more than one subject matter. *Walthour v. City of Atlanta*, 157 Ga. 24, 120 S.E. 613 (1923).

Attack on a statute was not properly raised, and could not be considered by the Supreme Court where the plaintiff in error failed to show wherein the statute violates the constitutional provision. *Davis v. State*, 204 Ga. 467, 50 S.E.2d 604 (1948).

Cited in *Morgan v. Lowry*, 168 Ga. 723, 149 S.E. 37 (1929); *Mobley v. Personius*, 172 Ga. 261, 157 S.E. 294 (1931); *Georgia*

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Hwy. Express v. Harrison, 172 Ga. 431, 157 S.E. 464 (1931); Johnson Transf. & Freight Lines v. Perry, 47 F.2d 900 (N.D. Ga. 1931); Atlanta Laundries, Inc. v. Harrison, 174 Ga. 448, 162 S.E. 912 (1932); Buie v. Buie, 175 Ga. 27, 165 S.E. 15 (1932); Richardson v. Johnson Furn. Co., 176 Ga. 28, 166 S.E. 662 (1932); State Bd. of Barber Exmrs. v. Blocker, 176 Ga. 125, 167 S.E. 298 (1932); Moseley v. State, 176 Ga. 889, 169 S.E. 97 (1933); Murphy v. Holman, 179 Ga. 329, 176 S.E. 5 (1934); Madronah Sales Co. v. Wilburn, 180 Ga. 837, 181 S.E. 173 (1935); Maner v. State, 181 Ga. 254, 181 S.E. 856 (1935); Harbin v. Holcomb, 181 Ga. 800, 184 S.E. 603 (1936); Chivilis v. West, 182 Ga. 379, 185 S.E. 348 (1936); Gormley v. Shiver, 182 Ga. 750, 187 S.E. 382 (1936); Russell v. Burroughs, 183 Ga. 361, 188 S.E. 451 (1936); Moore v. Bell, 186 Ga. 583, 198 S.E. 711 (1938); National Sur. Corp. v. Gatlin, 192 Ga. 293, 15 S.E.2d 180 (1941); Gernatt v. Huie, 192 Ga. 729, 16 S.E.2d 587 (1941); Singleton v. State, 196 Ga. 136, 26 S.E.2d 736 (1943); Ragans v. Ragans, 200 Ga. 890, 39 S.E.2d 162 (1946); Morris v. City Council, 201 Ga. 666, 40 S.E.2d 710 (1946); Kirkpatrick v. Candler, 205 Ga. 449, 53 S.E.2d 889 (1949); Houlihan v. Atkinson, 205 Ga. 720, 55 S.E.2d 233 (1949); Glustrom v. State, 206 Ga. 734, 58 S.E.2d 534 (1950); City of Atlanta v. Anglin, 209 Ga. 170, 71 S.E.2d 419 (1952); Walker v. McKenzie, 209 Ga. 653, 74 S.E.2d 870 (1953); Ball v. Peavy, 210 Ga. 575, 82 S.E.2d 143 (1954); State v. State Toll Bridge Auth., 210 Ga. 690, 82 S.E.2d 626 (1954); Calhoun v. State, 211 Ga. 112, 84 S.E.2d 198 (1954); Bibb County v. Hancock, 211 Ga. 429, 86 S.E.2d 511 (1955); Panlos v. Stephenson, 213 Ga. 816, 102 S.E.2d 165 (1958); Crow v. McCallum, 215 Ga. 692, 113 S.E.2d 203 (1960); Russell v. Venable, 216 Ga. 137, 115 S.E.2d 103 (1960); Williams v. State, 217 Ga. 312, 122 S.E.2d 229 (1961); City of Chamblee v. Village of N. Atlanta, 217 Ga. 517, 123 S.E.2d 663 (1962); Sweeney v. Balkcom, 219 Ga. 292, 133 S.E.2d 10 (1963); Stephenson v. State, 219 Ga. 652, 135 S.E.2d 380 (1964); Sheppard v. DeKalb County Bd. of Educ., 220 Ga. 219,

138 S.E.2d 271 (1964); Ralston Purina Co. v. Acrey, 220 Ga. 788, 142 S.E.2d 66 (1965); Pye v. State Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970); Road Bldrs., Inc. v. Hawes, 228 Ga. 608, 187 S.E.2d 287 (1972); DeKalb County v. Allstate Beer, Inc., 229 Ga. 483, 192 S.E.2d 342 (1972); Stoner v. Fortson, 379 F. Supp. 704 (N.D. Ga. 1974); Granger v. State, 235 Ga. 681, 221 S.E.2d 451 (1975); Orkin v. State, 236 Ga. 176, 223 S.E.2d 61 (1976); Osborne v. Ridge View Assocs., 238 Ga. 377, 233 S.E.2d 342 (1977); Auto-Owners Ins. Co. v. Safeco Ins. Co. of Am., 245 Ga. 558, 266 S.E.2d 175 (1980); Lang v. State, 168 Ga. App. 693, 310 S.E.2d 276 (1983); Porter v. Calhoun County Bd. of Comm'rs, 252 Ga. 446, 314 S.E.2d 649 (1984); American Booksellers Ass'n v. Webb, 590 F. Supp. 677 (N.D. Ga. 1984); Ellis v. State, 256 Ga. 751, 353 S.E.2d 19 (1987); Hussey v. Chatham County, 268 Ga. 871, 494 S.E.2d 510 (1998); City of Brookhaven v. City of Chamblee, 329 Ga. App. 346, 765 S.E.2d 33 (2014).

Plurality of Subject Matter

This paragraph stands as bar to any legislation which embodies more than one subject matter. Fields v. Arnall, 199 Ga. 491, 34 S.E.2d 692 (1945).

Act may contain any number of provisions consistent with the general subject. Whitley v. State, 134 Ga. 758, 68 S.E. 716 (1910).

Unity of purpose is criterion for consistency with general subject. Central of Ga. Ry. v. State, 104 Ga. 831, 31 S.E. 531 (1898); Branson v. Long, 159 Ga. 288, 123 S.E. 500 (1924).

Act may properly include various provisions, so long as they are not inconsistent with, or foreign to, general object of the Act. Hines v. Etheridge, 173 Ga. 870, 162 S.E. 113 (1931) (decided under 1877 Const).

All that this paragraph requires is that Act embrace only one general subject; and by this is meant, merely, that all matters treated by the Act should be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one subject. Crews v. Cook, 220 Ga. 479, 139 S.E.2d 490 (1964); Lord v. State, 235

Ga. 342, 219 S.E.2d 425 (1975); *American Booksellers Assoc. v. Webb*, 254 Ga. 399, 329 S.E.2d 495 (1985).

Any instrumentality aiding purpose of Act not unconstitutional. — When it is plain by the Act a certain thing is to be done, any instrumentality authorized by the Act in aid of, to conduce to, to assist, the one great purpose of the Act is not a different subject-matter, but is part of the main subject-matter; it is part of the “substantial unity in the statutable object,” and is not unconstitutional. *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938).

Test is whether all parts of Act are germane to single objective. — The test of whether an Act or a constitutional amendment violates the multiple subject matter rule is whether all of the parts of the Act or of the constitutional amendment are germane to the accomplishment of a single objective. *Wall v. Board of Elections*, 242 Ga. 566, 250 S.E.2d 408 (1978).

Test is whether Act embraces two dissimilar subjects. — To constitute plurality of subject matter, an Act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any logical connection with or relation to each other. *Crews v. Cook*, 220 Ga. 479, 139 S.E.2d 490 (1964); *Lord v. State*, 235 Ga. 342, 219 S.E.2d 425 (1975); *American Booksellers Assoc. v. Webb*, 254 Ga. 399, 329 S.E.2d 495 (1985).

Meaning of “subject” of Act. — The “subject” of an Act, within the meaning of this paragraph, is regarded as the matter or thing forming the groundwork of the Act. *Capitol Distrib. Co. v. Redwine*, 206 Ga. 477, 57 S.E.2d 578 (1950).

To constitute plurality of subject matter, an Act must embrace two or more dissimilar and discordant subjects that by no fair intendment can be considered as having any logical connection with or relation to each other. *Wall v. Board of Elections*, 242 Ga. 566, 250 S.E.2d 408 (1978).

Meaning of word “subject matter” as used in this paragraph is not synonymous with that of word “provision.” *Crews v. Cook*, 220 Ga. 479, 139 S.E.2d 490 (1964); *Lord v. State*, 235 Ga.

342, 219 S.E.2d 425 (1975).

No plurality where all parts of Act relate to subject of legislation. — Where the parts of a statute have a natural connection and reasonably relate, directly or indirectly, to one general and legitimate subject of legislation, the Act is not open to the objection of plurality of subject matter, within the meaning of this paragraph. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931); *Millhollan v. State*, 221 Ga. 165, 143 S.E.2d 730 (1965).

Paragraph does not mandate separate Acts for branches and segments of general subject matter. — This paragraph does not mean that every branch and segment of the general subject constitutes a subject matter different from that of the general subject to which it is related, and hence must be treated as a separate and independent Act. *Fields v. Arnall*, 199 Ga. 491, 34 S.E.2d 692 (1945).

General Assembly cannot amend charters of two municipalities in one Act. — An Act which attempted to annex land alleged to be within the corporate limits of another municipality, explicitly named in the Act, violated this paragraph. The General Assembly is incompetent to amend, repeal, or modify the charters of two separate and distinct municipal corporations in one Act, and to attempt to do so causes the Act to impermissibly refer to more than one subject matter. *Schneider v. City of Folkston*, 207 Ga. 434, 62 S.E.2d 177 (1950).

An Act whose title referred only to one city, but which also attempted to amend, partially repeal, and nullify the charter of another municipality caused the Act to contain matter different from what was expressed in the title in violation of this paragraph. *Schneider v. City of Folkston*, 207 Ga. 434, 62 S.E.2d 177 (1950).

When different questions on referendum may be consolidated in one law. — Where several different, unrelated bond issues are submitted to the voters in one referendum, this is something closely akin to coercion and not at all conducive to a free and untrammelled expression of public sentiment as to the merits of either. However, questions are properly consolidated into one law where the initial question was whether something should be

Plurality of Subject Matter (Cont'd)

done and the additional questions were merely incidental to the accomplishment of it. *Wall v. Board of Elections*, 242 Ga. 566, 250 S.E.2d 408 (1978).

Provision for penalty not unconstitutional. — The fact that an Act provides for a penalty upon one coming within the provisions of the Act, and that this penalty may be enforced by civil or criminal procedure, does not render the Act itself obnoxious to this paragraph. *Copeland v. Leathers*, 206 Ga. 280, 56 S.E.2d 530 (1949).

Acts not containing more than one subject. — Even though the crime of abandonment involves two distinct elements — bastardy and forsaking of parental duties, the statute creating the offense (O.C.G.A. § 19-10-1) deals with only one subject — the crime of abandonment — and therefore does not violate the constitutional prohibition. *Bembry v. State*, 250 Ga. 237, 297 S.E.2d 36 (1982).

Sufficiency of Caption**1. In General**

The purpose of this constitutional provision requiring that the act's title must alert the reader to the matters contained in its body is to protect against surprise legislation. *Mead Corp. v. Collins*, 258 Ga. 239, 367 S.E.2d 790 (1988).

General object of law is all that need be indicated by title. *Howell v. State*, 71 Ga. 224 (1883); *Fullington v. Williams*, 98 Ga. 807, 27 S.E. 183 (1896); *Welborne v. State*, 114 Ga. 793, 40 S.E. 857 (1902); *Inter-City Coach Lines v. Harrison*, 172 Ga. 390, 157 S.E. 673 (1931); *City of Albany v. Ader*, 176 Ga. 391, 168 S.E. 1 (1933); *Wright v. State*, 53 Ga. App. 371, 186 S.E. 149 (1936); *Complete Auto Transit, Inc. v. Floyd*, 214 Ga. 232, 104 S.E.2d 208 (1958); *Eubanks v. State*, 217 Ga. 588, 124 S.E.2d 269 (1962).

The caption of an Act need only indicate the general object and subject matter to be dealt with therein and broad enough to protect the people against covert or surprise legislation. *State v. Resolute Ins. Co.*, 221 Ga. 815, 147 S.E.2d 433 (1966);

Ray v. Hand, 225 Ga. 589, 170 S.E.2d 692 (1969).

Title which reasonably expresses general subject of legislation covers all matters properly connected with general subject and germane thereto. *Martin v. Broach*, 6 Ga. 21 (1849); *Howell v. State*, 71 Ga. 224 (1883); *Davis v. Warde*, 155 Ga. 748, 118 S.E. 378, appeal dismissed, 263 U.S. 725, 44 S. Ct. 3, 68 L. Ed. 527 (1923); *Wilson v. Supreme Forest Woodman Circle*, 156 Ga. 403, 119 S.E. 394 (1923); *Morgan v. Shepherd*, 171 Ga. 33, 154 S.E. 780 (1930).

Legislators not to be misled by title. — One of the evils this paragraph seeks to prevent is the insertion of clauses in the body of Acts of which the title gives no intimation. *Cade v. State*, 207 Ga. 135, 60 S.E.2d 763 (1950).

The purpose of this section is protection against surprise or fraudulent matter in the body of an Act, of which the title gives no intimation. Therefore, in considering an attack on a statute pursuant to this section, the question is whether the language of the title gives notice of what the body of the Act contains. *Carsello v. State*, 220 Ga. 90, 137 S.E.2d 305 (1964).

To prevent fraud and surprise it is important that the members of the General Assembly should be notified at least by the title of the Act of the subject matter about which they are legislating; they should not be misled by the title. *Fortson v. Weeks*, 232 Ga. 472, 208 S.E.2d 68 (1974).

Act void if title and body do not correspond. — If both the title and the body of the Act contain separate and distinct subject-matters, the Act will be void in its entirety. *Bass v. Lawrence*, 124 Ga. 75, 52 S.E. 296 (1905).

When the caption of the Act describes one area or territory, and the body of the Act another area or territory, whether it be larger or smaller, the body of the Act contains a subject matter totally different from that contained in the caption, and is therefore in violation of this paragraph. *Adams v. City of Cornelia*, 206 Ga. 687, 58 S.E.2d 398 (1950).

Where there is inserted in the body of an Act a completely unrelated provision of which the title gives no intimation, this

paragraph is violated. *Brown v. Clower*, 225 Ga. 165, 166 S.E.2d 363 (1969).

This paragraph does not require that the title should contain a synopsis of the law. The general object of the law is all that need be indicated by the title. Minute details should be omitted. *Wright v. Fulton County*, 169 Ga. 354, 150 S.E. 262 (1929); *Green v. Harper*, 177 Ga. 680, 170 S.E. 872 (1933); *Cade v. State*, 207 Ga. 135, 60 S.E.2d 763 (1950).

This paragraph does not require that the title of an Act should contain a synopsis of the law proposed, but that the Act should contain no matter variant from the title. *Inter-City Coach Lines v. Harrison*, 172 Ga. 390, 157 S.E. 673 (1931); *City of Albany v. Ader*, 176 Ga. 391, 168 S.E. 1 (1933); *Wright v. State*, 53 Ga. App. 371, 186 S.E. 149 (1936).

The title to an Act need not contain a synopsis of all of its provisions. *Board of Educ. & Orphanage v. State Bd. of Educ.*, 186 Ga. 200, 197 S.E. 261 (1938); *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Constitution does not require that title of Act should contain a synopsis of the law, but that Act should contain no matter variant from title; if title is descriptive generally of purposes of Act, it is sufficient, and it is not necessary that it should particularize the several provisions contained in the body of the Act. *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981); *Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981).

Minute details should be omitted. *Banks v. State*, 124 Ga. 15, 52 S.E. 74 (1905); *Inter-City Coach Lines v. Harrison*, 172 Ga. 390, 157 S.E. 673 (1931).

It is not intended that the substance of an Act should be set forth in the caption, nor that every detail stated in the body thereof be mentioned in the title; if what follows after the enacting clause is definitely related to what is expressed in the caption, if it be naturally connected therewith, and related to the main object or subject matter of the legislation and is not in conflict therewith, there is no infringement of this paragraph. *State v. Resolute Ins. Co.*, 221 Ga. 815, 147 S.E.2d 433 (1966); *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14,

148 S.E.2d 402 (1966); *Ray v. Hand*, 225 Ga. 589, 170 S.E.2d 692 (1969); *Frazer v. City of Albany*, 245 Ga. 399, 265 S.E.2d 581 (1980); *Devier v. State*, 247 Ga. 635, 277 S.E.2d 729 (1981); *Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981); *Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981).

Every detail in the Act need not be set forth in the caption in order to apprise the public and the legislature of the intended legislation. *Green v. Bryson*, 223 Ga. 862, 159 S.E.2d 56 (1968).

This paragraph does not require the legislature to set forth the entire substance of an Act in its title. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Titles exceedingly brief, general, and indefinite may be sufficient. *Fullington v. Williams*, 98 Ga. 807, 27 S.E. 183 (1896); *Plumb v. Christie*, 103 Ga. 686, 30 S.E. 759 (1898); *Nolan v. Central Ga. Power Co.*, 134 Ga. 201, 67 S.E. 656 (1910); *Wright v. Fulton County*, 169 Ga. 354, 150 S.E. 262 (1929); *Inter-City Coach Lines v. Harrison*, 172 Ga. 390, 157 S.E. 673 (1931).

Title sufficient if germane to subject. — If what follows after an enacting clause is definitely related to what is expressed in the title, has a natural connection, relates to the main subject of legislation, and is not in conflict therewith, there is no infringement of this paragraph. *Cady v. Jardine*, 185 Ga. 9, 193 S.E. 869 (1937).

This paragraph does not mean that the caption must be as detailed as the Act. It is sufficient if the provision of the Act is germane to the subject thereof stated in the caption. *Undercofler v. Hospital Auth.*, 221 Ga. 501, 145 S.E.2d 487 (1965); *Hawes v. Cordell Ford Co.*, 223 Ga. 260, 154 S.E.2d 599 (1967); *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974).

Substantial correspondence necessary between title and body. — The title and body of legislative Acts must correspond, not literally but substantially, and this is to be determined in view of the subject matter to which the legislation relates. *Green v. Bryson*, 223 Ga. 862, 159 S.E.2d 56 (1968).

Substance of the Act must be related to the title, and the title must

Sufficiency of Caption (Cont'd)**1. In General** (Cont'd)

give notice of the Act's contents. Davenport v. Davenport, 243 Ga. 613, 255 S.E.2d 695 (1979).

Legislation germane to purpose of Act may be included. — Any legislation which is germane to the general purpose of an Act as indicated in the title can be properly embraced in the Act, and no matter what may be its details the legislation embraced therein will not render the Act subject to the objection that it contains matter variant from the title, so long as such matter is legitimately within the general scope of the purpose of the Act as indicated in the title. Board of Educ. & Orphanage v. State Bd. of Educ., 186 Ga. 200, 197 S.E. 261 (1938).

Every detail of an Act need not be expressed in the caption and as long as the provisions are germane to the general purpose of the Act they will not be considered different subject matter. Rich v. State, 237 Ga. 291, 227 S.E.2d 761 (1976).

It is only necessary that the subject matter in the body of the Act relate to what is expressed in the title and have a natural connection to the main object of the legislation and not in conflict therewith, so as not to be deceiving upon a casual reading of only the heading of the Act. Lee v. State, 239 Ga. 769, 238 S.E.2d 852 (1977).

Act not unconstitutional when title broader than body. — An Act is not unconstitutional because language employed in the body of the Act is not as broad as might be warranted by the caption. Plumb v. Christie, 103 Ga. 686, 30 S.E. 759 (1898); Coleman v. Board of Educ., 131 Ga. 643, 63 S.E. 41 (1908).

The mere fact that the title of a statute is broader in terms and scope than the body of the Act does not affect its sufficiency under this paragraph if the variance is not such as to be misleading. Hill v. Perkins, 218 Ga. 354, 127 S.E.2d 909 (1962).

Matter in the body of an Act inconsistent with the title may be omitted if the remainder of the Act sets forth a complete scheme. Barnett v. State, 117 Ga. 298, 43 S.E. 720 (1903); Pearson v.

Bass, 132 Ga. 117, 63 S.E. 798 (1909); Jackson v. Beavers, 156 Ga. 71, 118 S.E. 751 (1923).

Inclusion of penalty not mentioned in title not unconstitutional. — This paragraph is not violated by the inclusion in the body of an Act of a penalty which is not alluded to in the caption of the Act where the penalty affixed is germane to the purpose of the Act. Pitts v. State, 219 Ga. 222, 132 S.E.2d 649 (1963).

2. Use of Words "And for Other Purposes"

Use of words authorizes inclusion of germane provisions. — The use of the words "and for other purposes" will not authorize legislation upon any subject save one which is germane to the general subject embraced in the title. Board of Pub. Educ. v. Barlow, 49 Ga. 232 (1873); Crawley v. State, 150 Ga. 86, 102 S.E. 898 (1920); Storey v. Town of Summerville, 158 Ga. 182, 123 S.E. 139 (1924).

Provisions germane to the general subject-matter embraced in the title of an Act, and which are designed to carry into effect the purposes for which it is passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by use of the words, "and for other purposes." White v. Donaldson, 170 Ga. 432, 153 S.E. 19 (1930); Morgan v. Shepherd, 171 Ga. 33, 154 S.E. 780 (1930); Inter-City Coach Lines v. Harrison, 172 Ga. 390, 157 S.E. 673 (1931); Hines v. Etheridge, 173 Ga. 870, 162 S.E. 113 (1931); Cady v. Jardine, 185 Ga. 9, 193 S.E. 869 (1937); Shadrick v. Bledsoe, 186 Ga. 345, 198 S.E. 535 (1938); Eubanks v. State, 217 Ga. 588, 124 S.E.2d 269 (1962); Campbell v. J.D. Jewell, Inc., 221 Ga. 543, 145 S.E.2d 569 (1965); Nash v. National Preferred Life Ins. Co., 222 Ga. 14, 148 S.E.2d 402 (1966).

The phrase "and for other purposes" authorizes the inclusion in the Act of matter germane to the general subject of the Act. Black v. Jones, 190 Ga. 95, 8 S.E.2d 385 (1940).

Where the caption of an Act contains the words "and for other purposes" this language authorizes the incorporation in the body of the Act of any provision that is incidental or germane to the main objec-

tive as indicated by the caption. *Harris v. State*, 191 Ga. 243, 12 S.E.2d 64 (1940).

The clause, “and for other purposes,” contained in the caption of an Act of the legislature, will include almost any provision of the Act consistent with the general purpose of the Act as amended. *Adams v. City of Cornelia*, 206 Ga. 687, 58 S.E.2d 398 (1950).

Use of words “and for other purposes” does not warrant the introduction of new subject matter in the Act. *Jackson v. State*, 5 Ga. App. 177, 62 S.E. 726 (1908).

Specific Laws

1. Laws of General Application

Section taxing charge for use of real property unconstitutional when under caption of “personal property.” — Section 3 (C) 1 (b) of Ga. L. 1951, p. 360 (§ 48-8-2(6)(C)) violates this paragraph, for the reason that the title gives notice of its intention to tax leases and rentals of “tangible personal property,” but gives no notice of an intention to tax the lease, rental, or other charge for the use of real property. *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E.2d 691 (1966).

Act fixing qualifications of tax assessors may include disqualification provision. — Where a portion of the caption indicates that the Act (Ga. L. 1913, p. 125, §§ 48-5-291 through 48-5-296) is to fix the “qualifications” of tax assessors it is sufficient to authorize the incorporation in the Act of a provision for their disqualification. *Parks v. Ash*, 168 Ga. 868, 149 S.E. 207 (1929), overruled on other grounds, *Lucas v. Woodward*, 240 Ga. 770, 243 S.E.2d 28 (1978).

Only one subject matter, that is, the right to redeem property sold for taxes, is referred to in Ga. L. 1949, p. 1132. Every provision in the body of the Act is specifically expressed in the title, and the statute does not violate this paragraph. *Patterson v. Florida Realty & Fin. Corp.*, 212 Ga. 440, 93 S.E.2d 571 (1956).

This paragraph is not violated by the General Tax Act of 1890 (Ga. L. 1890-91, p. 35). *McGhee v. State*, 92 Ga.

21, 17 S.E. 276 (1893).

Title of Act embracing malt beverages cannot extend to all alcoholic beverages. — Where the title of an Act (Ga. L. 1935, p. 73) embraces “malt beverages” only, and a section (Code 1933, § 58-724, see § 3-3-21) within the body extends to “alcoholic beverages of any kind,” and prohibits the sale thereof on any school grounds or college campus or within 100 yards thereof, it contains matter different from that in the title, in violation of this paragraph. *McCaffrey v. State*, 183 Ga. 827, 189 S.E. 825 (1937).

Act setting tax rate on malt beverage crowns constitutional. — Ga. L. 1937-38 Ex. Sess., p. 175 (Code 1933, § 58-739), purporting to amend the General Tax Act of 1935 (§ 3-5-60) as related to the tax on auctioneers, and “to provide that the tax paid crowns or lid crown required by law to be attached or affixed to bottles or cans containing malt beverages shall be at the rate of two cents for each can or bottle containing 12 fluid ounces or proportionally thereof, so as to graduate the tax on bottles or cans of various sizes,” does not violate this paragraph. *Crisp v. Head*, 187 Ga. 20, 199 S.E. 219 (1938).

Section limiting state’s power to affect interests of owners of Municipal Electric Authority bonds. — Ga. L. 1975, p. 107 (see now O.C.G.A. § 46-3-146), limiting the power of the state to adversely affect the interests of the owners of the Municipal Electric Authority’s bonds and notes, is not in violation of this paragraph. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Act fixing venue of suits against electric companies constitutional (Ga. L. 1912, p. 66, § 46-1-2). *Towaliga Falls Power Co. v. Foster*, 143 Ga. 688, 85 S.E. 835 (1915).

Act dealing with municipal taxation of life insurers not unconstitutional because title does not mention county powers. — Even though there is no reference in the title to the provision in the Act (Ga. L. 1964, p. 122, § 33-8-8) that no county or unincorporated area shall be permitted to impose, levy, or charge any of the taxes and fees mentioned therein, no reference in the title need be specifically

Specific Laws (Cont'd)**1. Laws of General****Application (Cont'd)**

made to the fact that no county or unincorporated area thereof could impose such taxes and fees under the Act since the title sufficiently covers this provision by stating that the Act involves the "exercise of the powers of municipal corporations and other political subdivisions." This phrase is sufficient to cover both the granting and the taking of power from the various political subdivisions in the establishment of a uniform policy. *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966).

Not unconstitutional because it does not mention effect on business licenses. — Even though the title does not indicate that the Act (Ga. L. 1964, p. 122) deals with business licenses issued by the county, the words "fees and taxes" as used in the title are sufficient to include those various and specific types which are set out in detail in the body of the Act including business licenses. *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966).

Not unconstitutional because it preempts field of imposing taxes on life insurers. — Even though no reference is made in the title that the purpose of the Act (Ga. L. 1964, p. 122) is to preempt to the state the field of imposing taxes upon life insurance companies, the title does state that the Act is to "provide a uniform policy," and there could be no such uniform policy established in this field unless total authority in this matter is preempted and placed into one policy making body, in this case the General Assembly. The fact that the body of the Act mentions preemption does not violate the Constitution because it is incidental and necessary to carry out the purpose of establishing a uniform policy. *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966).

Not unconstitutional because it deals with both county and municipal governments. — The Act (Ga. L. 1964, p. 122) does not refer to more than one subject matter even though it deals with the powers of both county and mu-

nicipal governments, since the Act deals with the taxing of insurance company premiums and that alone is the subject matter of the Act. *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966).

Employer's Liability Act constitutional. (Ga. L. 1909, p. 160). *Georgia C. & P.R.R. v. Hines*, 138 Ga. 713, 76 S.E. 60 (1912).

Housing Authorities Act constitutional. — Neither Ga. L. 1937, p. 210 nor p. 697 (Art. 1, Ch. 3, T. 8) refer to more than one subject-matter, or contain matter different from that expressed in the title contrary to this paragraph. *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938).

Banking Law of 1919 constitutional. — The Banking Law of 1919 (Ga. L. 1919, p. 135) is not repugnant to this paragraph. *Felton v. Bennett*, 163 Ga. 849, 137 S.E. 264 (1927).

Nonresident Motorist Act constitutional. — There is no merit in the contention that the Nonresident Motorist Act (Ga. L. 1937, p. 732) is lacking in the unity of purpose required by this paragraph, because it provides for both a method of serving a nonresident and the venue of suits brought thereunder. *Lloyd Adams, Inc. v. Liberty Mut. Ins. Co.*, 190 Ga. 633, 10 S.E.2d 46 (1940).

Motor vehicle registration law constitutional. (Ga. L. 1915, Ex. Sess., p. 107, now repealed). *Tarver v. City of Albany*, 160 Ga. 251, 127 S.E. 856 (1925).

Motor Vehicle Registration Law (Ga. L. 1937-38, Ex. Sess., p. 259) does not violate this paragraph insofar as it attempts to deal with or tax public property. *Burkett v. State*, 198 Ga. 747, 32 S.E.2d 797 (1945).

Uniform Rules of the Road Act constitutional. — The Uniform Rules of the Road Act, Ga. L. 1974, p. 633, as amended by Ga. L. 1976, p. 977, does not violate this paragraph by containing matter different from what is expressed in the title. *Head v. State*, 246 Ga. 360, 271 S.E.2d 452 (1980).

Georgia Motor Vehicle Accident Reparations Act constitutional. — The fact that the title to the Georgia Motor Vehicle Accident Reparations Act (Ga. L.

1974, p. 113; O.C.G.A. Ch. 34, T. 33) does not make reference to a penalty provision provided for in the body of that Act does not render it unconstitutional under this paragraph. *Atlanta Cas. Co. v. Jones*, 247 Ga. 238, 275 S.E.2d 328 (1981).

Resolution authorizing sale of list of motor vehicle owners constitutional. — The resolution of 1929 (former Ga. L. 1929, p. 1483) authorizing the sale of the list of motor vehicle owners is not unconstitutional and void, for the reason that it has no caption and was not passed in conformity; it being evident from reading the resolution that it was intended as a revenue measure. While the resolution has not a formal caption as precedes an Act, the preamble was in substance a caption and the resolution was introduced in the House of Representatives as required by Ga. Const. 1976, Art. III, Sec. VII, Para. VIII (see Ga. Const. 1983, Art. III, Sec. V, Para. II) and as required of all revenue bills. *Grizzard v. State Revenue Comm'n*, 177 Ga. 845, 171 S.E. 765 (1933).

Registration section of Motor Common Carriers Act constitutional. — Section 18 (former O.C.G.A. § 46-7-15) of the former Motor Common Carriers Act (Ga. L. 1931, p. 199) was not unconstitutional on the grounds that the statute referred to more than one subject matter or contained matter different from what was expressed in the statute's title. *City of Albany v. Ader*, 176 Ga. 391, 168 S.E. 1 (1933); *Mayor of Savannah v. V.C. Ellington Co.*, 177 Ga. 149, 170 S.E. 38 (1933).

Housing Authority Law of 1937 constitutional. — The "Housing Authority Law" of 1937 (Ga. L. 1937, p. 210, § 8-3-1 et seq.), and the Act of 1939 amending this law (Ga. L. 1939, p. 121), is not in contravention of this paragraph, as referring to more than one subject matter, or as containing matter different from what is expressed in the title; and is not in contravention of the uniformity clause contained in Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), a special law as to matters covered by general laws. *Barber v. Housing Auth.*, 189 Ga. 155, 5 S.E.2d 425 (1939).

Section relating to divorce procedure constitutional. — The legislation

enacting § 19-6-1 (Ga. L. 1977, p. 1253) meets the single subject matter requirement of this paragraph, because its provisions all relate to changes in divorce and alimony procedure necessitated by the advent of "no fault" divorce, and because the lien provision has a natural connection with the main object of the legislation. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Act providing for liens upon estates relating to alimony constitutional. — The statement in the caption of Ga. L. 1977, p. 1253 that it amended former Code 1933, § 30-201 (see now O.C.G.A. § 19-6-1), relating to permanent and temporary alimony "to provide for liens upon estates," gave sufficient notice of the provisions of the Act to meet the requirement of this paragraph. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

The Child Abuse and Prevention Act refers to only one subject matter and that is the implementation relating to a State Children's Trust Fund. *Collins v. Woodham*, 257 Ga. 643, 362 S.E.2d 61 (1987).

State Bar Act not unconstitutional on grounds that it violates this paragraph (Art. 2, Ch. 19, T. 15). *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969), commented on in 21 Mercer L. Rev. 355 (1969).

Act regulating dental hygienists constitutional. — The Act regulating the occupation of dental hygienists, approved February 25, 1949, Ga. L. 1949, p. 1192 (now repealed) is not unconstitutional, because it violates the due-process and equal-protection clauses of U.S. Const., amend. 14 and the Georgia Constitution, or because it violates this paragraph. *Lamons v. Yarbrough*, 206 Ga. 50, 55 S.E.2d 551 (1949).

Paragraph not violated by Act proscribing practice of dentistry without a license. *Wrzesinski v. State*, 271 Ga. 659, 522 S.E.2d 461 (1999).

Failure to mention penalty of injunction in caption of roadhouse licensing Act not unconstitutional. — The fact that no particular reference is made in the title of the Act (Ga. L. 1945, p. 326) to the penalty of injunction provided for in Ga. L. 1945, p. 326, § 17A (see now

Specific Laws (Cont'd)**1. Laws of General****Application (Cont'd)**

O.C.G.A. § 43-21-57) does not render this provision of the Act repugnant to this paragraph. *Copeland v. Leathers*, 206 Ga. 280, 56 S.E.2d 530 (1949).

Act requiring contractor to give bond in public works contracts constitutional (Ga. L. 1916, p. 94; see O.C.G.A. Art. 4, Ch. 82, T. 36). *Ty Ty Consol. Sch. Dist. v. Colquitt Lumber Co.*, 153 Ga. 426, 112 S.E. 561 (1922).

Land Registration Act constitutional (Ga. L. 1917, p. 108; see O.C.G.A. Art. 2, Ch. 2, T. 44). *Crowell v. Akin*, 152 Ga. 126, 108 S.E. 791 (1921).

Legislation germane to purpose of Act. — O.C.G.A. § 9-3-51 which insulates architects, engineers, contractors, and all other parties participating in the design, planning, supervision, or construction of an improvement to real property from liability for injuries to persons or property occurring more than eight years after substantial completion of such improvement and resulting from negligent designing, planning, supervision, or construction of such an improvement does not violate this paragraph. *Mullis v. Southern Co. Servs.*, 250 Ga. 90, 296 S.E.2d 579 (1982).

Building Authority Act not violative of paragraph. — Because the entire County Building Authority Act dealt with the creation and operation of county building authorities, the Act did not violate Ga. Const. 1983, Art. III, Sec. V, Para. III by allegedly covering two distinct subject matters: (1) the creation, functions, and powers of county building authorities; and (2) the specific grant of power to other governmental entities to deal with the building authority. *Building Auth. v. State*, 253 Ga. 242, 321 S.E.2d 97 (1984).

Definition of "burglary" in § 16-7-1 does not violate this paragraph. — Definition of "burglary" in O.C.G.A. § 16-7-1 relates to main object of legislation, contains "no matter variant from the title," and bears "a natural connection" to the matter contained in the enacting clause, and does not violate this paragraph. *Ladson v. State*, 248 Ga. 470, 285 S.E.2d 508 (1981).

Notice of repeal of tax deduction. —

Where an Act's title, which refers to Ga. L. 1969, p. 115 and relates the amendment to "adjustments to federal taxable income to be made by corporations," it gives adequate notice of the repeal of the deduction for corporate long-term capital gains as the title puts the reader on notice that subsection (b) affecting corporate adjustments is being amended, and as the long-term capital gains deduction is one of the corporate adjustments in the referenced section and is naturally connected with and germane to the main object of the legislation as stated in the title; that subsection (b)(6) is on page 117, Ga. L. 1969, rather than on page 115, Ga. L. 1969, is not fatal. *Mead Corp. v. Collins*, 258 Ga. 239, 367 S.E.2d 790 (1988).

Tort Reform Act. — O.C.G.A. § 51-12-5.1(e)(2) is unconstitutional as containing matter different from that expressed in the title of the Tort Reform Act and containing subject matter different from other subject matter in the body of the Act. *McBride v. GMC*, 737 F. Supp. 1563 (M.D. Ga. 1990).

Punitive damages law. — Because the trial court erroneously concluded that the purpose of O.C.G.A. § 51-12-5.1 is revenue raising, it erred in holding that the statute violates Ga. Const. 1983, Art. III, Sec. V, Para. III, providing that no bill shall contain subject matter different from that expressed in the title. *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 436 S.E.2d 635 (1993); *State v. Moseley*, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994).

Guardianship for veterans. — Former O.C.G.A. § 29-6-11(c), prohibiting a guardian appointed to allow a ward to receive Department of Veterans Affairs benefits from receiving a bequest under the ward's will, did not violate Ga. Const. 1983, Art. III, Sec. V, Para. III, prohibiting the passage of a bill containing matter different from the bill's title, because one of the bill's stated purposes was to provide for a comprehensive change in the guardianship of beneficiaries of the United States Department of Veterans Affairs, and the statute was sufficiently related to this purpose. *Cross v. Stokes*, 275 Ga. 872,

572 S.E.2d 538 (2002).

2. Penal Statutes

This paragraph applies to penal statutes. *Harris v. State*, 110 Ga. 887, 36 S.E. 232 (1900).

Penalty need not be mentioned in title. *Morris v. State*, 117 Ga. 1, 43 S.E. 368 (1903); *Pearson v. Bass*, 132 Ga. 117, 63 S.E. 798 (1909); *Stanley v. State*, 135 Ga. 859, 70 S.E. 591 (1911).

Body of penal statute cannot be narrowed to conform to title. — The body of a penal statute, when broader in its terms than the title warrants, cannot be so narrowed by constructions as to make the statute good for what is embraced within the title, unless the result thus arrived at will correspond with the real legislative intention. *McCaffrey v. State*, 183 Ga. 827, 189 S.E. 825 (1937).

Act imposing death penalty constitutional. — The Act providing for the imposition of the death penalty (Ga. L. 1973, p. 159; see O.C.G.A. § 17-10-30) deals with only one subject and is not violative of the Georgia Constitution. *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974).

Act amending sections on bail in criminal cases constitutional. — Ga. L. 1943, p. 282, while amending provisions which deal with the subject of bail in criminal cases by providing for service of the forfeiture proceeding and for relief of the surety after final judgment, does not contain more than one subject matter in violation of this paragraph. *Fields v. Arnall*, 199 Ga. 491, 34 S.E.2d 692 (1945).

Act making it felony to defraud laborers and materialmen constitutional. — The Act of 1941, Ga. L. 1941, p. 480 (now repealed), which declares that it shall be a felony for any person, with the intent to defraud, to use the proceeds of any payment made to the person for the purpose of improving real property, otherwise than for the payment of labor and material cost, if there be any obligations outstanding, and providing that the failure to pay such labor and material cost would be prima-facie evidence of intent to defraud, is not violative of this paragraph, or in violation of Ga. Const. 1976, Art. I, Sec. I, Para. XX (see Ga. Const. 1983, Art.

I, Sec. I, Para. XXIII), which prohibits an imprisonment for debt; or in violation of the equal protection and due process clauses of U.S. Const., amend. 14. *Collins v. State*, 206 Ga. 95, 55 S.E.2d 599 (1949).

Void check law constitutional. — Act (Ga. L. 1919, p. 135, Art. 20, § 34) prohibiting utterance of void checks constitutional. *Corenblum v. State*, 153 Ga. 596, 113 S.E. 159 (1922).

Prohibition law constitutional (Ga. L. 1907, p. 81; former Code 1910, §§ 426 through 433). *Whitley v. State*, 134 Ga. 758, 68 S.E. 716 (1910).

Local Act providing penalty for illegal voting constitutional (Ga. L. 1914, p. 1172). *Holland v. State*, 155 Ga. 795, 118 S.E. 203 (1923).

Local Act regulating sale of liquor constitutional (Ga. L. 1906, p. 430). *Glover v. State*, 126 Ga. 594, 55 S.E. 592 (1906).

3. Amendments

Title of original Act will aid in determining scope of amendatory Act. *Dallis v. Griffin*, 117 Ga. 408, 43 S.E. 758 (1903); *Holland v. State*, 155 Ga. 795, 118 S.E. 203 (1923); *Southwestern R.R. v. Wright*, 156 Ga. 1, 118 S.E. 552 (1923).

In determining whether an amending statute contains matter different from that expressed in its title, the title of the original statute may be considered when it is set forth in the title of the amending statute. *Campbell v. J.D. Jewell, Inc.*, 221 Ga. 543, 145 S.E.2d 569 (1965).

Insertion of matter not mentioned in title violates paragraph. — When the caption of an amendatory Act specifically limits the matters to be included in the amendment, and there is inserted in the body of the Act a completely unrelated provision of which the title gives no intimation, this paragraph is violated. *Nelson v. Southern Guar. Ins. Co.*, 221 Ga. 804, 147 S.E.2d 424 (1966).

Radical change in Act not unconstitutional. — Though amendatory Act may radically change provisions of Act which it amends, this does not render it obnoxious to this paragraph. *Sayer v. Brown*, 119 Ga. 539, 46 S.E. 649 (1904).

Retention of all features in original Act by revising Act constitutional. —

Specific Laws (Cont'd)**3. Amendments (Cont'd)**

If, in revising an old law, the revising Act embraces two features, both of which were embraced in the law revised, the retention of both features in the revising Act does not make the body of the Act contain or refer to matters not expressed in its title. *White v. Donaldson*, 170 Ga. 432, 153 S.E. 19 (1930).

Provision in caption designating amended Act permits inclusion of consistent material. — A provision in the caption of an Act of the legislature, simply describing the Act as one to amend a designated Act, is sufficient to permit any provision in the Act not inconsistent with the original Act to be amended. *Adams v. City of Cornelia*, 206 Ga. 687, 58 S.E.2d 398 (1950).

Amendment to Workers' Compensation Act constitutional (Ga. L. 1922, p. 185, amending Ga. L. 1920, p. 167; see O.C.G.A. Ch. 9, T. 34). *Athens Ry. & Elec. Co. v. Kinney*, 160 Ga. 1, 127 S.E. 290 (1925).

Amendment to § 34-9-13(e) of Workers' Compensation Act unconstitutional. — 1989 amendment to O.C.G.A. § 34-9-13(e) is unconstitutional since the alteration greatly limited availability of workers' compensation benefits to surviving spouses and was enacted in legislation that had the object and title reflecting a purpose of correcting only grammatical errors and to modernize language in various statutes—all non-substantive alterations; 1989 amendment to § 34-9-13(e), which greatly limited the availability of benefits to surviving spouses, was a substantive alteration made in violation of Ga. Const. 1983, Art. III, Sec. V, Para. III. *Sherman Concrete Pipe Co. v. Chinn*, 283 Ga. 468, 660 S.E.2d 368 (2008).

The 1990 Act amending O.C.G.A. § 16-6.5.1(b) to include a person "who is enrolled in a school" to the class of victims did not violate Ga. Const. 1983, Art. III, Sec. V, Para. III. *Randolph v. State*, 269 Ga. 147, 496 S.E.2d 258 (1998).

4. Local Laws

Title authorizes inclusion of all matter germane to general subject. —

Where title of an Act was: "An Act to amend the several Acts relating to and incorporating the Mayor and Aldermen of The City of Savannah, to extend the corporate limits of the City of Savannah and for other purposes," any legislation could constitutionally be embodied in the Act which was germane to the general subject of amending the charter of the city. *Parker v. Mayor of Savannah*, 216 Ga. 210, 115 S.E.2d 555 (1960).

General Assembly cannot amend charters of two municipalities in one Act. — An Act which attempted to annex land alleged to be within the corporate limits of another municipality, explicitly named in the Act, violated this paragraph. The General Assembly is incompetent to amend, repeal, or modify the charters of two separate and distinct municipal corporations in one Act, and to attempt to do so causes the Act to impermissibly refer to more than one subject matter. *Schneider v. City of Folkston*, 207 Ga. 434, 62 S.E.2d 177 (1950).

An Act whose title referred only to one city, but which also attempted to amend, partially repeal, and nullify the charter of another municipality caused the Act to contain matter different from what was expressed in the title in violation of this paragraph. *Schneider v. City of Folkston*, 207 Ga. 434, 62 S.E.2d 177 (1950).

An Act which attempted to annex additional territory within the corporate limits of another municipality violated this paragraph even though it made no explicit mention of the latter, but merely described the territory; the Act improperly purported to amend the charters of two municipalities by subtraction and addition of property. *City of Chamblee v. Village of N. Atlanta*, 217 Ga. 517, 123 S.E.2d 663 (1962).

It is not necessary that title of local Act be specific, but where title of such is definite, it is therefore necessarily limited, and to permit other and totally different matter to be incorporated would be to let in the very mischief intended to be prevented by this provision. *Bray v. City of E. Point*, 203 Ga. 315, 46 S.E.2d 257 (1948).

Act amending Act creating new city charter violates this paragraph, inso-

far as it purports to create a joint board of tax appeals. *Toole v. Anderson*, 177 Ga. 814, 171 S.E. 714 (1933).

Act regulating fees of officers of city court invalid as conflicting with this paragraph. *Christie v. Miller*, 128 Ga. 412, 57 S.E. 697 (1907).

Act authorizing city to acquire fee-simple title by condemnation void, as it could be construed to include two distinct powers of condemnation. *O'Dowd's Sons & Co. v. City Council*, 141 Ga. 748, 82 S.E. 148 (1914).

Act allowing mayor to succeed to position in office unconstitutional in part as violating this paragraph. *Griffith v. Merrit*, 223 Ga. 562, 157 S.E.2d 23 (1967), commented on in 19 *Mercer L. Rev.* 436 (1968).

Creation of municipality constitutional. *Welborne v. State*, 114 Ga. 793, 40 S.E. 857 (1902); *Mayor of Americus v. Perry*, 114 Ga. 871, 40 S.E. 1004 (1920); *Tison v. City of Doerun*, 155 Ga. 367, 116 S.E. 615 (1923); *Storey v. Town of Summerville*, 158 Ga. 182, 123 S.E. 139 (1924).

Act creating new city charter constitutional. *Baugh v. City of LaGrange*, 161 Ga. 80, 130 S.E. 69 (1925).

Act granting commission form of government constitutional. *City of Cartersville v. McGinnis*, 142 Ga. 71, 82 S.E. 487 (1914); *Davis v. Warde*, 155 Ga. 748, 118 S.E. 378, appeal dismissed, 263 U.S. 725, 44 S. Ct. 3, 68 L. Ed. 527 (1923); *Cady v. Jardine*, 185 Ga. 9, 193 S.E. 869 (1937).

Act creating city court constitutional. *Welborne v. State*, 114 Ga. 793, 40 S.E. 857 (1902); *Fountain v. Ragan-Malone Co.*, 141 Ga. 58, 80 S.E. 306 (1913).

Act changing terms of court constitutional. *Burge v. Mangum*, 134 Ga. 307, 67 S.E. 857 (1910).

Acts to raise money for school purposes valid. *Smith v. Bohler*, 72 Ga. 546 (1884); *Georgia R.R. & Banking Co. v. Hutchinson*, 125 Ga. 762, 54 S.E. 725 (1906); *Board of Educ. v. Board of Educ.*, 147 Ga. 776, 95 S.E. 684 (1918).

Act creating municipal court and permitting oral charges to jury is not unconstitutional because in conflict

with this paragraph. *Robinson v. Odom*, 168 Ga. 81, 147 S.E. 569 (1929).

Act changing county lines constitutional. *Manson v. City of College Park*, 131 Ga. 429, 62 S.E. 278 (1908).

Annexation Acts generally. — Annexation Acts do not refer to more than one subject matter because they both annex property into city school district and remove property from county school district. *Upton County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981).

Shifting of school district boundaries is merely one of several consequences of annexation, not a "subject matter" contained in annexation Acts. For example, one effect of annexation is to render the annexed territory subject to taxation by city. An Act which provides for annexation but does not provide for taxation of annexed territory does not contain matter different from what is expressed in the title within the meaning of this paragraph. *Upton County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981).

Act annexing contiguous territory to city constitutional. *Mayor of Macon v. Hughes*, 110 Ga. 795, 36 S.E. 247 (1900); *Richardson v. Mayor of Macon*, 132 Ga. 122, 63 S.E. 790 (1909); *White v. City of Atlanta*, 134 Ga. 532, 68 S.E. 103 (1910); *Davidson v. Town of Kirkwood*, 152 Ga. 357, 110 S.E. 154 (1921).

Act for creation of metropolitan rapid transit system constitutional. — Legislation which has many provisions that are made for the creation and development of a rapid transit system for a metropolitan, multicounty area does not violate this section. *Camp v. Metropolitan Atlanta Rapid Transit Auth.*, 229 Ga. 35, 189 S.E.2d 56 (1972).

Local Act which changes method of compensating two county officials does not violate this paragraph. — This paragraph does not require a general revision of the method of compensating all the public officials of the county in order to deal in one Act with the method of compensating more than one of such public officials. *Gainer v. Ellis*, 226 Ga. 79, 172 S.E.2d 608 (1970).

Act amending incorporation law of school is not unconstitutional under

Specific Laws (Cont'd)**4. Local Laws (Cont'd)**

this paragraph. *English v. Smith*, 162 Ga. 195, 133 S.E. 847 (1926).

Caption broad enough to allow appropriation in Act. — Caption of Act creating county board of education was sufficiently broad to allow inclusion in Act of appropriation of funds to carry out purpose of Act. *Board of Educ. & Orphanage v. State Bd. of Educ.*, 186 Ga. 200, 197 S.E. 261 (1938).

5. Municipal Ordinances

This paragraph has no application to ordinances passed by municipal authorities. *Padrosa v. Amos*, 175 Ga. 413, 165 S.E. 248 (1932); *Watkins v. Simmons*, 179 Ga. 162, 175 S.E. 493 (1934).

Ordinance covering unrelated subject matters is not for that reason rendered invalid. *Atlantic Co. v. Jones*, 86 Ga. App. 515, 71 S.E.2d 824 (1952).

Charter regulating occupation tax.

— Because a second city provided by local ordinance for the levy, assessment, and collection of an occupation tax on businesses and practitioners operating within that city's limits, the second city had the general authority to collect such a tax under O.C.G.A. § 48-13-6(b), and only the second city was authorized to levy, assess, and collect an occupation tax from businesses and practitioners at the airport that were located within the second city's limits to the extent consistent with Ga. Const. 1983, Art. IX, Sec. IV, Para. I, O.C.G.A. § 48-13-6(b), other applicable statutes, and that city's own charter, ordinances, and regulations; *Atlanta, Ga., Charter*, § 7-105(f) is ineffective to the extent it purports to divest College Park, Georgia of the authority to levy, assess, and collect an occupation tax on those businesses and practitioners operating at the airport and within the city limits of College Park. *City of Atlanta v. City of College Park*, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

OPINIONS OF THE ATTORNEY GENERAL

If there is serious conflict between the matters covered in title and in law itself, law is unconstitutional; the general purpose of this paragraph is to give notice of the subject of the Act. 1972 Op. Att'y Gen. No. 72-82 (see Ga. Const. 1983, Art. III, Sec. V, Para. III).

This paragraph does not require that body of an Act express everything mentioned in caption, but only vice versa. 1954-56 Op. Att'y Gen. p. 382 (see Ga. Const. 1983, Art. III, Sec. V, Para. III).

This paragraph excludes amendments to a General Appropriations Act for a prior fiscal year. 1974 Op. Att'y Gen. No. 74-53 (see Ga. Const. 1983, Art. III, Sec. V, Para. III).

Act relating to ethics code for Board of Human Resources may be unconstitutional. — Courts could rule

the Act, (see now O.C.G.A. §§ 45-10-3, 45-10-4 and 45-10-5), which imposes a general code of ethics on members of the Board of Human Resources and takes away the rule making authority of all boards, commissions, and authorities of state government, constitutionally defective under this paragraph. 1976 Op. Att'y Gen. No. 76-43.1 (see Ga. Const. 1983, Art. III, Sec. V, Para. III).

Acts placing city courts under Employees' Retirement System of Georgia do not affect jurisdiction. — Titles to Acts placing city courts under Employees' Retirement System of Georgia (Ga. L. 1953, Nov.-Dec. Sess., p. 305, § 47-2-293 and Ga. L. 1962, p. 54, § 47-2-290) do not mention any relation to jurisdiction of such courts, and so those sections cannot be construed as affecting jurisdiction. 1970 Op. Att'y Gen. No. U70-93.

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 53 et seq.

ALR. — Sufficiency of title of act licensing or otherwise regulating dealers in se-

curities or other interests or obligations of third persons, 153 ALR 874.

Paragraph IV. Statutes and sections of Code, how amended.

No law or section of the Code shall be amended or repealed by mere reference to its title or to the number of the section of the Code; but the amending or repealing Act shall distinctly describe the law or Code section to be amended or repealed as well as the alteration to be made.

1976 Constitution. — Art. III, Sec. VII, Para. XII.

Law reviews. — For article, “Bill Drafting — Some Guidelines and Pitfalls,” see 2 Ga. St. B.J. 181 (1965). For article discussing problems of construction when repeal statutes are subsequently repealed, see 10 Ga. St. B.J. 41 (1973).

For comment on *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969) as to the constitutionality of the State Bar Act (Art. 2, Ch. 19, T. 15), see 21 Mercer L. Rev. 355 (1969).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- SUFFICIENCY OF DESCRIPTION
- IMPLIED REPEALS
- SPECIFIC LAWS

General Consideration

Objectives of paragraph. — An object of this paragraph is to put legislators and the public who might be affected on guard as to all matters connected with subject matter. *Ragans v. Ragans*, 200 Ga. 890, 39 S.E.2d 162 (1946); *Bienert v. State*, 82 Ga. App. 179, 60 S.E.2d 575 (1950) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

This paragraph has no reference to Act complete in itself, which does not purport to amend any particular law. *Bagwell v. City of Lawrenceville*, 94 Ga. 654, 21 S.E. 903 (1894) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph does not apply to constitutional amendments. *Cooney v. Foote*, 142 Ga. 647, 83 S.E. 537 (1914) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph does not apply to Acts passed pursuant thereto. *McCall v. Wilkins*, 145 Ga. 342, 89 S.E. 219 (1916) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph does not apply to general tax Acts. — This paragraph does not

apply to general tax Acts designed to raise revenue for the purposes of the state government from time to time, and according to changing necessities and exigencies the state may require less revenue or more than theretofore. *Fidelity Fruit & Produce Co. v. City of Atlanta*, 183 Ga. 698, 189 S.E. 527 (1937) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Act which does not purport to amend or repeal any particular law or section is not within purview of this paragraph. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931); *Aven v. Steiner Cancer Hosp.*, 189 Ga. 126, 5 S.E.2d 356 (1939) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Adoption of Code containing Act originally passed in violation of this paragraph cures the defect. *McFarland v. Donaldson*, 115 Ga. 567, 41 S.E. 1000 (1902); *Aultman v. Hodge*, 147 Ga. 626, 95 S.E. 297 (1918) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Parts of third Act incorporated. — Where the body of the Act amends the original act by adding a new section which

General Consideration (Cont'd)

makes certain sections of a third Act part of the Act as amended, this is a sufficient description under this section of the alteration to be made in the Act sought to be amended, and this is so although such third Act and the amending Act became laws on the same day. *Holland v. State*, 155 Ga. 795, 118 S.E. 203 (1923) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Effect of abrogation of law. — Where an amending Act recites that the old Act as amended shall read in a certain way, such recital as to what the law shall be after the passage of the amended Act abrogates everything in the old law which is not contained therein. *Gilbert v. Georgia R.R. & Banking Co.*, 104 Ga. 412, 30 S.E. 673 (1898).

For effect of repealing a repealing Act, see *McCants v. Layfield*, 149 Ga. 231, 99 S.E. 877 (1919).

General law may be repealed or modified by another general law, but it cannot be repealed or modified by special or local law. *Cheatham v. Palmer*, 176 Ga. 227, 167 S.E. 522 (1933).

No requirement of citing effect of legislation on judicial decisions. — There is no constitutional nor statutory requirement that the legislature cite decisions of the court which may be changed, modified, or abrogated by legislative enactments. *Davis v. State*, 204 Ga. 467, 50 S.E.2d 604 (1948).

Cited in *Wood v. City of Rome*, 172 Ga. 696, 158 S.E. 585 (1931); *Buie v. Buie*, 175 Ga. 27, 165 S.E. 15 (1932); *Terrell v. Forest Park Consol. Sch. Dist.*, 175 Ga. 88, 165 S.E. 122 (1932); *National Fin. Co. v. Citizens Loan & Sav. Co.*, 184 Ga. 619, 192 S.E. 717 (1937); *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938); *Pierce v. Powell*, 188 Ga. 481, 4 S.E.2d 192 (1939); *State Bd. of Educ. v. County Bd. of Educ.*, 190 Ga. 588, 10 S.E.2d 369 (1940); *Morris v. City Council*, 201 Ga. 666, 40 S.E.2d 710 (1946); *Price v. State*, 202 Ga. 205, 42 S.E.2d 728 (1947); *Glustrom v. State*, 206 Ga. 734, 58 S.E.2d 534 (1950); *Complete Auto Transit, Inc. v. Floyd*, 214 Ga. 232, 104 S.E.2d 208 (1958); *Cavendar v. Evans*, 218 Ga. 739, 130 S.E.2d 717 (1963); *Burson v. Bishop*, 117 Ga. App. 602, 161

S.E.2d 518 (1968); *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970); *Mayson v. Davis*, 227 Ga. 399, 181 S.E.2d 64 (1971); *Perdue v. City Council*, 137 Ga. App. 702, 225 S.E.2d 62 (1976); *Osborne v. Ridge View Assocs.*, 238 Ga. 377, 233 S.E.2d 342 (1977); *Pendigrass v. Edmonds*, 247 Ga. 508, 277 S.E.2d 247 (1981); *DOT v. Cochran*, 160 Ga. App. 583, 287 S.E.2d 599 (1981); *Teachers Retirement Sys. v. City of Atlanta*, 249 Ga. 196, 288 S.E.2d 200 (1982).

Sufficiency of Description

This paragraph refers to what is contained in body of the Act, and not to contents of title. *Holland v. State*, 155 Ga. 795, 118 S.E. 203 (1923); *Southwestern R.R. v. Wright*, 156 Ga. 1, 118 S.E. 552 (1923) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Basic requirement of paragraph. — All that this paragraph requires is that the Act amended or repealed should be identified in some other way than by mere reference to its title. *Welborne v. State*, 114 Ga. 793, 40 S.E. 857 (1902); *Fountain v. Ragan-Malone Co.*, 141 Ga. 58, 80 S.E. 306 (1913) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Mere reference to the Code section to be affected is insufficient, and a reasonably clear and concise description of the subject matter of the affected statute is necessary. *Mead Corp. v. Collins*, 258 Ga. 239, 367 S.E.2d 790 (1988).

This paragraph is not complied with if only reference to law to be amended or repealed is its title or number of section. *Ragans v. Ragans*, 200 Ga. 890, 39 S.E.2d 162 (1946) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Title and date of approval of Act recited. — Under this paragraph, an Act of the legislature can be amended or repealed by a recital of its title and the date of its approval. *Adam v. Wright*, 84 Ga. 720, 11 S.E. 893 (1890); *Fullington v. Williams*, 98 Ga. 807, 27 S.E. 183 (1896); *Town of Maysville v. Smith*, 132 Ga. 316, 64 S.E. 131 (1909); *Holland v. State*, 155 Ga. 795, 118 S.E. 203 (1923) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

This paragraph requires only description, not transcription, and

though the description must be distinct it need not be lengthy or extended. *Newman v. State*, 101 Ga. 534, 28 S.E. 1005 (1897); *Cunningham v. State*, 1 Ga. App. 697, 58 S.E. 23 (1907); *Cunningham v. State*, 128 Ga. 55, 57 S.E. 90 (1907); *Ragans v. Ragans*, 200 Ga. 890, 39 S.E.2d 162 (1946) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph satisfied when all on notice that certain Act is to be amended. *Stembridge v. Newton*, 213 Ga. 304, 99 S.E.2d 133 (1957) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated where casual reading shows amended section. — Where a most casual reading of the amendment will suffice to show precisely, and without the slightest danger of mistake, what section was to be amended, this paragraph is not violated. *Ryle v. Wilkinson County*, 104 Ga. 473, 30 S.E. 934 (1898) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Omission of date of approval immaterial where original Act is sufficiently described in the body of the amendment. *Town of Maysville v. Smith*, 132 Ga. 316, 64 S.E. 131 (1909); *Tison v. City of Doerun*, 155 Ga. 367, 116 S.E. 615 (1923).

Place of description. — It is immaterial that the description did not precede, but followed, that portion of the amending Act which declared what the amendment should be. *Fite v. Black*, 85 Ga. 413, 11 S.E. 782 (1890); *Georgia R.R. & Banking Co. v. George*, 92 Ga. 760, 19 S.E. 813 (1894); *Silvey & Co. v. Phoenix Ins. Co.*, 94 Ga. 609, 21 S.E. 607 (1894); *Fullington v. Williams*, 98 Ga. 807, 27 S.E. 183 (1896); *Gilbert v. Georgia R.R. & Banking Co.*, 104 Ga. 412, 30 S.E. 673 (1898); *Ryle v. Wilkinson County*, 104 Ga. 473, 30 S.E. 934 (1898).

Entire amendment is construed together. *Georgia R.R. & Banking Co. v. George*, 92 Ga. 760, 19 S.E. 813 (1894); *Gilbert v. Georgia R.R. & Banking Co.*, 104 Ga. 412, 30 S.E. 673 (1898).

Title as well as entire Act may be considered in determining whether Act violates this paragraph. *Ragans v. Ragans*, 200 Ga. 890, 39 S.E.2d 162 (1946) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Town charter amended by setting forth name and date thereof. *Town of Poulan v. Atlantic Coast Line R.R.*, 123 Ga. 605, 51 S.E. 657 (1905); *City of Cartersville v. McGinnis*, 142 Ga. 71, 82 S.E. 487 (1914).

Implied Repeals

This paragraph has no reference to implied amendments or repeals. *Peed v. McCrary*, 94 Ga. 487, 21 S.E. 232 (1894); *Silver v. State*, 147 Ga. 162, 93 S.E. 145 (1917); *Berry v. State*, 153 Ga. 169, 111 S.E. 669 (1922); *Walthour v. City of Atlanta*, 157 Ga. 24, 120 S.E. 613 (1923); *Durham v. State*, 166 Ga. 561, 144 S.E. 109 (1928); *Head v. Wilkinson*, 186 Ga. 739, 198 S.E. 782 (1938); *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939); *Barber v. Housing Auth.*, 189 Ga. 155, 5 S.E.2d 425 (1939); *Fortson v. Fortson*, 200 Ga. 116, 35 S.E.2d 896 (1945); *Leonard v. State ex rel. Lanier*, 204 Ga. 465, 50 S.E.2d 212 (1948) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

There is amendment or repeal by implication where later law is irreconcilable with older law. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Repeals by implication are not favored. *Glover v. State*, 126 Ga. 594, 55 S.E. 592 (1906); *Edalgo v. Southern Ry.*, 129 Ga. 258, 58 S.E. 846 (1907); *Thomas v. Board of Comm'rs*, 196 Ga. 10, 25 S.E.2d 647 (1943).

Repeal by implication is possible, but not favored, and before an Act will be held to have been repealed by implication the conflict between it and the repealing Act must be clear. One statute will not be construed to repeal another by implication unless the two are in irreconcilable conflict. *Kaminsky v. State*, 76 Ga. App. 505, 46 S.E.2d 640 (1948).

The intention to repeal will not be presumed, nor the effect of repeal admitted, unless the inconsistency is unavoidable. *Goebel v. Hodges*, 83 Ga. App. 574, 64 S.E.2d 207 (1951).

Valid subsisting statute is not repealed by implication by later Act unless they are wholly inconsistent, or unless the later Act covers the entire field of the former legislation. *Fairfax*

Implied Repeals (Cont'd)

Bldg. Co. v. Oldknow, 46 Ga. App. 281, 167 S.E. 538 (1933).

Specific Laws

Omission of section of tax Act in succeeding Act is repeal. — Where a section of the General Tax Act of 1927 exempting vendors of perishable farm products from payment of license fees or taxes (Ga. L. 1927, p. 56, former Code 1933, § 92-1602) was entirely omitted from the succeeding Tax Act of 1935 (Ga. L. 1935, p. 11), which Act covered the entire subject matter dealt with by the general Tax Act of 1927, the omission must be held to have been intentional and to have effected the repeal of the omitted provision in the previous Act. *Fidelity Fruit & Produce Co. v. City of Atlanta*, 183 Ga. 698, 189 S.E. 527 (1937).

O.C.G.A. § 40-5-58(d) not amendment to § 17-7-95. — O.C.G.A. § 40-5-58(d), dealing with the effect of a nolo contendere plea upon the punishment of an habitual traffic law violator, does not constitute an amendment to or repeal of O.C.G.A. § 17-7-95, dealing with the effect of a nolo contendere plea generally, within the meaning of this paragraph. *Smith v. State*, 248 Ga. 828, 286 S.E.2d 709 (1982) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by local Act fixing election and terms of certain officers. *Collins v. Russell*, 107 Ga. 423, 33 S.E. 444 (1899) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by amendment to town charter. *Shippen Bros. Lumber Co. v. Elliott*, 134 Ga. 699, 68 S.E. 509 (1910) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by Act changing terms of superior court. *Burge v. Mangum*, 134 Ga. 307, 67 S.E. 857 (1910) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by Act amending Workers' Compensation Law. — Act adding a new paragraph (Ga. L. 1943, p. 401; see O.C.G.A. § 34-9-6) to the Code, which, among other things, provided that accidents to employees of de-

partments which had been operating under the Workers' Compensation Law and had occurred prior to the passage of this Act would be treated as compensable accidents just as though the employee had been covered under workers' compensation, is not in violation of this paragraph. *State Hwy. Dep't v. Bass*, 197 Ga. 356, 29 S.E.2d 161 (1944) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by Act ceding jurisdiction to federal government. — The 1927 Act of cession of jurisdiction (Ga. L. 1927, p. 352; see O.C.G.A. §§ 50-2-22 through 50-2-24) is not an Act of repeal or amendment of prior Acts. It is a new and general statute by which the state makes a complete and general cession of jurisdiction to the federal government over all lands held by the United States for "purposes of government." Those sections are in nowise contrary to this paragraph. *Bowen v. United States*, 134 F.2d 845 (5th Cir.), cert. denied, 319 U.S. 764, 63 S. Ct. 1320, 87 L. Ed. 1714 (1943) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by Act providing for bond validation. — Former Code 1933, § 87-314 (Ga. L. 1939, p. 177), providing for the validation of bonds, does not violate this paragraph. *Town of McIntyre v. Scott*, 191 Ga. 473, 12 S.E.2d 883 (1940) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by Act providing for recovery for homicide of parent. — The Act of 1924 as to recovery for homicide of parent (Ga. L. 1924, p. 60; see O.C.G.A. § 51-4-2) is not unconstitutional as being in violation of this paragraph. *Peeler v. Central of Ga. Ry.*, 163 Ga. 784, 137 S.E. 24 (1927) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by Act providing for electrocutions. — The Act of February 16, 1938 (Ga. L. Ex. Sess. 1937-1938, p. 330; see O.C.G.A. § 17-10-38), providing that electrocutions be carried out by the Board of Penal Administration (now Department of Offender Rehabilitation) is not unconstitutional as violative of this paragraph. *Williams v. State*, 187 Ga. 415, 1 S.E.2d 27 (1939) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by Act taxing business of selling malt beverages. — So far as Ga. L. 1937-38, Ex. Sess., p. 175 (former Code 1933, § 58-739), purports to impose a tax upon the business of selling malt beverages, it does not profess to change or repeal any particular law or statute upon the subject, and it therefore is not within the prohibition of this paragraph. *Crisp v. Head*, 187 Ga. 20, 199 S.E. 219 (1938) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by State Bar Act. — (Ga. L. 1963, p. 70; see O.C.G.A. Art. 2, Ch. 19, T. 15). *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969), commented on in 21 Mercer L. Rev. 355 (1969).

Paragraph not violated by amendment to statute providing for administration of ward's estates. — Statute, under which, upon the death of a ward, the guardian becomes the ward's administrator, does not violate this paragraph, since the 1958 amendment (Ga. L. 1958, p. 377) to that statute did not refer to

former Code 1933, § 113-1202 (see now O.C.G.A. § 53-6-24), relating to selection of administrators by majority of heirs, or in any manner purport to amend or repeal it, and the 1958 amendment clearly stated the law to be amended and the nature of the alterations to be accomplished. *Cavender v. Evans*, 219 Ga. 449, 133 S.E.2d 856 (1963) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by local Act amending Act creating board of county commissioners. *Stembridge v. Newton*, 213 Ga. 304, 99 S.E.2d 133 (1957) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by local Act providing for assessments of street paving costs. *City of Valdosta v. Harris*, 156 Ga. 490, 119 S.E. 625 (1923) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

Paragraph not violated by local Act amending Act incorporating school. *English v. Smith*, 162 Ga. 195, 133 S.E. 847 (1926) (see Ga. Const. 1983, Art. III, Sec. V, Para. IV).

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 259 et seq.

C.J.S. — 82 C.J.S., Statutes, § 291 et seq.

ALR. — Repeal of constitutional provision or amendment, 36 ALR 1456.

Withdrawal by constitutional amendment or legislative Act of power under which political body acted in punishing act as crime, as affecting prior offenses, 89 ALR 1514.

Effect of modification or repeal of constitutional or statutory provision adopted by reference in another provision, 168 ALR 627.

Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication, 5 ALR2d 1270.

Paragraph V. Majority of members to pass bill.

No bill shall become law unless it shall receive a majority of the votes of all the members to which each house is entitled, and such vote shall so appear on the journal of each house.

1976 Constitution. — Art. III, Sec. VII, Para. VII.

JUDICIAL DECISIONS

Enrolled Act is conclusive of the fact that this paragraph was complied with. *DeLoach v. Newton*, 134 Ga. 739, 68 S.E. 708 (1910); *Whitley v. State*, 134 Ga. 758, 68 S.E. 716 (1910); *Dorsey v. Wright*, 150 Ga. 321, 103 S.E. 591 (1920); *Williams v. MacFeeley*, 186 Ga. 145, 197 S.E. 225 (1938) (see Ga. Const. 1983, Art. III, Sec. V, Para. V).

Entries or lack thereof in journals cannot be used to show enrolled Act

invalid. — An enrolled Act of the legislature, bearing the signatures of the officers of both houses, and the approval of the Governor, and deposited with the Secretary of State, cannot be shown to be invalid by reason of entries or lack of entries in the journals of the General Assembly touching the details of its passage. *Williams v. MacFeeley*, 186 Ga. 145, 197 S.E. 225 (1938).

OPINIONS OF THE ATTORNEY GENERAL

Effect of vacancy on number of votes required by paragraph. — There having been 205 members elected to House (House now to consist of not fewer than 180 members), requisite vote under this paragraph would be majority of the 205 so elected. Fact that vacancy exists

would not reduce number of votes required. 1962 Op. Att'y Gen. p. 259. (Opinion rendered prior to 1983 Constitution, which provides that no bill shall become law unless voted for by majority of members to which each house is entitled.)

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, §§ 25, 26.

C.J.S. — 82 C.J.S., Statutes, §§ 52, 53.

Paragraph VI. When roll-call vote taken.

In either house, when ordered by the presiding officer or at the desire of one-fifth of the members present or a lesser number if so provided by the rules of either house, a roll-call vote on any question shall be taken and shall be entered on the journal. The yeas and nays in each house shall be recorded and entered on the journal upon the passage or rejection of any bill or resolution appropriating money and whenever the Constitution requires a vote of two-thirds of either or both houses for the passage of a bill or resolution.

1976 Constitution. — Art. III, Sec. VII, Paras. V, VI; Art. III, Sec. X, Para. II.

Cross references. — Votes to override executive veto or to propose changes to Constitution of Georgia, Ga. Const. 1983, Art. III, Sec. V, Para. XI. Votes on appropriations bills, Ga. Const. 1983, Art. III, Sec. V, Para. VI. Votes on compensation

for public officials, § 28-5-3. State financing and investment generally, § 50-17-20 et seq.

Law reviews. — For note discussing the local option sales tax, Code 1933, § 92-3447a.1 (see Art. 2, Ch. 8, T. 48), see 31 Mercer L. Rev. 313 (1979).

JUDICIAL DECISIONS

Enrolled Act is conclusive of fact that this paragraph was complied

with. Dorsey v. Wright, 150 Ga. 321, 103 S.E. 591 (1920).

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 23 et seq.

C.J.S. — 82 C.J.S., Statutes, §§ 45, 50.

ALR. — Construction of requirement

that proposed constitutional amendment be entered in journal of each branch of the legislature, 41 ALR 640.

Paragraph VII. Reading of general bills.

The title of every general bill and of every resolution intended to have the effect of general law or to amend this Constitution or to propose a new Constitution shall be read three times and on three separate days in each house before such bill or resolution shall be voted upon; and the third reading of such bill and resolution shall be in their entirety when ordered by the presiding officer or by a majority of the members voting on such question in either house.

1976 Constitution. — Art. III, Sec. VII, Para. III.

JUDICIAL DECISIONS

Act adopting Code valid. — The Act of 1895 adopting the Code is not unconstitutional because the various sections of the Code were not read three times on three separate days in each house of the General Assembly before the passage of the Act. *Central of Ga. Ry. v. State*, 104 Ga. 831, 31 S.E. 531 (1898).

Relation of caption to subject. — This paragraph does not require that the caption must be as detailed as the Act. It is sufficient if the provision of the Act is germane to the subject thereof stated in the caption. *Undercofler v. Hospital Auth.*, 221 Ga. 501, 145 S.E.2d 487 (1965) (see Ga. Const. 1983, Art. III, Sec. V, Para. VII).

Operation of presumption of proper enactment. — A duly enrolled Act, properly authenticated by the regular presiding officers of both houses of the General Assembly, approved by the Governor, and deposited with the Secretary of State as an existing law, will be conclusively presumed to have been enacted in accordance with constitutional require-

ments; and it is not permissible to show, by the legislative journals or other records, that it did not receive on its passage a majority vote of all the members elected to each house, or that there was any irregularity in its enactment. *Capitol Distrib. Co. v. Redwine*, 206 Ga. 477, 57 S.E.2d 578 (1950).

Introduction of legislative journal and photostatic copies of bill not permissible to impeach Act. — Where a copy of an enrolled Act levying excise taxes on malt beer and wine and purporting to contain the signatures of the Speaker of the House, Clerk of the House, President of the Senate, Secretary of the Senate, and the Governor, is set out and made a part of the amended petition, which seeks to show invalidity upon the contention that a portion of the title was composed and inserted by some method or agency in an irregular manner during the process of its passage, neither the legislative journals nor photostatic copies of the bill are permissible to impeach the Act, because of the conclusive presumption

against any irregularity in its enactment. Capitol Distrib. Co. v. Redwine, 206 Ga. 477, 57 S.E.2d 578 (1950).

Cited in York v. State, 172 Ga. 483, 158 S.E. 53 (1931); Glustrom v. State, 206 Ga. 734, 58 S.E.2d 534 (1950).

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 24.

C.J.S. — 82 C.J.S., Statutes, § 33 et seq.

Paragraph VIII. Procedure for considering local legislation.

The General Assembly may provide by law for the procedure for considering local legislation. The title of every local bill and every resolution intended to have the effect of local law shall be read at least once before such bill or resolution shall be voted upon; and no such bill or resolution shall be voted upon prior to the second day following the day of introduction.

1976 Constitution. — Art. III, Sec. VII, Para. III.

Law reviews. — For article, "Local

Legislation in Georgia: The Notice Requirement," see 7 Ga. L. Rev. 22 (1972).

JUDICIAL DECISIONS

Constitutionality of procedures. — Procedures for enactment of local legislation by the General Assembly do not violate the principle of "one person, one vote" in violation of the fourteenth amendment. DeJulio v. Georgia, 127 F. Supp. 2d 1274 (N.D. Ga. 2001).

Relation of caption to subject. — This paragraph does not require that the caption must be as detailed as the Act. It is sufficient if the provision of the Act is germane to the subject thereof stated in the caption. Undercofler v. Hospital Auth., 221 Ga. 501, 145 S.E.2d 487 (1965) (see Ga. Const. 1983, Art. III, Sec. V, Para. VIII).

Operation of presumption of proper enactment. — A duly enrolled Act, properly authenticated by the regular presiding officers of both houses of the General Assembly, approved by the Governor, and deposited with the Secretary of State as an existing law, will be conclusively presumed to have been enacted in accordance with constitutional requirements; and it is not permissible to show, by the legislative journals or other re-

cords, that it did not receive on its passage a majority vote of all the members elected to each house, or that there was any irregularity in its enactment. Capitol Distrib. Co. v. Redwine, 206 Ga. 477, 57 S.E.2d 578 (1950).

Introduction of legislative journal and photostatic copies of bill not permissible to impeach Act. — Where a copy of an enrolled Act levying excise taxes on malt beer and wine and purporting to contain the signatures of the Speaker of the House, Clerk of the House, President of the Senate, Secretary of the Senate, and the Governor is set out and made a part of the amended petition, which seeks to show invalidity upon the contention that a portion of the title was composed and inserted by some method or agency in an irregular manner during the process of its passage, neither the legislative journals nor photostatic copies of the bill are permissible to impeach the Act, because of the conclusive presumption against any irregularity in its enactment. Capitol Distrib. Co. v. Redwine, 206 Ga. 477, 57 S.E.2d 578 (1950).

Paragraph IX. Advertisement of notice to introduce local legislation.

The General Assembly shall provide by law for the advertisement of notice of intention to introduce local bills.

1976 Constitution. — Art. III, Sec. VII, Para. IX.

Cross references. — Force of law of local Acts, Ga. Const. 1983, Art. IX, Sec. II, Para. I. Local referenda on abolishing offices or changing term, § 1-3-11. Notice of introduction of local legislation, §§ 28-1-14 and 36-34-8.

Law reviews. — For article discussing trend to abolish fee system for compensation of public officials and court resistance manifested in rigid interpretation of notice requirements, see 9 Mercer L. Rev. 231 (1958). For article on the historical interpretation and validity of statutes pertaining to county commissioners, see 15 Mercer L. Rev. 258 (1963). For article, “Bill Drafting — Some Guidelines and Pitfalls,” see 2 Ga. St. B.J. 181 (1965). For article discussing consent considerations in municipal annexations by the Legislature, see 2 Ga. L. Rev. 35 (1967). For article, “Local Legislation in Georgia: The Notice Requirement,” see 7 Ga. L. Rev. 22

(1972). For article analyzing the changing relationship between state and local governments in Georgia in light of “Amendment 19,” see 9 Ga. L. Rev. 757 (1975). For article discussing standards for determining whether constitutional amendments are general or special, see 10 Ga. L. Rev. 169 (1975). For article examining history of recall in local government law, and considering future developments, see 10 Ga. L. Rev. 883 (1976).

For note on the validity of population statutes, see 2 Ga. St. B.J. 533 (1966). For note discussing the notice requirement of local legislation in light of purportedly general population bills, see 22 Mercer L. Rev. 602 (1971).

For comment on *Smith v. McMichael*, 203 Ga. 74, 45 S.E.2d 431 (1947), appearing below, see 10 Ga. B.J. 227 (1947). For comment on *Gay v. Laurens County*, 213 Ga. 518, 100 S.E.2d 271 (1957), appearing below, see 20 Ga. B.J. 535 (1958).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- CHANGES IN LOCAL GOVERNMENT
- PROOF OF NOTICE
- FORMALITIES OF NOTICE

General Consideration

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. III, Sec. VII, Para. IX and antecedent provisions, specifying the method by which intention to introduce local legislation was to be advertised, are included in the annotations for this paragraph.

Notice of intent to introduce legislation to continue the effectiveness of a 1952 constitutional amendment allowing the establishment of a joint board of tax assessors in a population category applying only to Fulton County and the City of

Atlanta was sufficient, notwithstanding that the notice did not specifically refer to either Fulton County or the City of Atlanta. *Lomax v. Lee*, 261 Ga. 575, 408 S.E.2d 788 (1991).

Purpose of paragraph. — One of the purposes of this paragraph is to prevent local and special laws which affect only a particular locality, such as a county or municipality, from becoming laws unless notice of intention to introduce such bills be given during a specified time preceding their introduction in the General Assembly by newspaper advertisement published in the locality affected, with the

General Consideration (Cont'd)

object of preventing duties and obligations from being imposed on local governments without giving those in charge of such governments an opportunity to oppose their passage. *Fleming v. Daniell*, 221 Ga. 43, 142 S.E.2d 804 (1965); *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Purpose of advertisement is to protect against surprise legislation. — The purpose of the advertisement under this paragraph as to local legislation is “to protect the people against covert or surprise legislation.” *Brown v. Clower*, 225 Ga. 165, 166 S.E.2d 363 (1969) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Cannot restrain power to create or abolish charters of municipal corporations. — This paragraph may not be extended by implication to place restraint upon power of General Assembly to create or abolish charters of municipal corporations, either by local or general law, since municipalities are creatures of the legislature, and their existence may be established, altered, amended, enlarged, or diminished, or utterly abolished by the legislature. *City of Mt. View v. Clayton County*, 242 Ga. 163, 249 S.E.2d 541 (1978), appeal dismissed, 440 U.S. 902, 99 S. Ct. 1205, 59 L. Ed. 2d 450 (1979) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Paragraph as test of whether bill is special. — A decisive proof that laws are not local or special within the meaning of the Constitution is, that by this paragraph every local or special bill has to be advertised beforehand in the locality where the matter or thing to be affected may be situated. *Mathis v. Jones*, 84 Ga. 804, 11 S.E. 1018 (1890) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Acts which affect only certain counties are local and special Acts. *Fleming v. Daniell*, 221 Ga. 43, 142 S.E.2d 804 (1965).

Standing to challenge constitutionality of Act. — Parties as citizens and taxpayers are entitled to challenge the constitutionality under this paragraph of an Act purporting to incorporate town. *Bracewell v. Warnock*, 208 Ga. 388, 67

S.E.2d 114 (1951) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Changes in Local Government

Right of incumbent to office depends upon law under which the incumbent holds office. If the law is capable of being repealed, the right of the officer is gone. *City of Mt. View v. Clayton County*, 242 Ga. 163, 249 S.E.2d 541 (1978), appeal dismissed, 440 U.S. 902, 99 S. Ct. 1205, 59 L. Ed. 2d 450 (1979).

Creation of board of county commissioners not unconstitutional infringement on power of ordinary (now judge of the probate court). — Since the General Assembly has constitutional authority to create a board of county commissioners, and since the ordinary (now judge of the probate court) is given jurisdiction over county matters only when such a board has not been created, a contention that an Act creating such a board unconstitutionally infringes upon and restricts the power and authority of an ordinary (now judge of the probate court) is without merit. *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969).

Authority of General Assembly to prescribe powers of ordinary (now judge of the probate court) over county affairs necessarily includes authority to increase or diminish such powers. *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969).

Changing commission form of government not violation of paragraph. — Act replacing one county commissioner with three member board of commissioners, and keeping the incumbent commissioner as member of board, did not abolish the office of the commissioner in violation of this paragraph. *Webb v. Echols*, 211 Ga. 724, 88 S.E.2d 625 (1955) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

To abolish office means to abrogate, annihilate, destroy, extinguish, or put an end to it. *Webb v. Echols*, 211 Ga. 724, 88 S.E.2d 625 (1955).

General Assembly may not provide for initial appointment of new county commissioners. — This paragraph requires new members of the board of commissioners of a county to be elected, and it

is not constitutionally permissible for the General Assembly to provide for the initial appointment of additional commissioners pending a subsequent election. *Lance v. Stepp*, 232 Ga. 675, 208 S.E.2d 559 (1974) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Recall of county officeholder provided for under special Act does not abolish or modify term of office but merely creates a vacancy in the office and such a recall procedure does not abolish, shorten, or lengthen the term of office. *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975).

Paragraph not violated when office and court of justice of the peace abolished at end of term of such officer, at which time the magistrate's court will operate in lieu of the justice court. *Burpee v. Logan*, 216 Ga. 434, 117 S.E.2d 339 (1960) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Former third sentence of this paragraph not violated by Act which classed judge as "junior," because the Act does not change the office held, the duties thereof, or the term. *Mulling v. Houlihan*, 205 Ga. 735, 55 S.E.2d 150 (1949), cert. denied, 338 U.S. 948, 70 S. Ct. 486, 94 L. Ed. 585 (1950) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Proof of Notice

Enrolled copy of local bill must show copy of required notice and certificate or affidavit in order to become law. *Smith v. Clayton*, 80 Ga. App. 21, 55 S.E.2d 171 (1949).

Advertisement required. — Under this paragraph, the absence of the required proof of advertisement prevents an Act from becoming a law. It follows that a referendum approving the Act is unlawful, and the result of the unlawful referendum is likewise unlawful. *Smith v. City Council*, 203 Ga. 511, 47 S.E.2d 582 (1948) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Notice as proven becomes integral part of bill itself and as such must be embodied within the enrollment of such bill. *Smith v. McMichael*, 203 Ga. 74, 45 S.E.2d 431 (1947), commented on in 10 Ga. B.J. 227 (1947).

Inclusion of proof of notice imputes absolute verity as to contents. —

When the enrollment of any local or special bill has incorporated therein the required proof of notice, and after it has been properly signed and filed with the Secretary of State, it will not only impute absolute verity as to its contents, but it will also conclusively show upon its face its validity with respect to this paragraph; whereas, if such enrollment fails to show the required proof of notice, it is upon its face invalid. *Smith v. McMichael*, 203 Ga. 74, 45 S.E.2d 431 (1947); *Bracewell v. Warnock*, 208 Ga. 388, 67 S.E.2d 114 (1951); *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969), commented on in 10 Ga. B.J. 227 (1947). (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

No presumption or evidence allowed to speak in lieu of contents of enrolled Act. — It is the manifest intention of the first two paragraphs of this section that the bill finally enrolled as the statute shall speak for itself, and that no presumption and no sort of evidence shall be allowed to speak in lieu of what the enrolled Act says for itself; this clear manifestation of intent can not be defeated by mere punctuations that might appear therein. *Smith v. McMichael*, 203 Ga. 74, 45 S.E.2d 431 (1947); *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969), commented on in 10 Ga. B.J. 227 (1947). (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

For decisions holding that presumption of proper notice is operative, see *Speer v. Mayor of Athens*, 85 Ga. 49, 11 S.E. 802 (1890); *Peed v. McCrary*, 94 Ga. 487, 21 S.E. 232 (1894); *Fullington v. Williams*, 98 Ga. 807, 27 S.E. 183 (1896); *Chamlee v. Davis*, 115 Ga. 266, 41 S.E. 691 (1902); *Lee v. Tucker*, 130 Ga. 43, 60 S.E. 164 (1908).

No particular form of affidavit required. — An affidavit of publication of notice of intention to introduce a local Act into the General Assembly is essential to its validity. It certifies that the local people are notified of the proposed legislation as required by law. However, no particular form of affidavit is required. *City of Mt. View v. Clayton County*, 242 Ga. 163, 249 S.E.2d 541 (1978), appeal dismissed, 440 U.S. 902, 99 S. Ct. 1205, 59 L. Ed. 2d 450 (1979).

Proof of Notice (Cont'd)

Example of affidavit meeting requirements of paragraph. — An affidavit showing publication in the newspaper in which sheriff's advertisements for the locality affected, were published once a week for three weeks during a period of 60 days immediately preceding its introduction into the General Assembly "as provided by law," satisfies the requirements of this paragraph. *City of Mt. View v. Clayton County*, 242 Ga. 163, 249 S.E.2d 541 (1978), appeal dismissed, 440 U.S. 902, 99 S. Ct. 1205, 59 L. Ed. 2d 450 (1979) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Enrolled copy of bill providing for trial by jury of six fails to show compliance with this paragraph, so it can never become law. *Smith v. Clayton*, 80 Ga. App. 21, 55 S.E.2d 171 (1949) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Act relating to management of county school system failed to show proof of notice, and is therefore void. *Nickles v. County Bd. of Educ.*, 203 Ga. 755, 48 S.E.2d 546 (1948).

Act amending town charter violates this paragraph. *Bergman v. Dutton*, 203 Ga. 672, 48 S.E.2d 101 (1948) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Formalities of Notice

Paragraph does not require more information than in caption of bill. — Under reasonable rules of construction, this paragraph does not require more information as to the law to be enacted than would be required in the caption of the bill itself. *Walker Elec. Co. v. Walton*, 203 Ga. 246, 46 S.E.2d 184 (1948); *Swiney v. City of Forest Park*, 211 Ga. 154, 84 S.E.2d 573 (1954); *Parker v. Mayor of Savannah*, 216 Ga. 210, 115 S.E.2d 555 (1960) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Paragraph requires only general notice. — This paragraph does not require specificity in the notice, but requires only a general notice sufficient to put the public on notice that legislation affecting a particular subject will be introduced. *Cain v. Lumpkin County*, 229 Ga. 274, 190 S.E.2d 910 (1972) (see Ga. Const. 1983,

Art. III, Sec. V, Para. IX).

Sufficient notice found. — Where the corporate limits of a municipality include portions of two counties, and the notice of intention to apply for passage of a local bill is published as required by law in the newspaper in which the sheriff's advertisements for the county of the legal situs of the municipality are published, and the local act in its enrolled form contains proof of such publication in the county of the legal situs of the municipality, this is a sufficient compliance with the requirements of Art. III, Sec. VII, Para. XIV of the Constitution of 1945. *Robertson v. Temple*, 207 Ga. 311, 61 S.E.2d 285 (1950).

Omission of material provision violates paragraph. — Where the notice of intention to apply for local legislation specifically details the matters to be included in the Act, but omits a material provision of the proposed Act, the notice does not meet the requirements of this paragraph. *DeKalb County v. Atlanta Gas Light Co.*, 228 Ga. 512, 186 S.E.2d 732 (1972) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Mention of specific matters excludes foreign subjects. — Specificity of subject matter in the notice is not required by this paragraph; however, once specific matters are mentioned in the notice, matters foreign to those subjects may not constitutionally appear in the bill. *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Not necessary to specify state or legislative body of introduction of bill. — Contention that notice is insufficient under this paragraph because it does not say in what General Assembly of what state a bill is to be introduced, or that a bill is to be introduced in any legislative forum, is without merit. *Swiney v. City of Forest Park*, 211 Ga. 154, 84 S.E.2d 573 (1954) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Title of Act to amend charter sufficiently broad to include any change. — Where the title of an Act expressly declares that its purpose is to amend the charter of a city, this is clearly broad enough to refer to any change made in the charter in the body of the act. *Parker v. Mayor of Savannah*, 216 Ga. 210, 115 S.E.2d 555 (1960).

Use of words sufficient to include enlargement of city limits. — The words “to define said limits of said city”, as used in notice of legislation, are sufficiently broad to include the extension or enlargement of the corporate limits. *Swiney v. City of Forest Park*, 211 Ga. 154, 84 S.E.2d 573 (1954).

Advertisement which appears on January 1, a legal holiday, is valid. *Parker v. Mayor of Savannah*, 216 Ga. 210, 115 S.E.2d 555 (1960).

This paragraph is not complied with when one of the publications is on a Sunday for the reason that where the law requires publication of a notice as a condition precedent to the doing of some act, its publication on a Sunday is not legal and amounts to no publication at all. *Gay v. Laurens County*, 213 Ga. 518, 100 S.E.2d 271 (1957), commented on in 20

Ga. B.J. 535 (1958)(see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Personal notice of proposed annexation is not required under this paragraph, although notice by publication is required. *Ballentine v. Willingham*, 237 Ga. 60, 226 S.E.2d 593, appeal dismissed, 429 U.S. 909, 97 S. Ct. 298, 50 L. Ed. 2d 276 (1976) (see Ga. Const. 1983, Art. III, Sec. V, Para. IX).

Bill cannot be introduced during third week of publication. — This paragraph requires that the notice be published at least once a week during three separate weeks, and the first publication must not be more than 60 days before the bill is introduced, and the local bill cannot be introduced during the week embraced in the third publication. *Bracewell v. Warnock*, 208 Ga. 388, 67 S.E.2d 114 (1951).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. III, Sec. VII, Para. IX and antecedent provisions, which specified the method by which intention to introduce local legislation was to be advertised, are included in the annotations for this paragraph.

Legal requirements for publication of notice. — For discussion of the various legal requirements concerning the publication of advertisements of notices of intention to introduce local legislation, see 1952-53 Op. Att'y Gen. p. 376.

Local Act which does not contain any evidence of publication is unconstitutional and void, and the courts will look to the enrolled Act to see whether it was duly published. 1945-47 Op. Att'y Gen. p. 4.

Notice must put citizens on notice of general nature of legislation. — The notice of intention to apply for local legislation must be sufficient to put the citizens on notice as to the general nature of the proposed legislation. 1945-47 Op. Att'y Gen. p. 3.

Copy of notice must be attached to bill. — Evidence that the caption of the bill has been advertised need not be set out in the body of the bill, but a copy of the

notice which has been certified by the publisher or an affidavit of the author to the effect that the notice has been published must be attached to the bill. 1948-49 Op. Att'y Gen. p. 23.

Newspaper must cover entire judicial circuit area. — If one newspaper does not cover the entire area included in the judicial circuit, the required notice must be run in as many newspapers as necessary so as to cover the entire area included in the judicial circuit affected by the local legislation. 1967 Op. Att'y Gen. No. 67-453.

Any bill passed without notice required by this paragraph being attached is unconstitutional and void. 1948-49 Op. Att'y Gen. p. 37.

When local bill is rendered unconstitutional by failure to show publication, new notice of intent to introduce must be published. 1948-49 Op. Att'y Gen. p. 24.

This section applies only to local bills and does not apply to general legislation. 1958-59 Op. Att'y Gen. p. 178.

Proposed local constitutional amendment need not be published in accordance with this paragraph. 1970 Op. Att'y Gen. No. U70-117.

Since city court involves local or special law, provisions of this section are applicable with respect to its abolition. 1957 Op. Att'y Gen. p. 46.

Referendum must be held to abolish city court before all terms of office expire. — The proper means of abolishing a city court would be by a local Act, duly advertised, repealing the Act creating said court, and if such Act were to take effect immediately, or any time before the date on which all terms of office of the court officials expire, such Act, to be constitutional, would have to require that a referendum be held. If the Act should provide that it would not take effect until the expiration of the terms of office of the present officeholders a referendum is not necessary. 1957 Op. Att'y Gen. p. 46.

For opinion that Act creating city court is a general law, see 1945-47 Op. Att'y Gen. p. 74.

History of naming officials to hold commission office. — If referendum is held under this paragraph, one-man commission abolished, and completely new commission established, situation exists where General Assembly has in past named individuals who will fill new offices. The only objection which could be made would be that it would be against

public policy to name individuals to hold office for a long term without an election. 1957 Op. Att'y Gen. p. 36.

Time between publication and introduction. — As long as there is no more than 60 days between first publication and introduction of bill, which introduction must of course be after third publication, then it will comply with this paragraph. 1948-49 Op. Att'y Gen. p. 23.

This paragraph does not mean that a bill must be advertised 60 days before its introduction; therefore a bill may be advertised any time during a period of 60 days before it is introduced in the General Assembly. For example, a bill could be advertised on December fourteenth, twenty-first and twenty-eighth and introduced any time during the month of January or the first part of February, so long as the introduction comes within the period of 60 days. 1948-49 Op. Att'y Gen. p. 24.

Appointive office. — Since the third sentence limits its application to elected officials, the General Assembly may enact legislation which has the effect of shortening the term of appointed small claims court judge without necessity of a referendum approving the legislation. 1982 Op. Att'y Gen. No. U82-13.

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 30 et seq.

C.J.S. — 82 C.J.S., Statutes, § 18 et seq.

ALR. — Constitutional provisions

against special legislation relating to counties or municipalities as affected by the distinction between their political and nonpolitical character, 50 ALR 1163.

Paragraph X. Acts signed.

All Acts shall be signed by the President of the Senate and the Speaker of the House of Representatives.

1976 Constitution. — Art. III, Sec. VII, Para. X.

JUDICIAL DECISIONS

Cited in Cooney v. Foote, 142 Ga. 647, 83 S.E. 537 (1914); Glustrom v. State, 206 Ga. 734, 58 S.E.2d 534 (1950).

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, §§ 28, 30 et seq.
C.J.S. — 82 C.J.S., Statutes, §§ 74, 75.

Paragraph XI. Signature of Governor.

No provision in this Constitution for a two-thirds' vote of both houses of the General Assembly shall be construed to waive the necessity for the signature of the Governor as in any other case, except in the case of the two-thirds' vote required to override the veto or to submit proposed constitutional amendments or a proposal for a new Constitution.

1976 Constitution. — Art. III, Sec. VII, Para. XI; Art. V, Sec. II, Para. VII.	Constitutional amendments, Ga. Const. 1983, Art. X, Sec. I.
Cross references. — Recording two-thirds' votes, Ga. Const. 1983, Art. III, Sec. V, Para. VI. Vetoes by the Governor, Ga. Const. 1983, Art. V, Sec. II, Para. IV.	Law reviews. — For article, "History of the Veto Power in Georgia," see 8 Ga. St. B.J. 513 (1972).

RESEARCH REFERENCES

ALR. — Vote necessary to pass bill over veto, 2 ALR 1593.	give reasons for vetoing or objections to measure vetoed, 119 ALR 1189.
Effect of failure of officers of Legislature to sign bills as required by constitutional provisions, 95 ALR 278.	Failure of governor to sign bill until after the date at which it is to become effective, 146 ALR 693.
Validity of veto as affected by failure to	

Paragraph XII. Rejected bills.

No bill or resolution intended to have the effect of law which shall have been rejected by either house shall again be proposed during the same regular or special session under the same or any other title without the consent of two-thirds of the house by which the same was rejected.

1976 Constitution. — Art. III, Sec. VII, Para. X.

Paragraph XIII. Approval, veto, and override of veto of bills and resolutions.

(a) All bills and all resolutions which have been passed by the General Assembly intended to have the effect of law shall become law if the Governor approves or fails to veto the same within six days from the date any such bill or resolution is transmitted to the Governor unless the General Assembly adjourns sine die or adjourns for more than 40 days prior to the expiration of said six days. In the case of such

adjournment sine die or of such adjournment for more than 40 days, the same shall become law if approved or not vetoed by the Governor within 40 days from the date of any such adjournment.

(b) During sessions of the General Assembly or during any period of adjournment of a session of the General Assembly, no bill or resolution shall be transmitted to the Governor after passage except upon request of the Governor or upon order of two-thirds of the membership of each house. A local bill which is required by the Constitution to have a referendum election conducted before it shall become effective shall be transmitted immediately to the Governor when ordered by the presiding officer of the house wherein the bill shall have originated or upon order of two-thirds of the membership of such house.

(c) The Governor shall have the duty to transmit any vetoed bill or resolution, together with the reasons for such veto, to the presiding officer of the house wherein it originated within three days from the date of veto if the General Assembly is in session on the date of transmission. If the General Assembly adjourns sine die or adjourns for more than 40 days, the Governor shall transmit any vetoed bill or resolution, together with the reasons for such veto, to the presiding officer of the house wherein it originated within 60 days of the date of such adjournment.

(d) During sessions of the General Assembly, any vetoed bill or resolution may upon receipt be immediately considered by the house wherein it originated for the purpose of overriding the veto. If two-thirds of the members to which such house is entitled vote to override the veto of the Governor, the same shall be immediately transmitted to the other house where it shall be immediately considered. Upon the vote to override the veto by two-thirds of the members to which such other house is entitled, such bill or resolution shall become law. All bills and resolutions vetoed during the last three days of the session and not considered for the purpose of overriding the veto and all bills and resolutions vetoed after the General Assembly has adjourned sine die may be considered at the next session of the General Assembly for the purpose of overriding the veto in the manner herein provided. If either house shall fail to override the Governor's veto, neither house shall again consider such bill or resolution for the purpose of overriding such veto.

(e) The Governor may approve any appropriation and veto any other appropriation in the same bill, and any appropriation vetoed shall not become law unless such veto is overridden in the manner herein provided.

1976 Constitution. — Art. V, Sec. II,
Para. VI.

OPINIONS OF THE ATTORNEY GENERAL

Effect of governor’s veto of appropriations. — Appropriations veto power of Governor may be exercised only with respect to General Assembly’s statement of the amount of the authorized expenditure and the purpose for which it is authorized; effect of such veto is to reduce, by the amount vetoed, the larger appropriation in which the specific appropriation is included. 1973 Op. Att’y Gen. No. U73-94.

Exercise of the veto power under the Georgia Constitution against amended appropriation leaves intact the prior appropriation for that purpose. Veto of an additional appropriation in an Act amending a General Appropriations Act renders ineffectual that appropriation. 1974 Op. Att’y Gen. No. U74-36.

Application. — The effect of the governor’s veto of the Cooperative Educational Services language was to arrest the operation of Act No. 1379 to Ga. L. 1973, p. 1353, § 27 insofar as it purported to amend the prior language authorizing an expenditure of funds for that purpose, thus leaving intact the prior appropriation. 1974 Op. Att’y Gen. No. U74-36.

Governor’s veto of state fund appropriations in Section 23 (B) (1) of General Appropriations Act for Fiscal Year 1975,

Ga. Laws 1974, p. 1508, was proper and reduced the total appropriations to the Department of Labor. 1974 Op. Att’y Gen. No. U74-98.

The governor’s veto of Ga. L. 1974, pp. 1508 and 1576 eliminated the authorization for the Department of Labor to expend the specified amounts for those purposes designated as “Basic Employment Security” and necessarily reduced the total appropriation to the Department of Labor by that amount. 1974 Op. Att’y Gen. No. U74-98.

General law may not be conditioned on referendum. — Although the General Assembly has the broad authority to condition the effectiveness of a law upon a subsequent event, it may not delegate its ultimate responsibility to make decisions on fundamental legislative issues. Therefore, the General Assembly may not enact a general law which by its terms conditions its effectiveness upon approval by the voters at a statewide referendum. 1993 Op. Att’y Gen. No. 93-5.

Limitation on veto of individual appropriations. — The Governor’s power to veto individual appropriations does not include the power to reduce an appropriation. 2000 Op. Att’y Gen. No. U2000-2.

Paragraph XIV. Jointly sponsored bills and resolutions.

The General Assembly may provide by law for the joint sponsorship of bills and resolutions.

1976 Constitution. — There were no similar provisions in the 1976 Constitution.

SECTION VI.

EXERCISE OF POWERS

Paragraph

- I. General powers.
- II. Specific powers.
- III. Powers not to be abridged.
- IV. Limitations on special legislation.

Paragraph

- V. Specific limitations.
- VI. Gratuities.
- VII. Regulation of alcoholic beverages.

Paragraph I. General powers.

The General Assembly shall have the power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state.

1976 Constitution. — Art. III, Sec. VIII, Para. I.

Cross references. — Power of the judiciary to declare void those Acts which are repugnant to the Constitution, Ga. Const. 1983, Art. I, Sec. II, Para. V. Limited power to make laws during special sessions, Ga. Const. 1983, Art. V, Sec. II, Para. VII.

Law reviews. — For article discussing extent of state legislative power, see 12 Ga. B.J. 147 (1949). For article, "History

of the Veto Power in Georgia," see 8 Ga. St. B.J. 513 (1972).

For note examining commercial arbitration in Georgia, and advocating incorporation into law of essential features of the Uniform Arbitration Act, see 12 Ga. L. Rev. 323 (1978).

For comment on *Rogers v. Medical Ass'n*, 244 Ga. 151, 259 S.E.2d 85 (1979), as to unconstitutional delegation of legislative authority to a private organization, see 29 Emory L.J. 1183 (1980).

JUDICIAL DECISIONS

ANALYSIS

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SPECIFIC CASES

General Consideration

Power of making laws vested in legislature. — This paragraph and Ga. Const. 1976, Art. I, Sec. II, Para. IV (see Ga. Const. 1983, Art. I, Sec. II, Para. III) vest the power of making laws in the legislature, which cannot be divested by contract. *Harrick v. Rouse*, 17 Ga. 56 (1855); *Daly v. Harris*, 33 Ga. 38 (1864); *Orr v. James*, 159 Ga. 237, 125 S.E. 468 (1924) (see Ga. Const. 1983, Art. III, Sec. VI, Para. I).

Cannot enact measures prohibited by state or federal Constitution. — Legislature is absolutely unrestricted in its power to legislate, so long as it does not undertake to enact measures prohibited by the state or federal Constitution. *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975); *Bryan v. Georgia Pub. Serv. Comm'n*, 238 Ga. 572, 234 S.E.2d 784 (1977).

This paragraph is a limitation on power of General Assembly. *Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) (see Ga. Const. 1983, Art. III, Sec. VI, Para. I).

Discretion of legislature as to determination of public interest. — Large discretion is necessarily vested in the legislature to determine: (a) what the interests of the public require; and (b) what measures are necessary for the protection of such interests. *Mack v. Westbrook*, 148 Ga. 690, 98 S.E. 339 (1919).

Difference between state legislature and United States Congress in their power to make laws is that the former can do all things not prohibited by the Constitution, while the latter can exercise no power not delegated to it by the states in the United States Constitution. *Plumb v. Christie*, 103 Ga. 686, 30 S.E. 759 (1898).

Public welfare must be protected. *Walker v. Whitehead*, 43 Ga. 538 (1871), rev'd on other grounds, 83 U.S. 314, 21 L. Ed. 357 (1872).

Scope of the police power is to protect the public morals, the public health and safety, without a denial of equal protection of the laws. *Georgia S. & Fla. Ry. v. Adkins*, 156 Ga. 826, 120 S.E. 610 (1923).

Comprehended in this broad power

to “make all laws” is power to change or modify existing laws. — A law enacted by one General Assembly is subject to repeal or modification by the same or a subsequent General Assembly. *State Bd. of Educ. v. County Bd. of Educ.*, 190 Ga. 588, 10 S.E.2d 369 (1940).

There is a strong presumption in favor of the constitutionality of a statute. *Bryan v. Georgia Pub. Serv. Comm’n*, 238 Ga. 572, 234 S.E.2d 784 (1977).

Federal government, in exercise of its exclusive prerogative to wage war, cannot be interfered with by state legislation. *City of Atlanta v. Stokes*, 175 Ga. 201, 165 S.E. 270 (1932).

Cited in *Green v. Harper*, 177 Ga. 680, 170 S.E. 872 (1933); *Miller v. Head*, 186 Ga. 694, 198 S.E. 680 (1938); *Tripp v. Martin*, 210 Ga. 284, 79 S.E.2d 521 (1954); *Village of N. Atlanta v. Cook*, 219 Ga. 316, 133 S.E.2d 585 (1963); *Jones v. Balkcom*, 222 Ga. 201, 149 S.E.2d 97 (1966); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969); *Carroway v. Stynchcombe*, 225 Ga. 586, 170 S.E.2d 396 (1969); *Ray v. Hand*, 225 Ga. 589, 170 S.E.2d 692 (1969); *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974); *Harrell v. Courson*, 234 Ga. 350, 216 S.E.2d 105 (1975); *Atlanta Journal v. Hill*, 257 Ga. 398, 359 S.E.2d 913 (1987); *Arneson v. Board of Trustees*, 257 Ga. 579, 361 S.E.2d 805 (1987); *Crump Ins. Servs. v. All Risks, Ltd.*, 315 Ga. App. 490, 727 S.E.2d 131 (2012).

Specific Cases

Delegation of legislative power to the voters. — Legislature may submit to electorate question whether legislation framed and approved by General Assembly shall become operative. An Act is not unconstitutional and void for the reason that it delegates legislative power to the voters. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931).

Under police power right to contract is not unlimited, but is subject to regulation. *City of Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S.E. 508 (1911); *Railroad Comm’n v. Louisville & N.R.R.*, 140 Ga. 817, 80 S.E. 327 (1913); *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 142 Ga. 841, 83 S.E. 946 (1914), *aff’d*, 248

U.S. 372, 39 S. Ct. 117, 63 L. Ed. 309 (1919); *Union Dry Goods Co. v. Georgia Pub. Serv. Corp.*, 248 U.S. 372, 39 S. Ct. 117, 63 L. Ed. 309 (1919).

Power to regulate occupations. — Under the police power, laws may be passed regulating common occupations which, from their nature, afford opportunity for fraud and imposition. *Bazemore v. State*, 121 Ga. 619, 49 S.E. 701 (1905).

Act regulating business of photography unconstitutional. — The Act approved March 25, 1937, Ga. L. 1937, p. 280 (former Code 1933, Ch. 84-23) establishing a state board of photographic examiners, and providing, among other things, that except as to stated classes, persons desiring to engage in the business of photography or photofinishing must stand an examination and thereby qualify as to competency, ability, and integrity, and denouncing as a crime a violation of any of the terms of the Act, is unconstitutional and void as an exercise of the police power, in that the prescribed regulations are imposed upon a lawful business, and considered as a whole do not bear any reasonable or substantial relation to the public health, safety, or morality, or other phase of the general welfare. *Bramley v. State*, 187 Ga. 826, 2 S.E.2d 647 (1939).

State can fix the interest rate and regulate business of lending money. *King v. State*, 136 Ga. 709, 71 S.E. 1093 (1911).

Regulation of municipal corporations. — A municipal corporation is a creature of legislation, and its modes of government and the officers conducting the same may be changed by the legislature. *Churchill v. Walker*, 68 Ga. 681 (1882).

Power to set standards for municipal incorporation. — It is in the power of the legislature to decide when a given locality has a sufficient number of inhabitants to entitle it to be incorporated as a city. *Mattox v. State*, 115 Ga. 212, 41 S.E. 709 (1902).

Selection of state judge cannot be left to municipal corporation. — The creation of state courts is a sovereign state function, and they can be created only by the General Assembly; the creation of such courts involves the appointment or

Specific Cases (Cont'd)

the selection of the judges and of the necessary court officers, and this phase of the creation of the court is likewise a function of the state and cannot be delegated by the General Assembly to a lesser governmental unit of the state, and certainly not to municipal corporations. *City of Atlanta v. Landers*, 212 Ga. 111, 90 S.E.2d 583 (1955).

Court created subordinate to municipal authorities not to try state offenses. — The legislature has no power to establish a municipal court, or police court, and make it subordinate to the will of the municipal authorities, and at the same time to confer upon it jurisdiction to try offenses against the state when committed within the limits of the municipal corporation. *City of Atlanta v. Landers*, 212 Ga. 111, 90 S.E.2d 583 (1955).

Act granting municipality power over streets valid. — An Act conferring on a municipal corporation the power to grade, pave, and improve its streets and sidewalks, and to assess the real estate abutting on each side of the street is valid. *Hayden v. City of Atlanta*, 70 Ga. 817 (1883).

Regulation of municipal corporations. — Just as the General Assembly is limited by Ga. Const. 1983, Art. III, Sec. VI, Para. I in its conduct relative to municipal corporations, so is a state agency limited in its conduct relative to municipal corporations by laws passed by the General Assembly pursuant to Ga. Const. 1983, Art. III, Sec. VI, Para. I. *DOT v. City of Atlanta*, 255 Ga. 124, 337 S.E.2d 327 (1985).

For distinction between valid and invalid ordinance, see *Badkins v. Robinson*, 53 Ga. 613 (1875).

Zoning ordinance prohibiting the holding of stores in residential districts not valid. *Smith v. City of Atlanta*, 161 Ga. 769, 132 S.E. 66, cert. denied, 271 U.S. 672, 46 S. Ct. 486, 70 L. Ed. 1144 (1926).

Former “Steinberg Act” (former O.C.G.A. § 36-67-1 et seq.), providing for zoning proposal review procedures in urbanized counties, did not unconstitutionally bind the local government in any way

nor infringe on the local government’s ability to “exercise the power of zoning.” *Northridge Community Ass’n v. Fulton County*, 257 Ga. 722, 363 S.E.2d 251 (1988).

Regulation of soliciting. — Soliciting for hotels, bathhouses, physicians, or similar enterprises may be prohibited in the exercise of the police power. *Jackson v. Beavers*, 156 Ga. 71, 118 S.E. 751 (1923).

Sale of spirituous liquors may be regulated under the police power. *Plumb v. Christie*, 103 Ga. 686, 30 S.E. 759 (1898).

Delegation of power to make appointments unconstitutional. — The General Assembly may, within constitutional limitations, establish qualifications for public office and designate a governmental appointing authority; but it cannot delegate the appointive power to a private organization; thus, where the Medical Association of Georgia, a private organization, controlled the appointment of the members of the State Board of Medical Examiners under former Code 1933, §§ 84-903 and 84-1201 (see now O.C.G.A. § 43-34-22) which provided that the Governor must appoint from its nominees, the Act violated this paragraph. *Rogers v. Medical Ass’n*, 244 Ga. 151, 259 S.E.2d 85 (1979) (decided prior to 1997 amendment; see Ga. Const. 1983, Art. III, Sec. VI, Para. I).

Under this paragraph, legislature may prescribe a rule for the measure of damages. *Clay v. Cent. R.R. & Banking Co.*, 84 Ga. 345, 10 S.E. 967 (1890) (see Ga. Const. 1983, Art. III, Sec. VI, Para. I).

General Assembly possesses inherent power to regulate public utilities, independent of Ga. Const. 1976, Art. III, Sec. VIII, Para. IX (see Ga. Const. 1983, Art. III, Sec. VI, Para. V). *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

Grant of power to Board of Regents of the University System of Georgia constitutional. — Former Code 1933, § 32-121 (see now O.C.G.A. § 20-3-31), declaring that the Board of Regents of the University System of Georgia shall have power to exercise any power usually granted to such corporation, necessary to its usefulness, which is not in conflict with

the Constitution and laws of this state, is not inconsistent with this paragraph. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948) (see Ga. Const. 1983, Art. III, Sec. VI, Para. I).

Adoption. — Trial court abused the court's discretion by denying a foster parent's petition to adopt the foster child on the ground that placing the child with the foster parent violated the state's public policy because all of the evidence showed that the adoption would be in the child's

best interest, and the trial court failed to apply the law as written and determine whether it was in the child's best interest to allow the adoption; as long as the adoption laws are constitutional, neither the superior court nor the court of appeals has the authority to amend the law to establish what the court deems are better qualifications for those seeking to adopt. *In re Goudeau*, 305 Ga. App. 718, 700 S.E.2d 688 (2010).

OPINIONS OF THE ATTORNEY GENERAL

No duty or authority is conferred upon Commissioner of Agriculture by the Constitution; to the contrary, the expressed authority is reserved in the General Assembly to prescribe the duties, authority, and salaries of the executive officers. 1958-59 Op. Att'y Gen. p. 4.

Creation of autonomous agricultural services within power of General Assembly. — The General Assembly does not have the authority to abolish the office of the Commissioner of Agriculture, but it has the authority to curtail the activities of the Commissioner of Agriculture by creating autonomous agricultural services. 1958-59 Op. Att'y Gen. p. 4.

Option to terminate does not make invalid contract valid. — Fact that contract which violates Constitution contains option to terminate does not make it comply with Constitution, and is beyond authority of a state agency. 1974 Op. Att'y Gen. No. 74-115, supplemented in Position Paper, 8-8-78, 1978 Op. Att'y Gen. p. 267.

Legally and historically, conferring of "official" status has been and is within exclusive province of General Assembly. 1969 Op. Att'y Gen. No. 69-329.

Only General Assembly can create or designate an "official" state theater. 1969 Op. Att'y Gen. No. 69-329.

When funds may be expended on official state theater. — The mere des-

ignation of an official state theater by the General Assembly would not, in itself, authorize the expenditure of state funds in its operation if the theater's ownership remained private; any contribution of funds under these circumstances would constitute a donation or gratuity in violation of Ga. Const. 1976, Art. III, Sec. VIII, Para. XII(1) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI). Conversely, should a theater be acquired and operated by the state or function in connection with a state department or agency, state funds may then be used in its operation. 1969 Op. Att'y Gen. No. 69-329.

General law may not be conditioned on referendum. — Although the General Assembly has the broad authority to condition the effectiveness of a law upon a subsequent event, it may not delegate its ultimate responsibility to make decisions on fundamental legislative issues. Therefore, the General Assembly may not enact a general law which by its terms conditions its effectiveness upon approval by the voters at a statewide referendum. 1993 Op. Att'y Gen. No. 93-5.

Georgia Public Defenders Standards Council. — The General Assembly was authorized to move the Georgia Public Defenders Standards Council from the judicial branch of government to the executive branch. 2009 Op. Att'y Gen. No. 2009-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, § 237 et seq.

72 Am. Jur. 2d, States, Territories, and Dependencies, § 38 et seq.

ALR. — Power of Legislature to set aside or impair judgment, 3 ALR 450.

Power of Legislature to investigate conduct of private person, corporation, or institution, 9 ALR 1341.

Power of state to change private contract rates for public utilities, 9 ALR 1423.

Constitutionality of "civil rights" legislation by state, 49 ALR 505.

Power of legislative body or committee to compel attendance of nonmember as witness, 65 ALR 1518; 135 ALR 1096.

Governmental powers in peace-time emergency, 86 ALR 1539; 88 ALR 1519; 96 ALR 312; 96 ALR 826.

Constitutionality of legislative delegation of powers to prescribe or vary regulations concerning motor vehicles used on highways, 87 ALR 546.

Power of Legislature to change title of constitutional office, 110 ALR 1215.

Power to detach land from municipal corporations, towns, or villages, 117 ALR 267.

Adoption by or under authority of state statute without specific enactment or reenactment of prospective federal legislation or federal administrative rules as unconstitutional delegation of legislative power, 133 ALR 401.

Power of Legislature respecting admission to bar, 144 ALR 150.

Constitutionality, construction, and application of statutes abolishing civil actions for alienation of affections, criminal conversation, seduction, and breach of promise to marry, 158 ALR 617; 167 ALR 235.

Validity of state statutory provisions for arbitration of labor disputes, as against the objection of delegation of legislative power without setting up adequate standards to guide the administrative agency, 9 ALR2d 871.

Validity of state statute or regulation fixing minimum prices at which alcoholic beverages may be sold at retail, 96 ALR3d 639.

Paragraph II. Specific powers.

(a) Without limitation of the powers granted under Paragraph I, the General Assembly shall have the power to provide by law for:

(1) Restrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state.

(2) A militia and for the trial by courts-martial and nonjudicial punishment of its members, the discipline of whom, when not in federal service, shall be in accordance with law and the directives of the Governor acting as commander in chief.

(3) The participation by the state and political subdivisions and instrumentalities of the state in federal programs and the compliance with laws relating thereto, including but not limited to the powers, which may be exercised to the extent and in the manner necessary to effect such participation and compliance, to tax, to expend public money, to condemn property, and to zone property.

(4) The continuity of state and local governments in periods of emergency resulting from disasters caused by enemy attack including but not limited to the suspension of all constitutional legislative rules during such emergency.

(5) The participation by the state with any county, municipality, nonprofit organization, or any combination thereof in the operation of

any of the facilities operated by such agencies for the purpose of encouraging and promoting tourism in this state.

(6) The control and regulation of outdoor advertising devices adjacent to federal aid interstate and primary highways and for the acquisition of property or interest therein for such purposes and may exercise the powers of taxation and provide for the expenditure of public funds in connection therewith.

(b) The General Assembly shall have the power to implement the provisions of Article I, Section III, Paragraph I(2.); Article IV, Section VIII, Paragraph II; Article IV, Section VIII, Paragraph III; and Article X, Section II, Paragraph XII of the Constitution of 1976 in force and effect on June 30, 1983; and all laws heretofore adopted thereunder and valid at the time of their enactment shall continue in force and effect until modified or repealed.

(c) The distribution of tractors, farm equipment, heavy equipment, new motor vehicles, and parts therefor in the State of Georgia vitally affects the general economy of the state and the public interest and public welfare. Notwithstanding the provisions of Article I, Section I, Paragraphs I, II, and III or Article III, Section VI, Paragraph V(c) of this Constitution, the General Assembly in the exercise of its police power shall be authorized to regulate tractor, farm equipment, heavy equipment, and new motor vehicle manufacturers, distributors, dealers, and their representatives doing business in Georgia, including agreements among such parties, in order to prevent frauds, unfair business practices, unfair methods of competition, impositions, and other abuses upon its citizens. Any law enacted by the General Assembly shall not impair the obligation of an existing contract but may apply with respect to the renewal of such a contract after the effective date of such law. (Ga. Const. 1983, Art. 3, § 6, Para. 2; Ga. L. 1992, p. 3342, § 1/SR 486.)

1976 Constitution. — Art. I, Sec. III, Para. I; Art. III, Sec. VIII, Para. IIIA; Art. III, Sec. XI, Paras. I-IV; Art. III, Sec. XII, Para. I; Art. IV, Sec. VII, Para. II; Art. IV, Sec. VIII, Paras. II, III; Art. X, Sec. II, Para. XII.

Cross references. — Congress's powers as to militia, U.S. Const., art. I, sec. VIII, cl. XVI. General restriction on power of General Assembly to grant donations, Ga. Const. 1983, Art. III, Sec. VI, Para. VI. Zoning and planning, Ga. Const. 1983, Art. IX, Sec. II, Para. IV. Preservation of natural resources generally, T. 12, T. 27, T. 52. Federal aid to education, §§ 20-2-14 et seq., 20-2-168, 20-2-169, 20-2-575. Federal aid for vocational education and rehabilitation, §§ 20-4-1 et seq., 20-4-22,

49-9-4 et seq. Relocation assistance to persons displaced by federal-aid public works projects, Ch. 4, T. 22. Naming state roads, bridges, or interchanges, § 32-4-3. Federal aid for public roads, § 32-5-1 et seq. Outdoor advertising, § 32-6-70 et seq. Limited access roads, § 32-6-110 et seq. Junkyards, § 32-6-241 et seq. Relocation assistance for persons displaced by highway projects, Ch. 8, T. 32. Establishment of militia districts, Ch. 2, T. 36. State militia generally, § 38-2-1 et seq. Emergency powers of Governor generally, §§ 38-3-51, 45-12-29 et seq. Convening of emergency session of General Assembly, § 38-3-52 et seq.

Editor's notes. — The constitutional amendment (Ga. L. 1992, p. 3342, § 1)

which added subparagraph (c) was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

Law reviews. — For article discussing aesthetic beauty as an element significant to zoning, see 11 J. of Pub. L. 260 (1962). For article suggesting increased state role in land use planning, see 10 Ga. L. Rev. 53 (1975). For article discussing park and outdoor recreation planning through the national park system, with special emphasis on the Chattahoochee River corridor, see 25 Emory L.J. 255 (1976). For article surveying recent legislative and judicial developments in zoning, planning and environmental law, see 31 Mercer L. Rev. 89 (1979). For annual survey of law on environment, natural resources, and

land use, see 35 Mercer L. Rev. 147 (1983). For annual survey of appellate practice and procedure, see 38 Mercer L. Rev. 47 (1986). For article, "Judicial Review of Georgia Zoning: Cyclones and Doldrums in the Windmills of the Mind," see 2 Ga. St. U.L. Rev. 97 (1986).

For note discussing the historical aspects and current law concerning the state's ownership rights in tidelands, see 17 Ga. L. Rev. 851 (1983). For note, "Constitutional Barriers to Statewide Land Use Regulation in Georgia: Do They Still Exist?," see 3 Ga. St. U.L. Rev. 249 (1987).

For comment on *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979), see 31 Mercer L. Rev. 375 (1979).

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For standard for review of constitutionality of state land use regulations, see *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979), commented on in 31 Mercer L. Rev. 375 (1979).

Exercise of zoning power does not require payment of compensation. — The police power of the state to zone property to prevent its use for certain purposes in the future, as distinguished from the taking or damaging in respect to a use already in existence, is not open to question and does not require the payment of any compensation. *National Adv. Co. v. State Hwy. Dep't*, 230 Ga. 119, 195 S.E.2d 895 (1973).

Enactment of outdoor advertising zoning laws is within legislature's power. — The 1983 Constitution carried forward power exclusively in the counties and municipalities from Paragraph II of Section VIII of Article IV of the Georgia Constitution of 1976, (see Ga. Const. 1983, Art. X, Sec. 11, Paras. VI, IV, VI, and VII); the Outdoor Advertising Act does not conflict with Ga. Const. 1983, Art. IX, Sec. II, Para. IV. *Patrick v. Head*, 262 Ga. 654, 424 S.E.2d 615 (1993).

Cited in *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d, Military, and Civil Defense, § 1 et seq.

53A Am. Jur. 2d, Military, and Civil Defense, § 383 et seq.

C.J.S. — 16 C.J.S., Constitutional Law, § 419 et seq. 101A C.J.S., Zoning and Land Planning, §§ 8 et seq., 57.

ALR. — Constitutionality of statute limiting or controlling exploitation or waste of natural resources, 24 ALR 307; 78 ALR 834.

License tax or fee on automobiles as

affected by interstate commerce clause, 25 ALR 37; 52 ALR 533; 115 ALR 1105.

Power of state to prohibit or restrict exportation of natural resources, 32 ALR 331.

Validity of privilege or occupation tax on business of severing natural resources from soil, 32 ALR 827; 52 ALR 187; 60 ALR 101.

Powers of federal and state governments respectively as regards railroad stations, 37 ALR 1372.

Constitutionality, construction, and application of statute conferring emergency powers upon governor during war, 150 ALR 1488.

Regulation of junk dealers, 45 ALR2d 1391.

Paragraph III. Powers not to be abridged.

The General Assembly shall not abridge its powers under this Constitution. No law enacted by the General Assembly shall be construed to limit its powers.

1976 Constitution. — Art. III, Sec. VIII, Paras. II, III.

Cross references. — Statutory construction generally, Ch. 3, T. 1.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EMINENT DOMAIN
POLICE POWER

General Consideration

Prohibiting impairment of contract. — Hotel/motel tax statute providing that once the courts have validated a bond issue and the bonds have been issued, the state cannot impair the contract between the issuer and the bondholder does not violate Ga. Const. 1983, Art. III, Sec. VI, Para. III. *Youngblood v. State*, 259 Ga. 864, 388 S.E.2d 671 (1990).

Eminent Domain

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. III, Sec. VIII, Para. II and antecedent provisions, relating specifically to the preservation of the state's right to exercise the power of eminent domain, are included in the annotations for this paragraph.

Right of eminent domain gives legislature control of private property for use of the public, provided just compensation be made to the owner therefor. All grantees of land from the state, and their assigns, hold it under this tacit agreement or implied understanding. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Authority to prescribe procedure. — The exercise of the right of eminent domain is a legislative function and the

General Assembly may by law prescribe the procedure for taking private property for public uses. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Necessity or expediency of appropriating particular property for public use is not matter of judicial cognizance, but one for the determination of the legislative branch, and this must obviously be so where the state takes for its own purposes. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Legislature may exercise power of eminent domain only by payment for land taken, except in extraordinary cases. *Loughbridge v. Harris*, 42 Ga. 500 (1871).

Property owner must be paid just and adequate compensation before property is taken. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Private life and health more important than public convenience. — The right of private convenience, the right of the private citizen to hold and own any particular property, must yield to public convenience and public service whenever and wherever the legislature says yield, and to this extent the right of eminent domain is paramount; but private life and private health are more precious in the eyes of the law than even public convenience. *Thrasher v. City of Atlanta*, 178

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Ga. 514, 173 S.E. 817 (1934).

Governing authority not to use eminent domain power to restrict legitimate activity. — A governing authority has no right to utilize the power of eminent domain under Ga. Const. 1976, Art. III, Sec. VIII, Para. II and Ga. Const. 1976, Art. I, Sec. III, Para. I (see Ga. Const. 1983, Art. I, Sec. III, Para. I) in order to restrict a legitimate activity in which the state has an interest. *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

Condemning authority may not act in bad faith in exercise of right of eminent domain. *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

Blocking hazardous waste facility. — County acted in bad faith under Ga. Const. 1976, Art. III, Sec. VIII, Para. II and Ga. Const. 1976, Art. I, Sec. III, Para. I (see Ga. Const. 1983, Art. I, Sec. III, Para. I) when it instituted condemnation proceedings for purpose of preventing land from being used as hazardous waste facility. *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

Right of eminent domain can operate only upon property and never on the person or citizen. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934).

Strict compliance with statute necessary. — In proceedings under statutory authority, whereby an owner may be deprived of property, the statute must be strictly pursued. Compliance with all its prerequisites must be shown. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Neither notice nor opportunity to be heard are prerequisite to the exercise of the power of eminent domain, provided only that the owner have an opportunity, in the course of the condemnation proceeding, to be heard and to offer evidence as to the value of the land taken. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Legislature may delegate to agencies power to condemn property. —

Since the legislature cannot in every case supervise the condemnation of property for public use, it may confer the power to do so on agencies. *State Hwy. Dep't v. Smith*, 219 Ga. 800, 136 S.E.2d 334 (1964).

Condemnation of land by water power owners may be authorized. *Jones v. North Ga. Elec. Co.*, 125 Ga. 618, 54 S.E. 85 (1906).

One exercising delegated power of eminent domain may not condemn property already devoted to another and different public use unless power to do so is conferred upon it in express terms or by necessary implication. *Southern Ry. v. State Hwy. Dep't*, 219 Ga. 435, 134 S.E.2d 12 (1963), commented on in 1 Ga. St. B.J. 242 (1964).

Authority to annex noncontiguous property. — Since the authority of the General Assembly to annex municipal property is limited only by the state and federal constitutions, its annexation of municipal property which was not contiguous to lands owned by the city was valid; therefore, the city's annexation of property which was contiguous to that property was also valid. *City of Ft. Oglethorpe v. Boger*, 267 Ga. 485, 480 S.E.2d 186 (1997).

Effect of contrary zoning regulations on governmental use. — Municipality may use property acquired by purchase for necessary governmental use, regardless of contrary zoning regulations. *Mayor of Savannah v. Collins*, 211 Ga. 191, 84 S.E.2d 454 (1954).

City ordinance providing for condemnation invalid. — City ordinance which provides for the condemnation of property, with the proviso that the city might refuse to accept the property or to pay the award of the assessors if the amount, manner of payment, and terms thereof were not satisfactory to the city, is invalid and city would be enjoined from proceeding thereunder. *Thomas v. City of Cairo*, 206 Ga. 336, 57 S.E.2d 192 (1950).

Property condemned for purposes of relocating railroad track displaced by highway construction is validly condemned for highway use. *Hinson v. DOT*, 230 Ga. 314, 196 S.E.2d 883 (1973).

Police Power

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. III, Sec. VIII, Para. II and antecedent provisions, relating specifically to the preservation of the state's right to exercise police power, are included in the annotations for this paragraph.

Police power is broad, but must be exercised in subordination to Constitution. Commissioners of Glynn County v. Cate, 183 Ga. 111, 187 S.E. 636 (1936).

Constitutional considerations which limit government's right of eminent domain do not apply to police power, and the citizen whose property is taken or destroyed is helpless before it. However, the police power can be invoked only in the face of compelling necessity, and it extends no further than the emergency which creates it. Horne v. City of Cordele, 140 Ga. App. 127, 230 S.E.2d 333 (1976).

Uncompensated destruction of property of citizen exceeding immediate necessity of the occasion is unconstitutional exercise of police power. Horne v. City of Cordele, 140 Ga. App. 127, 230 S.E.2d 333 (1976).

Police power is possessed by municipal corporations only if, where, and to extent there has been express grant by state. Palmer v. Hall, 380 F. Supp. 120 (M.D. Ga. 1974), modified, 517 F.2d 705 (5th Cir. 1975).

Power and necessity for legislatures and municipal governments to impose restrictions through zoning laws and ordinances is no longer subject to question. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Municipality free to contract where no exercise of state police power. — Where state has not exercised its police power in regulating street railway fares, it is not unconstitutional for a municipality to make a contract in this area. Georgia Ry. & Power Co. v. Railroad Comm'n, 149 Ga. 1, 98 S.E. 696 (1919).

Power to suspend business license to prevent public indecency. — A mu-

nicipality's right under its police power to prevent public indecency is vital to local government and the power exists to suspend ex parte a business license in a proper case where public morals are threatened. Sokolic v. Ryan, 304 F. Supp. 213 (S.D. Ga. 1969).

Commercial movies not immune from regulation. — First amendment (U.S. Const., amend. 1) rights as they attach to commercial movies are not so fundamental as to be immune from valid regulation under the police power, particularly where the restraint upon such movies is relatively minor and the public interest to be protected is substantial. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Civil rights do not authorize operation of business within municipality in violation of ordinances enacted under police power and for welfare of community. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Fact that regulation affects only one person not unconstitutional. — The mere fact that only one party operating a business is affected by a regulation designed to localize the operation of such business in a certain district in a city does not show arbitrary, unreasonable, or unjust discrimination in violation of organic rights. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Motion picture theaters, like filling stations and whiskey stores, are not immune from regulation under police power. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Nuisance not legalized. — It is never to be presumed that the legislature intended to authorize a corporation to erect a nuisance. Towaliga Falls Power Co. v. Sims, 6 Ga. App. 749, 65 S.E. 844 (1909).

Police Power (Cont'd)

Prohibition laws are within the exercise of police power. *Whitley v. State*, 134 Ga. 758, 68 S.E. 716 (1910).

Regulation of buses valid. — Ordinance regulating buses for transportation of passengers in streets is not unconstitutional. *Schlesinger v. City of Atlanta*, 161 Ga. 148, 129 S.E. 861 (1925).

Office of police officer carries with it no inherent power and is purely

statutory creation. *Palmer v. Hall*, 380 F. Supp. 120 (M.D. Ga. 1974), modified, 517 F.2d 705 (5th Cir. 1975).

Metropolitan River Protection Act (Ga. L. 1973, p. 128, Ga. L. 1975, p. 837), providing for protection of city water supply, is constitutional. *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d 16 (1978), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979), commented on in 31 Mercer L. Rev. 375 (1979).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. III, Sec. VIII, Para. II and antecedent provisions, relating specifically to the preservation of the state's right to exercise the power of eminent domain, are included in the annotations for this paragraph.

Legislature has power to authorize municipal corporation to acquire lands beyond municipal limits and for that purpose to exercise the power of eminent domain where the proposed taking of private property is strictly for public use. 1965-66 Op. Att'y Gen. No. 66-65 (decided under Ga. Const. 1976, Art. III, Sec. VIII, Para. II).

Provisions of this paragraph give broad effect to state's right of eminent domain. 1981 Op. Att'y Gen. No. U81-1.

General law may not be conditioned on referendum. — Although the General Assembly has the broad authority to condition the effectiveness of a law upon a subsequent event, it may not delegate its ultimate responsibility to make decisions on fundamental legislative issues. Therefore, the General Assembly may not enact a general law which by its terms conditions its effectiveness upon approval by the voters at a statewide referendum. 1993 Op. Att'y Gen. No. 93-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, §§ 344 et seq., 375 et seq.

C.J.S. — 16 C.J.S., Constitutional Law, § 380 et seq.

ALR. — Constitutionality of statute or ordinance requiring proprietor of place of amusement to furnish fire or police protection at his own expense, 8 ALR 1628.

Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation, or employment, 9 ALR 1366.

Power of state to change private contract rates for public utilities, 9 ALR 1423.

Constitutionality of fence and stock laws, 18 ALR 67.

Constitutionality of regulations as to milk, 18 ALR 235; 42 ALR 556; 58 ALR 672; 80 ALR 1225; 101 ALR 64; 110 ALR 644; 119 ALR 243; 155 ALR 1383.

Licensing and regulation of pool and billiard rooms and bowling alleys, 20 ALR 1482; 29 ALR 41; 53 ALR 149; 72 ALR 1339.

License tax or fee on automobiles as affected by interstate commerce clause, 25 ALR 37; 52 ALR 533; 115 ALR 1105.

Power of state to prohibit or restrict exportation of natural resources, 32 ALR 331.

Public regulation of dancing, dance halls, dancing schools, etc., 48 ALR 144; 60 ALR 173.

Validity of regulations affecting wholesale produce dealers, 48 ALR 449.

Statute or ordinance in relation to advertising as interference with interstate commerce, 48 ALR 563; 57 ALR 105; 115 ALR 952.

Power to make abandonment, deser-

tion, or nonsupport of wife or family criminal offense, 48 ALR 1193.

Constitutionality of statute in relation to oleo/margarine or other substitute for butter, 53 ALR 474.

Validity of statute or ordinance in relation to doors, 53 ALR 920.

Power to establish building line along street, 53 ALR 1222.

Constitutionality of statute regulating sale of poisons, drugs, or medicines, 54 ALR 730.

Constitutionality of statute regulating sale or dispensation of medicines or drugs in original package, 54 ALR 744.

Constitutionality and effect of statutory restriction on moving or aiding in moving of tenant or laborer, 55 ALR 311.

Constitutional power to compel railroad company to relocate or reconstruct highway crossing or to pay or contribute to expense thereof, 55 ALR 660; 62 ALR 815; 109 ALR 768.

Ice business as affected with a public interest, 68 ALR 1033.

Constitutionality of legislative delegation of powers to prescribe or vary regulations concerning motor vehicles used on highways, 87 ALR 546.

Validity of license law which requires security for payment of debts by licensee, 101 ALR 827.

Constitutionality, construction, and application of statutes relating to the purchase of farm and dairy products from producers for purposes of resale, 117 ALR 347.

Validity of statutes or ordinances requiring license for, or otherwise regulating, solicitation of alms or contributions for charitable, religious, or individual purposes, 130 ALR 1504.

Validity of provision of statute or ordinance that requires vacation of premises which do not comply with building or sanitary regulations, upon notice to that effect, without judicial proceeding, 153 ALR 849.

Validity of commercial rent control legislation as applied to pre-existing leases, 162 ALR 202.

Power to revoke license as affected by the fact that the penalty provided by license statute or ordinance for violation of its terms or conditions does not include revocation, 165 ALR 1174.

Public regulation or control of insurance agents or brokers, 10 ALR2d 950.

Validity and construction of gun control laws, 28 ALR3d 845.

Validity, construction, and application of state statutes forbidding possession, transportation, or sale of unstamped or unlicensed cigarettes or other tobacco products, 46 ALR3d 1342.

Validity and construction of statute or ordinance regulating or prohibiting self-service gasoline filling stations, 46 ALR3d 1393.

Conservation: Validity, construction, and application of enactments restricting land development by dredging or tilling, 46 ALR3d 1422.

Relief to owner of motor vehicle subject to state forfeiture for use in violation of narcotics laws, 50 ALR3d 172.

Validity and construction of statute or ordinance forbidding unauthorized persons to enter upon or remain in school building or premises, 50 ALR3d 340.

Validity and construction of statute or ordinance prohibiting commercial exhibition of malformed or disfigured persons, 62 ALR3d 1237.

Validity and construction of state or local regulation prohibiting off-premises advertising structures, 81 ALR3d 486.

Validity and construction of state or local regulation prohibiting the erection or maintenance of advertising structures within a specified distance of street or highway, 81 ALR3d 564.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 ALR4th 931.

Federal constitutional right to bear arms, 37 ALR Fed. 696.

Construction and application of 18 USCS § 922(e), prohibiting delivery of firearms to common carrier, 125 ALR Fed. 613.

Paragraph IV. Limitations on special legislation.

(a) Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.

(b) No population bill, as the General Assembly shall define by general law, shall be passed. No bill using classification by population as a means of determining the applicability of any bill or law to any political subdivision or group of political subdivisions may expressly or impliedly amend, modify, supersede, or repeal the general law defining a population bill.

(c) No special law relating to the rights or status of private persons shall be enacted.

1976 Constitution. — Art. I, Sec. II, Para. VII; Art. IX, Sec. V, Paras. I, II.

Cross references. — Equal protection, U.S. Const., amend. 14, and Ga. Const. 1983, Art. I, Sec. I, Para. II. Prohibition on laws relating to social status of a citizen, Ga. Const. 1983, Art. I, Sec. I, Para. XXV. Population bill defined, § 28-1-15.

Law reviews. — For article discussing constitutional limitations on special legislation, see 13 Ga. B.J. 147 (1950). For article analyzing alternative means of implementing home rule legislation and advocating home rule for municipalities in light of numerous attempts to pass such legislation in Georgia, prior to repeal of Municipal Home Rule Law of 1951 and adoption of the Municipal Home Rule Act of 1965, see 8 Mercer L. Rev. 337 (1957). For article on the historical interpretation and validity of statutes pertaining to Georgia county commissioners, see 15 Mercer L. Rev. 258 (1963). For article, "Bill Drafting — Some Guidelines and Pitfalls," see 2 Ga. St. B.J. 181 (1965). For article discussing the constitutionality of retaining local legislation which deviates from statutes of general application, see 5 Ga. St. B.J. 309 (1969). For article, "Delegation in Georgia Local Government Law," see 7 Ga. St. B.J. 9 (1970). For article, "The Legislative Process in Georgia Local Government Law," see 5 Ga. L. Rev. 1 (1971). For article discussing the

evolution of municipal annexation law in Georgia in light of *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 178 S.E.2d 868 (1970), see 5 Ga. L. Rev. 499 (1971). For article discussing the effect of the general criminal statute on self-interest and municipal purchasing (§ 16-10-6) on the general statute on votes by municipal councilmen in matters of personal interest (§ 36-30-6) and on local statutory law, see 7 Ga. St. B.J. 431 (1971). For article, "Local Legislation in Georgia: The Notice Requirement," see 7 Ga. L. Rev. 22 (1972). For article analyzing the changing relationship between state and local governments in Georgia in light of "Amendment 19," see 9 Ga. L. Rev. 757 (1975). For article, "Selected Oddities in Georgia Municipal Law," see 9 Ga. L. Rev. 783 (1975). For article discussing standards for determining whether constitutional amendments are general or special, see 10 Ga. L. Rev. 169 (1975). For article examining history of recall in Georgia local government law, and considering future developments, see 10 Ga. L. Rev. 883 (1976). For article providing an overview of Georgia's treatment of special or local legislation, see 27 Mercer L. Rev. 1167 (1976). For article discussing effect of *City of Atlanta v. Myers*, 240 Ga. 261, 240 S.E.2d 60 (1977), appearing below, on limits of municipal government autonomy, see 12 Ga. L. Rev. 805 (1978). For article,

“Unlawful Special Laws: A Postscript on the Proscription,” see 30 Mercer L. Rev. 319 (1978). For article on the effect on receiving government-issued licenses after a conviction based on a nolo contendere plea, see 13 Ga. L. Rev. 723 (1979). For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979). For article surveying developments in Georgia local government law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 187 (1981). For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981). For article on

constitutional law, see 34 Mercer L. Rev. 53 (1982). For article, “The United States Supreme Court as Home Rule Wrecker,” see 34 Mercer L. Rev. 363 (1982). For article, “The Georgia Supreme Court and Local Government Law: Two Sheets to the Wind,” see 16 Ga. St. U.L. Rev. 361 (1999).
For note on the validity of population statutes in Georgia, see 2 Ga. St. B.J. 533 (1966). For note discussing the notice requirement of local legislation in light of purportedly general population bills, see 22 Mercer L. Rev. 602 (1971).
For comment on *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E.2d 723 (1953), see 16 Ga. B.J. 343 (1954).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- UNIFORM OPERATION
- SPECIAL LAWS
- PRIVATE RIGHTS
- CLASSIFICATION
 - 1. IN GENERAL
 - 2. BY POPULATION
- MUNICIPAL ORDINANCES
- COUNTY COMMISSIONERS

General Consideration

Purpose of this paragraph is to insure the uniform operation of general laws throughout the state. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).
This paragraph is intended to insure that once the legislature enters a field by enacting a general law, that field must thereafter be reserved exclusively to general legislation and cannot be open to special or local laws. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942); *Beard v. City of Atlanta*, 91 Ga. App. 584, 86 S.E.2d 672 (1955) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).
The broad objective of this paragraph was manifestly to prevent the confusion and uncertainty that would necessarily result if there existed at the same time a general law and a special law dealing with or regulating the same subject matter. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19

S.E.2d 508 (1942) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).
Prevention of unequal privileges or duties. — What this paragraph seeks to do is to prevent the creation of special laws giving any one community any more rights or privileges than another, or putting any more duties on one community than any other similarly situated. *DeJarnette v. Hospital Auth.*, 195 Ga. 189, 23 S.E.2d 716 (1942) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).
Immunity of water authority. — The immunity provision of the charter of the Macon Water Authority Act that exempted the Authority from vicarious liability was not preempted by O.C.G.A. § 51-2-2, and did not offend Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a). *Matthews v. Macon Water Auth.*, 273 Ga. 436, 542 S.E.2d 106 (2001).
General and special laws mutually exclusive. — A law territorially general, and a subsequent law territorially special,

General Consideration (Cont'd)

for the same order of cases, are mutually exclusive of each other. The legislature may have either, but, in the nature of things, cannot have both. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942).

State statutes preempted city's ordinance. — Conviction and fine against a convenience store operator for violating a city ordinance that prohibited certain retailers of packaged alcoholic beverages from allowing coin operated amusement machines (COAMs) on the same premises was reversed because the state's COAM Laws, O.C.G.A. §§ 16-12-35 and 50-27-70 to 50-27-104, preempted the city's ordinance at least insofar as the ordinance applied to COAMs as defined by the state statutes. *Gebrekidan v. City of Clarkston*, No. S15A1442, 2016 Ga. LEXIS 238 (Mar. 21, 2016).

Statute providing for recovery of costs for converting from oil-burning to coal-burning facility. — O.C.G.A. § 46-2-26.3, relating to recovery of costs of conversion from oil-burning to coal-burning generating facility, is not unconstitutional as a special law for which provision has been made by general law, because O.C.G.A. § 46-2-23 does not divest the General Assembly of its power to regulate public utilities. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

The County Building Authority Act was not a special law or population bill and was not unconstitutional under either the 1976 or the 1983 Constitutions. Therefore, the Fulton County Building Authority was authorized to issue bonds to finance the acquisition and construction of mental retardation training centers and to finance studies, services, and reports incidental to preparing plans for a county office building, because such projects were within the scope of the Act, which was a "general law," as referred to in Ga. Const. 1983, Art. IX, Sec. VI, Para. I. *Building Auth. v. State*, 253 Ga. 242, 321 S.E.2d 97 (1984).

Supreme Court's approval of a local court rule providing that civil actions seeking primarily money damages up to

\$25,000 or in an unspecified amount would be referred to compulsory but non-binding arbitration did not abridge the rights of any litigants or conflict with any federal or state constitutional provision or Georgia statute. *Davis v. Gaona*, 260 Ga. 450, 396 S.E.2d 218 (1990).

Condemning property for utility company. — Pursuant to O.C.G.A. § 46-3-201(b)(9), the electric corporation, which had to condemn property in order to effectuate its project, did not have to demonstrate to the county the necessity or the appropriateness of its proposed project; thus, the county ordinance prohibiting the electric lines for three years was unconstitutional. *Rabun County v. Ga. Transmission Corp.*, 276 Ga. 81, 575 S.E.2d 474 (2003).

Amendment changing retroactive effect of prior amendment. — An amendment which changed the retroactive effect of an earlier amendment to O.C.G.A. § 40-5-67.1, the implied consent warning law, so that it applied only to stops made after the effective date of the earlier amendment, rather than to cases pending on such date, did not violate the uniformity or special laws provisions of the state constitution. *State v. Martin*, 266 Ga. 244, 466 S.E.2d 216 (1996).

County ordinance was proper use of police power. — Since the stated purpose of Gwinnett County, Ga., Ord. No. 82-11 was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power; further, by expressly preserving local laws in O.C.G.A. § 44-12-135, which included county ordinances, the legislature had in effect "authorized" them, and so Gwinnett County, Ga., Ord. No. 82-11 did not conflict with O.C.G.A. § 44-12-138. *Pawnmart, Inc. v. Gwinnett County*, 279 Ga. 19, 608 S.E.2d 639 (2005).

Cited in *County of Dougherty v. Boyt*, 71 Ga. 484 (1883); *Houston County v. Killen*, 76 Ga. 826 (1886); *Maxwell v. Tumlin*, 79 Ga. 570, 4 S.E. 858 (1887); *Adair v. Ellis*, 83 Ga. 464, 10 S.E. 117 (1889); *Mathis v. Jones*, 84 Ga. 804, 11 S.E. 1018 (1890); *Weed v. Mayor of Savannah*, 87 Ga. 513, 13 S.E. 522 (1891); *Union Sav. Bank & Trust Co. v. Dottenheim*, 107

Ga. 606, 34 S.E. 217 (1899); *Williams v. Fears*, 110 Ga. 584, 35 S.E. 699, 50 L.R.A. 685 (1900); *Sayer v. Brown*, 119 Ga. 539, 46 S.E. 649 (1904); *Barber v. Alexander*, 120 Ga. 30, 47 S.E. 580 (1904); *Neal v. McWhorter*, 122 Ga. 431, 50 S.E. 381 (1905); *Sellers v. Cox*, 127 Ga. 246, 56 S.E. 284 (1906); *Binns v. Ficklen*, 130 Ga. 377, 60 S.E. 1051 (1908); *Clark v. Reynolds*, 136 Ga. 817, 72 S.E. 254 (1911); *Hammond v. State*, 10 Ga. App. 143, 72 S.E. 937 (1911); *Clark v. Clark*, 137 Ga. 185, 73 S.E. 16 (1911); *Macon, D. & S.R.R. v. Calhoun*, 138 Ga. 165, 74 S.E. 1030 (1912); *Williams v. State*, 138 Ga. 168, 74 S.E. 1083 (1912); *Greer v. Turner County*, 138 Ga. 558, 75 S.E. 578 (1912); *Stewart v. Anderson*, 140 Ga. 31, 78 S.E. 457 (1913); *Board of Comm'rs v. Mayor of Americus*, 141 Ga. 542, 81 S.E. 435 (1914); *McWilliams v. Smith*, 142 Ga. 209, 82 S.E. 569 (1914); *Sampson v. Harris*, 147 Ga. 426, 94 S.E. 558 (1917); *Wright v. Hardwick*, 152 Ga. 302, 109 S.E. 903 (1921); *Cooper v. Rollins*, 152 Ga. 588, 110 S.E. 726 (1922); *Wilkins v. Mayor of Savannah*, 152 Ga. 638, 111 S.E. 42 (1922); *Walthour v. City of Atlanta*, 157 Ga. 24, 120 S.E. 613 (1923); *Downs v. State*, 158 Ga. 669, 124 S.E. 166 (1924); *Spielberger v. Hall & Co.*, 159 Ga. 511, 126 S.E. 391 (1925); *Abbott v. Commissioners of Fulton County*, 160 Ga. 657, 129 S.E. 38 (1925); *Baugh v. City of LaGrange*, 161 Ga. 80, 130 S.E. 69 (1925); *Shore v. Banks County*, 162 Ga. 185, 132 S.E. 753 (1926); *Mayor of Danville v. Wilkinson County*, 166 Ga. 460, 143 S.E. 769 (1928); *Harris County v. Williams*, 167 Ga. 45, 144 S.E. 756 (1928); *Cochran v. City of Thomasville*, 167 Ga. 579, 146 S.E. 462 (1928); *Greer v. State*, 169 Ga. 552, 150 S.E. 839 (1929); *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930); *Wilson v. Harris*, 170 Ga. 800, 154 S.E. 388 (1930); *Taliaferro County v. Edwards*, 171 Ga. 289, 155 S.E. 180 (1930); *Curtis v. Town of Helen*, 171 Ga. 256, 155 S.E. 202 (1930); *Murray v. City of Waycross*, 171 Ga. 484, 156 S.E. 38 (1930); *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930); *Bower v. Avery*, 172 Ga. 272, 158 S.E. 10 (1931); *York v. State*, 172 Ga. 483, 158 S.E. 53 (1931); *Medders v. Stewart*, 172 Ga. 507, 158 S.E. 56 (1931); *Jordan v. State*, 172 Ga. 857, 159 S.E. 235 (1931); *Felton v.*

McArthur, 173 Ga. 465, 160 S.E. 419 (1931); *Strickland v. Houston*, 173 Ga. 615, 161 S.E. 262 (1931); *Hopkins v. Chatham Phoenix Nat'l Bank & Trust Co.*, 174 Ga. 136, 162 S.E. 521 (1932); *Family Fin. Co. v. Allman*, 174 Ga. 467, 163 S.E. 143 (1932); *Slater v. Davis*, 174 Ga. 633, 163 S.E. 704 (1932); *State Bd. of Barber Exmrs. v. Blocker*, 176 Ga. 125, 167 S.E. 298 (1932); *Von Schmidt v. Noland Co.*, 176 Ga. 784, 169 S.E. 11 (1933); *Moseley v. State*, 176 Ga. 889, 169 S.E. 97 (1933); *Green v. Harper*, 177 Ga. 680, 170 S.E. 872 (1933); *Felton v. Huie*, 178 Ga. 311, 173 S.E. 660 (1933); *Newport v. Longino*, 178 Ga. 797, 174 S.E. 537 (1934); *Simmons v. Newton*, 178 Ga. 806, 174 S.E. 703 (1934); *Dillon v. Continental Trust Co.*, 179 Ga. 198, 175 S.E. 652 (1934); *Gormley v. Searcy*, 179 Ga. 389, 175 S.E. 913 (1934); *Williams v. McIntosh County*, 179 Ga. 735, 177 S.E. 248 (1934); *Georgia Pub. Serv. Comm'n v. City of Albany*, 180 Ga. 355, 179 S.E. 369 (1935); *Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32 (1935); *Harbin v. Holcomb*, 181 Ga. 800, 184 S.E. 603 (1936); *Board of Educ. v. Board of Comm'rs of Rds. & Revenues*, 182 Ga. 326, 185 S.E. 331 (1936); *Wright v. Richmond County Dep't of Health*, 182 Ga. 651, 186 S.E. 815 (1936); *Gormley v. Hart*, 54 Ga. App. 373, 188 S.E. 66 (1936); *Russell v. Burroughs*, 183 Ga. 361, 188 S.E. 451 (1936); *McKown v. City of Atlanta*, 184 Ga. 221, 190 S.E. 571 (1937); *National Fin. Co. v. Citizens Loan & Sav. Co.*, 184 Ga. 619, 192 S.E. 717 (1937); *Freeney v. Pape*, 185 Ga. 1, 194 S.E. 515 (1937); *Sharpe v. City of Waycross*, 185 Ga. 208, 194 S.E. 522 (1937); *Gibson v. Hood*, 185 Ga. 426, 195 S.E. 444 (1938); *Webb v. City of Atlanta*, 186 Ga. 430, 198 S.E. 50 (1938); *Hoover v. Brown*, 186 Ga. 519, 198 S.E. 231 (1938); *Head v. Wilkinson*, 186 Ga. 739, 198 S.E. 782 (1938); *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938); *State Hwy. Dep't v. H.G. Hastings Co.*, 187 Ga. 204, 199 S.E. 793 (1938); *Lloyds Am. v. Brown*, 187 Ga. 240, 200 S.E. 292 (1938); *Steele v. City of Waycross*, 187 Ga. 382, 200 S.E. 704 (1938); *Rourke v. U.S. Fid. & Guar. Co.*, 187 Ga. 636, 1 S.E.2d 728 (1939); *County Bd. of Educ. v. Young*, 187 Ga. 644, 1 S.E.2d 739 (1939); *Garner v. Wood*, 188

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Ga. 463, 4 S.E.2d 137 (1939); Barber v. Housing Auth., 189 Ga. 155, 5 S.E.2d 425 (1939); Kelisen v. Savannah Theatres Co., 61 Ga. App. 100, 5 S.E.2d 712 (1939); Upson v. Almand, 190 Ga. 376, 9 S.E.2d 662 (1940); Board of Pub. Educ. & Orphanage v. State Bd. of Educ., 190 Ga. 581, 10 S.E.2d 365 (1940); Town of McIntyre v. Scott, 191 Ga. 473, 12 S.E.2d 883 (1940); Feagin v. Freeney, 192 Ga. 868, 17 S.E.2d 61 (1941); Jones v. Methvin, 193 Ga. 17, 17 S.E.2d 172 (1941); Sumter County v. Allen, 193 Ga. 171, 17 S.E.2d 567 (1941); McCook v. Long, 193 Ga. 299, 18 S.E.2d 488 (1942); Brock v. Chappell, 196 Ga. 567, 27 S.E.2d 38 (1943); Chappell v. Kilgore, 196 Ga. 591, 27 S.E.2d 89 (1943); Derrick v. City Council, 138 F.2d 507 (5th Cir. 1943); Nichols v. Hampton, 198 Ga. 327, 31 S.E.2d 659 (1944); Sneed v. State, 72 Ga. App. 102, 33 S.E.2d 29 (1945); Morgan v. Mertins, 198 Ga. 800, 33 S.E.2d 156 (1945); Owens v. Rutherford, 200 Ga. 143, 36 S.E.2d 309 (1945); Bowen v. Lewis, 201 Ga. 487, 40 S.E.2d 80 (1946); Nichols v. Pirkle, 202 Ga. 372, 43 S.E.2d 306 (1947); Mayor of Savannah v. Savannah Distrib. Co., 202 Ga. 559, 43 S.E.2d 704 (1947); Lashley v. McDowell, 75 Ga. App. 695, 44 S.E.2d 487 (1947); Christian v. Moreland, 203 Ga. 20, 45 S.E.2d 201 (1947); Brunswick Peninsular Corp. v. Daugharty, 203 Ga. 454, 47 S.E.2d 275 (1948); Irwin v. Torbert, 204 Ga. 111, 49 S.E.2d 70 (1948); City of Griffin v. Southeastern Textile Co., 204 Ga. 579, 50 S.E.2d 322 (1948); Hasty v. Hamrick, 205 Ga. 84, 52 S.E.2d 470 (1949); Calhoun County v. Early County, 205 Ga. 169, 52 S.E.2d 854 (1949); Houlihan v. Saussy, 206 Ga. 1, 55 S.E.2d 557 (1949); Norris v. McDaniel, 207 Ga. 232, 60 S.E.2d 329 (1950); Richards v. Richards, 85 Ga. App. 605, 69 S.E.2d 911 (1952); City of Atlanta v. Anglin, 209 Ga. 170, 71 S.E.2d 419 (1952); Mayor of Savannah v. Harvey, 87 Ga. App. 122, 73 S.E.2d 260 (1952); City of Atlanta v. Wilson, 209 Ga. 527, 74 S.E.2d 455 (1953); Phillips v. City of Atlanta, 210 Ga. 72, 77 S.E.2d 723 (1953); Herrod v. O'Beirne, 210 Ga. 476, 80 S.E.2d 684 (1954); City of Atlanta v. Sims, 210 Ga. 605, 82 S.E.2d

130 (1954); Richmond Concrete Prods. Co. v. Ward, 212 Ga. 773, 95 S.E.2d 677 (1956); Hansell v. Citizens & S. Nat'l Bank, 213 Ga. 205, 98 S.E.2d 622 (1957); Hannah v. State, 97 Ga. App. 188, 102 S.E.2d 624 (1958); Laurens County v. Keen, 214 Ga. 32, 102 S.E.2d 697 (1958); Sigman v. Brunswick Port Auth., 214 Ga. 332, 104 S.E.2d 467 (1958); Smith v. City of Albany, 97 Ga. App. 731, 104 S.E.2d 488 (1958); Barnett v. Boling, 214 Ga. 401, 105 S.E.2d 312 (1958); Hix v. Ramey, 214 Ga. 464, 105 S.E.2d 452 (1958); City of Macon v. Harrison, 98 Ga. App. 769, 106 S.E.2d 833 (1958); Lewis v. City Council, 215 Ga. 427, 110 S.E.2d 665 (1959); Smith v. Branch, 215 Ga. 744, 113 S.E.2d 445 (1960); Kennison v. Lee, 217 Ga. 155, 121 S.E.2d 821 (1961); Williams v. State, 217 Ga. 312, 122 S.E.2d 229 (1961); Cox v. DeJarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961); Willingham v. State, 104 Ga. App. 863, 123 S.E.2d 199 (1961); Vandiver v. Williams, 218 Ga. 60, 126 S.E.2d 210 (1962); Meeks v. Lunsford, 106 Ga. App. 154, 126 S.E.2d 531 (1962); Vandiver v. Williams, 106 Ga. App. 435, 127 S.E.2d 168 (1962); Harper Motor Lines v. Roling, 218 Ga. 812, 130 S.E.2d 817 (1963); Stewart v. Davidson, 218 Ga. 760, 130 S.E.2d 822 (1963); Clark v. Kaylor, 219 Ga. 256, 132 S.E.2d 778 (1963); Stephenson v. State, 219 Ga. 652, 135 S.E.2d 380 (1964); Howard v. Housing Auth., 220 Ga. 640, 140 S.E.2d 880 (1965); Ralston Purina Co. v. Acrey, 220 Ga. 788, 142 S.E.2d 66 (1965); Henson v. Georgia Indus. Realty Co., 220 Ga. 857, 142 S.E.2d 219 (1965); Fleming v. Daniell, 221 Ga. 43, 142 S.E.2d 804 (1965); Stephens v. Moran, 221 Ga. 4, 142 S.E.2d 845 (1965); City of Columbus v. Atlanta Cigar Co., 111 Ga. App. 774, 143 S.E.2d 416 (1965); DuBose v. City of Lumpkin, 113 Ga. App. 297, 147 S.E.2d 837 (1966); Billingslea v. Flynt, 222 Ga. 444, 150 S.E.2d 678 (1966); Ingram v. Payton, 222 Ga. 503, 150 S.E.2d 825 (1966); Lee v. City of Jesup, 222 Ga. 530, 150 S.E.2d 836 (1966); Talley v. Sun Fin. Co., 223 Ga. 419, 156 S.E.2d 55 (1967); Cambron v. Cogburn, 118 Ga. App. 454, 164 S.E.2d 350 (1968); Dobson v. Brown, 225 Ga. 73, 166 S.E.2d 22 (1969); Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969); Local 574, Int'l Ass'n of Firefighters v.

Floyd, 225 Ga. 625, 170 S.E.2d 394 (1969); Gainer v. Ellis, 226 Ga. 79, 172 S.E.2d 608 (1970); Flanigen v. Preferred Dev. Corp., 226 Ga. 267, 174 S.E.2d 425 (1970); Pye v. State Hwy. Dep't, 226 Ga. 389, 175 S.E.2d 510 (1970); Electro-Kinetics Corp. v. Wilson, 122 Ga. App. 171, 176 S.E.2d 604 (1970); Gresham v. Symmers, 227 Ga. 616, 182 S.E.2d 764 (1971); Laidler v. Smith, 227 Ga. 759, 182 S.E.2d 891 (1971); Forbes v. Lovett, 227 Ga. 772, 183 S.E.2d 371 (1971); Silverman v. Mayor of Savannah, 125 Ga. App. 41, 186 S.E.2d 447 (1971); Gordon v. Green, 228 Ga. 505, 186 S.E.2d 719 (1972); Marietta Broadcasting Co. v. Advance Mktg. Research, Inc., 231 Ga. 13, 200 S.E.2d 134 (1973); Webb v. Board of Comm'rs, 231 Ga. 365, 201 S.E.2d 462 (1973); Hodges v. Hodges, 231 Ga. 810, 204 S.E.2d 291 (1974); Edwards v. Bullard, 131 Ga. App. 34, 205 S.E.2d 115 (1974); Jackson v. Inman, 232 Ga. 566, 207 S.E.2d 475 (1974); Powell v. Board of Comm'rs of Rds. & Revenues, 234 Ga. 183, 214 S.E.2d 905 (1975); Sellers v. Home Furnishing Co., 235 Ga. 831, 222 S.E.2d 34 (1976); Evans v. City of Tifton, 138 Ga. App. 374, 226 S.E.2d 471 (1976); Thompson v. Municipal Elec. Auth., 238 Ga. 19, 231 S.E.2d 720 (1976); City of Atlanta v. Associated Bldrs. & Contractors, 143 Ga. App. 115, 237 S.E.2d 601 (1977); Thompson v. Hill, 143 Ga. App. 272, 238 S.E.2d 271 (1977); City of Atlanta v. Myers, 240 Ga. 261, 240 S.E.2d 60 (1977); Williams v. Richmond County, 241 Ga. 89, 243 S.E.2d 55 (1978); State v. Ramsey, 147 Ga. App. 150, 248 S.E.2d 289 (1978); Georgia S. & Fla. Ry. v. Odom, 242 Ga. 169, 249 S.E.2d 545 (1978); Lambert v. City of Atlanta, 242 Ga. 645, 250 S.E.2d 456 (1978); Edmonds v. City of Albany, 242 Ga. 648, 250 S.E.2d 458 (1978); Cochran v. City of Rockmart, 242 Ga. 732, 251 S.E.2d 259 (1978); Savage v. City of Atlanta, 242 Ga. 671, 251 S.E.2d 268 (1978); Gleason v. City Council, 242 Ga. 796, 251 S.E.2d 536 (1979); City of Columbus v. Ronald A. Edwards Constr. Co., 155 Ga. App. 502, 271 S.E.2d 643 (1980); McSears v. State, 247 Ga. 48, 273 S.E.2d 847 (1981); Chatham County v. Kiley, 249 Ga. 110, 288 S.E.2d 551 (1982); Clark & Stephenson v. State Personnel Bd., 252 Ga. 548, 314 S.E.2d 658 (1984); Bowen v. City of Columbus, 256 Ga. 462,

349 S.E.2d 740 (1986); Terrell County v. Albany/Dougherty Hosp. Auth., 256 Ga. 627, 352 S.E.2d 378 (1987); Brophy v. McCranie, 264 Ga. 187, 442 S.E.2d 230 (1994); Weldon v. Board of Comm'rs, 212 Ga. App. 885, 443 S.E.2d 513 (1994); Franklin County v. Fieldale Farms Corp., 270 Ga. 272, 507 S.E.2d 460 (1998); Nash v. Pierce, 238 Ga. App. 466, 519 S.E.2d 462 (1999); In re Estate of Dasher, 259 Ga. App. 201, 575 S.E.2d 921 (2002); City of Buford v. Ga. Power Co., 276 Ga. 590, 581 S.E.2d 16 (2003); Wheatley v. Moe's Southwest Grill, LLC, 580 F. Supp. 2d 1324 (N.D. Ga. 2008); Smart v. State, 318 Ga. App. 882, 732 S.E.2d 850 (2012); Wilbros, LLC v. State, 294 Ga. 514, 755 S.E.2d 145 (2014); City of Brookhaven v. City of Chamblee, 329 Ga. App. 346, 765 S.E.2d 33 (2014).

Uniform Operation

What constitutes general law. — A law, to be general under this paragraph, must operate uniformly, throughout the whole state, upon the subject or class of subjects with which it proposes to deal. *Lorentz & Rittler v. Alexander*, 87 Ga. 444, 13 S.E. 632 (1891); *Union Sav. Bank & Trust Co. v. Dottenheim*, 107 Ga. 606, 34 S.E. 217 (1899) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

This paragraph requires a law to have uniform operation. *Hortman v. Yarbrough*, 214 Ga. 693, 107 S.E.2d 202 (1959); *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966); *Cragg v. State*, 224 Ga. 196, 160 S.E.2d 817 (1968); *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

Uniformity does not mean universality. *Hortman v. Yarbrough*, 214 Ga. 693, 107 S.E.2d 202 (1959); *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966); *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

This paragraph does not mean that general laws may have no exceptions. *McAllister v. American Nat'l Red Cross*, 240 Ga. 246, 240 S.E.2d 247 (1977) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

Uniform Operation (Cont'd)

Requirements for constitutional uniformity. — A law shall apply to all persons, matters or things which it is intended to affect. *Hortman v. Yarbrough*, 214 Ga. 693, 107 S.E.2d 202 (1959); *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966); *Cragg v. State*, 224 Ga. 196, 160 S.E.2d 817 (1968); *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

This provision is complied with when the law operates uniformly upon all persons who are brought within the relations and circumstances provided by it. *Hortman v. Yarbrough*, 214 Ga. 693, 107 S.E.2d 202 (1959); *Cragg v. State*, 224 Ga. 196, 160 S.E.2d 817 (1968); *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

If an Act operates generally upon the entire class of subjects with which it deals, uniformly throughout the state, there is no merit in a constitutional attack based upon this paragraph. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

If a law operates alike on all who come within the scope of its provisions, constitutional uniformity is secured. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

O.C.G.A. § 51-1-29.5(c) does not violate the uniformity provision of the Georgia Constitution, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because it is a general law; it operates uniformly upon all health care liability claims arising from emergency medical care, and classification of the designated class is neither arbitrary nor unreasonable. *Gliemmo v. Cousineau*, 287 Ga. 7, 694 S.E.2d 75 (2010).

School districts. — There is no lack of uniformity in a section which applies to every board of education throughout the state in precisely the same way. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Independent school systems constitute one class and uniformity requires that they be treated alike. *Rice v. Cook*, 222 Ga. 499, 150 S.E.2d 822 (1966).

Abolition of local school districts by re-

peal of their corporate charters does not violate constitutional uniformity requirement. *Upson County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981).

General law may except certain persons or things. — A law operating uniformly throughout the state, but from which the General Assembly excepts certain persons or things, is still a general law. *McAllister v. American Nat'l Red Cross*, 240 Ga. 246, 240 S.E.2d 247 (1977).

To be territorially general, law may not exclude any county. — It is not necessary that every county in the state, at the time of the passage of a law, should fall within its operation, but it is necessary that none should be excepted in such a way that it can never fall within its provisions. *Shadrick v. Bledsoe*, 186 Ga. 345, 198 S.E. 535 (1938).

If a statute should except from its operation even one county, either by name, or by the use of such words as clearly indicate that the law can never apply to such county, the Act is lacking in the feature of territorial generality, and is therefore not a general law. *Davis v. Board of Educ.*, 203 Ga. 44, 45 S.E.2d 429 (1947).

The exception of five named counties from the provisions of an Act prevented the Act from having uniform operation throughout the state. *Davis v. Board of Educ.*, 203 Ga. 44, 45 S.E.2d 429 (1947).

Municipal charters need not be uniform. — There is no requirement in the Constitution that there be uniformity in the charters of the municipalities. *Harris v. McMillan*, 186 Ga. 529, 198 S.E. 250 (1938).

O.C.G.A. § 9-11-68 is a general law and does not violate the uniformity clause. — The Tort Reform Act of 2005, O.C.G.A. § 9-11-68, does not violate the uniformity clause of the Georgia Constitution, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because § 9-11-68 is a general law since it applies uniformly throughout the state to all tort cases; the purpose of the general law to encourage litigants in tort cases to make and accept good faith settlement proposals in order to avoid unnecessary litigation is a legitimate legislative purpose, consistent with the state's strong public policy of encouraging

negotiations and settlements, and the fact that the statute applies to tort cases, but not other civil actions, does not render it an impermissible special law. *Smith v. Baptiste*, 287 Ga. 23, 694 S.E.2d 83 (2010).

Exception to hotel/motel tax cap proper. — O.C.G.A. § 48-13-51(a)(5)(B) was not unconstitutional under the Uniformity Clause, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), but was a proper exception to the general law of § 48-13-51(a)(1)(D), which imposed a three percent cap on Hotel/Motel taxes, in that the statute applied uniformly on all taxing authorities within the scope of the statute's provisions, and because the classification made by the statute was not arbitrary or unreasonable. *Cottrell v. Atlanta Dev. Auth.*, 297 Ga. 1, 770 S.E.2d 616 (2015).

Special Laws

Constitution does not prohibit special laws per se. — The legislature may enact special laws affecting special classes, but it cannot do so if it has previously legislated in that area by general law nor may it do so if the classification of those affected is unreasonable. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

Special law conflicting with existing general law invalid. — A special or local law dealing with a subject as to which provision has already been made by an existing general law is in conflict with that section and invalid. *Cheatham v. Palmer*, 176 Ga. 227, 167 S.E. 522 (1933).

Touching anything whatever of a local nature, there may be a local law, provided no existing general statute applies to it, but the same thing cannot be regulated one way by a general statute, and another way by a subsequent local statute. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942).

An Act which deals with a subject matter for which provision has been made by an existing general law is repugnant to this paragraph, and is therefore null and void. *Studstill v. Gary*, 216 Ga. 268, 116 S.E.2d 213 (1960) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

Paragraph applies to all fields covered by general law. — This paragraph is not limited to those fields and subjects which have been completely exhausted by a general law. It embraces every field and subject which has been covered, though superficially, by a general law. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

Paragraph applies to element embraced but not specifically dealt with in general law. — The mere fact that a special law deals with some remote segment or element of the general subject embraced in the general law, which segment or element is not dealt with by the general law, does not alter the fact that such special law is enacted in a case where provision has been made by an existing general law. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942); *Giles v. Gibson*, 208 Ga. 850, 69 S.E.2d 774 (1952); *Pace v. City of Atlanta*, 135 Ga. App. 399, 218 S.E.2d 128 (1975).

Conflict required. — A special law does not conflict with a general law if it does not detract from or hinder the operation of the general law, but rather augments and strengthens it. *Grovenstein v. Effingham County*, 262 Ga. 45, 414 S.E.2d 207 (1992).

A local ordinance that effectively prohibited sales of alcoholic beverages to minors in a more restrictive manner than under O.C.G.A. § 3-3-2 was not a special law that was preempted by a general law. The local ordinance was authorized by Ga. Const. 1983, Art. III, Sec. VI, Para. IV, and O.C.G.A. § 3-3-2 and did not result in a conflict. *Grovenstein v. Effingham County*, 262 Ga. 45, 414 S.E.2d 207 (1992).

Special or local law cannot repeal or modify general law. — A general law may be repealed or modified by another general law, but it cannot be repealed or modified by a special or local law. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942); *Hood v. Burson*, 194 Ga. 30, 20 S.E.2d 755 (1942); *Irwin County Elec. Membership Corp. v. Haddock*, 214 Ga. 682, 107 S.E.2d 195 (1959).

While a special law may not conflict with the general law in the sense that it has the effect of repealing some portion of

Special Laws (Cont'd)

the general law, nevertheless if the special law modifies it in any manner, either by expanding or contracting its meaning, such special law is obnoxious to the Constitution and cannot be sustained. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942).

In the eye of the Constitution, every local law is special relative to a general law. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942).

Special laws cannot change grand jury. — The powers and duties of grand jury bodies, as stated by general laws, cannot be altered by any special laws to enlarge, diminish, modify, or change them. *Bussell v. Youngblood*, 239 Ga. 553, 238 S.E.2d 89 (1977).

Law territorially general cannot be made territorially special. — General statutes can be killed, but not mutilated. The smallest of their territorial members cannot be cut off. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942); *Davis v. Board of Educ.*, 203 Ga. 44, 45 S.E.2d 429 (1947).

A law which is general by reason of its territorial comprehensiveness only can no more be limited in its operation territorially by a subsequent special law than can one which is general in the nature of its subject matter. *Hood v. Burson*, 194 Ga. 30, 20 S.E.2d 755 (1942).

There is no way to convert a statute territorially general into one territorially special. It may be altered at will, save that, whilst it has life it must live over the state with equal vigor, and can be excluded from no nook or corner in which there is a subject matter for its operation, and any of its attributes may be changed or destroyed except its territorial generality and uniformity, which must be as enduring as its life. *Davis v. Board of Educ.*, 203 Ga. 44, 45 S.E.2d 429 (1947).

General law can only be affected by another general law. — If a general law is not exhaustive and fails to reach every minute element of the subject dealt with, the only constitutional remedy for a more exhaustive legislative treatment is by amendment of the general law by a general enactment. It cannot be done by

amending or supplementing the general law by a special law. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942).

A general statute cannot cease to be general other than by another general statute repealing it. *City of Atlanta v. Hudgins*, 193 Ga. 618, 19 S.E.2d 508 (1942); *Hood v. Burson*, 194 Ga. 30, 20 S.E.2d 755 (1942).

Terms of superior courts. — When the legislature deals with superior courts in fixing the terms at which they are to be held in the several counties, it does so by general and not by special legislation. *Burge v. Mangum*, 134 Ga. 307, 67 S.E. 857 (1910); *Geer v. Bush*, 146 Ga. 701, 92 S.E. 47 (1917); *Geer v. Colquitt Hdwe. & Furn. Co.*, 146 Ga. 811, 92 S.E. 515 (1917); *Norris v. McDaniel*, 207 Ga. 232, 60 S.E.2d 329 (1950).

Act fixing terms of a superior court and providing for attendance of grand juries thereat is a general law. *Long v. State*, 160 Ga. 292, 127 S.E. 842 (1925); *Brown v. State*, 242 Ga. 602, 250 S.E.2d 491 (1978).

O.C.G.A. § 3-7-43 held unconstitutional. — O.C.G.A. § 3-7-43, pursuant to which a city and a county were issuing alcoholic beverage licenses to private clubs without previous voter approval, is unconstitutional as a special law in conflict with existing general law. *Regency Club v. Stuckey*, 253 Ga. 583, 324 S.E.2d 166 (1984).

Statute allowing claims against manufacturers or suppliers of asbestos. — O.C.G.A. § 9-3-30.1, providing for the revival or extension of actions against manufacturers or suppliers of asbestos, does not meet constitutional standards because it singles out for special treatment property claims against manufacturers and suppliers of asbestos and differentiates them from all other claims that might be based upon other hazardous or toxic substances. *Celotex Corp. v. St. Joseph Hosp.*, 259 Ga. 108, 376 S.E.2d 880 (1989), cert. denied, 493 U.S. 1081, 110 S. Ct. 1138, 107 L. Ed. 2d 1043 (1990).

Zoning ordinances. — The Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq., preempted the provisions in a city charter for the purposes of the adoption and amendment of zoning ordinances. *Lit-*

tle v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000).

War on Terrorism Local Assistance Act. — Legislation enacting the War on Terrorism Local Assistance Act, O.C.G.A. § 36-75-11(c), does not violate Ga. Const. 1983, Art. III, Sec. VI, Para. IV because the legislation and § 36-75-11(c) are logically related and do not embrace discordant subjects when the legislation generally pertains to public safety and judicial facilities authorities, and § 36-75-11(c) applies to authorities in counties that have activated public safety and judicial facilities authorities; it was the legislature's decision to enact a statute imposing a referendum requirement on any authority that has been authorized to incur bonded indebtedness in a county with an activated public safety and judicial facilities authority when that authority has constructed or operates buildings or facilities for use by a department, agency, division or commission of such county. *Dev. Auth. v. State*, 286 Ga. 36, 684 S.E.2d 856 (2009).

Private Rights

Private rights are confined to such rights, when applied to property, as persons may possess unconnected with, and not essentially affecting, the public interest, or growing out of a public institution of society. *Board of Educ. & Orphanage v. State Bd. of Educ.*, 186 Ga. 200, 197 S.E. 261 (1938).

Classification

1. In General

Legislature may make classifications for purposes of legislation and pass general laws with reference to such classes. *Commissioners of Rds. & Revenues v. Davis*, 213 Ga. 792, 102 S.E.2d 180 (1958); *City of Atlanta v. Gower*, 216 Ga. 368, 116 S.E.2d 738 (1960); *Jones v. City of College Park*, 223 Ga. 778, 158 S.E.2d 384 (1967).

Provided classification relates to object of legislation. — In order to constitutionally classify for legislation, the basis for classification must relate to the object or purpose of the legislation. *City of*

Atlanta v. Wilson, 209 Ga. 527, 74 S.E.2d 455 (1953).

The basis of classification must have some reasonable relation to the subject matter of the law, and must furnish a legitimate ground of differentiation. *City of Atlanta v. Gower*, 216 Ga. 368, 116 S.E.2d 738 (1960); *Jones v. City of College Park*, 223 Ga. 778, 158 S.E.2d 384 (1967).

Classification cannot be unreasonable or arbitrary. — Mere arbitrary discriminations are not permissible under the Constitution. *City of Atlanta v. Gower*, 216 Ga. 368, 116 S.E.2d 738 (1960).

A classification is valid if it relates to the subject matter of the legislation and is not unreasonable or arbitrary. *Strickland v. Richmond County*, 243 Ga. 462, 254 S.E.2d 844 (1979).

Must operate uniformly. — A tax is not violative of this paragraph if applied uniformly. *Underwriters Salvage Co. v. City of Atlanta*, 174 Ga. 678, 163 S.E. 893 (1932) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

A law which operates uniformly upon all persons of a designated class is a general law within the meaning of the Constitution, provided that the classification thus made is not arbitrary or unreasonable. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

To be constitutional, it is necessary only that the law applies uniformly to the class or classes of persons or things affected by it, and that the classes included or excluded from its general effect are reasonable and not arbitrary. *McAllister v. American Nat'l Red Cross*, 240 Ga. 246, 240 S.E.2d 247 (1977).

Classification may not restrict Act's application to single county. — While the legislature may make a classification for the purposes of legislation, and pass general laws with respect to different classes, it cannot place one county in a class for such purposes. If the attempted classification is so hedged about and restricted that the Act applies to only one county, and other counties cannot come within the class created, it is a local law and not a general one having operation throughout the state. *Marbut v. Hollingshead*, 172 Ga. 531, 158 S.E. 28 (1931).

Classification (Cont'd)

1. In General (Cont'd)

May not restrict application to single county unless other counties may enter class. — An Act is not unconstitutional as a special law at the time it is passed if it is reasonable and not arbitrary, and it provides that the class may be enlarged when other counties attain the characteristic of the member of the class. It is not necessarily a special law, even though it applies to but one county. *Lawson v. State*, 242 Ga. 744, 251 S.E.2d 304 (1978).

Effect of population bill carried forward from 1945 constitution. — A 1952 amendment to the 1945 constitution, allowing the establishment of a joint board of tax assessors in a population category applying only to Fulton County and the City of Atlanta, was carried forward in the present constitution, and neither the amendment nor a 1952 implementing statute was unconstitutional. However, subsequent amendments which attempted to establish by local act any appeal system other than that specified in the 1952 amendment, and other amendments that attempted to change the population category affected by the 1952 amendment, were unconstitutional and void. *Lomax v. Lee*, 261 Ga. 575, 408 S.E.2d 788 (1991).

Classification of property for tax purposes. — The General Assembly may fix the taxing situs of all tangible or intangible personal property, but it must be by general law, and classified according to the nature of the property, and not according to the nature of the owner. *County of Walton v. County of Morgan*, 120 Ga. 548, 48 S.E. 243 (1904).

Professions. — Separate classification and treatment of architects, engineers, and contractors by O.C.G.A. § 9-3-51 from owners, tenants, and manufacturers is reasonable and not arbitrary. *Mullis v. Southern Co. Servs.*, 250 Ga. 90, 296 S.E.2d 579 (1982).

2. By Population

Editor's notes. — The cases noted under this heading were decided prior to the 1983 Constitution, which provides that no

population bill shall be passed except as defined by the General Assembly.

Requirements for valid classification of counties by population are that: the bases of classification must have some reasonable relation to the subject matter of the law, and must furnish a legitimate ground of differentiation; the classification must be open to let in counties subsequently falling within the class, as well as open to let out a county which, either by increase or decrease of population, ceases to have the required population; and the law must apply uniformly to all counties within the class, and must not be so hedged about and restricted that the Act applies only to one county. *Estes v. Jones*, 203 Ga. 686, 48 S.E.2d 99 (1948).

The legislature would be authorized to make a classification of cities on the basis of population, and pass a general law with reference to such classification, provided the basis of classification has some reasonable relation to the subject matter of the law, and furnishes a legitimate ground for differentiation, and provided that the Act is so framed as to let in all cities coming within the population classification, and let out all cities falling below the classification. *City of Atlanta v. Gower*, 216 Ga. 368, 116 S.E.2d 738 (1960).

Reasonable relation to subject matter of legislation. — A classification upon the basis of population is a reasonable and natural classification where it is adjusted to the purpose or subject matter of the legislation and, consequently, does not violate the Constitution. *Orr v. Hapeville Realty Invs., Inc.*, 211 Ga. 235, 85 S.E.2d 20 (1954), overruled on other grounds, *East Lands, Inc. v. Floyd County*, 244 Ga. 761, 262 S.E.2d 51 (1979).

A population classification of not less than 145,000 but not more than 165,000 has no reasonable relationship to the subject matter of a statute. *Strickland v. Richmond County*, 243 Ga. 462, 254 S.E.2d 844 (1979).

Depends upon particular facts. — Whether or not classification by population bears a reasonable relation to the subject matter of the statute depends largely upon the facts of each particular case. *Strickland v. Richmond County*, 243 Ga. 462, 254 S.E.2d 844 (1979).

Classification must be open to let in new county or city. — Where the basis of classification is that of population, in order to be a general law it is necessary that such classification shall be open to let in any county or city which by any future census might have the stipulated population. *Barge v. Camp*, 209 Ga. 38, 70 S.E.2d 360 (1952); *Commissioners of Rds. & Revenues v. Davis*, 213 Ga. 792, 102 S.E.2d 180 (1958).

An Act which makes a classification by population must be open to let in counties subsequently falling within the class. *Humthlett v. Reeves*, 211 Ga. 210, 85 S.E.2d 25 (1954).

Classification which does not allow new county or city is not general law. — Where a classification is made on the basis of population as to counties or cities, and the Act is so limited and restricted that all counties or cities which may come within the population class cannot come within the provisions of the Act, it is not a general law. *City of Atlanta v. Gower*, 216 Ga. 368, 116 S.E.2d 738 (1960).

Classification of counties based upon population of an adjoining county is purely arbitrary. *Humthlett v. Reeves*, 211 Ga. 210, 85 S.E.2d 25 (1954).

The population of one county cannot have any reasonable relation to the subject matter of a statute dealing with establishing cemeteries so as to make it applicable to an adjoining county. *Humthlett v. Reeves*, 211 Ga. 210, 85 S.E.2d 25 (1954).

Classification by population permitted. — Acts providing for a cadastral survey in certain counties would not have been unconstitutional, illegal, and void even had such Acts named certain counties rather than fixing a classification based on population since the purpose of such Acts was to confer upon the proper governing authority of counties falling within the fixed classification additional powers and duties. *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952).

O.C.G.A. § 15-9-120(2), granting the right to a jury trial in the probate courts of counties with a certain population according to the 1990 decennial census “or any future such census”, was not an unconsti-

tutional special law, under Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because the statute’s use of the disjunctive “or” gave the statute the elasticity required to make the statute a general law as this allowed counties to move into or out of this class of counties according to the latest census. *Ellis v. Johnson*, 291 Ga. 127, 728 S.E.2d 200 (2012).

Classification not permitted. — A section purporting to create a classification of counties for the purpose of levying a school tax solely upon the basis of population is unconstitutional. *Southern Ry. v. Harrison*, 172 Ga. 465, 157 S.E. 462 (1931).

Population as the sole basis for the attempted classification of counties to be excluded from the privilege of fishing noncommercially on Sunday is discriminatory and repugnant. *McAllister v. State*, 220 Ga. 570, 140 S.E.2d 828 (1965).

The portion of a section allowing tax collectors in counties of certain populations to retain a different percentage of school taxes collected than that specified in the general law for the collection of county school taxes was a special law in violation of a general law and was held invalid because the population bracket used applied to only one county and there was no rational relationship between the population bracket used and the subject matter of the law. *Board of Comm’rs v. Clayton County Sch. Dist.*, 250 Ga. 244, 297 S.E.2d 724 (1982).

For a classification by population to render a statute general instead of special, the statute must not only be open to let in counties later falling within the class, but must be open to let out a county that by increase or decrease according to the last census ceases to have the required population, so as not to freeze a county within the original population restriction. *Dougherty Co. v. Bush*, 227 Ga. 137, 179 S.E.2d 343 (1971).

Municipal Ordinances

Municipal ordinance is “special law.” — A municipal ordinance which deals with matters covered by a general law is a special law within the meaning of this paragraph. *Jenkins v. Jones*, 209 Ga.

Municipal Ordinances (Cont'd)

758, 75 S.E.2d 815 (1953) (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

Generally, a municipal ordinance passed in pursuance of express legislative authority is a law within the meaning of the Constitution, and has the same effect as a local law duly enacted by the state legislature. *Jenkins v. Jones*, 209 Ga. 758, 75 S.E.2d 815 (1953).

A municipal ordinance is nothing more than a special law limiting its application to the territory embraced within the municipality. *Pace v. City of Atlanta*, 135 Ga. App. 399, 218 S.E.2d 128 (1975).

Penal ordinance yields to state law. — A municipal ordinance which penalizes an act made penal by existing state law covering the same subject matter must yield to the state law. *City of Albany v. Key*, 124 Ga. App. 16, 183 S.E.2d 20 (1971).

Ordinance may not infringe upon acts made penal by state law. *Harper v. State*, 135 Ga. App. 924, 219 S.E.2d 636 (1975).

Municipal ordinance must differ from state statute. — Where a municipal ordinance and a public criminal statute operate upon the same state of physical acts, the ordinance is invalid unless the offense created thereby contains some characterizing ingredient not contained in the state offense. *Jenkins v. Jones*, 209 Ga. 758, 75 S.E.2d 815 (1953).

A municipality may by ordinance penalize an act which is forbidden by the penal laws of the state, if there is in the municipal offense some essential ingredient not essential to the state offense, or if the municipal offense lacks some ingredient essential to the state offense. *Goldstein v. City of Atlanta*, 141 Ga. App. 701, 234 S.E.2d 344, cert. dismissed, 239 Ga. 843, 240 S.E.2d 551 (1977).

Municipalities may not penalize an act which is also forbidden by a state penal law unless there is an "essential" or "characterizing" ingredient in the municipal offense which is not essential to or contained in the state offense. This is the test intended to be applied in determining the validity of a local ordinance, when there exists a general law on the same subject,

and there is no express legislative authorization for the special law. *Akin v. Hardison*, 245 Ga. 57, 262 S.E.2d 814 (1980).

Municipal ordinance must affect peace and good order of municipality. — The act which the municipality seeks to punish as a municipal offense must be such as affects the peace and good order of the municipality and contain some characterizing ingredient not contained in the state offense. *Gordon v. Green*, 228 Ga. 505, 186 S.E.2d 719 (1972).

Power of municipality conferred by general legislative Act. — The ordinance of a city penalizing a lesser speed than is penalized by the statute of the state is merely supplemental to the statute. The legislative Acts regulating the speed of motor vehicles within the state specifically authorize municipalities to regulate traffic within the municipal limits. *Walters v. State*, 90 Ga. App. 360, 83 S.E.2d 48 (1954).

The power of a municipality to punish as a municipal offense that which is by general law of the state also a state offense must be conferred by a general rather than a special Act of the legislature and the grant of such power must be clearly expressed. *Gordon v. Green*, 228 Ga. 505, 186 S.E.2d 719 (1972).

Authority must be clear and unequivocal. — The General Assembly may authorize the punishment of an act as a city offense which would also be a state offense, provided the terms of the Act conferring the authority are clear and unequivocal and manifest a legislative intent to confer authority for the punishment of such act. *Akin v. Hardison*, 245 Ga. 57, 262 S.E.2d 814 (1980).

Municipal ordinance that augments general law. — There is no unconstitutional conflict between the state minimum wage law and a city ordinance where the ordinance does not detract from or hinder the operation of the minimum wage law, but rather it augments and strengthens it. *City of Atlanta v. Associated Bldrs. & Contractors*, 240 Ga. 655, 242 S.E.2d 139 (1978).

Municipal charter's authority insufficient. — The mere authority granted in a municipal charter to enact ordinances

for the general welfare is not a sufficient delegation of the municipality's authority. *Gordon v. Green*, 228 Ga. 505, 186 S.E.2d 719 (1972).

Special ordinances, conflicting with a general ordinance, may be passed. *Brown v. Atlanta Ry. & Power Co.*, 113 Ga. 462, 39 S.E. 71 (1901); *Sawyer v. City of Blakely*, 2 Ga. App. 159, 58 S.E. 399 (1907).

Express authorization for ordinance. — Subsection (a) of O.C.G.A. § 3-3-2 constituted an express authorization by general law for Effingham County to exercise by local ordinance the police power of revoking licenses for the sale of beer and wine, provided that the ordinance met the requirement of subsection (a) of Ga. Const. 1983, Art. III, Sec. VI, Para. IV. *Grovenstein v. Effingham County*, 262 Ga. 45, 414 S.E.2d 207 (1992).

Municipality's unconstitutional regulation of practice of law. — An occupational tax ordinance levied on professionals and requiring registration and a fee payment at the beginning of each year, prior to the transaction of business, operated as an unconstitutional precondition on the practice of law. *Sexton v. City of Jonesboro*, 267 Ga. 571, 481 S.E.2d 818 (1997).

Ordinance holding surety liable on criminal appearance bond until fine collected deemed constitutional. — Section 4-1009(6) of the Code of Ordinances of the City of Macon, which seeks to hold the surety liable on a criminal appearance bond until the fine imposed is collected, does not conflict with Georgia case law, is authorized by O.C.G.A. § 36-32-4, which authorizes municipal corporations to make provision by ordinance as to what constitutes the forfeiture of bonds given by offenders for their appearance before municipal courts, and does not conflict with O.C.G.A. § 17-6-31 (surrender on surety bonds); for these reasons, there has not been preemption by the state in this area of regulatory activity. Therefore, § 4-1009(6) is not unconstitutional under Ga. Const. 1983, Art. III, Sec. VI, Para. IV. *City of Macon v. Davis*, 251 Ga. 332, 305 S.E.2d 116 (1983).

Ordinance providing certain insurance benefits for dependents of city

employees who qualified and registered as domestic partners, which defined "dependent" consistent with state law, did not violate the Georgia Constitution or the Municipal Home Rule Act. *City of Atlanta v. Morgan*, 268 Ga. 586, 492 S.E.2d 193 (1997).

City's ordinances prohibiting the use of amphibious vehicles as tour vehicles in parts of the city were not preempted by the state law giving the Public Service Commission the authority to issue certificates of public convenience and necessity; the ordinances fall within the constitutional exception to the doctrine of preemption since the General Assembly enacted general laws authorizing the local government to exercise its police powers and enact the local laws at issue. *Old South Duck Tours, Inc. v. Mayor & Aldermen of Savannah*, 272 Ga. 869, 535 S.E.2d 751 (2000).

County ordinance was proper use of police power. — Since the stated purpose of Gwinnett County, Ga., Ord. No. 82-11 was to impede the sale of stolen property, and its requirements were designed to achieve that end, it was a proper use of the county's police power; further, by expressly preserving local laws in O.C.G.A. § 44-12-135, which included county ordinances, the legislature had in effect "authorized" them, and so Gwinnett County, Ga., Ord. No. 82-11 did not conflict with O.C.G.A. § 44-12-138. *Pawnmart, Inc. v. Gwinnett County*, 279 Ga. 19, 608 S.E.2d 639 (2005).

City ordinance regarding discontinuance of water service pre-empted. — Pursuant to the uniformity clause of Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), § 154-120(1) of the Code of Ordinances of the City of Atlanta, Ga., which authorized the discontinuance of water service until a bill was paid, was pre-empted by O.C.G.A. § 36-60-17(a), which did not allow a supplier to refuse to supply water to a water meter because of a prior owner's indebtedness. *Fed. Home Loan Mortg. Corp. v. City of Atlanta*, 285 Ga. 189, 674 S.E.2d 905 (2009).

City ordinance regulating age of persons who could enter adult entertainment establishments. — Trial court erred by rejecting entertainers' challenge

Municipal Ordinances (Cont'd)

under the uniformity clause, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), to a city's ordinance prohibiting persons aged 18 to 21 from entering adult entertainment establishments where alcohol was served because the ordinance conflicted with O.C.G.A. § 3-3-24(a), allowing persons over 18 to work in such establishments. *Willis v. City of Atlanta*, 285 Ga. 775, 684 S.E.2d 271 (2009).

Ordinance did not impair operation of state law. — Definition of "public sidewalk" found in City of Forest Park, Ga., Ordinance § 9-8-45(f) is not unconstitutional as conflicting with state law because nothing in § 9-8-45 impairs the operation of O.C.G.A. § 40-1-1(57); by its specific terms, § 40-1-1(57), is not intended to be a definition of general application, but defines the term "sidewalk" in the context of Title 40 of the Georgia Code, which is labeled "Motor Vehicles and Traffic," and it does not appear that the definition set forth in § 40-1-1(57) would apply elsewhere in the Code in which the word "sidewalk" is used in other contexts. *Braley v. City of Forest Park*, 286 Ga. 760, 692 S.E.2d 595 (2010).

Ordinance not preempted by statute. — Miller County, Ga., Ordinance No. 10-01, § 3 could not be preempted by O.C.G.A. § 36-1-14 because § 3 did not impair the statute's operation but rather strengthened and augmented the statute; the exception in § 3 was more narrow than in O.C.G.A. § 36-1-14, requiring that a majority of the Board of Commissioners of Miller County approve the contract or transaction after establishing that the goods, and the County had authority, as an incident of the county's home rule power, to amend Ga. L. 1983, p. 4594, § 14. *Bd. of Comm'rs v. Callan*, 290 Ga. 327, 720 S.E.2d 608 (2012).

Ordinance imposing an occupational tax. — City ordinance imposing an occupational tax on attorneys who maintain an office and practice law in the city did not violate constitutional equal protection because the tax paid for a variety of city services that benefited all citizens within the city, including attorneys, it was reasonable for the city to require attor-

neys with offices inside city limits to help pay for city services from which the attorneys benefit, and all attorneys subject to the ordinance were taxed uniformly. *Moss v. City of Dunwoody*, 293 Ga. 858, 750 S.E.2d 326 (2013).

County Commissioners

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. I, Sec. II, Para. VII, Ga. Const. 1976, Art. IX, Sec. I, Paras. VI and VII, and antecedent provisions, are included in the annotations for this paragraph. The 1983 Constitution now provides that counties shall have such governing authorities as are provided by the 1983 Constitution (see Ga. Const. 1983, Art. IX, Sec. I, Para. I) and by law.

No requirement as to uniformity. — There is no constitutional requirement as to uniformity where the duties and powers of county commissioners are concerned. *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966).

Paragraph does not apply. — There is good reason to construe Ga. Const. 1976, Art. IX, Sec. I, Para. VI (no comparable provision) as being separate and distinct in its requirements from the provisions of this paragraph prohibiting the passing of special laws where there is already an existing general law. *Toole v. Anderson*, 177 Ga. 814, 171 S.E. 714 (1933).

The purpose of this paragraph was to ordain the uniform operation throughout the state of all the general laws; but to this general rule the Constitution itself made an exception as to county commissioners (Ga. Const. 1976, Art. IX, Sec. I, Para. VII [no comparable provision]), which sanctions the utmost diversity consistent with the needs of the particular county that may require them. *Bradford v. Hammond*, 179 Ga. 40, 175 S.E. 18 (1934); *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952).

The constitutional provision prohibiting special laws in cases for which provision has been made by general law does not apply to statutes defining the powers of a county governing authority. *SCA Servs. of Ga., Inc. v. Fulton County*, 238 Ga. 154,

231 S.E.2d 774 (1977).

Creation of duties by special Acts. — There is no limitation or restriction upon the General Assembly in the creation by special law of county commissioners, and in fixing their jurisdiction, powers, and duties. *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952).

Local law invalidated in compensation dispute. — Trial court correctly held that a county solicitor general was improperly compensated beginning in July 2007 but erred in calculating the back pay due to him as of January 1, 2009, based on an amended local law because the amended local law irreconcilably conflicted with O.C.G.A. § 15-18-67(b), which prohibited the reduction of a solicitor-general's compensation during his term of office. *Inagawa v. Fayette County*, 291 Ga. 715, 732 S.E.2d 421 (2012).

This paragraph has been construed together with Ga. Const. 1976, Art. IX, Sec. I, Paras. VI and VII (no comparable pro-

visions) to impose very little restriction on the General Assembly in creating and defining the duties of county commissioners by special Act. The General Assembly has the power to pass separate and distinct laws creating county commissioners for every county in Georgia. *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975).

Inapplicability of general laws. — General laws, so far as they refer to county commissioners, are subject to qualification by special Acts, and the special Acts need not be uniform. *Robitzsch v. State*, 189 Ga. 637, 7 S.E.2d 387 (1940); *Moore v. Whaley*, 189 Ga. 647, 7 S.E.2d 394 (1940).

The provisions of general laws enacted by the legislature do not apply to county commissioners, unless made so by the special laws creating them. *Humthlett v. Reeves*, 211 Ga. 210, 85 S.E.2d 25 (1954); *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Intent of paragraph. — This paragraph was intended to ensure that once the legislature enters a field by enacting a general law, that field is thereafter to be reserved exclusively for general legislation and cannot be open to special or local laws. Thus, once the General Assembly has legislated in an area, such legislation preempts additional action in the form of special or local laws. 1980 Op. Att'y Gen. No. 80-150.

Local ordinance covering same subject as a general law must conform with the provisions of the general law, but may exact additional requirements. 1971 Op. Att'y Gen. No. 71-149.

General air pollution law does not preclude local ordinances. — The existence of general air pollution laws does not necessarily preclude the adoption of local ordinances on the same subject provided such ordinances are of a nonpenal nature, are provided for the protection of the health, safety, and comfort of the community and are not prohibited by express or implied language in the general law. 1971 Op. Att'y Gen. No. 71-149.

Invalidation of special laws. — A local or special law is invalidated by the second clause of this paragraph only where a general law covering the subject already exists, while the first clause of this paragraph invalidates local or special legislation even where no general law dealing with the subject matter exists. 1954-56 Op. Att'y Gen. p. 375 (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV).

Local law providing for salary. — Local legislation can be used to supplement by salary the fees of the ordinary (now judge of the probate court) and sheriff of a particular county. 1952-53 Op. Att'y Gen. p. 24.

Municipal ordinances creating status of domestic partnership. — Municipal ordinances which create the status of domestic partnership are violative of constitutional and statutory provisions precluding municipal legislation relating to legal status and relationship; thus, group health insurance coverage provided pursuant to such ordinances is violative of the public policy of this state. 1993 Op. Att'y Gen. No. 93-26.

Glue sniffing ordinance prohibited. — A city may not adopt an ordinance prohibiting glue sniffing, already denounced by a state statute. 1970 Op. Att’y Gen. No. U70-59.

Local Act requiring special election before expiration of 29 days between call of election and election itself is invalid. 1980 Op. Att’y Gen. No. 80-27.

Evacuation to protect lives and property is exercise of government’s inherent “police powers.” 1983 Op. Att’y Gen. No. 83-60.

Fire ordinances for day care centers. — The authority of local governments to enact fire ordinances for day care centers is preempted by former O.C.G.A. § 49-5-14 which gave the Board of Human Resources authority to adopt fire safety codes for day care centers. 1984 Op. Att’y Gen. No. 84-9.

Residency requirements for candidates for Board of Commissioners. — The provisions of the local Act establishing a requirement that candidates for the Board of Commissioners of Clay County be residents of the commissioner districts from which they are seeking election for a period of at least five years immediately preceding the date of the election is unenforceable as being a local Act in derogation of general law. 1984 Op. Att’y Gen. No. U84-31.

Local regulation of air pollutants. — While local governments are not preempted from regulating in the area of air quality control, any ordinance in this area

which contradicts or detracts from the Georgia Air Quality Act, O.C.G.A. § 12-9-1 et seq., would be unconstitutional and void. 1986 Op. Att’y Gen. No. U86-22.

Local licensing of journeymen electricians. — The State Construction Industry Licensing Board Act, O.C.G.A. Ch. 14, T. 43, prohibits a municipality or county from establishing licensing requirements for journeyman electricians since any local provision would constitute a local law in conflict with the general provision. 1987 Op. Att’y Gen. No. 87-3.

Payroll deduction programs for public employees. — Political subdivisions may establish payroll deduction programs for public employees provided that there is statutory authority to do so and that the programs are not unconstitutional gratuities. The General Assembly, by acting in this area through various general statutory provisions, intended to permit local governments to utilize payroll deduction plans only in limited circumstances as outlined in those kinds of general laws; there is no general law authorizing local governments to undertake payroll deduction programs either through the passage of local law or through local ordinances. Absent authority to engage in such programs through the enactment of local laws, the most appropriate method for their implementation would be through the passage of general laws. 2014 Op. Att’y Gen. No. U2014-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 16A Am. Jur. 2d, Constitutional Law, §§ 284 et seq., 312 et seq., 319 et seq.

C.J.S. — 16 C.J.S., Constitutional Law, § 280.

ALR. — Constitutional provisions against special legislation relating to counties or municipalities as affected by

the distinction between their political and nonpolitical character, 50 ALR 1163.

Constitutional provision prohibiting local or special legislation as applied to statutes relating to juries, 155 ALR 789.

Validity of statutory classifications based on population — intoxicating liquor statutes, 100 ALR3d 850.

Paragraph V. Specific limitations.

(a) The General Assembly shall not have the power to grant incorporation to private persons but shall provide by general law the manner in which private corporate powers and privileges may be granted.

(b) The General Assembly shall not forgive the forfeiture of the charter of any corporation existing on August 13, 1945, nor shall it grant any benefit to or permit any amendment to the charter of any corporation except upon the condition that the acceptance thereof shall operate as a novation of the charter and that such corporation shall thereafter hold its charter subject to the provisions of this Constitution.

(c)(1) The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of encouraging a monopoly, which is hereby declared to be unlawful and void. Except as otherwise provided in subparagraph (c)(2) of this Paragraph, the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, which is hereby declared to be unlawful and void.

(2) The General Assembly shall have the power to authorize and provide by general law for judicial enforcement of contracts or agreements restricting or regulating competitive activities between or among:

- (A) Employers and employees;
- (B) Distributors and manufacturers;
- (C) Lessors and lessees;
- (D) Partnerships and partners;
- (E) Franchisors and franchisees;
- (F) Sellers and purchasers of a business or commercial enterprise; or
- (G) Two or more employers.

(3) The authority granted to the General Assembly in subparagraph (c)(2) of this Paragraph shall include the authority to grant to courts by general law the power to limit the duration, geographic area, and scope of prohibited activities provided in a contract or agreement restricting or regulating competitive activities to render such contract or agreement reasonable under the circumstances for which it was made.

(d) The General Assembly shall not have the power to regulate or fix charges of public utilities owned or operated by any county or municipality of this state, except as authorized by this Constitution.

(e) No municipal or county authority which is authorized to construct, improve, or maintain any road or street on behalf of, pursuant to a contract with, or through the use of taxes or other revenues of a

county or municipal corporation shall be created by any local Act or pursuant to any general Act nor shall any law specifically relating to any such authority be amended unless the creation of such authority or the amendment of such law is conditioned upon the approval of a majority of the qualified voters of the county or municipal corporation affected voting in a referendum thereon. This subparagraph shall not apply to or affect any state authority. (Ga. Const. 1983, Art. 3, § 6, Para. 5; Ga. L. 1986, p. 1628, § 1/HR 662; Ga. L. 2010, p. 1260, § 1/HR 178.)

1976 Constitution. — Art. III, Sec. VIII, Paras. V, VI, VIII-X.

Cross references. — Impairment of contract obligations generally, U.S. Const., art. I, sec. X, cl. 1. Regulation of utilities generally, Ga. Const. 1983, Art. IV, Sec. I, Para. I. Establishment of just and reasonable rates, fares, and charges for transportation, § 40-1-118. Granting particular corporate powers: banks, § 7-1-395; insurance companies, § 33-14-5; express companies, § 46-9-230; canal companies, § 52-4-1; navigation companies, § 52-5-1. Illegal and void contracts generally, Ch. 8, T. 13. Corporations generally, T. 14. O.C.G.A. §§ 13-8-2; Art. 4 of Ch. 8 of T. 13. Inviolability of charters generally, §§ 14-2-1701, 14-3-1701. Forfeiture of corporate charters, § 14-4-160. Right of state to withdraw franchise when charter granted since January 1, 1863, § 14-5-3. Penalty for conspiring to restrain competition, § 16-10-22. Regulation of utility rates generally, § 46-2-23 et seq. Penalties for unjust discrimination by utilities, § 46-2-90 et seq. Regulation of rates charged by motor carriers, § 46-7-18. Regulation of rates charged by railroad companies, § 46-8-20. Street, suburban, and interurban railroads, § 46-8-330 et seq. Penalty for discrimination in rates and charges by carriers generally, § 46-9-250 et seq.

Editor's notes. — The constitutional amendment (Ga. L. 1986, p. 1628, § 1) which added subparagraph (e) was approved by a majority of the qualified voters voting at the general election held on November 4, 1986.

The constitutional amendment (Ga. L. 1994, p. 2022, § 1) which would have authorized agreements among health care providers and other persons for the provi-

sion of health care services which may have had the effect of lessening competition if, according to criteria established by the General Assembly, the benefits to the public of such contracts or agreements outweighed the disadvantages of lessened competition was defeated at the general election on November 8, 1994.

The constitutional amendment (Ga. L. 2010, p. 1260, § 1), which rewrote subsection (c), was ratified at the general election held on November 2, 2010.

Law reviews. — For article, "The General Practitioner and Antitrust Problems," see 20 Ga. B.J. 47 (1957). For article surveying important general legal principles of municipal and county government purchasing and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965). For article discussing 1976 constitutional amendment transferring authority to grant corporate powers and privileges from superior courts to the Secretary of State, and subsequent procedural changes, see 13 Ga. St. B.J. 91 (1976). For article discussing origin of state bar on anticompetitive combinations, see 15 Ga. St. B.J. 39 (1978). For article on enforceability of restrictive covenants in employment contracts, see 17 Ga. St. B.J. 110 (1981). For article, "Liabilities of the Former Officer or Director," see 18 Ga. St. B.J. 150 (1982). For article, "The Underbrush Grows Deeper: Restrictive Covenants in Employment Agreements in Georgia," see 21 Ga. St. B.J. 28 (1984). For article, "Survey of Current Georgia Law Regarding Restrictive Covenants," see 25 Ga. St. B.J. 188 (1989). For article, "Georgia Constitution May Restrict the 1990 Restrictive Covenant Law," see 27 Ga. St. B.J. 82 (1990). For article, "Restrictions on Post-Employment Competition by an Executive Under Georgia Law," see 54 Mer-

cer L. Rev. 1133 (2003). For annual survey on labor and employment law, see 64 Mercer L. Rev. 173 (2012).

For note, "Maintaining Trade Secrecy: The Significance of *Water Services v. Tesco Chemicals*" (410 F.2d 163 (5th Cir. 1969)), see 4 Ga. L. Rev. 541 (1970). For note discussing covenants not to compete in employment contracts as void when in general restraint of trade, see 10 Ga. St.

B.J. 125 (1973). For note discussing restrictions on the creation of public purpose corporations, see 8 Ga. L. Rev. 680 (1974).

For comment on *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949), see 11 Ga. B.J. 491 (1949). For comment on *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973), see 8 Ga. L. Rev. 526 (1974).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

GRANT OF CORPORATE POWERS

CONTRACTS TO DEFEAT COMPETITION

1. IN GENERAL
2. COVENANTS NOT TO COMPETE
 - A. IN GENERAL
 - B. ANCILLARY TO CONTRACT OF EMPLOYMENT
 - C. ANCILLARY TO SALE OF BUSINESS
 - D. COVENANTS NOT TO DISCLOSE TRADE SECRETS
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REGULATION OF PUBLIC UTILITIES

1. IN GENERAL
2. DECISIONS UNDER PRIOR LAW

General Consideration

Cited in *McAlpin v. Coweta Fayette Surgical Assocs.*, 217 Ga. App. 669, 458 S.E.2d 499 (1995); *Crosby v. Hospital Auth.*, 93 F.3d 1515 (11th Cir. 1996); *Atlanta Bread Co. Int'l v. Lupton-Smith*, 285 Ga. 587, 679 S.E.2d 722 (2009); *WMW, Inc. v. Am. Honda Motor Co.*, 291 Ga. 683, 733 S.E.2d 269 (2012).

Grant of Corporate Powers

Standing. — In order to have standing to bring claims under Ga. Const. 1983, Art. III, Sec. VI, Para. V, or O.C.G.A. § 13-8-2(a)(2), plaintiff must be a party to the alleged illegal contract or agreement. *Valley Prods. Co. v. Landmark*, 877 F. Supp. 1087 (W.D. Tenn. 1994), *aff'd*, 128 F.3d 398 (11th Cir. 1997).

Creation of Municipal Electric Authority constitutional. — As the Municipal Electric Authority is a public corporation of the state, the creation of the authority and the granting of powers to it do not constitute a grant of corporate

powers and privileges to a private company in violation of paragraph (a). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

State Bar of Georgia is not private corporation under paragraph (a), but is an administrative arm of the court. *Wallace v. Wallace*, 225 Ga. 102, 166 S.E.2d 718, *cert. denied*, 396 U.S. 939, 90 S. Ct. 369, 24 L. Ed. 2d 240 (1969) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Object of paragraph (b) is to subject corporations to taxing power of the state, although exempted therefrom under their original charters, and the proviso was made for the purpose of encouraging the building of railroads. *State v. Central of Ga. Ry.*, 109 Ga. 716, 35 S.E. 37, 48 L.R.A. 351 (1900) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Change of penalty during life of charter. — Where the charter of a turnpike company granted in 1840 provided for a penalty for neglect of certain duties, the legislature could not change the pen-

Grant of Corporate Powers (Cont'd)

alty during the life of the charter. *Habersham Tpk. Co. v. Taylor*, 73 Ga. 552 (1884).

Restrictive covenant for subdivision. — A restrictive covenant barring “For Sale” signs in a subdivision was not an unenforceable restraint on trade; the cases citing such authority referred to restrictive covenants in the employment area, not to restrictive covenants on the use of real property, and it was well settled that a grantor of real property could restrict the use of it by restrictive covenants. *Godley Park Homeowners Ass’n v. Bowen*, 286 Ga. App. 21, 649 S.E.2d 308 (2007).

Contracts in special charters creating perpetual tax exemptions are not revocable by paragraph (b). *Central of Ga. Ry. v. Wright*, 248 U.S. 525, 39 S. Ct. 181, 63 L. Ed. 401 (1919) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

The fact that contracts in special charters creating perpetual tax exemptions are not revocable by paragraph (b) applies to lessees of the original contracting company. *Central of Ga. Ry. v. Wright*, 250 U.S. 519, 40 S. Ct. 1, 63 L. Ed. 1123 (1919) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Contracts to Defeat Competition**1. In General**

Paragraph (c) based on common law. — Paragraph (c) is based on the common-law principle which invalidates contracts creating monopolies or defeating competition. *Central R.R. v. Collins*, 40 Ga. 582 (1869); *State v. Central of Ga. Ry.*, 109 Ga. 716, 35 S.E. 37 (1900) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Contracts in restraint of trade void generally. — Contracts which tend to lessen competition or which are in restraint of trade are against public policy and are void. *Wedgewood Carpet Mills, Inc. v. Color-Set, Inc.*, 149 Ga. App. 417, 254 S.E.2d 421 (1979).

Common law tort actions. — Georgia recognizes a common law tort action in favor of third parties who are injured by a conspiracy in restraint of trade. *United*

States Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986 (11th Cir. 1993), cert. denied, 512 U.S. 1221, 114 S. Ct. 2710, 129 L. Ed. 2d 2837 (1994).

Legal effect of restrictive covenant determines enforceability. — In carrying out the policy stated in subsection (c) of Ga. Const. 1983, Art. III, Sec. VI, Para. V, regarding defeating or lessening of competition, it is the legal effect of a restrictive covenant in a contract, not the parties’ specified manner of enforcement of the provision, that determines enforceability of a contract. *Dougherty, McKinnon & Luby v. Greenwald, Denzik & Davis*, 213 Ga. App. 891, 447 S.E.2d 94 (1994).

Paragraph (c) has same meaning as former Code 1933, § 20-504 (see now O.C.G.A. § 13-8-2), prohibiting restraint of trade and monopoly. *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949), commented on in 11 Ga. B.J. 491 (1949) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Application of term “competition.” — The term “competition” is relative and dependent upon public benefits. *State v. Central of Ga. Ry.*, 109 Ga. 716, 35 S.E. 37 (1900).

Paragraph (c) does not impose absolute bar against every kind of restrictive agreement. *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 236 S.E.2d 265 (1977), cert. denied, 445 U.S. 938, 100 S. Ct. 1332, 63 L. Ed. 2d 772 (1980); *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d 759 (1981) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Restraints to be considered against public policy background. — Contractual restraints which tend to diminish competition and trade have to be considered against a background of public policy generally disfavoring contracts which have that effect. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Factors for consideration in restraint of trade. — Covenants in restraint of trade may be enforced if they are reasonable as to time and place and are not overly broad as to the activities proscribed, taking into consideration the interests of individuals in gaining and pursuing a livelihood, of commercial con-

cerns in protecting property, confidential information and relationships, good will and economic advantage, and of the broader public policy favoring individual freedom to enter into contracts. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973), commented on in 8 Ga. L. Rev. 526 (1974).

Not all restraints of trade are unconstitutional and the test in this state is whether the restraint involved is “injurious to the public interest.” *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

A contract which tends to lessen competition or which is in restraint of trade may be upheld if the restraint is reasonable and the contract is valid in other respects. *Wedgewood Carpet Mills, Inc. v. Color-Set, Inc.*, 149 Ga. App. 417, 254 S.E.2d 421 (1979).

Statement of “rule of reason.” — When a contract in restraint of trade is considered in the circumstances in which it is made, and the restraint appears to have been for the legitimate interests of the party in whose favor it is imposed, and is not specially injurious to the public, the restraint will be held valid. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973), commented on in 8 Ga. L. Rev. 526 (1974); *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

The broad language of Ga. Const. 1983, Art. III, Sec. VI, Para. V has been narrowed by the application of a court created “rule of reason.” Thus, the legislature may encourage narrowly tailored contracts, which do not unreasonably chill competition, based upon the legislature’s evaluation of the public interest. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441 (11th Cir. 1991).

Contract in partial restraint may be upheld provided restraint is reasonable and the contract is valid in other essentials. *Britt v. Davis*, 239 Ga. 747, 238 S.E.2d 881 (1977).

A contract in partial restraint of trade is enforceable if it is reasonably limited as to time and territory and not otherwise unreasonable. *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970).

Limited restraints, if not greater than

protection the other party requires, are not outlawed. *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

Former O.C.G.A. § 13-8-2.1, permitting contracts in partial restraint of trade, did not violate Ga. Const. 1983, Art. III, Sec. VI, Para. V. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441 (11th Cir. 1991).

“Blue-pencil theory of severability” rejected. — If a contract contains illegal and unenforceable clauses within a restrictive covenant, the entire covenant must fail because the “blue-pencil theory of severability” is rejected. *McNease v. National Motor Club of Am., Inc.*, 238 Ga. 53, 231 S.E.2d 58 (1976); *Uni-Worth Enters., Inc. v. Wilson*, 244 Ga. 636, 261 S.E.2d 572 (1979).

2. Covenants Not to Compete

A. In General

Rule of reason prevails. — In all cases involving covenants not to compete, whether in sales of businesses or covenants ancillary to employment contracts, the rule of reason prevails. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973), commented on in Ga. L. Rev. 526 (1974).

Three prerequisites for enforcement of noncompetition provisions. — There are three prerequisites which must be met before noncompetition provisions in contracts may be enforced without contravening public policy: (1) the provision must be reasonable as to the time of the restraint; (2) the provision must be definite and reasonable as to the territorial extent of the duty owed not to compete; (3) the provision must be definite and reasonable as to nature of the business activities proscribed by the noncompetition covenant. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Standard of review. — Covenants not to compete are scrutinized to determine if they are sufficiently limited in time and territorial effect and are otherwise reasonable, considering the interests to be protected and the effects on both parties to the contract. *Rash v. Toccoa Clinic Medical Assocs.*, 253 Ga. 322, 320 S.E.2d 170 (1984).

Contracts to Defeat**Competition (Cont'd)****2. Covenants Not to Compete (Cont'd)****A. In General (Cont'd)**

Preferred interpretation of restrictive covenant. — When a court is presented with a restrictive covenant that is susceptible to more than one reasonable interpretation, the preferred interpretation is the one that least restricts competition, thereby posing the least affront to the public policy of the State of Georgia. *Atlanta Ctr. Ltd. v. Hilton Hotels Corp.*, 848 F.2d 146 (11th Cir. 1988).

Contract in restraint of trade. — Small movie theater company sufficiently alleged that a large theater chain forced movie distributors to enter into exclusive dealing agreements by threatening that their refusal to grant clearances in the local area would result in adverse economic consequences; thus, the company could pursue the company's claims for both tortious interference and for violations of Georgia law prohibiting contracts in restraint of trade. *Cobb Theatres III, LLC v. AMC Entm't Holdings, Inc.*, 101 F. Supp. 3d 1319 (N.D. Ga. 2015).

Greater latitude given to covenants relating to sale of business. — What is reasonable in a restrictive covenant is a matter of law for the court to decide, allowing greater latitude for covenants relating to the sale of a business than for covenants ancillary to employment. *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970).

Since the employee who agrees to the covenant may have done so from an inferior bargaining position, and since the covenant may seriously impair the employee's ability to earn a living, courts traditionally give greater scrutiny to restrictive covenants within employment contracts, as opposed to such covenants contained in business sales or partnership agreements. *Rash v. Toccoa Clinic Medical Assocs.*, 253 Ga. 322, 320 S.E.2d 170 (1984).

B. Ancillary to Contract of Employment

Reasonableness of restraint a question of law. — Whether the restraints

imposed by an employment contract are reasonable under paragraph (c) is a question of law for determination by the court. *Orkin Exterminating Co. v. Pelfrey*, 237 Ga. 284, 227 S.E.2d 251 (1976); *McNease v. National Motor Club of Am., Inc.*, 238 Ga. 53, 231 S.E.2d 58 (1976); *Koger Properties, Inc. v. Adams-Cates Co.*, 247 Ga. 68, 274 S.E.2d 329 (1981) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Public policy generally disfavors such covenants. — Covenants not to compete ancillary to employment contracts must be scrutinized in terms of the public policy generally disfavoring such contracts as restraints on trade and competition. *Preferred Risk Mut. Ins. Co. v. Jones*, 233 Ga. 423, 211 S.E.2d 720 (1975).

Covenant valid. — Restrictive covenant in employment contract between defendant broadcasting corporation and plaintiff meteorologist/television personality which prohibited competition "on air" in the Atlanta market for a period of six months after termination of employment was valid. *Beckman v. Cox Broadcasting Corp.*, 250 Ga. 127, 296 S.E.2d 566 (1982).

Trial court erred in striking down non-solicitation of customer covenants in an employment contract between former employees and their employer, as the restrictive covenants were reasonable, limited in scope, and not against public policy under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c) and O.C.G.A. § 13-8-2; the covenants only included current, existing clients and not former customers of the employer, the employees were only prohibited from soliciting the current customers that they had served during their employment, and they were only prohibited from selling them insurance or employee benefit plans that were offered by the employer during their employment. *Palmer & Cay of Ga., Inc. v. Lockton Cos., Inc.*, 284 Ga. App. 196, 643 S.E.2d 746 (2007), cert. denied, 2007 Ga. LEXIS 503 (Ga. 2007).

Covenant valid if not against public interest and not unnecessarily injurious to obligor. — So long as a noncompetition provision in an employment contract does not adversely affect the interest of the public or injure the

obligor beyond what is necessary to protect the legitimate rights of the obligees, it is valid. *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949), commented on in 11 Ga. B.J. 491 (1949); *Wulfhorst v. Hudgins & Co.*, 231 Ga. 170, 200 S.E.2d 743 (1973).

Non-competition and non-solicitation covenants were reasonable and enforceable where they were of a two-year duration, were limited to a seven-county territorial area, and where prohibiting the professional activity of accounting and the solicitation of clients pursuant to the covenant in light of the firm's need to protect its investment in defendant's skills. *Habif, Arogeti & Wynne v. Baggett*, 231 Ga. App. 289, 498 S.E.2d 346 (1998).

Covenants against competition must be limited in time and territorial effect. — A restrictive covenant in a contract of employment whereby a person agrees not to engage in an occupational activity of a particular kind which is reasonably limited as to time and territory is valid and enforceable so long as it is not unreasonable in other respects. *Baxley v. Black*, 224 Ga. 456, 162 S.E.2d 389 (1968).

Covenants against competition contained in employment contracts are considered in partial restraint of trade and are to be tolerated only if strictly limited in time and territorial effect and otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee. *Purcell v. Joyner*, 231 Ga. 85, 200 S.E.2d 363 (1973); *Preferred Risk Mut. Ins. Co. v. Jones*, 233 Ga. 423, 211 S.E.2d 720 (1975); *Orkin Exterminating Co. v. Pelfrey*, 237 Ga. 284, 227 S.E.2d 251 (1976); *McNease v. National Motor Club of Am., Inc.*, 238 Ga. 53, 231 S.E.2d 58 (1976); *Fuller v. Kolb*, 238 Ga. 602, 234 S.E.2d 517 (1977); *Howard Schultz & Assocs. v. Broniec*, 239 Ga. 181, 236 S.E.2d 265 (1977); *Uni-Worth Enters., Inc. v. Wilson*, 244 Ga. 636, 261 S.E.2d 572 (1979); *Koger Properties, Inc. v. Adams-Cates Co.*, 247 Ga. 68, 274 S.E.2d 329 (1981); *Merrill Lynch, Pierce, Fenner & Smith v. Stidham*, 506 F. Supp. 1182 (M.D. Ga.), *aff'd in part, vacated in part on other grounds*, 658 F.2d 1098 (5th Cir. 1981); *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d

759 (1981); *Barnes Group, Inc. v. Harper*, 653 F.2d 175 (5th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S. Ct. 1278, 71 L. Ed. 2d 462 (1982).

A contract which includes a noncompetition agreement must specify a time that is reasonable and a territory that is reasonable for the protection of the employer's legitimate business interests in order to be enforced. *Wulfhorst v. Hudgins & Co.*, 231 Ga. 170, 200 S.E.2d 743 (1973).

A restriction against doing business with any actual or potential customers of the employer located in a specific geographical area in which the employee had not actually done business is overbroad and unreasonable. *Hulcher Servs. v. R.J. Corman R.R. Co. L.L.C.*, 247 Ga. App. 486, 543 S.E.2d 461 (2000).

Restrictive covenant must be reasonably necessary to protect interest of the party in whose favor it is imposed. *Baxley v. Black*, 224 Ga. 456, 162 S.E.2d 389 (1968).

Restrictions which place greater limitations than are necessary to protect employer render contract void and unenforceable. *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970).

Language which restricts former employees from activities in a much more limited fashion than is necessary for the protection of the employer will not withstand the reasonableness test so as to uphold the covenant. *Puritan/Churchill Chem. Co. v. Eubank*, 245 Ga. 334, 265 S.E.2d 16 (1980).

Three elements are essential in determining reasonableness. — These three elements may be categorized as: (1) the restraint in the activity of the employee, or former employee, imposed by the contract; (2) the territorial or geographical restraint; and (3) the length of time during which the covenant seeks to impose the restraint. *Britt v. Davis*, 239 Ga. 747, 238 S.E.2d 881 (1977).

Covenant supported by sufficient consideration and rendered definite by performance valid. — Where a restrictive clause in a contract of employment was supported by sufficient consideration in the form of mutual promises

Contracts to Defeat**Competition (Cont'd)****2. Covenants Not to Compete (Cont'd)****B. Ancillary to Contract of****Employment (Cont'd)**

and had been rendered definite by performance of the main contract, and was reasonable as to time and area, it was not void under this paragraph or former Code 1933, § 20-504 (see now O.C.G.A. § 13-8-2). *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949), commented on in 11 Ga. B.J. 491 (1949) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

“Blue-pencil theory of severability” rejected. — The court will not sever or “blue pencil” a covenant not to compete ancillary to an employment contract so as to remove the offending restraint of trade provision and give effect to the remaining portions of the contract. *Interstate Transp., Inc. v. Syfan*, 154 Ga. App. 413, 268 S.E.2d 751 (1980).

Generally, territorial restrictions which relate to territory in which employee was employed will be enforced. *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d 759 (1981).

Employee must be able to forecast territorial extent of duty. — A contractual provision which prohibits an employee upon termination of employment from entering into any competitive activity within a 50-mile radius of where the employer is operating is overly broad and unreasonable because of the employee’s inability to forecast with certainty the territorial extent of the duty owed the former employer. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973), commented on in 8 Ga. L. Rev. 526 (1974).

Where the employee is unable to forecast with certainty the territorial extent of the duty owed the former employer, the contract is void for indefiniteness. *Britt v. Davis*, 239 Ga. 747, 238 S.E.2d 881 (1977).

A territorial restriction in a covenant not to compete which cannot be determined until the date of the employee’s termination is too indefinite to be enforced. *Koger Properties, Inc. v.*

Adams-Cates Co., 247 Ga. 68, 274 S.E.2d 329 (1981).

Restriction relating to entire business territory of employer generally unenforceable. — A territorial restriction which relates to the territory in which an employer does business (as opposed to the territory serviced by the employee) is generally unenforceable unless an employer shows a legitimate business interest to be protected. *Koger Properties, Inc. v. Adams-Cates Co.*, 247 Ga. 68, 274 S.E.2d 329 (1981); *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d 759 (1981).

Insofar as territorial restrictions are concerned, some of them relate to the territory in which the employee was employed; others relate to the territory in which the employer does business. The former generally will be enforced while the latter generally are unenforceable absent a showing by the employer of the legitimate business interests sought to be protected. *Merrill Lynch, Pierce, Fenner & Smith v. Stidham*, 506 F. Supp. 1182 (M.D. Ga. 1981), aff’d in part and rev’d in part, 658 F.2d 1098 (5th Cir. 1981).

Covenant related to territory where employer does business where only justification is that employer wants to avoid competition by employee in that area is not prima facie valid. *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d 759 (1981).

Provisions which allow employer to assign employee to new territory, with restrictive covenants following the employee wherever the employee might be assigned, are too indefinite to be enforced. *McNease v. National Motor Club of Am., Inc.*, 238 Ga. 53, 231 S.E.2d 58 (1976).

Contract embracing too much territory not enforceable in smaller area. — A contract enumerating numerous territories which are not necessary for the protection of legitimate business interests of the employer is not an enforceable contract, and as a result is not enforceable in even the smallest area specified, though that smaller area would be a legitimate and enforceable restricted area standing alone. *Wulforth v. Hudgins & Co.*, 231 Ga. 170, 200 S.E.2d 743 (1973).

Restrictive covenant held invalid for including too much territory. *Purcell v. Joyner*, 231 Ga. 85, 200 S.E.2d 363 (1973).

Three year and world-wide restrictions unenforceable. — Covenant prohibiting former employee from working in any capacity in the world in the business of developing or selling electronic firearm systems for three years following the employee's termination was overbroad in terms of territorial coverage. *Firearms Training Sys. v. Sharp*, 213 Ga. App. 566, 445 S.E.2d 538 (1994).

Absence of geographical limitation. — A nonsolicitation clause in an employment contract prohibiting solicitation of the employer's clients that the employee actually contacted while serving the employer is enforceable notwithstanding the absence of explicit geographical limitation. *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 422 S.E.2d 529 (1992).

Effect of prohibition against entering into same or similar business. — A contract not to enter into a certain business or the same kind or similar business is unambiguous and excludes on the part of one who makes such a covenant any participation or sharing or taking a part in the aid of such sales. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Agreement is enforceable which prohibits employee from pirating the former employer's customers served by the employee, during the employment, at the employer's direct or indirect expense. *Adcock v. Speir Ins. Agency, Inc.*, 158 Ga. App. 317, 279 S.E.2d 759 (1981).

Overbroad and unreasonable covenant unenforceable. — A post-employment restriction in a covenant not to compete was overbroad, unreasonable, and unenforceable where it prohibited a former employee from performing services not only for former customers of the employer with whom the employee had personal contact, but also for anyone in protected areas, and which prohibited the employee from accepting business from former customers of the employer, regardless of who initiated the contact. *AmeriGas Propane, L.P. v. T-Bo Propane, Inc.*, 972 F. Supp. 685 (S.D. Ga. 1997).

A covenant not to compete in an employ-

ment contract that was overbroad as to its territorial coverage and the scope of activity prohibited was unenforceable. *Harville v. Gunter*, 230 Ga. App. 198, 495 S.E.2d 862 (1998).

Agreement prohibiting a physician from practicing within a 20-mile radius of any of the employer's medical centers for two years from termination, even centers where the physician never worked and those opened during the physician's tenure, was overly broad and not enforceable. *Davis v. Albany Area Primary Health Care, Inc.*, 233 Ga. App. 311, 503 S.E.2d 909 (1998).

Trial court erred by not determining, as a matter of law, whether noncompete agreements were enforceable; because the agreements contained neither specific territorial limits nor limited their restrictions to customers with whom the former employees had contacts during their employment, the restrictions were unreasonable, overbroad, and unenforceable. *Fellows v. All Star, Inc.*, 272 Ga. App. 262, 612 S.E.2d 86 (2005).

Employment contract which contained noncompete and nonsolicitation clauses was deemed unenforceable, pursuant to Ga. Const. 1983, Art. III, Sec. VI, Para. V(c) and O.C.G.A. § 13-8-2, because the noncompete clause was overly broad in that it attempted to preclude the former employee not only from performing painting services for prior clients, but also from acting as a sales person in the decorative or faux painting business; there was no evidence that the employer had employed "sales persons" or that the employee had ever acted in that capacity on behalf of the employer, and summary judgment to the employee was proper. *Whimsical Expressions, Inc. v. Brown*, 275 Ga. App. 420, 620 S.E.2d 635 (2005).

A noncompetition agreement that provided that an employee of a drug and alcohol testing service would not compete with the employer "in any area of business" of the employer's, including solicitation of existing accounts, was unreasonable as overly broad and indefinite; when read as a whole, the noncompetition agreement was plainly intended to prevent any type of competing activity whatsoever, with the reference to solicitation merely being illustrative of one type of prohibited activity. *Stultz v. Safety &*

Contracts to Defeat**Competition (Cont'd)****2. Covenants Not to Compete (Cont'd)****B. Ancillary to Contract of****Employment (Cont'd)**

Compliance Mgmt., 285 Ga. App. 799, 648 S.E.2d 129 (2007), cert. denied, 2007 Ga. LEXIS 812 (Ga. 2007).

A non-compete clause in a Software Agreement between an employer and employee was unenforceable as a restraint of trade under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c), because it was unlimited as to time and territory. However, under O.C.G.A. § 10-1-762(d), the employee was prohibited from using a software version that incorporated the employer's trade secrets and confidential information, regardless of the non-compete clause. *Coleman v. Retina Consultants, P.C.*, 286 Ga. 317, 687 S.E.2d 457 (2009).

Covenant attempting to prohibit all activities of employee in connection with another real estate business is overly broad, in excess of any legitimate protection necessary for the employer, and unreasonable. *C.V. Mosley Constr. Co. v. McCuin*, 238 Ga. 503, 233 S.E.2d 763 (1977).

Covenant not to compete was overbroad in territory and scope. — The restrictive covenant not to compete contained in former employee's employment agreement with plaintiff-company was overbroad as to territory and scope of activities where it included all of Georgia and Florida and was not tailored to the job the employee performed for the company, but instead, prohibited the employee from being connected in any way with a similar business. *Ceramic & Metal Coatings Corp. v. Hizer*, 242 Ga. App. 391, 529 S.E.2d 160 (2000).

Covenant wherein employee agrees not to accept employment with competitor "in any capacity" imposes greater limitation upon employee than is necessary for the protection of the employer and, therefore, is unenforceable. *Uni-Worth Enters., Inc. v. Wilson*, 244 Ga. 636, 261 S.E.2d 572 (1979).

Covenant unenforceable when it prohibits competition with any services or products of employer. —

Where each of the four subparagraphs of the restrictive covenant in this case prohibits the employee from doing certain enumerated acts "competitive with any services or products offered or possessed by employer," the entire restrictive covenant is too indefinite to be enforced. *Uni-Worth Enters., Inc. v. Wilson*, 244 Ga. 636, 261 S.E.2d 572 (1979).

Mere agreement in covenant of areas of employer's business insufficient to enforce contract. — A post-employment covenant containing an agreement between the parties that the employer is doing business in a specified area is not enough, standing alone, to warrant enforcement of the covenant. *Wulforth v. Hudgins & Co.*, 231 Ga. 170, 200 S.E.2d 743 (1973).

Injunction enforcing restrictive covenants against employee amounted to wrongful restraint. — Injunction enforcing restrictive covenants against the employee amounted to a wrongful restraint under Ga. Const. 1983, Art. III, Sec. VI, Para. V(c) since the non-disclosure provisions in the form and the agreement were unenforceable on their face because the provisions were not limited in time, and Georgia law was clear that, if one covenant in an agreement subject to strict scrutiny was unenforceable, then the other covenants were all unenforceable. Therefore, the appellate court remanded the case for a determination of the amount of actual damages, if any, suffered by the employee during the period of the injunction's enforcement. *Cox v. Altus Healthcare & Hospice, Inc.*, 308 Ga. App. 28, 706 S.E.2d 660 (2011).

C. Ancillary to Sale of Business

Given broader latitude than covenants ancillary to employment contracts. — Covenants not to compete incorporated in agreements for the sale of a business or its assets have been given greater latitude and broadness in their interpretation and enforcement than those noncompetition covenants ancillary to contracts of employment. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Reasonable time limitation not applicable. — A contract in the sale of

properties and good will of a business not to engage in such a business within a reasonable space of territory need not be limited as to time in order to be a valid and binding contract. *Watkins v. Avnet, Inc.*, 122 Ga. App. 474, 177 S.E.2d 582 (1970); *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Contract can extend to all territory covered by business. — A contract which affords a fair protection to the party in whose favor it is made and is not injurious to the public may extend to all the territory covered by the business, the good will of which has been sold. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Duty not to compete for customers is reasonable and definite where it extends only to those customers existing at time of the sale as shown by the seller's accounts receivable. *Farmer v. Airco, Inc.*, 231 Ga. 847, 204 S.E.2d 580 (1974).

Sale of franchise. — A noncompetition covenant in a franchise contract which purported to be effective for one year after the franchise was terminated was void as overbroad. *Allen v. Hub Cap Heaven, Inc.*, 225 Ga. App. 533, 484 S.E.2d 259 (1997).

D. Covenants Not to Disclose Trade Secrets

Factors in determining reasonableness. — In determining whether a covenant not to disclose is reasonable, two factors are important: (1) is the information confidential and related to the business; and (2) is the restraint reasonably related to the protection of such information? *Water Servs., Inc. v. Tesco Chems.*, 410 F.2d 163 (5th Cir. 1969), commented on in 4 Ga. L. Rev. 541 (1970).

Nondisclosure covenants bear no relation to territorial limitations. — Covenants not to disclose and utilize confidential business information are related to general covenants not to compete because of the similar employer interest in maintaining competitive advantage. Unlike general noncompetition provisions, however, specific nondisclosure covenants bear no relation to territorial limitations and their reasonableness turns on factors of time and the nature of the business

interest sought to be protected. *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145 (1973), commented on in 8 Ga. L. Rev. 526 (1974).

Nondisclosure covenants are separately enforceable. — Although noncompetition covenants in employment contracts may not be enforceable, nondisclosure clauses in the same contract can be separately enforced under a reasonableness test. *Nolan v. Meyners-Robinson Co.*, 246 Ga. 49, 268 S.E.2d 656 (1980).

Covenant overbroad when reaches beyond trade secrets. — Restricting an employee from utilizing the experience gained and using information not designated as trade secrets and attempting to extend the restriction beyond the employer's business in perpetuity to that of its clients, customers, consultants, licensees, or affiliates without geographic restriction reaches beyond the scope permitted in terms of time, territory, and activities protected. *Thomas v. Best Mfg. Corp.*, 234 Ga. 787, 218 S.E.2d 68 (1975).

Noncompetition agreement alone not personal service contract. — While a noncompetition agreement joined with affirmative promises is a personal services contract which terminates upon the death of the promisor, a noncompetition agreement standing alone, with no affirmative promises, is not. *Mail & Media, Inc. v. Rotenberry*, 213 Ga. App. 826, 446 S.E.2d 517 (1994).

3. Specific Cases

General Assembly is free to restrict competition among public utilities where, in the judgment of the legislature or its duly authorized delegate, such competition may be injurious to existing public service. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975); *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Superior court has no jurisdiction to make or regulate price of a commodity made and sold in this state by a manufacturing corporation. *Southern Ice & Coal Co. v. Atlantic Ice & Coal Corp.*, 143 Ga. 810, 85 S.E. 1021 (1915).

Sections of Franchise Practices Act unconstitutional. — Code 1933,

Contracts to Defeat**Competition (Cont'd)****3. Specific Cases (Cont'd)**

§§ 84-6603(s) and 84-6610(a)(4) of the Franchise Practices Act (Ga. L. 1976, p. 1440) are unconstitutional, null and void because their purpose is to enable franchised dealers of motor vehicles to establish a monopoly in violation of paragraph (c). *Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc.*, 244 Ga. 800, 262 S.E.2d 106 (1979) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Exclusive privilege to Municipal Electric Authority. — Right granted by Ga. L. 1975, p. 107, § 17 (see now O.C.G.A. § 46-3-129) to political subdivisions to give exclusive privilege or monopoly to Municipal Electric Authority does not violate paragraph (c). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Paragraph (c) not violated by purchase of stock of insurance company by securities company. *Clarke v. Central R.R. & Banking Co.*, 50 F. 338 (S.D. Ga. 1892); *Winter v. Southern Sec. Co.*, 155 Ga. 590, 118 S.E. 214 (1923) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Purchase of controlling stock to create illegal consolidation is prohibited. *Clarke v. Central R.R. & Banking Co.*, 50 F. 338 (S.D. Ga. 1892).

Mere issuance of bonds contrary to bylaws may not violate paragraph (c). *Georgia G.R.R. v. Miller*, 144 Ga. 665, 87 S.E. 897 (1916) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Paragraph (c) applies to street railways. *Trust Co. v. State*, 109 Ga. 736, 35 S.E. 323 (1900) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Granting of concessions by carrier not necessarily unconstitutional. — Paragraph (c) does not deny a carrier the right to grant concessions to some patrons if no public duty is involved. *Kates v. Atlanta Baggage & Cab Co.*, 107 Ga. 636, 34 S.E. 372 (1899); *Atlanta Term. Co. v. American Baggage & Transp. Co.*, 125 Ga. 677, 54 S.E. 711 (1906); *Hart v. Atlanta Term. Co.*, 128 Ga. 754, 58 S.E. 452 (1907) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Contract binding only one party violates paragraph. — Where a contract prohibits B from selling 12 colors of its product at all except to A, yet A has no requirements to make any purchases at all, admitting of no exceptions, the contract is a clear violation of paragraph (c) and O.C.G.A. § 13-8-2. *Wedgewood Carpet Mills, Inc. v. Color-Set, Inc.*, 149 Ga. App. 417, 254 S.E.2d 421 (1979) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Contract preventing incurrence of additional debt not illegal. — Contract provision which prohibits the borrower from incurring additional debt for business operations without the consent of the lender while the loan is still unpaid is not an unreasonable restraint on trade because it protects the legitimate rights of the lender by promoting the solvency of the borrower. *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

Water power contract may be assigned. *Columbus R.R. v. City Mills Co.*, 135 Ga. 626, 70 S.E. 242 (1911).

Contract to sell official Code does not violate paragraph. — Contract which grants to publishing company "the exclusive right to distribute and sell sets and volumes of the 'Official Code of Georgia Annotated,'" the copyright for which will be in the name of the state, does not prevent other companies from publishing a competitive product and therefore does not violate the constitutional prohibition against a monopoly. *Harrison Co. v. Code Revision Comm'n*, 244 Ga. 325, 260 S.E.2d 30 (1979).

State's purchase of Code from publishing company as provided for in contract does not tend to create monopoly merely because it gives publishing company a subsidy and a substantial competitive advantage, within paragraph (c). *Harrison Co. v. Code Revision Comm'n*, 244 Ga. 325, 260 S.E.2d 30 (1979) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Rental of space in state-owned exhibition center. — The decision of the George L. Smith II Georgia World Congress Center Authority, which operated a state-owned exhibition center, not to rent space to a promoter for a proposed fall

home show but to rent instead to a competitor to hold its own fall home show did not violate Ga. Const. 1983, Art. III, Sec. VI, Para. V. *Exposition Enters., Inc. v. George L. Smith II Ga. World Congress Ctr. Auth.*, 177 Ga. App. 211, 338 S.E.2d 726 (1985).

Contracts in partial restraint of trade. — Former O.C.G.A. § 13-8-2.1 (contracts in partial restraint of trade) was beyond the power of the General Assembly, and was unlawful and void, inasmuch as it authorizes contracts and agreements which may have the effect of or which were intended to have the effect of defeating or lessening competition or encouraging monopoly. *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991).

Covenant prohibiting former employee from accepting unsolicited former clients. — Covenant not to solicit was unenforceable where it prohibited former insurance representative from accepting applications for insurance from employer's policyholders who wished to transfer to the new company without any solicitation on the representative's part. *American Gen. Life & Accident Ins. Co. v. Fisher*, 208 Ga. App. 282, 430 S.E.2d 166 (1993).

Covenant prohibiting supervisory work. — Covenant was overbroad because it did not permit employee to "assist, aid or abet" others, which, in effect, prohibited employee from working as a supervisor or in other capacities. *American Gen. Life & Accident Ins. Co. v. Fisher*, 208 Ga. App. 282, 430 S.E.2d 166 (1993).

Restrain trade of alcoholic beverages. — State revenue department's regulation regarding distribution of malt beverages in Georgia did not violate the provision of the Georgia Constitution that prohibited the General Assembly from creating a monopoly in a business by passing laws that appeared to restrain trade because the authority to sell alcoholic beverages was a privilege and not a right; as a result, a monopoly in such a business created by the General Assembly, by engaging in the traffic upon a body corporate, was not violative of the Georgia Constitution. *Ga. Oilmen's Ass'n v. Ga. Dep't of Revenue*, 261 Ga. App. 393, 582 S.E.2d 549 (2003).

4. Practice and Pleading

Injunction as remedy. — The remedy for a breach of paragraph (c) may be injunction, and it is not always necessary to forfeit the charter. *Trust Co. v. State*, 109 Ga. 736, 35 S.E. 323, 48 L.R.A. 520 (1900) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Private citizen cannot question illegal purchase of stock. *Brown v. Atlanta Ry. & Power Co.*, 113 Ga. 462, 39 S.E. 71 (1901); *Cox v. Hardee*, 135 Ga. 80, 68 S.E. 932 (1910).

Private citizen cannot bring suit to enjoin contract in restraint of trade. — At common law, contracts in restraint of trade were unenforceable, just as they are unenforceable under paragraph (c); but a mere member of the public cannot bring a suit to enjoin it. *Palmer v. Atlantic Ice & Coal Corp.*, 178 Ga. 405, 173 S.E. 424 (1934) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Bondholders have no standing to attack illegal contract. — The state, the stockholders, and the parties alone can attack a contract as being ultra vires or in restraint of trade; bondholders cannot do so. *Palmer v. Atlantic Ice & Coal Corp.*, 178 Ga. 405, 173 S.E. 424 (1934).

Who may bring action against railroad company. — If a railroad company violates its public duty to the injury of the traveling public, an action for damages will lie by a proper party plaintiff so injured, or remedy may be had by injunction or mandamus in a proper case; or probably the Attorney General might proceed on behalf of the public. *Palmer v. Atlantic Ice & Coal Corp.*, 178 Ga. 405, 173 S.E. 424 (1934).

Removal of case. — A case may be removed to federal court where a domestic corporation violated paragraph (c) by purchasing stock in a foreign corporation. *South Carolina v. Port Royal & Augusta Ry.*, 56 F. 333 (D.S.C. 1893) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Ruling in interlocutory order a finding of law. — Where court rules that a restrictive covenant is illegal and unenforceable, a court makes a determination of a legal question, not an adjudication of contested facts. *Uni-Worth Enters., Inc. v.*

Contracts to Defeat**Competition (Cont'd)****4. Practice and Pleading (Cont'd)**

Wilson, 244 Ga. 636, 261 S.E.2d 572 (1979).

Regulation of Public Utilities**1. In General**

Prohibition against fixing municipal utility rates does not affect broader powers of General Assembly.

— The provision of paragraph (d) which prohibits the General Assembly from regulating or fixing the charges of municipally owned or operated public utilities does not deal with every aspect of the General Assembly's broad, inherent powers over both public utilities and municipal corporations. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Term "regulate or fix" refers to dollar amount to be charged electric customers. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975).

2. Decisions Under Prior Law

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. III, Sec. VIII, Para. IX and antecedent provisions, describing with specificity the power of the state to regulate public utilities, are included in the annotations for this paragraph.

General Assembly possesses inherent power to regulate public utilities, independent of this paragraph. *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Paragraph not intended to limit powers. — Independently of this paragraph, the General Assembly possesses the inherent power to regulate public utilities. The conference upon the General Assembly of the powers stated in this paragraph was not intended to limit its powers to those expressed in this paragraph. *Atlanta Term. Co. v. Georgia Pub.*

Serv. Comm'n, 163 Ga. 897, 137 S.E. 556 (1927) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

This paragraph is not construed to restrict powers of General Assembly over public utilities and municipal corporations unless it is clearly and indisputably shown that the legislation in question is intended as a restriction regulating or fixing charges. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Power to regulate electric light company. — The Railroad Commission (now Public Service Commission) has power to prescribe schedules of just and reasonable rates of charges for services by electric light and power companies. *City of Atlanta v. Georgia Ry. & Power Co.*, 149 Ga. 411, 100 S.E. 442 (1919).

Right to and standard for judicial review of utility rates are not found in this paragraph. *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Mandatory form of this paragraph is intentional. *Southern Ry. v. Melton*, 133 Ga. 277, 65 S.E. 665 (1909) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Creation of Public Service Commission object of paragraph. — The object of this paragraph was attained by creation of the Public Service Commission and conferring of powers thereon. *Tilley v. Savannah, Fla. & W. R.R.*, 5 F. 641 (S.D. Ga. 1881); *Georgia R.R. v. Smith*, 70 Ga. 694 (1883) (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Public Service Commission has power to regulate rates and practices of public utilities. *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062, 92 S. Ct. 732, 30 L. Ed. 2d 750 (1972).

Commission jurisdiction ousted by contract. — The jurisdiction of the commission was ousted by a contract between a city and street railway providing for transfers upon payment of a full fare. *Georgia Ry. & Power Co. v. Railroad Comm'n*, 149 Ga. 1, 98 S.E. 696 (1919).

Reasonableness of rates is judicial question. *Richmond & Danville R.R. v.*

Trammel, 53 F. 196 (N.D. Ga. 1892).

Industrial and economic facts are considered in rate fixing. Southern Ry. v. Atlanta Stove Works, 128 Ga. 207, 57 S.E. 429 (1907); Hill v. Wadley S. Ry., 128 Ga. 705, 57 S.E. 795 (1907).

Single continuous rate over separate lines void. Georgia S. & Fla. Ry. v. Georgia Pub. Serv. Comm'n, 289 F. 878 (N.D. Ga. 1923).

Rate fixing contracts between shippers and carriers void. Wight v. Pelham & Havana R.R., 18 Ga. App. 195, 89 S.E. 176 (1916).

Group of railroad companies may refuse to renew lease of part of terminal property constructed for the purpose of encouraging traffic. Williams-Thompson Co. v. Louisville & Nashville R.R., 159 Ga. 793, 126 S.E. 833 (1925).

OPINIONS OF THE ATTORNEY GENERAL

Paragraph based on common law. — Paragraph (c) was an embodiment of the common-law rule which prohibited contracts in general restraint of trade, and thus it had the same meaning as former Code 1933, § 20-504 (see now O.C.G.A. § 13-8-2) which states that contracts in general restraint of trade cannot be enforced. 1960-61 Op. Att'y Gen. p. 429 (see Ga. Const. 1983, Art. III, Sec. VI, Para. V).

Applicability to public service corporations. — The principle that contracts even in partial restraint of trade are void if contrary to the interest of the public is applicable to public service corporations. 1960-61 Op. Att'y Gen. p. 429.

Jurisdiction of Public Service Commission. — The Public Service Commission maintains its jurisdiction over the services and property of that portion of a municipally-owned, revenue bond-financed natural gas distribution system which has been extended beyond the boundaries of the county in which the municipality is located even if the revenue bonds have been paid off by the municipality. 1985 Op. Att'y Gen. No. 85-39.

The Public Service Commission has no jurisdiction over the services and property of a natural gas distribution system

owned and operated by and within a municipality. 1985 Op. Att'y Gen. No. 85-39.

The Public Service Commission has no jurisdiction over master-metered customers so long as the activities of the customers do not constitute furnishing service to the public. 1985 Op. Att'y Gen. No. 85-39.

Validity of partial restraints of trade. — While contracts in general restraint of trade are void, contracts in partial restraint of trade are valid if they are reasonable and not injurious to the public interest. 1960-61 Op. Att'y Gen. p. 429.

Paragraph (c) applies to governmental departments. — The phrase, "General Assembly of this State shall have no power to authorize any such contract or agreement" means that governmental departments receiving their power from the General Assembly shall likewise have no such power. 1980 Op. Att'y Gen. No. 80-2 (decided under Ga. Const. 1976, Art. III, Sec. VIII, Para. VIII).

Reservation of state jobs for bid by designated contractors. — Program whereby certain state jobs or parts of state jobs would be reserved to be bid upon exclusively by designated class of contractors would tend to defeat or lessen competition and any contract entered into pursuant to such a program would be null and void. 1980 Op. Att'y Gen. No. 80-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 443 et seq. 64 Am. Jur. 2d, Public Utilities, § 67 et seq.

C.J.S. — 58 C.J.S., Monopolies, § 66 et

seq. 73B C.J.S., Public Utilities, § 18 et seq. 74 C.J.S., Railroads, § 85 et seq.

ALR. — Federal control of public utilities, 8 ALR 969; 10 ALR 956; 11 ALR 1450; 14 ALR 234; 19 ALR 678; 52 ALR 296.

Power of state to change private contract rates for public utilities, 9 ALR 1423.

Constitutionality of statute or ordinance authorizing use of public funds, credit, or power of taxation for restoration or repair of privately owned public utility, 13 ALR 313.

Special services or facilities afforded by shipper as a factor in carrier's rates, 25 ALR 191.

Right to cut off water supply because of nonpayment of water bill or charges for connections, etc., 28 ALR 472.

Right of manufacturer, producer, or wholesaler to control resale price, 32 ALR 1087; 103 ALR 1331; 125 ALR 1335.

Validity, construction, and effect of provisions for the appropriation of excess income of public utility, 33 ALR 488.

Regulation of food service in connection with passenger transportation, 36 ALR 1451.

Discrimination by carrier between shippers as to use of right of way or wharf, 44 ALR 1526.

Discrimination in the operation of a municipal utility, 50 ALR 126.

Application of anti-trust laws to combinations to maintain prices of commodities as affected by reasonableness of prices fixed, 50 ALR 1000.

Power of state to amend charter of a private incorporated charity, 62 ALR 573.

Power of state or municipality to fix minimum public utility rates, 68 ALR 1002.

Validity of stipulation in contract of employment against connection with labor union or employers' association, and power of Legislature to prohibit such contract, 68 ALR 1267.

Removal or attempted removal of one from field of competition by inducing him to enter another's employment as violation of anti-monopoly Act, 74 ALR 289.

Power of state or public service commission to regulate rates of municipally owned or operated public utility, 76 ALR 851; 127 ALR 94.

Sale of business and "good will," or of interest in partnership and "good will," as implying restriction against competition in absence of provision in that regard, 82 ALR 1030.

Construction of contract or regulations

regarding time of payment for public utility service, 97 ALR 982.

Power of corporation to amend its charter in respect of character or kind of business, 111 ALR 1525.

Right of user of public utility to discontinue use, 112 ALR 230.

Constitutionality of statute or ordinance requiring public utility to supply fixtures or accessories or incidental service to customers free of charge or for fixed charge, 115 ALR 1162.

Price fixing by Legislature or administrative body, 119 ALR 985.

Validity of covenant by employee or seller of business not to enter employment of customers, clients, or patrons of the business, 119 ALR 1452.

Constitutionality of statute fixing or regulating (or authorizing the fixing or regulating) of prices for personal services, 119 ALR 1481.

Right of public utility to make a fixed monthly service charge or a minimum monthly bill, 122 ALR 193.

Right of manufacturer, producer, or wholesaler to control resale price, 125 ALR 1335.

Constitutional and statutory provisions relating to consolidation, merger, or reorganization of corporations as applicable retrospectively to corporation previously chartered, 131 ALR 734.

Danger to person or property as affecting right of public utility to discontinue its service upon failure of consumer to comply with reasonable and valid regulations, 132 ALR 914.

Operation of negative or restrictive covenant in contract of employment for a specific period, as extended by continuance in the employment after the expiration of that period, 163 ALR 405.

Who are entitled to benefit of statutes giving right to combine, 166 ALR 161.

Discrimination between property within and that outside municipality or other governmental district as to public service or utility rates, 4 ALR2d 595.

Right of public utilities to discontinue line or branch on ground that it is unprofitable, 10 ALR2d 1121.

Right of customers of public utility with respect to fund representing a refund from another supplying utility upon reduction of latter's rates, 18 ALR2d 1343.

Variations of utility rates based on flat and meter rates, 40 ALR2d 1331.

Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice, or property, as affected by duration of restriction, 45 ALR2d 77; 13 ALR4th 661.

Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice, or property, as affected by territorial extent of restriction, 46 ALR2d 119; 13 ALR4th 661.

Application to banks and banking institutions of antimonopoly or antitrust laws, 83 ALR2d 374.

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantor, 97 ALR2d 4.

Rendering financial or other assistance to another as breach of covenant not to compete, 1 ALR3d 778.

Covenant restricting use of land, made for purpose of guarding against competition, as running with land, 25 ALR3d 897.

Employee's duty, in absence of express contract, not to disclose or use in new employment special skills or techniques acquired in earlier employment, 30 ALR3d 631.

Validity and construction of restrictive covenant not to compete ancillary to franchise agreement, 50 ALR3d 746.

Sufficiency of consideration for employee's covenant not to compete, entered into after inception of employment, 51 ALR3d 825.

Enforceability, insofar as restrictions would be unreasonable, of contract con-

taining unreasonable restrictions on competition, 61 ALR3d 397.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to sale of practice, 62 ALR3d 918.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to partnership agreement, 62 ALR3d 970.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to employment agreement, 62 ALR3d 1014.

Validity and construction of state statutes forbidding area price discrimination, 67 ALR3d 26.

Application of state antitrust laws to athletic leagues or associations, 85 ALR3d 970.

Practices forbidden by state deceptive trade practice and consumer protection Acts, 89 ALR3d 449.

Validity and construction of contractual restriction on right of accountant to practice, incident to sale of practice or withdrawal from accountancy partnership, 13 ALR4th 661.

Application of state antitrust laws to activities or practices of real-estate agents or associations, 22 ALR4th 103.

Reinstatement of repealed, forfeited, expired, or suspended corporate charter as validating interim acts of corporation, 42 ALR4th 392.

Propriety, under state law, of manufacturer's or supplier's refusal to sell medical product to individual physician, hospital, or clinic, 45 ALR4th 1006.

Paragraph VI. Gratuities.

(a) Except as otherwise provided in the Constitution, (1) the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public, and (2) the General Assembly shall not grant or authorize extra compensation to any public officer, agent, or contractor after the service has been rendered or the contract entered into.

(b) All laws heretofore adopted under Article III, Section VIII, Paragraph XII of the Constitution of 1976 in force and effect on June 30, 1983, shall continue in force and effect and may be amended if such amendments are consistent with the authority granted to the General Assembly by such provisions of said Constitution.

(c) The General Assembly may provide by law and may expend or authorize the expenditure of public funds for a health insurance plan or program for persons and the spouses and dependent children of persons who are retired former employees of public schools or public school systems of this state.

(d) The General Assembly may provide by law for indemnification with respect to licensed emergency management rescue specialists who are or have been killed or permanently disabled in the line of duty on or after January 1, 1991, and publicly employed emergency medical technicians who are or have been killed or permanently disabled in the line of duty on or after January 1, 1987.

(e)(1) The General Assembly may provide by law for a program of indemnification with respect to the death or permanent disability of any law enforcement officer, fireman, prison guard, or publicly employed emergency medical technician who is or at any time in the past was killed or permanently disabled in the line of duty. Funds shall be appropriated as necessary for payment of such indemnification or for the purchase of insurance for such indemnification or both.

(2) The General Assembly may provide by law for a program of compensation for injuries incurred by law enforcement officers and firemen in the line of duty. A law enforcement officer who becomes physically disabled, but not permanently disabled, as a result of a physical injury incurred in the line of duty and caused by a willful act of violence and a fireman who becomes physically disabled, but not permanently disabled, as a result of a physical injury incurred in the line of duty while fighting a fire shall be entitled to receive monthly compensation from the state in an amount equal to any such person's regular compensation for the period of time that the law enforcement officer or fireman is physically unable to perform the duties of his or her employment; provided, however, that such benefits provided in this subparagraph shall not be granted for more than a total of 12 months for injuries resulting from a single incident. A law enforcement officer or fireman shall be required to submit to a state agency satisfactory evidence of such disability. Benefits made available under this subparagraph shall be subordinate to workers' compensation benefits, disability and other compensation benefits from an employer which the law enforcement officer or fireman is awarded and shall be limited to the difference between the amount of workers' compensation benefits, disability and other compensation benefits actually paid and the amount of the law enforcement officer's or fireman's regular compensation. Any law enforcement officer or fireman who receives indemnification under subparagraph (1) of this subparagraph (e) shall not be entitled to any compensation under this subparagraph.

(f) The General Assembly is authorized to provide by law for compensating innocent victims of crimes which occur on and after July 1, 1989. The General Assembly is authorized to define the types of victims eligible to receive compensation and to vary the amounts of compensation according to need. The General Assembly shall be authorized to allocate certain funds, to appropriate funds, to provide for a continuing fund, or to provide for any combination thereof for the purpose of compensating innocent victims of crime and for the administration of any laws enacted for such purpose.

(g) The General Assembly may provide by law for indemnification with respect to public school teachers, administrators, and employees who are killed or permanently disabled by an act of violence in the line of duty, a nonlapsing indemnification fund for such purposes, and dedication of revenue from special and distinctive motor vehicle license plates honoring Georgia educators to such fund.

(g) The General Assembly may provide by law for a program of indemnification with respect to the death or permanent disability of any state highway employee who is or at any time in the past was killed or permanently disabled in the line of duty. Funds shall be appropriated as necessary for payment of such indemnification or for the purchase of insurance for such indemnification or both. (Ga. Const. 1983, Art. 3, § 6, Para. 6; Ga. L. 1986, p. 1622, § 1/HR 69; Ga. L. 1986, p. 1623, § 1/HR 125; Ga. L. 1986, p. 1627, § 1/HR 644; Ga. L. 1988, p. 2096, § 1/SR 274; Ga. L. 1990, p. 2432, § 1/HR 588; Ga. L. 2000, p. 1999, § 1/SR 204; Ga. L. 2000, p. 2001, § 1/HR 971; Ga. L. 2000, p. 2007, § 1/SR 519.)

1976 Constitution. — Art. III, Sec. VIII, Paras. VII, XII.

Cross references. — Reward for first oil well in state, § 12-4-20. Compensation for crime victims, § 17-14-30 et seq. Indemnification for death of publicly employed emergency services personnel and prison guards, § 45-9-80 et seq. Temporary disability compensation for officers or firefighters injured in the line of duty, § 45-9-101 et seq. Donations of books and printed materials to nonprofit organizations, § 45-13-83 et seq. Payment by Department of Industry and Trade of expenses of industrial prospects, § 50-7-15.

Editor's notes. — The constitutional amendment (Ga. L. 1986, p. 1623, § 1) which added subparagraph (c), regarding health insurance plans for retired employees of public school systems and their spouses and children, was approved by a

majority of the qualified voters voting at the general election on November 4, 1986.

The constitutional amendment (Ga. L. 1986, p. 1622, § 1) which added subparagraph (c), regarding indemnification of publicly employed emergency medical technicians who are or have been killed or permanently disabled in the line of duty on or after January 1, 1987, was approved by a majority of the qualified voters voting at the general election held on November 4, 1986.

The constitutional amendment (Ga. L. 1986, p. 1627, § 1) which added subparagraph (c), regarding indemnification of law enforcement officers, firemen, prison guards, or publicly employed emergency medical technicians "who are or at any time in the past were killed or permanently disabled in the line of duty" was approved by a majority of the qualified

voters voting at the general election held on November 4, 1986.

The constitutional amendment (Ga. L. 1988, p. 2096, § 1) which added subparagraph (f), authorizing the General Assembly to provide by law for compensating innocent victims of crime, and authorizing the General Assembly to allocate funds, to appropriate funds, and to provide for a continuing fund and which redesignated the former subparagraphs (c) added by Ga. L. 1986, p. 1622, § 1 and Ga. L. 1986, p. 1627, § 1 as subparagraphs (d) and (e), respectively, was approved by a majority of the qualified voters voting at the general election held on November 8, 1988.

The constitutional amendment (Ga. L. 1990, p. 2432, § 1) which inserted in subparagraph (d) “licensed emergency management rescue specialists who are or have been killed or permanently disabled in the line of duty on or after January 1, 1991, and” following “indemnification with respect to” was approved by a majority of the qualified voters voting at the general election held on November 6, 1990.

The constitutional amendment (Ga. L. 2000, p. 1999, § 1), which redesignated the existing provisions of subparagraph (e) as subparagraph (e)(1) and added subparagraph (e)(2), was approved by a majority of the qualified voters voting at the general election held November 7, 2000.

The constitutional amendment (Ga. L. 2000, p. 2001, § 1), which added the first subparagraph (g), so as to provide that the General Assembly may provide by law for indemnification with respect to public school teachers, administrators, and em-

ployees who are killed or permanently disabled by an act of violence in the line of duty, a nonlapsing indemnification fund for such purposes, and dedication of revenue from special and distinctive motor vehicle license plates honoring Georgia educators to such fund, was approved by a majority of the qualified voters voting at the general election held November 7, 2000.

The constitutional amendment (Ga. L. 2000, p. 2007, § 1), which added the second subparagraph (g), so as to provide that the General Assembly may provide by law for a program of indemnification with respect to the death or permanent disability of any state highway employee who is or at any time in the past was killed or permanently disabled in the line of duty, was approved by a majority of the qualified voters voting at the general election held November 7, 2000.

Law reviews. — For article discussing sovereign immunity and the State Court of Claims, see 14 Ga. St. B.J. 152 (1978). For article, “Public Rights in Georgia’s Tidelands,” see 9 Ga. L. Rev. 79 (1974). For article, “Workers’ Compensation in Georgia Municipal Law,” see 15 Ga. L. Rev. 57 (1980). For annual survey of constitutional law, see 40 Mercer L. Rev. 117 (1988).

For note discussing restrictions on the creation of public purpose corporations, see 8 Ga. L. Rev. 680 (1974).

For comment on *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969) as to the constitutionality of the State Bar Act (Art. 2, Ch. 19, T. 5), see 21 Mercer L. Rev. 355 (1969).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- SPECIFIC CASES
- RECOGNIZANCES

General Consideration

Paragraph is applicable to cities and counties as well as to General Assembly. *Grand Lodge, I.O.O.F. v. City of Thomasville*, 226 Ga. 4, 172 S.E.2d 612

(1970) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

This paragraph applies to pension systems for municipal employees. *Bender v. Anglin*, 207 Ga. 108, 60 S.E.2d 756, cert. denied, 340 U.S. 878, 71 S. Ct.

125, 95 L. Ed. 638 (1950) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

State may be liable as joint tort-feasor. — Nothing in the Georgia Tort Claims Act contradicts the holding that the state can be liable as a joint tort-feasor, and such holding does not violate the provisions of Ga. Const. 1983, Art. III, Sec. VI, Para. VI. *DOT v. Brown*, 218 Ga. App. 178, 460 S.E.2d 812 (1995), *aff'd*, 267 Ga. 6, 471 S.E.2d 849 (1996).

Definitions of “pension” and “compensation.” — The words “pension” and “compensation” are not synonymous. The former is ordinarily a gratuity or bounty from the government in recognition of but not in payment for past services. *Dewitt v. Richmond County*, 192 Ga. 770, 16 S.E.2d 579 (1941).

Word “gratuity” as used in this paragraph is employed in its natural and ordinary meaning. *McCook v. Long*, 193 Ga. 299, 18 S.E.2d 488 (1942) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

No “gratuity” involved where county recovers substantial benefits in return for use of county property. *Smith v. Board of Comm’rs of Rds. & Revenues*, 244 Ga. 133, 259 S.E.2d 74 (1979).

Consideration paid for services not gratuity. — Consideration provided by a contract to be paid by the state for services to be performed under the terms of the contract is not a gratuity. *Harrison Co. v. Code Revision Comm’n*, 244 Ga. 325, 260 S.E.2d 30 (1979).

No “gratuity” where consideration provided. — Because the University of Georgia Athletic Association provides ample consideration and services for the funds that it receives, the transfer of student athletic fees collected by the university to the association is not a “gratuity” within the meaning of Ga. Const. 1983, Art. III, Sec. VI, Para. VI. *Haggard v. Board of Regents*, 257 Ga. 524, 360 S.E.2d 566 (1987).

A grant of property by a municipality for use by an organization as rescue missions did not constitute an impermissible gratuity in violation of Ga. Const. 1983, Art. III, Sec. VI, Para. VI. *Swanberg v. City of*

Tybee Island, 271 Ga. 23, 518 S.E.2d 114 (1999).

County not authorized to donate public funds to chamber of commerce, freight bureau, or convention and tourist bureau. *Atlanta Chamber of Commerce v. McRae*, 174 Ga. 590, 163 S.E. 701 (1931).

Cited in *Morris v. Tatum*, 178 Ga. 728, 174 S.E. 340 (1934); *West v. Trotzier*, 185 Ga. 794, 196 S.E. 902 (1938); *Garr v. E.W. Banks Co.*, 206 Ga. 831, 59 S.E.2d 400 (1950); *Cole v. Foster*, 207 Ga. 416, 61 S.E.2d 814 (1950); *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950); *Barge v. Camp*, 209 Ga. 38, 70 S.E.2d 360 (1952); *City of Atlanta v. Anglin*, 209 Ga. 170, 71 S.E.2d 419 (1952); *State v. State Toll Bridge Auth.*, 210 Ga. 690, 82 S.E.2d 626 (1954); *McKelvey v. Logan*, 220 Ga. 197, 137 S.E.2d 651 (1964); *Trice v. Wilson*, 113 Ga. App. 715, 149 S.E.2d 530 (1966); *Hospital Auth. v. Stewart*, 226 Ga. 530, 175 S.E.2d 857 (1970); *DOT v. Hardin*, 231 Ga. 359, 201 S.E.2d 441 (1973); *Richmond County v. Pierce*, 234 Ga. 274, 215 S.E.2d 665 (1975); *Wilson v. Strange*, 235 Ga. 156, 219 S.E.2d 88 (1975); *Rich v. State*, 237 Ga. 291, 227 S.E.2d 761 (1976); *DOT v. Doss*, 238 Ga. 480, 233 S.E.2d 144 (1977); *Savage v. City of Atlanta*, 242 Ga. 671, 251 S.E.2d 268 (1978); *Kellett v. DOT*, 174 Ga. App. 214, 329 S.E.2d 514 (1985); *City of Lithia Springs v. Turley*, 241 Ga. App. 472, 526 S.E.2d 364 (1999); *Bauerband v. Jackson County*, 278 Ga. 222, 598 S.E.2d 444 (2004).

Specific Cases

Paragraph violated where public street vacated for benefit of private individual. *Marietta Chair Co. v. Henderson*, 121 Ga. 399, 49 S.E. 312 (1904) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Resolution to refund to sureties on bond of defaulting treasurer any sum which they paid violated this paragraph. *Smith v. Fuller*, 135 Ga. 271, 69 S.E. 177 (1910) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Resolution relieving bondsmen of liability, and directing county to pay sureties the amounts paid by them, is invalid. *Geer*

Specific Cases (Cont'd)

v. Dancer, 164 Ga. 9, 137 S.E. 558 (1927) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Resolution instructing city to refund to surety amount paid on criminal bond forfeiture unconstitutional. McCook v. Long, 193 Ga. 299, 18 S.E.2d 488 (1942).

After the payment of a final judgment on a bond forfeiture and the delivery of that money to the county authorities, who maintain the courts, no resolution or Act of the legislature may legally direct a refund of such payment. Washburn v. MacNeill, 205 Ga. 772, 55 S.E.2d 135 (1949).

For decision holding that such a resolution is not unconstitutional, see Stewart v. Davis, 175 Ga. 545, 165 S.E. 598 (1932).

Paragraph not violated by grant of right of way to railroad. Georgia v. Trustees of Cincinnati S. Ry., 248 U.S. 26, 39 S. Ct. 14, 63 L. Ed. 104 (1918) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Act requiring municipal authorities to pay registration clerk in tax collector's office a certain salary does not violate this paragraph. Mayor of Savannah v. Guerard, 158 Ga. 205, 122 S.E. 691 (1924) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Workers' Compensation Act does not violate this paragraph. — The Workers' Compensation Act (Ga. L. 1920, p. 167; see O.C.G.A. Ch. 9, T. 34), providing in part that "employers" shall include any municipal corporation within the state and any political division thereof, does not violate this paragraph. City of Macon v. Benson, 175 Ga. 502, 166 S.E. 26 (1932) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Act (Ga. L. 1943, p. 401) amending the Workers' Compensation Act, so far as it provides for compensation for past accidents of employees who had been employed in a state department that has previously operated under the Workers' Compensation Act is not unconstitutional under this paragraph as being a grant of a "donation" or "gratuity." State Hwy. Dep't v. Bass, 197 Ga. 356, 29 S.E.2d 161 (1944)

(see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

State Bridge Building Authority Act does not violate this paragraph (Ga. L. 1953, p. 626, now repealed). McLucas v. State Bridge Bldg. Auth., 210 Ga. 1, 77 S.E.2d 531 (1953) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

State School Building Authority Act does not violate paragraph. — The State School Building Authority Act, Ga. L. 1951, p. 241 (see now O.C.G.A. Pt. 3, Art. 11, Ch. 2, T. 20) plainly forbids any attempt thereunder to obligate the state, pledge the state's faith or credit, or donate anything belonging to the state; therefore, neither the Act, lease contract executed thereunder, nor the revenue bonds issued pursuant thereto offend this paragraph. Sheffield v. State Sch. Bldg. Auth., 208 Ga. 575, 68 S.E.2d 590 (1952) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Payment to hospital for purposes of providing ward for care of indigent sick does not violate this paragraph. Brock v. Chappell, 196 Ga. 567, 27 S.E.2d 38 (1943) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

State Bar Act not gratuity under this Paragraph (Ga. L. 1963, p. 70; see O.C.G.A. Art. 2, Ch. 19, T. 15). Sams v. Olah, 225 Ga. 497, 169 S.E.2d 790 (1969), commented on in 21 Mercer L. Rev. 355 (1969) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Regulations permitting tree trimming on highway rights-of-way. — Regulations of the Department of Transportation permitting the trimming of trees and vegetation on highway rights-of-way in order to make advertising signs on private property more visible violated the constitutional prohibition against gratuities. Garden Club of Ga., Inc. v. Shackelford, 266 Ga. 24, 463 S.E.2d 470 (1995).

Legislative scheme in O.C.G.A. § 32-6-75.3 allowing the owners of private outdoor advertising to trim vegetation on public property blocking the view of their advertising was not an unconstitutional donation, under Ga. Const. 1983, Art. III, Sec. VI, Para. VI, because the legislature declared that outdoor advertising benefits the state, and private individuals were

required to pay the state for the privilege of allowing the public to have an unimpeded view of their signs. *Garden Club of Ga. v. Shackelford*, 274 Ga. 653, 560 S.E.2d 522 (2002).

Payments from county to building authority. — Since the payments to be made by the county to the building authority under the binding agreements entered into pursuant to the County Building Authority Act, in regard to the acquisition and construction of certain county buildings, were in return for bargained-for consideration, they were not prohibited donations or gratuities. *Building Auth. v. State*, 253 Ga. 242, 321 S.E.2d 97 (1984).

Bond resolution did not violate the Gratuities Clause of the Georgia Constitution because the county and the airport authority did not extend a gratuity to a commercial aviation company as the county's issuance of the bond created a substantial benefit for the county, namely the presence and use of an airport which could accommodate commercial passenger flights, which directly benefited the airport authority and the county; the fact that the commercial aviation company received a secondary benefit as being the commercial airline service renting part of the terminal and landing flights on the expanded taxiway did not change that result. *Avery v. State of Ga.*, 295 Ga. 630, 761 S.E.2d 56 (2014).

Services sufficient consideration for payments. — Intergovernmental Agreement did not violate the gratuities clause as the Cobb-Marietta Coliseum and Exhibit Hall Authority's services were sufficient consideration for the promised payments. *Savage v. State of Ga.*, 297 Ga. 627, 774 S.E.2d 624 (2015).

Peace officer's retirement benefit which is based on service prior to the date of the retirement Act is not extra compensation after the service is rendered nor is it a gratuity in violation of subparagraphs 1 and 2. *Cole v. Foster*, 207 Ga. 416, 61 S.E.2d 814 (1950).

Condition on grants for road construction and maintenance. — Condition in statute authorizing grants of state funds for road construction and maintenance, that no county was eligible to re-

ceive any funds unless a tax credit was given on homesteads first and then on tangible property (exclusive of motor vehicles and trailers) in accordance with the formulas prescribed in the Act, was not a forbidden gratuity within the meaning of the Georgia Constitution. *Brown v. Wright*, 231 Ga. 686, 203 S.E.2d 487 (1974) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Acceptance of subdivision roads. — Because a developer expended hundreds of thousands of dollars to build the roads in question, and because the evidence, even when viewed favorably to the county, showed that the problems raised by the county concerning shoulders occur at only certain locations in the two-mile road system, the county's acceptance of the roads did not amount to an illegal gratuity. *Rabun County v. Mt. Creek Estates, LLC*, 280 Ga. 855, 632 S.E.2d 140 (2006).

Amendment to Homestead Option Sales and Use Tax not payment of gratuity. — Trial court did not err in holding that Ga. L. 2007, p. 598, § 1 et seq., which amended the Homestead Option Sales and Use Tax (HOST) Act, O.C.G.A. § 48-8-100 et seq., was not the payment of a gratuity in violation of Ga. Const. 1983, Art. III, Sec. VI, Para. VI(a) because the equalization amount received by a city as a qualified municipality within a county special tax district clearly represented the share of homestead option sales and use tax capital outlay proceeds the legislature determined the city's residents were entitled to receive; therefore, that share was not a gift in violation of Ga. Const. 1983, Art. III, Sec. VI, Para. VI(a); under the Homestead Option Sales and Use Tax Act, O.C.G.A. § 48-8-100 et seq., as amended, the city, just like the county, would act as an agent for the special tax district coterminous with the geographical boundaries of the county in expending HOST revenues for capital outlay projects that benefited the special tax district. *DeKalb County v. Perdue*, 286 Ga. 793, 692 S.E.2d 331 (2010).

Billboard take-down credits. — Trial court erred in holding that the take-down credits under O.C.G.A. § 32-6-75.3(j) violated the gratuities clause because, to the contrary, the Su-

Specific Cases (Cont'd)

preme Court of Georgia has found that the Georgia legislature has explicitly determined that removal of outdated signs provides a benefit to the State of Georgia and that there would be a financial benefit in allowing take-down credits. *City of Columbus v. Ga. Dep't of Transp.*, 292 Ga. 878, 742 S.E.2d 728 (2013).

Recognizances

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. III, Sec. VIII, Para. VII and antecedent provisions, relating to restrictions on the power of the General Assembly to relieve principals or

securities upon forfeited recognizances from payment thereof, are included in the annotations for this paragraph.

Resolution authorizing court to refund to surety amount paid on criminal bond forfeiture unconstitutional. *McCook v. Long*, 193 Ga. 299, 18 S.E.2d 488 (1942).

After the payment of a final judgment on a bond forfeiture and the delivery of that money to the county authorities no resolution or Act of the legislature may legally direct a refund of such payment. *Washburn v. MacNeill*, 205 Ga. 772, 55 S.E.2d 135 (1949).

For decision holding that such a resolution is not unconstitutional, see *Stewart v. Davis*, 175 Ga. 545, 165 S.E. 598 (1932).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

DONATIONS TO ORGANIZATIONS AND INDUSTRY

SALE OF AND IMPROVEMENTS TO REAL PROPERTY

EDUCATIONAL INSTITUTIONS

PUBLIC EMPLOYEES

OTHER EXPENDITURES

General Consideration

Paragraph applies to departments. — If the General Assembly cannot grant any donation or gratuity in favor of any person, corporation, or association, a department of the state would not be authorized to do so. 1957 Op. Att'y Gen. p. 246.

Conveyances in aid of public purposes. — Conveyance in aid of public purpose from which great benefits are expected is not within class of evils that this paragraph intended to prevent and is not within the meaning of the word "gratuity" as it naturally would be understood. 1958-59 Op. Att'y Gen. p. 281 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

General welfare grants not permitted. — Direct grants to private persons to induce economic activity for the general welfare are not permitted. 1998 Op. Att'y Gen. No. U98-15.

Donations by city prohibited. — A contribution by a city to a private person, corporation, or association for any pur-

pose which is not authorized by the charter of that city or by any provision of the Constitution or general law of this state is prohibited by this paragraph. 1974 Op. Att'y Gen. No. U74-59 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Gratuities proscription is applicable to counties. 1980 Op. Att'y Gen. No. U80-43.

Payment of entertainment expense as gratuity. — Regional Development Centers, as public agencies and instrumentalities of the municipalities and counties in their regions, are subject to the Georgia Constitution's gratuities clause. Absent any specific authorizing statute, the payment of entertainment expenses would be unauthorized. Indeed, such an expenditure would constitute a gratuity in violation of the Georgia Constitution. 1992 Op. Att'y Gen. No. 92-1.

Journalists' use of government office space not a violation. — The gratuities clause of the Georgia Constitution is not per se violated by the free use of

government office space as a news room by journalists covering state government. 1993 Op. Att’y Gen. No. U93-14.

Use of state-owned aircraft. — If the Governor, Lieutenant Governor, or Speaker of the House must travel on personal or political business, such travel must be accomplished by private means unless the commissioner of public safety has determined that travel on state aircraft is necessary for personal security; otherwise, where any public officer uses a state aircraft for a personal or political reason, the use of the aircraft is contrary to the prohibitions of the gratuities clause and state statutes authorizing the use of state aircraft, even if the official was to reimburse the state for the direct costs associated with the trip. 2004 Op. Att’y Gen. No. 04-3.

Donations to Organizations and Industry

Paragraph violated by donation to private industry. — Municipalities are not authorized to make any donations or other financial contributions to private industry. 1952-53 Op. Att’y Gen. p. 129.

Chamber of commerce. — A municipality cannot constitutionally donate tax funds to a chamber of commerce. 1954-56 Op. Att’y Gen. p. 499.

A development authority may not disburse funds to a chamber of commerce for general promotion and other described activities without violating Ga. Const. 1983, Art. III, Sec. VI, Para. VI. 1983 Op. Att’y Gen. No. 83-7.

A county development authority is not precluded by the gratuities clause of the Georgia Constitution from contracting with a chamber of commerce to encourage and promote the expansion of industry, agriculture, and trade in the county, using funds appropriated to the authority by the county board of commissioners, but such contracts must not be sham agreements, and they must result in substantial benefits to the county. 1986 Op. Att’y Gen. No. U86-28.

Donation to Southeastern Legal Foundation violated paragraph. — Funds of the Georgia Agricultural Commodity Commission may not be expended for contributions to and support of the

activities of the Southeastern Legal Foundation. 1976 Op. Att’y Gen. No. 76-102.

Donation to Ducks Unlimited violated paragraph. — Game and Fish Commission (now Department of Natural Resources) may not make grant to Ducks Unlimited, although funds may be appropriated for the same purposes (e.g., recreation, conservation of natural resources). 1971 Op. Att’y Gen. No. 71-128.

Donation to Paralympic Organizing Committee violated paragraph. — The Department of Natural Resources could not use an appropriation to pay rent and other expenses to Georgia Tech on behalf of the Paralympic Organizing Committee. 1997 Op. Att’y Gen. No. 97-6.

Furnishing of office to privately organized credit union unconstitutional. — The board of regents may not donate to a privately organized credit union any office space, supplies, or telephone services when the expenses for same are borne by appropriations of the General Assembly. 1967 Op. Att’y Gen. No. 67-418.

Expenditure of state funds to furnish secretarial service to nonstate agency violated this paragraph. 1960-61 Op. Att’y Gen. p. 43 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Disbursement of federal funds to private hospital associations violated this paragraph. — In view of Ga. Const. 1976, Art. IX, Sec. V, Para. II (see Ga. Const. 1983, Art. IX, Sec. IV), and this paragraph, the State Treasurer (now director of the Office of Treasury and Fiscal Services) and the Department of Public Health (now Department of Human Resources) are without authority to receive and disburse federal funds under the provisions of the Hill-Burton Act (60 Stat. 1040, see 42 U.S.C. §§ 291a through 291m) to private nonprofit hospital associations or corporations. 1948-49 Op. Att’y Gen. p. 341 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Forgiveness of loans made by the Georgia Housing and Finance Authority under the Economic Development Incentive Loan Program violates state law. 1995 Op. Att’y Gen. No. 95-22 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Donations to Organizations and Industry (Cont'd)

Indemnity and hold harmless clause violates prohibition. — An indemnity and hold harmless clause in a proposed contract, under which clause a state agency would indemnify a private corporation, constitutes both a gratuity and a pledge of the state's credit and thus falls within the prohibitions contained in this paragraph and Ga. Const. 1976, Art. VII, Sec. III, Para. IV (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII). 1980 Op. Att'y Gen. No. 80-67 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

County cannot make donations to water and sewerage authority, but it can enter into contracts with such authority. 1970 Op. Att'y Gen. No. U70-225.

Former Code 1933, §§ 104-204 and 104-205 (see now O.C.G.A. § 46-5-1 did not authorize telegraph and telephone companies to utilize state-owned stream bed properties without securing prior permission and making just compensation. 1970 Op. Att'y Gen. No. 70-169.

Board of regents may lease lands in return for the endowment of a research chair if the endowment is equal to the fair market value of the lease and the term of the lease is reasonable. 1995 Op. Att'y Gen. No. 95-25.

Paragraph not violated by purchase of promotional trinkets. — The purchase of cuff links and the decorative attachment to the key rings designed in the shape of the State of Georgia for controlled distribution to representatives of industries which the Department of Industry and Trade is attempting to encourage to locate or expand operations in Georgia is authorized by Ga. L. 1962, p. 694, § 7 (see now O.C.G.A. § 50-7-7) and is not repugnant to this paragraph, since the elements of gratuity are merely incidental to their dominant function of advertising and promotion. 1963-65 Op. Att'y Gen. p. 558.

Bondsman not entitled to refund of forfeiture even after surrender of principal. — Former Code 1933, § 27-904 (see now O.C.G.A. § 17-6-31)

provided for the relieving of a bondsman's liability prior to the time that the bondsman pays the forfeiture to the county, but after the payment by a bondsman to the county of a final judgment on an appearance bond forfeiture, the bondsman is not entitled to a refund of the forfeiture even though the bondsman later surrenders the principal to county authorities. 1976 Op. Att'y Gen. No. U76-28 (decided under Ga. Const. 1976, Art. III, Sec. VIII, Para. VII, relating to restrictions on the power of the General Assembly to relieve principals or securities on forfeited recognizances from payment thereof).

Sale of and Improvements to Real Property

In any exchange or other negotiation, the state must receive full value for any property conveyed; otherwise, there occurs a grant or gift contrary to the terms of this paragraph. 1971 Op. Att'y Gen. No. U71-17 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Hospital authority can lease unimproved land to a third party subject to the prohibition against gratuities contained in this paragraph. 1971 Op. Att'y Gen. No. 71-190 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Paragraph violated by use of state funds for permanent improvements to private property. — Expenditures by board of regents for improvements on real property to which board does not hold title are illegal and unconstitutional. 1962 Op. Att'y Gen. p. 588.

It is unlawful to expend state funds in order to make permanent improvements to property unless the state owns the fee interest in the property concerned or unless the improvements are of such a nature or character to be subject to either recoupment or removal by the state at the time the state's use of the property terminates. 1967 Op. Att'y Gen. No. 67-115.

Construction of fall-out shelters on private property violated this paragraph. — Municipal bond money cannot be legally spent on improvement of conversion of existing building located on private property for construction of public fall-out shelters. 1962 Op. Att'y Gen. p. 332.

Maintaining private driveways violates this paragraph. — State funds or county funds can only be used for valid “public purposes” which clearly does not encompass maintaining private driveways. 1963-65 Op. Att’y Gen. p. 466.

Use of convict labor on private property is permissible in situations where the sole benefit flows to state. 1969 Op. Att’y Gen. No. 69-158.

Paragraph not violated by clearing land in return for use of property. — Under Ga. L. 1956, p. 161, § 22 (see now O.C.G.A. § 42-5-60), an agreement entered into between the warden of a prison branch and a private landowner, whereby in consideration of the warden’s clearing five acres of land belonging to the landowner, the landowner will permit the prison branch to occupy the land rent free for a period of three years, is not illegal, so long as it was entered into in good faith, for the purpose of procuring the use of land for the state, rather than as a guise whereby the private landowner is enabled to receive a gratuity from the state, prohibited by this paragraph. 1958-59 Op. Att’y Gen. p. 248 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Positioning officer’s mobile home on prison property does not violate paragraph. — The use of inmate labor to position and level a correctional officer’s mobile home site on prison property is not a violation of this paragraph. 1969 Op. Att’y Gen. No. 69-418 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

When use of state labor to move fence for right of way permissible. — The State Highway Department (now Department of Transportation) can contract with a private property owner to use prison labor or state maintenance forces to remove and reset fences upon the private property which is to be used as a right of way, since the utilization of this prison labor is to the benefit of the state. However, the department cannot guarantee to a county that it will perform these acts or expend this money if a county in turn entered into such an agreement with the private landowner which guaranteed to the private landowner that the state would perform such acts. 1969 Op. Att’y Gen. No. 69-158.

Educational Institutions

This paragraph does not apply to state grants for educational purposes. 1971 Op. Att’y Gen. No. 71-147 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Grants to nonprofit educational corporation are legal where sole purpose is to carry forward a public-type undertaking previously conducted by state. 1958-59 Op. Att’y Gen. p. 281.

Junior College Act of 1958 does not violate this paragraph (Ga. L. 1958, p. 47; see O.C.G.A. Art. 4, Ch. 3, T. 20). 1963-65 Op. Att’y Gen. p. 100.

Use of federal funds in private schools approved. — So long as Title II of the Elementary and Secondary Education Act of 1965 (79 Stat. 27) is wholly financed by the federal government and no state matching funds are involved, the State Board of Education may lawfully administer a state plan adopted under this title of the Act even though it contemplates the providing of school library resources, textbooks, and other printed instructional materials for the use of students and teachers in private as well as public schools. 1965-66 Op. Att’y Gen. No. 65-4.

Neither the state, a county, or a city may constitutionally give or donate school property to a private individual or institution; outright sale of such school property with no strings attached is permissible. 1958-59 Op. Att’y Gen. p. 175.

While the discretionary powers of a county school board were exceedingly broad under former Code 1933, § 32-909 (see now O.C.G.A. § 20-2-520), it was quite clear that the section did not authorize a county school board to make a “gift” of school property to a citizen or group of citizens; the power of disposition was limited to the “sale” of such property. 1963-65 Op. Att’y Gen. p. 628.

Paragraph violated by use of funds for room and board and medical treatment for students. — Neither the State Board of Education nor local boards of education can lawfully use school funds for room and board (other than school lunches) or for medical (including psychiatric) treatment or services beyond such

Educational Institutions (Cont'd)

evaluation as is necessary to placement and the determination of the proper educational program for a given child. 1979 Op. Att'y Gen. No. 79-1.

Fiscal resources of the Georgia Agricultural Commodity Commission for Milk may not be expended to fund student scholarships in the dairy science curricula at University of Georgia or to participate in funding a private scholarship foundation for students matriculating in such curricula. 1976 Op. Att'y Gen. No. 76-115.

Board of regents may not lawfully employ "housemothers" at privately owned, off-campus, student dormitories. 1967 Op. Att'y Gen. No. 67-259.

Distinguishing between accredited and unaccredited proprietary schools for inclusion in informational directory. — State's interest in disseminating information only on schools which meet certain minimum standards for protection of its citizenry is certainly one rational basis for distinguishing between accredited and unaccredited proprietary schools for inclusion by Georgia Educational Improvement Council in informational directory regarding post-secondary schools. 1981 Op. Att'y Gen. No. 81-107.

Inclusion of proprietary schools by Georgia Educational Improvement Council in informational directory regarding certain post-secondary educational institutions does not violate this clause, since citizens of Georgia will benefit from a listing of accredited proprietary schools along with other post-secondary schools in one directory. 1981 Op. Att'y Gen. No. 81-107 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Prohibition contained in paragraph (b) applies to county boards of education. 1981 Op. Att'y Gen. No. U81-13 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Payment to make school superintendent's salary comply with requirements of State Board of Education constitutes salary adjustment rather than extra compensation and is not unlawful. 1981 Op. Att'y Gen. No. U81-13.

Licensing university trademarks. — The Board of Regents may by contract

authorize foundations and athletic associations affiliated with university system institutions to license trademarks of the Board of Regents with the specific requirement that any funds generated thereby will be applied solely for the use and benefit of the educational programs at the institution concerned without violating Ga. Const. 1983, Art. III, Sec. VI, Para. VI. 1983 Op. Att'y Gen. No. 83-10.

Public Employees

Paragraph violated by payment to one not performing services. — The State Board of Health (now Department of Human Resources) is not authorized to provide compensation for a person who is inactive and not performing services for the state in return for the emolument received. 1945-47 Op. Att'y Gen. p. 522.

County expending funds to satisfy judgment rendered against ex-sheriff violates this paragraph. 1975 Op. Att'y Gen. No. U75-26 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Payments to former chancellor violate this paragraph. — Payments to a former chancellor after the chancellor's resignation, and to the widow of the director of budgets after the director's death, are illegal under this paragraph and must be repaid to the state by the board of regents and its treasurer. 1948-49 Op. Att'y Gen. p. 540 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Payroll deductions for third party violates this paragraph. — In the absence of authorizing legislation, it would not be lawful for a state agency to deduct dues, contributions, or donations from a public employee's paycheck for transmittal to some third party with which the state agency has no contractual relationship; this includes prohibiting a state agency from making payroll deductions for charitable purposes from a state employee's pay on a voluntary basis. 1974 Op. Att'y Gen. No. U74-62.

Deductions for private parking facility violates this paragraph. — Monthly payroll deductions for parking spaces of individual employees in private facility, where the owner of the private facility is a third-party recipient not in contractual relationship with the govern-

ment, would be a gratuity prohibited by this paragraph. 1976 Op. Att'y Gen. No. 76-114 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

This paragraph prohibits pay raises which are retroactive in nature. 1967 Op. Att'y Gen. No. 67-150 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

If the management of an agency had the discretion to grant a merit increase and, for some reason did not exercise that discretion, any attempt to make retroactive payment would be granting extra compensation to a public officer or agent after the service had been rendered in violation of this paragraph. 1972 Op. Att'y Gen. No. 72-110 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

If the management of a department had the discretion to grant a merit increase and lawfully did not exercise that discretion, any attempt to later make a retroactive payment would be granting extra compensation to a public officer or agent after the service had been rendered and would violate this paragraph. 1976 Op. Att'y Gen. No. 76-62 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Discretionary salary increases may not be retroactively granted where higher appointing authority disagrees with lower appointing authority's earlier decision to deny increase. 1980 Op. Att'y Gen. No. 80-14.

Legislation which attempts to increase benefits of those already retired is in violation of this paragraph. 1967 Op. Att'y Gen. No. 67-399 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

A supplemental retirement plan for public employees which does not require a substantial benefit to the employer, in the form of new service or otherwise, violates the prohibitions against governmental gratuities and extra compensation for services rendered. 1996 Op. Att'y Gen. No. U96-21.

Voluntary deductions from wages for charitable donations. — Since charitable deductions are authorized by O.C.G.A. § 45-20-50 et seq. to provide employees of various state agencies with an additional employment benefit, such benefit becomes part of the employment

contract, and consequently is not a gratuity to the employees. 1982 Op. Att'y Gen. No. 82-79.

Paragraph not violated by payment of retirement allowance. — The regents may pay a retirement allowance to an employee of a radio station which is owned by the regents and operated under the auspices of the Georgia Institute of Technology. 1967 Op. Att'y Gen. No. 67-362.

Authorization of tax-sheltered annuity plans does not violate this paragraph. — The Board of Regents of the University System of Georgia may authorize the units of the university system to enter into tax-sheltered annuity plans for its employees, and such annuities cannot be considered gratuities under this paragraph. 1965-66 Op. Att'y Gen. No. 65-69 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Emeritus positions do not violate this paragraph. 1963-65 Op. Att'y Gen. p. 417 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Advance payment of travel expenses does not violate this paragraph. — The use of public funds for advance payment of state employee travel expenses, authorized under Ga. L. 1973, p. 842, § 1 et seq. (see now O.C.G.A. §§ 45-7-25 through 45-7-28), does not violate this paragraph or Ga. Const. 1976, Art. VII, Sec. III, Para. IV (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII). 1973 Op. Att'y Gen. No. 73-87 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Employees' Suggestion and Awards Program does not violate this paragraph. — Compensation pursuant to the Employees' Suggestion and Awards Program (see now O.C.G.A. Ch. 21, T. 45) would be payment for a service which has been performed by the employee and would not fall into the category of a gift or gratuity. 1971 Op. Att'y Gen. No. 71-183 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Money paid under the Employees' Suggestion and Awards Program (see now O.C.G.A. Ch. 21, T. 45) is an award and as such does not violate this paragraph, since such payment is a form of compensation. 1973 Op. Att'y Gen. No. 73-86 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Public Employees (Cont'd)

Local school system employee suggestion programs do not violate the constitutional prohibition against gratuities. 1998 Op. Att'y Gen. No. U98-14.

Payment for unused annual leave as terminal leave does not violate Ga. Const. 1983, Art. III, Sec. VI, Para. VI. — A county board of education may pay an elected Superintendent for the Superintendent's unused annual leave as terminal leave when the Superintendent vacates office so long as such payment was previously agreed to as part of his compensation package. 1989 Op. Att'y Gen. 89-51.

Employment status of University System professor not affected by detention behind Iron Curtain where trip abroad is part of professor's duties. 1967 Op. Att'y Gen. No. 67-178.

State employees may use department purchased corporate credit cards to purchase commercial transportation but employees provided with such cards should be required to execute change of beneficiary form so that any travel insurance benefits payable because of the use of the cards will be payable to the department to avoid conflict with this section. 1980 Op. Att'y Gen. No. 80-65 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Uniformed officers in Motor Carrier Certification and Enforcement Division, Georgia Public Service Commission, are not entitled to receive indemnification pursuant to Ga. L. 1978, p. 1914, § 1 (see now O.C.G.A. Art. 5, Ch. 9, T. 45) with respect to death occurring in the line of duty. 1980 Op. Att'y Gen. No. 80-119.

Transfer of leave time prohibited. — No leave accrued by a county employee under a county personnel system can be transferred when the employee becomes a state employee since assumption of such leave by the state would be a gratuity prohibited by Ga. Const. 1983, Art. III, Sec. VI, Para. VI and would violate Ga. Const. 1983, Art. VII, Sec. IV, Para. X, which prohibits the assumption of any debt owed by the county. 1984 Op. Att'y Gen. No. 84-38.

Educational debt repayment. — Even though hospital authorities are subject to the gratuities clause of the Georgia Constitution, an authority may offer a prospective employee a signing bonus if it receives a substantial benefit in exchange; however, a hospital authority may not assume payment of a prospective employee's educational loan without explicit statutory authority to do so. 2002 Op. Att'y Gen. No. U2002-7.

Other Expenditures

Paragraph violated by paying damages for negligence to a few. — The General Assembly has never seen fit to provide that the state would be liable to all persons who were injured or damaged by reason of the negligence of its employees. The giving of such benefits to a few, to the exclusion of others, would make such gift by the General Assembly a pure gratuity or donation. 1945-47 Op. Att'y Gen. p. 632.

Providing compensation for services already rendered violates this paragraph. — House Resolution No. 61-151 (1961), which attempts to provide compensation to a contractor because the authority of the Highway Department (now Department of Transportation) to do so is in question, is unconstitutional because it provides payment for services already rendered in violation of this paragraph. 1960-61 Op. Att'y Gen. p. 44 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Payment under illegal contract violates this paragraph. — Where Highway Department (now Department of Transportation) had no legal authority to enter into contracts for adjustment of facilities of utility owners, such contracts are void, and any attempt to make payment under them would violate this paragraph. 1967 Op. Att'y Gen. No. 67-339 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Assumption of shipping expenses violates this paragraph. — Where the seller must bear the shipping expense under the term "F.O.B. the place of destination" and there is no obligation on the state as purchaser to assume this burden, any attempt by the state to do so would be,

in effect, a gratuity. 1969 Op. Att'y Gen. No. 69-1.

Prisoners working on private vehicles unconstitutional. — It is not permissible for the inmates of a training and development center for state prisoners to perform work on private vehicles to obtain practice in carrying out procedures learned in the automobile school. 1967 Op. Att'y Gen. No. 67-452.

Payment for awards luncheon violates this paragraph. — It would be a violation of this paragraph for the state to pay for an awards luncheon. 1971 Op. Att'y Gen. No. 71-42 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

County jail inmates may not be utilized to clean graffiti from private property unless it can be clearly demonstrated that the use of such inmates for this purpose confers a substantial public benefit, since the performance of such a service at county expense would violate the gratuities clause of the Constitution. 2001 Op. Att'y Gen. No. U2001-4.

Payment of entertainment expense as gratuity. — Regional Development Centers, as public agencies and instrumentalities of the municipalities and counties in their regions, are subject to the Georgia Constitution's gratuities clause. Absent any specific authorizing statute, the payment of entertainment expenses would be unauthorized. Indeed, such an expenditure would constitute a gratuity in violation of the Georgia Constitution. 1992 Op. Att'y Gen. No. 92-1.

DOT precluded from acting as conduit for federal money. — If there is no specific statutory authority, the Department of Transportation will be precluded from acting as a conduit for federal money by this paragraph. 1972 Op. Att'y Gen. No. 72-117 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

County may not pay the processioners' fees in processioning proceeding unless it is the applicant for, otherwise, the payment would constitute a gratuity to the applicant in violation of this paragraph. 1971 Op. Att'y Gen. No. U71-45 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Bondsman not entitled to refund of forfeiture even after surrender of

principal. — Former Code 1933, § 27-904 (see now O.C.G.A. § 17-6-31) provided for the relieving of a bondsman's liability prior to the time that the bondsman pays the forfeiture to the county, but after the payment by a bondsman to the county of a final judgment on an appearance bond forfeiture, the bondsman was not entitled to a refund of the forfeiture even though the bondsman later surrendered the principal to county authorities. 1976 Op. Att'y Gen. No. U76-28.

Additional compensation for services not authorized. — The Department of Transportation may not include in a contract for services a provision which would allow it, if it desired, to pay additional compensation for the services if they are not completed for the originally agreed upon amount. 1974 Op. Att'y Gen. No. 74-37.

Proposed \$5,000 signing bonus for new therapists employed by the Division of Rehabilitation Services of the Department of Human Resources, if it is a gratuity, would violate subsection (a) of Ga. Const. 1983, Art. III, Sec. VI, Para. VI. 1989 Op. Att'y Gen. No. 89-10.

Carriage upon state aircraft must be limited to state officials and employees on official business of the state and those non-employees from whose carriage the state derives some benefit. The only exceptions may be in those areas exempted from subsection (a) of Ga. Const. 1983, Art. III, Sec. VI, Para. VI by subsection (b). 1989 Op. Att'y Gen. No. 89-19.

Paragraph not violated by payments pursuant to authorized contract. — When a county makes payments pursuant to a contract with another local government in return for bargained-for consideration which constitutes substantial benefits, and the contract is otherwise authorized, the gratuity provision would not be violated. 1989 Op. Att'y Gen. U89-15.

Reasonable tips for services are not gratuities and may be borne by state departments. 1970 Op. Att'y Gen. No. 70-28.

When funds may be expended on official state theater. — The mere designation of an official state theater by the General Assembly would not, in itself,

Other Expenditures (Cont'd)

authorize the expenditure of state funds in its operation if the theater's ownership remained private; any contribution of funds under these circumstances would constitute a donation or gratuity in violation of this paragraph. Conversely, should a theater be acquired and operated by the state or function in connection with a state department or agency, state funds may then be used in its operation. 1969 Op. Att'y Gen. No. 69-329 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Inmate scholarship matching program. — This paragraph was not applicable where the General Assembly appropriated state funds for a federal matching fund program for inmate scholarships. 1972 Op. Att'y Gen. No. 72-111 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

County may apply to federal government for funds to be used for urban redevelopment and for public housing within the county. 1975 Op. Att'y Gen. No. U75-35.

Agency or department of the state may employ Atlanta Historical Society to obtain information in connection with advertising and promoting historical resources. 1945-47 Op. Att'y Gen. p. 287.

Reimbursement by one state agency to another agency, both of which are administered by the State Merit System, is not prohibited by this paragraph. 1963-65 Op. Att'y Gen. p. 374 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Payment of claim under Motor Vehicle Certificate of Title Act approved. — If, pursuant to Ga. L. 1965, p. 304, § 10 (see now O.C.G.A. § 40-3-6), the board to hear complaints and claims finds that an act or omission of the commissioner or one of the commissioner's employees in the administration of the Motor Vehicle Certificate of Title Act (see now O.C.G.A. Ch. 3, T. 40) has caused monetary damage, the Department of Revenue can legally pay the claim. 1965-66 Op. Att'y Gen. No. 66-223.

Entering into enforceable contract for prepayment of professional services and paying pursuant to such contract is not unlawful. 1981 Op. Att'y Gen. No. 81-29.

Legality of pretrial release programs. — Pretrial release programs where defendants are allowed to pay 10 percent of the bond originally set by the court upon their satisfying certain administrative criteria are appropriate as long as the county is not put in the position of being the surety of the remaining part of the bond, which would be in violation of this section. 1980 Op. Att'y Gen. No. 80-85 (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI).

Department of Medical Assistance (now Department of Community Health) may not forbear collection of overpayments made to providers. 1980 Op. Att'y Gen. No. 80-89.

Removing vegetation to facilitate viewing of privately owned billboards not violative of paragraph. — Cutting of trees and vegetation on rights-of-way, without cost or expense to taxpayers and to extent no more than minimally necessary to facilitate reasonably adequate public viewing of privately owned billboards, does not itself amount to donation of constitutionally forbidden gratuity. 1981 Op. Att'y Gen. No. 81-75.

O.C.G.A. §§ 32-6-75.2 and 32-6-75.3 do not authorize direct economic benefit to private persons. — Neither O.C.G.A. § 32-6-75.2 nor O.C.G.A. § 32-6-75.3 authorizes any private person to derive any economic benefit directly from disposition of material severed from rights-of-way. 1981 Op. Att'y Gen. No. 81-75.

Payroll deduction programs for public employees. — Political subdivisions may establish payroll deduction programs for public employees provided that there is statutory authority to do so and that the programs are not unconstitutional gratuities. The General Assembly, by acting in this area through various general statutory provisions, intended to permit local governments to utilize payroll deduction plans only in limited circumstances as outlined in those kinds of general laws; there is no general law authorizing local governments to undertake payroll deduction programs either through the passage of local law or through local ordinances. Absent authority to engage in such programs through

the enactment of local laws, the most appropriate method for their implementation would be through the passage of gen-

eral laws. 2014 Op. Att’y Gen. No. U2014-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Funds, § 70 et seq.

ALR. — Power of Legislature to grant extra compensation for past services of individual public officer or employee, 23 ALR 612.

Validity of contract by officer with public for rendition of new or special services to be paid for in addition to regular compensation, 159 ALR 606.

Validity and effect of agreement by public officer or employee to accept less than compensation of fees fixed by law, or of

acceptance of reduced amount, 160 ALR 490.

Statutes providing for governmental compensation for victims of crime, 20 ALR4th 63.

State or local governmental body’s action or inaction, in provision of public utility services, benefiting private company as constituting gift of money, or pledge of credit, to private party in violation of state constitutional provision, 122 ALR5th 337.

Paragraph VII. Regulation of alcoholic beverages.

The State of Georgia shall have full and complete authority to regulate alcoholic beverages and to regulate, restrict, or prohibit activities involving alcoholic beverages. This regulatory authority of the state shall include all such regulatory authority as is permitted to the states under the Twenty-First Amendment to the United States Constitution. This regulatory authority of the state is specifically delegated to counties and municipalities of the state for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages; and such delegated regulatory authority may be exercised by the adoption and enforcement of regulatory ordinances by the counties and municipalities of this state. A general law exercising such regulatory authority shall control over conflicting provisions of any local ordinance but shall not preempt any local ordinance provisions not in direct conflict with general law.

Editor’s notes. — The constitutional amendment (Ga. L. 1994, p. 2018, § 1) providing that the state shall have full and complete authority to regulate alcoholic beverages in any manner permitted under the twenty-first amendment to the United States Constitution was approved by a majority of the qualified voters voting at the general election held on November

8, 1994. (Ga. Const. 1983, Art. 3, § 6, Para. 7; Ga. L. 1994, p. 2018, § 1/HR 709.)

Law reviews. — For article, “Regulation of Alcoholic Beverages Generally,” see 28 Ga. St. U.L. Rev. 255 (2011).

For note on the 1994 enactment of this paragraph, see 11 Ga. St. U.L. Rev. 33 (1994).

JUDICIAL DECISIONS

Constitutionality. — Ga. Const. 1983, Art. III, Sec. VI, Para. VII does not violate freedom of expression as guaranteed by the first amendment or the prohibition against multiple subject matters in the state Constitution, and the wording of the

ballot concerning the amendment did not violate the due process guarantees of the fourteenth amendment. *Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997), cert. denied, 522 U.S. 818, 118 S. Ct. 70, 139 L. Ed. 2d 31 (1997).

SECTION VII.

IMPEACHMENTS

Paragraph	Paragraph
I. Power to impeach.	III. Judgments in impeachment.
II. Trial of impeachments.	

Paragraph I. Power to impeach.

The House of Representatives shall have the sole power to vote impeachment charges against any executive or judicial officer of this state or any member of the General Assembly.

<p>1976 Constitution. — Art. III, Sec. VI, Para. I.</p> <p>Cross references. — Grounds for im-</p>	<p>peachment of judges, §§ 15-1-7, 15-6-13, and 15-6-21.</p>
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JUDICIAL DECISIONS

<p>Sentence of removal from office for official malpractice does not violate paragraph. — A sentence of court which imposed the penalty of removal from office for a violation of former Penal Code 1910, §§ 295 and 296 (see now O.C.G.A. § 45-11-4) did not violate this paragraph. The constitutional method and the legislative method of removing county and state officials from office were merely cumulative and not conflicting. <i>Kent v. State</i>, 18 Ga. App. 30, 88 S.E. 913 (1916) (see Ga. Const. 1983, Art. III, Sec. VII, Para. I).</p> <p>Liability of judge to disbarment proceedings. — That a lawyer is also a judge of the superior court and hence a constitutional officer and must have prac-</p>	<p>ticed law seven years at the time of the lawyer's election and is prohibited from practicing law while serving as judge, does not mean that the lawyer cannot at the same time be disbarred and the lawyer's license to practice law canceled as provided in former Code 1933, T. 9, Ch. 5 (see now O.C.G.A. Art. 2, Ch. 19, T. 15). The two proceedings are provided for the accomplishment of entirely different results. Each must be pursued to accomplish the result which it is intended to accomplish. <i>Gordon v. Clinkscales</i>, 215 Ga. 843, 114 S.E.2d 15 (1960).</p> <p>Cited in <i>Cargile v. State</i>, 194 Ga. 20, 20 S.E.2d 416 (1942); <i>DeKalb County Sch. Dist. v. Ga. State Bd. of Educ.</i>, 294 Ga. 349, 751 S.E.2d 827 (2013).</p>
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RESEARCH REFERENCES

<p>Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 154 et seq.</p> <p>ALR. — Physical or mental disability</p>	<p>as disqualification or ground of removal or impeachment of public officer, 28 ALR 777.</p>
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Membership in or affiliation with religious, political, social, or criminal society

or group as ground of removal of public officer, 116 ALR 358.

Paragraph II. Trial of impeachments.

The Senate shall have the sole power to try impeachments. When sitting for that purpose, the Senators shall be on oath, or affirmation, and shall be presided over by the Chief Justice of the Supreme Court. Should the Chief Justice be disqualified, then the Presiding Justice shall preside. Should the Presiding Justice be disqualified, then the Senate shall select a Justice of the Supreme Court to preside. No person shall be convicted without concurrence of two-thirds of the members to which the Senate is entitled.

1976 Constitution. — Art. III, Sec. VI, Para. II.

peachment of judges, §§ 15-1-7, 15-6-13, and 15-6-21.

Cross references. — Grounds for im-

JUDICIAL DECISIONS

Act granting power of removal of Railroad Commissioners (now Public Service Commissioners) does not violate this paragraph. (Ga. L. 1878-79, p. 125). *Gray v. McLendon*, 134 Ga. 224, 67 S.E. 859 (1910) (see Ga. Const. 1983, Art. III, Sec. VII, Para. II).

Liability of judge to disbarment proceedings. — That a lawyer is also a judge of the superior court and hence a constitutional officer and must have practiced law seven years at the time of the lawyer's election and is prohibited from practicing law while serving as judge,

does not mean that the lawyer cannot at the same time be disbarred and the lawyer's license to practice law canceled as provided in former Code 1933, T. 9, Ch. 5 (see now O.C.G.A. Art. 2, Ch. 19, T. 15). The two proceedings are provided for the accomplishment of entirely different results. Each must be pursued to accomplish the result which it is intended to accomplish. *Gordon v. Clinkscales*, 215 Ga. 843, 114 S.E.2d 15 (1960).

Cited in *Cargile v. State*, 194 Ga. 20, 20 S.E.2d 416 (1942).

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 154 et seq.
ALR. — Physical or mental disability

as disqualification or ground of removal or impeachment of public officer, 28 ALR 777.

Paragraph III. Judgments in impeachment.

In cases of impeachment, judgments shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit within this state or to receive a pension therefrom, but no such judgment shall relieve any party from any criminal or civil liability.

1976 Constitution. — Art. III, Sec. VI, Para. III.

JUDICIAL DECISIONS

Cited in *Cargile v. State*, 194 Ga. 20, 20 S.E.2d 416 (1942).

RESEARCH REFERENCES

ALR. — Physical or mental disability as disqualification or ground of removal or impeachment of public officer, 28 ALR 777.

Membership in or affiliation with religious, political, social, or criminal society or group as ground of removal of public officer, 116 ALR 358.

Governing law as to existence or character of offense for which one has been convicted in a federal court, or court of another state, as bearing upon disqualification to vote, hold office, practice profession, sit on jury, or the like, 175 ALR 784.

SECTION VIII.

INSURANCE REGULATION

Paragraph

I. Regulation of insurance.

Paragraph

II. Issuance of licenses.

Paragraph I. Regulation of insurance.

Provision shall be made by law for the regulation of insurance.

1976 Constitution. — Art. III, Sec. IX, Paras. I-V.

Cross references. — Insurance regulation generally, T. 33.

JUDICIAL DECISIONS

Insurers Rehabilitation and Liquidation Act. — O.C.G.A. § 33-37-56 does not impermissibly conflict with the constitutional jurisdiction of the superior courts; the statute is an authorized excep-

tion to the superior courts' grant of general jurisdiction. *Smith v. Farm & Home Life Ins. Co.*, 269 Ga. 709, 506 S.E.2d 104 (1998).

Paragraph II. Issuance of licenses.

Insurance licenses shall be issued by the Commissioner of Insurance as required by law.

1976 Constitution. — Art. III, Sec. IX, Paras. I-V.

Cross references. — Insurance regulation generally, T. 33.

RESEARCH REFERENCES

Am. Jur. 2d. — 43 Am. Jur. 2d, Insurance, § 27 et seq.

C.J.S. — 44 C.J.S., Insurance, § 67.

ALR. — Power to exact license fees or impose a penalty for benefit of private individual or corporation, 13 ALR 828; 19

ALR 205.

Right to enjoin business competitor

from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

SECTION IX.

APPROPRIATIONS

Paragraph	Paragraph
I. Public money, how drawn.	V. Other or supplementary appropriations.
II. Preparation, submission, and enactments of general appropriations bill.	VI. Appropriations to be for specific sums.
III. General appropriations bill.	VII. Appropriations void, when.
IV. General appropriations Act.	

Law reviews. — For article, “Urban Decay, Austerity, and the Rule of Law,” see 61 Emory L.J. 1, 25355 (2014).

JUDICIAL DECISIONS

Cited in Campbell v. State Rd. & Tollway Auth., 276 Ga. 714, 583 S.E.2d 32 (2003).

OPINIONS OF THE ATTORNEY GENERAL

Meaning of “appropriation”. — An appropriation is an authorization by the General Assembly to expend from public funds a sum of money not in excess of the amount specified for the purpose specified in the authorization. 1973 Op. Att’y Gen. No. U73-94.

New tax law or amendment increasing tax rate can be made effective as existing law upon passage by General Assembly and approval by Governor, notwithstanding the fact that the commencement of collection of the new or increased tax is a later date. 1968 Op. Att’y Gen. No. 68-422.

Transfer of appropriation ap-

proved. — Under the authority granted by former Code 1933, § 40-421 (see now O.C.G.A. § 45-12-90), the Office of Planning and Budget may transfer an appropriation to any of the agencies of the state having comparable authority; those agencies may, in turn, pursuant to this section and the referenced statutory authority, contract with the Georgia Residential Finance Authority for services which are both within the scope of the authority of those agencies as well as within the scope of the powers of the Georgia Residential Finance Authority. 1975 Op. Att’y Gen. No. 75-40 (see Ga. Const. 1983, Art. III, Sec. IX).

RESEARCH REFERENCES

ALR. — Liability for work done or materials furnished, etc., for state or federal governments in excess of appropriations, 19 ALR 408.

Use of public funds or exercise of taxing

power to promote patriotism, 30 ALR 1035.

Budget provisions of Constitution or statute in relation to appropriation of state funds, 40 ALR 1067.

Validity and effect of provision of appropriation bill subjecting expenditure or payment of amounts appropriated to approval of governor or other officer not otherwise authorized, 91 ALR 1511.

Constitutionality of appropriation of public funds for benefit of widow or other relative of deceased public officer or employee, 121 ALR 1317.

Paragraph I. Public money, how drawn.

No money shall be drawn from the treasury except by appropriation made by law.

1976 Constitution. — Art. III, Sec. X, Para. I.

Cross references. — Withdrawals only by warrant of Governor, § 45-12-21.

JUDICIAL DECISIONS

Duty of director of Office of Treasury and Fiscal Services. — Under this paragraph, it is the duty of the Treasurer (now director of the Office of Treasury and Fiscal Services) to keep safely the funds of the state, and to pay out the funds only upon the warrants of the Governor, when countersigned by the Comptroller General, excepting drafts of the President of the Senate or Speaker of the House for sums due to the members or officers thereof. *Gurnee, Jr. & Co. v. Speer*, 68 Ga. 711 (1882) (see Ga. Const. 1983, Art. III, Sec. IX, Para. I).

Warrant is not a contract, but a revocable license. *Fletcher v. Renfroe*, 56 Ga. 674 (1876).

Act not to be held unconstitutional where appropriation not at issue. — Act (Ga. L. 1943, p. 401) amending Workers' Compensation Law (see now O.C.G.A. Ch. 9, T. 34) so far as it provides for compensation for past accidents of employees of a state department that had previously operated under the Workers' Compensation Law, could not be held un-

constitutional on ground that no appropriation for payment of such claims had been made where the only issue was the right to establish liability against the Highway Department (now Department of Transportation) and the matter of discharging such liability was not involved. *State Hwy. Dep't v. Bass*, 197 Ga. 356, 29 S.E.2d 161 (1944).

Cited in *Nance v. Daniel*, 183 Ga. 538, 189 S.E. 21 (1936); *Irons v. Harrison*, 185 Ga. 244, 194 S.E. 749 (1937); *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941); *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947); *Maynard v. Thrasher*, 77 Ga. App. 316, 48 S.E.2d 471 (1948); *Gregory v. Hamilton*, 215 Ga. 735, 113 S.E.2d 395 (1960); *Georgia Ass'n of Educators v. Harris*, 403 F. Supp. 961 (N.D. Ga. 1975); *Briarcliff Haven, Inc. v. Department of Human Resources*, 403 F. Supp. 1355 (N.D. Ga. 1975); *Wilson v. Board of Regents*, 246 Ga. 649, 272 S.E.2d 496 (1980); *Buskirk v. State*, 267 Ga. 769, 482 S.E.2d 286 (1997); *Stalling v. State*, 312 Ga. App. 154, 717 S.E.2d 733 (2011).

OPINIONS OF THE ATTORNEY GENERAL

When failure to appropriate funds excuses failure to perform official duties. — A public official will be excused from carrying out an official duty upon failure of the General Assembly to appropriate funds for performance, if, but only if, the official is able to show that the resulting lack of funds, together with an inability to obtain the same, make perfor-

mance impossible. Failure of the General Assembly to appropriate moneys for a specific official duty might not justify a failure to perform where the official has received a general appropriation and could divert a portion thereof to carry out the official's statutory or official duty. 1969 Op. Att'y Gen. No. 69-174.

State agency is not authorized to

pledge credit of the state. 1974 Op. Att'y Gen. No. 74-115; Position Paper, 8-8-78, 1978 Op. Att'y Gen. p. 267.

State agency is not authorized to collect fees and deposit the fees in its own account, but rather such fees must be paid over in compliance with this paragraph and Ga. Const. 1976, Art. VII, Sec. II, Para. III (see Ga. Const. 1983, Art. VII, Sec. III, Para. II). 1948-49 Op. Att'y Gen. p. 631 (see Ga. Const. 1983, Art. III, Sec. IX, Para. I).

This paragraph generally prohibits state organizations from collecting money and using that money for their own programs. 1971 Op. Att'y Gen. No. 71-126 (see Ga. Const. 1983, Art. III, Sec. IX, Para. I).

Allocation of particular source of income for particular agency precluded. — This paragraph and Ga. Const. 1976, Art. VII, Sec. II, Para. III (see Ga. Const. 1983, Art. VII, Sec. III, Para. II), when read in conjunction with Art. III, Sec. X, Para. VII (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI), preclude both the practice of allocating particular sources of income for the use of a particular agency and the allocation of the fees, or any part of the fees, collected by the various examining boards to meet their expenses, and further preclude any implied commitment on the part of the General Assembly to appropriate to the examining boards an amount equal to the total fees generated. 1976 Op. Att'y Gen. No. 76-93.

Collections from delinquent accounts must be paid into general fund. — While this paragraph and Ga.

Const. 1976, Art. III, Sec. X, Para. VII, and Art. VII, Sec. II, Para. III (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI, and Art. VII, Sec. III, Para. II) do not specifically provide that money recovered for contractual violations or delinquent accounts be paid into the treasury, such money must be paid into the state treasury, and not earmarked. 1971 Op. Att'y Gen. No. 71-126 (see Ga. Const. 1983, Art. III, Sec. IX, Para. I).

Examining board may not use funds acquired from license fees. — Because license fees were remitted to the State Treasurer (now director of the Office of Treasury and Fiscal Services) as required by former Code 1933, § 84-101 (see now O.C.G.A. § 43-1-3), the only method by which an examining board may acquire the use of these funds was pursuant to an appropriation by the General Assembly. 1972 Op. Att'y Gen. No. 72-112.

Application fees nonrefundable. — Application fees by the joint secretary of the state examining boards, which are paid into the state treasury, are nonrefundable unless there is express statutory authority to do so. 1975 Op. Att'y Gen. No. 75-69.

Method of distributing funds to Georgia Real Estate Commission. — The lawful method of distribution of funds to the Georgia Real Estate Commission calls for the Secretary of State to exercise the secretary's discretion in dividing the total appropriation for the joint secretary's office among the various examining boards including the Georgia Real Estate Commission. 1976 Op. Att'y Gen. No. 76-93.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Funds, § 44 et seq.

ALR. — Constitutionality of statute appropriating money to reimburse public officer or employee for money paid or lia-

bility incurred by him in consequence of breach of duty, 155 ALR 1438.

What constitutes moral obligation justifying appropriation of public moneys for benefit of an individual, 172 ALR 1407.

Paragraph II. Preparation, submission, and enactments of general appropriations bill.

(a) The Governor shall submit to the General Assembly within five days after its convening in regular session each year a budget message

and a budget report, accompanied by a draft of a general appropriations bill, in such form and manner as may be prescribed by statute, which shall provide for the appropriation of the funds necessary to operate all the various departments and agencies and to meet the current expenses of the state for the next fiscal year.

(b) The General Assembly shall annually appropriate those state and federal funds necessary to operate all the various departments and agencies. To the extent that federal funds received by the state for any program, project, activity, purpose, or expenditure are changed by federal authority or exceed the amount or amounts appropriated in the general appropriations Act or supplementary appropriation Act or Acts, or are not anticipated, such excess, changed or unanticipated federal funds are hereby continually appropriated for the purposes authorized and directed by the federal government in making the grant. In those instances where the conditions under which the federal funds have been made available do not provide otherwise, federal funds shall first be used to replace state funds that were appropriated to supplant federal funds in the same state fiscal year. The fiscal year of the state shall commence on the first day of July of each year and terminate on the thirtieth of June following.

(c) The General Assembly shall by general law provide for the regulation and management of the finance and fiscal administration of the state.

1976 Constitution. — Art. III, Sec. X, Paras. III, V; Art. X, Sec. II, Para. IX.

Cross references. — State financing and investment generally, § 50-17-20 et seq.

Law reviews. — For article, "Judicial Review in General Assistance," see 6 J. of Pub. L. 100 (1957).

JUDICIAL DECISIONS

Purpose of appropriation control. — The purpose of this and other paragraphs on appropriation control is to end the practice of allocating or earmarking particular taxes for the use by any specific department, and to require the General Assembly to appropriate from the general fund specific amounts for each fiscal year for the support of each department or agency. *Gregory v. Hamilton*, 215 Ga. 735, 113 S.E.2d 395 (1960).

Cited in *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947); *Brown v. Wright*, 231 Ga. 686, 203 S.E.2d 487 (1974); *Georgia Ass'n of Educators v. Harris*, 403 F. Supp. 961 (N.D. Ga. 1975); *Briarcliff Haven, Inc. v. Department of Human Resources*, 403 F. Supp. 1355 (N.D. Ga. 1975); *Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

FEDERAL EDUCATIONAL PROGRAMS

General Consideration

It is the exclusive function of the executive branch to prepare budget report. 1979 Op. Att'y Gen. No. 79-18.

It is the exclusive function of the legislative branch to appropriate money in the form of a general appropriations bill. 1979 Op. Att'y Gen. No. 79-18.

The General Assembly is responsible for appropriating federal funds, but federal funds are continually appropriated. 1997 Op. Att'y Gen. No. U97-5.

General Assembly does not have authority to amend the revenue estimate established by Governor. 1979 Op. Att'y Gen. No. 79-18.

Governor's acquiescence to General Assembly proposal. — Governor may, by acquiescing in proposal by General Assembly to increase revenue estimate, effectively make that proposal the Governor's revised revenue estimate. 1979 Op. Att'y Gen. No. 79-18.

An appropriation's Act does no more or no less than authorize maximum amount of funds to be spent for specified objects; it does not mandate such expenditures. 1973 Op. Att'y Gen. No. 73-80.

The General Assembly may not consistently with this paragraph appropriate directly to an entity created as a separate corporate body, such as the Georgia Residential Finance Authority. 1975 Op. Att'y Gen. No. 75-40 (see Ga. Const. 1983, Art. III, Sec. IX, Para. II).

Effect of paragraph on agency spending authorization. — This paragraph prohibits an appropriations Act from doing anything other than authorizing a state agency to spend up to a maximum amount for a purpose or function which the agency is permitted or required by general law. 1977 Op. Att'y Gen. No. 77-87 (see Ga. Const. 1983, Art. III, Sec. IX, Para. II).

Actual power of a public agency to spend public money for particular activities or purposes must be pursuant to a general law, not an appropriation's Act. 1973 Op. Att'y Gen. No. 73-80.

Agency not authorized to pledge credit of state. — No agency may execute a contract with a private party for the

purchase of goods or services which purports to obligate appropriations or state funds from any other source not on hand at the time of the contract or where the fiscal obligation of the agency depends for its full performance upon such future appropriations or the continued existence of any other source of state funds. 1974 Op. Att'y Gen. No. 74-115; 1978 Op. Att'y Gen. p. 267.

Payment of membership dues. — Departments, institutions, and agencies can pay dues and membership fees in state and national organizations from appropriated funds. 1968 Op. Att'y Gen. No. 68-110.

This paragraph directs that the general appropriations Act be passed at regular session. 1952-53 Op. Att'y Gen. p. 257 (see Ga. Const. 1983, Art. III, Sec. IX, Para. II).

This paragraph excludes amendments to a general appropriations Act for a prior fiscal year. 1974 Op. Att'y Gen. No. 74-53 (see Ga. Const. 1983, Art. III, Sec. IX, Para. II).

Discretion lies with the state agency to determine which fiscal year's funds were obligated by particular contract. 1980 Op. Att'y Gen. No. 80-163.

Donated funds received by Department of Public Safety supplement rather than replace appropriated funds. 1974 Op. Att'y Gen. No. 74-140.

Federal Educational Programs

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. X, Sec. II, Para. IX, relating to appropriation of matching funds to obtain federal funds in aid of education, are included in the annotations for this paragraph.

Scholarship under this paragraph not burdened with employment and repayment restrictions. — Under this paragraph, the General Assembly could appropriate money to the Department of Human Resources to be used for federal matching, and the department could make a scholarship directly to the student; scholarships made under this provision would carry no restriction as to employment or repayment. 1971 Op. Att'y

Federal Educational Programs (Cont'd)

Gen. No. 71-147 (see Ga. Const. 1983, Art. III, Sec. IX, Para. II).

A state department or agency may

implement a doctoral-level training program for employees, provided that it does so using regularly appropriated funds to obtain federal matching funds. 1973 Op. Att'y Gen. No. 73-154.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Funds, § 64.

C.J.S. — 81A C.J.S., States, §§ 387, 392 et seq.

ALR. — Validity and effect of provision

of appropriation bill subjecting expenditure or payment of amounts appropriated to approval of governor or other officer not otherwise authorized, 91 ALR 1511.

Paragraph III. General appropriations bill.

The general appropriations bill shall embrace nothing except appropriations fixed by previous laws; the ordinary expenses of the executive, legislative, and judicial departments of the government; payment of the public debt and interest thereon; and for support of the public institutions and educational interests of the state. All other appropriations shall be made by separate bills, each embracing but one subject.

1976 Constitution. — Art. III, Sec. X, Para. IV.

and investment generally, § 50-17-20 et seq.

Cross references. — State financing

JUDICIAL DECISIONS

Purpose of appropriation control. — The purpose of this and other paragraphs on appropriation control is to end the practice of allocating or earmarking particular taxes for the use by any specific department, and to require the General Assembly to appropriate from the general fund specific amounts for each fiscal year for the support of each department or

agency. Gregory v. Hamilton, 215 Ga. 735, 113 S.E.2d 395 (1960) (see Ga. Const. 1983, Art. III, Sec. IX, Para. III).

Cited in Irons v. Harrison, 185 Ga. 244, 194 S.E. 749 (1937); Atlanta Fin. Co. v. Brown, 187 Ga. 729, 2 S.E.2d 415 (1939); Schaffer v. Oxford, 102 Ga. App. 710, 117 S.E.2d 637 (1960).

OPINIONS OF THE ATTORNEY GENERAL

It is exclusive function of legislative branch to appropriate money in form of a general appropriations bill. 1979 Op. Att'y Gen. No. 79-18.

Discretion lies with the state agency to determine which fiscal year's funds were obligated by particular contract. 1980 Op. Att'y Gen. No. 80-163.

When agency may contract in one fiscal year for services in the next. —

A state agency may contract with a party in one fiscal year for services to be performed in the next fiscal year so long as the funds to meet the obligations of the contract were existing in the agency's appropriation and were unobligated prior to the execution of the contract. 1980 Op. Att'y Gen. No. 80-163.

This paragraph excludes amendments to a general appropriations Act for a prior fiscal year. 1974 Op.

Att'y Gen. No. 74-53 (see Ga. Const. 1983, Art. III, Sec. IX, Para. III).

Appropriations Act may not alter responsibilities or powers of state agency which are derived from general law. 1979 Op. Att'y Gen. No. 79-46.

Appropriation Act does no more or no less than authorize maximum amount of funds to be spent for specified objects; it does not mandate such expenditures. 1973 Op. Att'y Gen. No. 73-80.

Establishment of obligation to pay funds into state treasury is matter of substantive law, and under this paragraph substantive laws cannot be contained in the General Appropriations Act. 1980 Op. Att'y Gen. No. 80-118 (see Ga. Const. 1983, Art. III, Sec. IX, Para. III).

Actual power of a public agency to

spend public money for particular activities or purposes must be pursuant to a general law, not an appropriations Act. 1973 Op. Att'y Gen. No. 73-80.

Effect of paragraph on agency spending authorization. — This paragraph prohibits an appropriations Act from doing anything other than authorizing a state agency to spend up to a maximum amount for a purpose or function which the agency is permitted or required by general law. 1977 Op. Att'y Gen. No. 77-87.

Payment of membership dues. — Departments, institutions, and agencies can pay dues and membership fees in state and national organizations from appropriated funds. 1968 Op. Att'y Gen. No. 68-110.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Funds, § 44.

ALR. — Particularity of specification of

purpose required in appropriation bill, 20 ALR 981.

Paragraph IV. General appropriations Act.

(a) Each general appropriations Act, now of force or hereafter adopted with such amendments as are adopted from time to time, shall continue in force and effect for the next fiscal year after adoption and it shall then expire, except for the mandatory appropriations required by this Constitution and those required to meet contractual obligations authorized by this Constitution and the continued appropriation of federal grants.

(b) The General Assembly shall not appropriate funds for any given fiscal year which, in aggregate, exceed a sum equal to the amount of unappropriated surplus expected to have accrued in the state treasury at the beginning of the fiscal year together with an amount not greater than the total treasury receipts from existing revenue sources anticipated to be collected in the fiscal year, less refunds, as estimated in the budget report and amendments thereto. Supplementary appropriations, if any, shall be made in the manner provided in Paragraph V of this section of the Constitution; but in no event shall a supplementary appropriations Act continue in force and effect beyond the expiration of the general appropriations Act in effect when such supplementary appropriations Act was adopted and approved.

(c) All appropriated state funds, except for the mandatory appropriations required by this Constitution, remaining unexpended and not

contractually obligated at the expiration of such general appropriations Act shall lapse.

(d) Funds appropriated to or received by the State Housing Trust Fund for the Homeless shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c), relative to the lapsing of funds, and may be expended for programs of purely public charity for the homeless, including programs involving the participation of churches and religious institutions, notwithstanding the provisions of Article I, Section II, Paragraph VII. (Ga. Const. 1983, Art. 3, § 9, Para. 3; Ga. L. 1988, p. 2098, § 1/HR 587.)

1976 Constitution. — Art. III, Sec. X, Para. V.

Cross references. — State debt generally, Ga. Const. 1983, Art. VII, Sec. IV.

Editor's notes. — The constitutional

amendment (Ga. L. 1988, p. 2098, § 1) which added subparagraph (d) was approved by a majority of the qualified voters voting at the general election held on November 8, 1988.

JUDICIAL DECISIONS

Purpose of appropriation control. — The purpose of this and other paragraphs on appropriation control is to end the practice of allocating or earmarking particular taxes for the use by any specific department, and to require the General Assembly to appropriate from the general fund specific amounts for each fiscal year for the support of each department or agency. *Gregory v. Hamilton*, 215 Ga. 735, 113 S.E.2d 395 (1960) (see Ga. Const. 1983, Art. III, Sec. IX, Para. IV).

Cited in *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947); *Busbee v. Georgia Conference, Am. Ass'n of Univ. Professors*, 235 Ga. 752, 221 S.E.2d 437 (1975); *Georgia Ass'n of Educators v. Harris*, 403 F. Supp. 961 (N.D. Ga. 1975); *Briarcliff Haven, Inc. v. Department of Human Resources*, 403 F. Supp. 1355 (N.D. Ga. 1975); *Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Clear intent to impose a "checks and balances" system on appropriations. — One of those "checks and balances" is the restriction which limits the legislative power to appropriate the amount of funds determined by the Governor to be available for appropriation. 1979 Op. Att'y Gen. No. 79-18.

Funds in reserves may not be appropriated in fiscal years subsequent to those in which reserves were created as long as the obligations against such reserves remain outstanding. 1979 Op. Att'y Gen. No. U79-26.

When agency may contract in one fiscal year for services in the next. — A state agency may contract with a party in one fiscal year for services to be per-

formed in the next fiscal year so long as the funds to meet the obligations of the contract were existing in the agency's appropriation and were unobligated prior to the execution of the contract. 1980 Op. Att'y Gen. No. 80-163.

Discretion lies with the state agency to determine which fiscal year's funds were obligated by particular contract. 1980 Op. Att'y Gen. No. 80-163.

Inclusion of estimated lapse for current fiscal year. — Legislature may not make appropriations up to budget amount which includes estimated lapse from appropriations for current fiscal year. 1968 Op. Att'y Gen. No. 68-11.

Attempt to authorize use of federal

funds in excess of amount contemplated invalid. — Georgia Laws 1977, pp. 1335, 1502, § 48 which authorizes the Office of Planning and Budget to utilize federal funds in excess of the amounts contemplated in the appropriations Act to supplant state funds, is invalid as an attempt to confer general law authority contrary to this paragraph. 1977 Op. Att'y Gen. No. 77-87 (see Ga. Const. 1983, Art. III, Sec. IX, Para. IV).

Agency not authorized to pledge credit of state. — No agency may execute a contract with a private party for the purchase of goods or services which purports to obligate appropriations or state funds from any other source not on hand at the time of the contract or where the fiscal obligation of the agency depends for its full performance upon such future appropriations or the continued existence of any other source of state funds. 1974 Op. Att'y Gen. No. 74-115; 1978 Op. Att'y Gen. p. 267.

Donated funds received by Department of Public Safety supplement rather than replace appropriated funds. 1974 Op. Att'y Gen. No. 74-140.

What roads measured in county to determine grant distribution. — The

measurement of roads in a county for the purpose of determining proportional share of the annual distribution of a state grant under the general appropriations Act should include only those roads which are outside the boundaries of the municipal districts. 1975 Op. Att'y Gen. No. 75-108.

Constitutional amendment necessary to authorize increase in retirement benefits to be paid from state funds to retired teachers in any local system funded through appropriations made by municipal corporations, counties, or any political subdivision. 1974 Op. Att'y Gen. No. 74-140.

Lapse of appropriations that become deobligated. — Appropriated state funds which become deobligated during a subsequent fiscal year are subject to lapse, and may not be applied to contracts for which motor fuel tax appropriations were previously committed. 1993 Op. Att'y Gen. No. 93-9.

Limitation on veto of individual appropriations. — The Governor's power to veto individual appropriations does not include the power to reduce an appropriation. 2000 Op. Att'y Gen. No. 2000-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Funds, § 44 et seq.

C.J.S. — 81A C.J.S., States, §§ 367, 369, 370, 404 et seq.

ALR. — Taxpayer's right to maintain

action to enjoin wrongful expenditure of public funds, as affected by the fact that the funds in question were not raised by taxation, 131 ALR 1230.

Paragraph V. Other or supplementary appropriations.

In addition to the appropriations made by the general appropriations Act and amendments thereto, the General Assembly may make additional appropriations by Acts, which shall be known as supplementary appropriation Acts, provided no such supplementary appropriation shall be available unless there is an unappropriated surplus in the state treasury or the revenue necessary to pay such appropriation shall have been provided by a tax laid for such purpose and collected into the general fund of the state treasury. Neither house shall pass a supplementary appropriation bill until the general appropriations Act shall have been finally adopted by both houses and approved by the Governor.

1976 Constitution. — Art. III, Sec. X,
Para. VI.

JUDICIAL DECISIONS

Purpose of appropriation control. — The purpose of this and other paragraphs on appropriation control is to end the practice of allocating or earmarking particular taxes for the use by any specific department, and to require the General Assembly to appropriate from the general

fund specific amounts for each fiscal year for the support of each department or agency. *Gregory v. Hamilton*, 215 Ga. 735, 113 S.E.2d 395 (1960) (see Ga. Const. 1983, Art. III, Sec. IX, Para. V).

Cited in *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947).

OPINIONS OF THE ATTORNEY GENERAL

This paragraph excludes amendments to a general appropriations Act for a prior fiscal year. 1974 Op.

Att’y Gen. No. 74-53 (see Ga. Const. 1983, Art. III, Sec. IX, Para. V).

Paragraph VI. Appropriations to be for specific sums.

(a) Except as hereinafter provided, the appropriation for each department, officer, bureau, board, commission, agency, or institution for which appropriation is made shall be for a specific sum of money; and no appropriation shall allocate to any object the proceeds of any particular tax or fund or a part or percentage thereof.

(b) An amount equal to all money derived from motor fuel taxes received by the state in each of the immediately preceding fiscal years, less the amount of refunds, rebates, and collection costs authorized by law, is hereby appropriated for the fiscal year beginning July 1, of each year following, for all activities incident to providing and maintaining an adequate system of public roads and bridges in this state, as authorized by laws enacted by the General Assembly of Georgia, and for grants to counties by law authorizing road construction and maintenance, as provided by law authorizing such grants. Said sum is hereby appropriated for, and shall be available for, the aforesaid purposes regardless of whether the General Assembly enacts a general appropriations Act; and said sum need not be specifically stated in any general appropriations Act passed by the General Assembly in order to be available for such purposes. However, this shall not preclude the General Assembly from appropriating for such purposes an amount greater than the sum specified above for such purposes. The expenditure of such funds shall be subject to all the rules, regulations, and restrictions imposed on the expenditure of appropriations by provisions of the Constitution and laws of this state, unless such provisions are in conflict with the provisions of this paragraph. And provided, however, that the proceeds of the tax hereby appropriated shall not be subject to budgetary reduction. In the event of invasion of this state by land, sea,

or air or in case of a major catastrophe so proclaimed by the Governor, said funds may be utilized for defense or relief purposes on the executive order of the Governor.

(c) A trust fund for use in the reimbursement of a portion of an employer's workers' compensation expenses resulting to an employee from the combination of a previous disability with subsequent injury incurred in employment may be provided for by law. As authorized by law, revenues raised for purposes of the fund may be paid into and disbursed from the trust without being subject to the limitations of subparagraph (a) of this Paragraph or of Article VII, Section III, Paragraph II.

(d) As provided by law, additional penalties may be assessed in any case in which any court in this state imposes a fine or orders the forfeiture of any bond in the nature of the penalty for all offenses against the criminal and traffic laws of this state or of the political subdivisions of this state. The proceeds derived from such additional penalty assessments may be allocated for the specific purpose of meeting any and all costs, or any portion of the cost, of providing training to law enforcement officers and to prosecuting officials.

(e) The General Assembly may by general law approved by a three-fifths' vote of both houses designate any part or all of the proceeds of any state tax now or hereafter levied and collected on alcoholic beverages to be used for prevention, education, and treatment relating to alcohol and drug abuse.

(f) The General Assembly is authorized to provide by law for the creation of a State Children's Trust Fund from which funds shall be disbursed for child abuse and neglect prevention programs. The General Assembly is authorized to appropriate moneys to such fund and such moneys paid into the fund shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c), relative to the lapsing of funds.

(g) The General Assembly is authorized to provide by law for the creation of a Seed-Capital Fund from which funds shall be disbursed at the direction of the Advanced Technology Development Center of the University System of Georgia to provide equity and other capital to small, young, entrepreneurial firms engaged in innovative work in the areas of technology, manufacturing, or agriculture. Funds shall be disbursed in the form of loans or investments which shall provide for repayment, rents, dividends, royalties, or other forms of return on investments as provided by law. Moneys received from returns on loans or investments shall be deposited in the Seed-Capital Fund for further disbursement. The General Assembly is authorized to appropriate moneys to such fund and such moneys paid into the fund shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c)

relative to the lapsing of funds. The General Assembly shall be authorized to provide by law for any matters relating to the purpose or provisions of this subparagraph.

(h) The General Assembly is authorized to provide by general law for additional penalties or fees in any case in any court in this state in which a person is adjudged guilty of an offense against the criminal or traffic laws of this state or an ordinance of a political subdivision of this state. The General Assembly is authorized to provide by general law for the allocation of such additional penalties or fees for the construction, operation, and staffing of jails, correctional institutions, and detention facilities by counties.

(i) The General Assembly is authorized to provide by general law for the creation of an Indigent Care Trust Fund. Any hospital, hospital authority, county, or municipality is authorized to contribute or transfer moneys to the fund and any other person or entity specified by the General Assembly may also contribute to the fund. The General Assembly may provide by general law for the dedication and deposit of revenues raised from specified sources for the purposes of the fund into the fund. Moneys in the fund shall be exclusively used for primary health care programs for medically indigent citizens and children of this state, for expansion of Medicaid eligibility and services, or for programs to support rural and other health care providers, primarily hospitals, who disproportionately serve the medically indigent. Any other appropriation from the Indigent Care Trust Fund shall be void. Contributions and revenues deposited to the fund shall not lapse and shall not be subject to the limitations of subparagraph (a) of this Paragraph or of Article VII, Section III, Paragraph II. Contributions in the fund which are not appropriated as required by this subparagraph shall be refunded pro rata to the contributors thereof, as provided by the General Assembly.

(j) The General Assembly is authorized to provide by general law for the creation of an emerging crops fund from which to pay interest on loans made to farmers to enable such farmers to produce certain crops on Georgia farms and thereby promote economic development. The General Assembly is authorized to appropriate moneys to such fund and moneys so appropriated shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c), relative to the lapsing of appropriated funds. Interest on loans made to farmers shall be paid from such fund pursuant to such terms, conditions, and requirements as the General Assembly shall provide by general law. The General Assembly may provide by general law for the administration of such fund by such state agency or public authority as the General Assembly shall determine.

(k) The General Assembly is authorized to provide by general law for additional penalties or fees in any case in any court in this state in

which a person is adjudged guilty of an offense involving driving under the influence of alcohol or drugs or reckless driving. The General Assembly is authorized to provide by general law for the allocation of such additional penalties or fees to the Brain and Spinal Injury Trust Fund, as provided by law, for the specified purpose of meeting any and all costs, or any portion of the costs, of providing care and rehabilitative services to citizens of the state who have survived neurotrauma with head or spinal cord injuries. Moneys appropriated for such purposes shall not lapse. The General Assembly may provide by general law for the administration of such fund by such authority as the General Assembly shall determine.

(l) The General Assembly is authorized to provide by general law for the creation of a roadside enhancement and beautification fund from which funds shall be disbursed for enhancement and beautification of public rights of way; for allocation and dedication of revenue from tree and other vegetation trimming or removal permit fees, other related assessments, and special and distinctive wildflower motor vehicle license plate fees to such fund; that moneys paid into the fund shall not lapse, the provisions of Article III, Section IX, Paragraph IV(c) notwithstanding; and for any matters relating to the purpose or provisions of this subparagraph. An Act creating such fund and making such provisions effective January 1, 1999, or later may originate or have originated in the Senate or the House of Representatives.

(m) There shall be within the Department of Agriculture a dog and cat reproductive sterilization support program to control dog and cat overpopulation and thereby reduce the number of animals housed and killed in animal shelters, which program shall be administered by the Commissioner of Agriculture. In order to fund the program, there shall be issued beginning in 2003 specially designed license plates promoting the program. The General Assembly shall provide by law for the issuance of such license plates and for the dedication of certain revenue derived from fees for such plates to the support of the program. All such dedicated revenue derived from special license plate fees, any funds appropriated to the department for such purposes, and any voluntary contributions or other funds made available to the department for such purposes and all interest thereon shall be deposited in a special fund for support of the program, shall not be used for any purpose other than support of the program, and shall not lapse. The General Assembly may provide by law for all matters necessary or appropriate to the implementation of this paragraph.

(n) The General Assembly may provide by law for the issuance and renewal of special motor vehicle license plates that motor vehicle owners may optionally purchase and renew for additional fees. The General Assembly may provide for all or a portion of the net revenue, as

defined by the General Assembly, derived from the additional fees charged for any such special license plate to be dedicated to an agency, fund, or nonprofit corporation to implement or support programs related to the nature of the special license plate, as intended by the authorizing statute. Any dedication of funds enacted pursuant to the authority of this subparagraph may be in whole or in part for the ultimate use of a nonprofit corporation, without limitation by Article III, Section VI, Paragraph VI, if the General Assembly determines that the license plate program and such appropriation will benefit both the state and the nonprofit corporation. Any law enacted pursuant to the authority of this subparagraph may provide that funds dedicated pursuant to such law shall not lapse as otherwise required by Article III, Section IX, Paragraph IV(c). Any law enacted pursuant to the authority of this subparagraph shall be required to receive a two thirds' majority vote in both the Senate and the House of Representatives. (Ga. Const. 1983, Art. 3, § 9, Para. 6; Ga. L. 1986, p. 1631, § 1/SR 330; Ga. L. 1988, p. 2106, § 1/HR 552; Ga. L. 1988, p. 2125, § 1/SR 347; Ga. L. 1988, p. 2126, § 1/SR 350; Ga. L. 1990, p. 2441, § 1/HR 796; Ga. L. 1992, p. 3333, § 1/HR 840; Ga. L. 1998, p. 1683/SR 144; Ga. L. 1998, p. 1688/SR 559; Ga. L. 2002, p. 1503, § 1/HR 264; Ga. L. 2006, p. 1112, § 1/HR 1564; Ga. L. 2014, p. 887, § 1/HR 1183.)

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2015, p. 1497, § 1/SR 7, if ratified, would add a new subparagraph to read as follows: “(o) The General Assembly may provide by general law for additional penalties in any case in any court in this state in which a person is adjudged guilty of keeping a place of prostitution, pimping, pandering, pandering by compulsion, solicitation of sodomy, masturbation for hire, trafficking of persons for sexual servitude, or sexual exploitation of children and may impose assessments on adult entertainment establishments as defined by law; and such appropriated amount shall not lapse as required by Article III, Section IX, Paragraph IV(c) and shall not be subject to the limitations of subparagraph (a) of this Paragraph, Article III, Section V, Paragraph II, Article VII, Section III, Paragraph II(a), or Article VII, Section III, Paragraph IV. The General Assembly may provide by general law for the allocation of such assessments and additional penalties to the Safe Harbor for Sexually Exploited Children Fund for the specified purpose of meeting any and all costs, or any portion of the costs, of pro-

viding care and rehabilitative and social services to individuals in this state who have been or may be sexually exploited. The General Assembly may provide by general law for the administration of such fund by such authority as the General Assembly shall determine.”

Amendment of the Georgia Constitution proposed by Ga. L. 2016, p. 895, § 1/SR 558, if ratified, would add a new subparagraph to read as follows: “(o) The proceeds of any excise tax imposed by general law on the sale of fireworks or consumer fireworks in this state shall be dedicated to the provision of trauma care, fire services, and local public safety purposes in Georgia. The General Assembly shall provide by general law for the use, dedication, and deposit of revenues raised from any such excise tax on fireworks or consumer fireworks. Contributions and revenues deposited for such purposes shall not lapse and shall not be subject to the limitations of subparagraph (a) of this Paragraph or of Article VII, Section III, Paragraph II.”

1976 Constitution. — Art. III, Sec. IX, Para. VI; Art. III, Sec. X, Para. VII; Art. VII, Sec. II, Para. III.

Cross references. — Provider Payment Agreement Act, § 31-8-179 et seq. Financing of state transportation system generally, § 32-2-2. Roadside enhancement and beautification, § 32-6-75.1 et seq. Creation of subsequent injury trust fund, § 34-9-352. Grants for road construction and maintenance, § 36-17-20. Use of fuel tax money for emergency defense purposes, § 38-2-172. Disposition of collected revenues, § 48-2-17. Motor fuel and road taxes generally, Ch. 9, T. 48. Peace Officer and Prosecutor Training Fund Act of 1983, § 15-21-70 et seq. Jail Construction and Staffing Act, § 15-21-90 et seq.

Editor's notes. — The constitutional amendment (Ga. L. 1986, p. 1631, § 1) which added subparagraph (f) was approved by a majority of the qualified voters voting at the general election held on November 4, 1986.

The constitutional amendment (Ga. L. 1988, p. 2106, § 1) which added subparagraph (g) authorizing the creation of a Seed-Capital Fund to provide equity and other capital to certain firms engaged in innovative work in the areas of technology, manufacturing, or agriculture, providing for payments into the fund and disbursements therefrom, and providing for returns on loans and investments was approved by a majority of the qualified voters voting at the general election held on November 8, 1988.

The constitutional amendment (Ga. L. 1988, p. 2125, § 1) which added subparagraph (g) (redesignated as subparagraph (h) by Ga. L. 1990, p. 2441, §§ 1, 2, approved November 6, 1990) authorizing the General Assembly to provide for additional penalties or fees in criminal or traffic cases, and to allocate such penalties or fees for the construction, operation, and staffing of jails, correctional institutions, and detention facilities by counties was approved by a majority of the qualified voters voting at the general election held on November 8, 1988.

The constitutional amendment (Ga. L. 1988, p. 2126, § 1) which added subparagraph (g) (redesignated as subparagraph (i) by Ga. L. 1990, p. 2441, §§ 1, 2, approved November 6, 1990) authorizing the creation of an Indigent Care Trust Fund

and authorizing contributions thereto and appropriations therefrom was approved by a majority of the qualified voters voting at the general election held on November 8, 1988.

The constitutional amendment (Ga. L. 1988, p. 2110, § 1) which would have added a new subparagraph authorizing the creation of an Export Finance Fund from which funds shall be disbursed for a Georgia export finance program to provide loan guarantees, insurance, and coinsurance, to support the export of certain goods, services, and agricultural commodities produced or grown primarily in Georgia, and to provide for payments into the fund and disbursements therefrom was defeated at the general election on November 8, 1988.

The constitutional amendment (Ga. L. 1990, p. 2441, §§ 1, 2) which redesignated the last two subparagraphs designated as subparagraph (g) as subparagraphs (h) and (i), respectively, and added subparagraph (j) was approved by a majority of the qualified voters voting at the general election held on November 6, 1990. Ga. L. 1990, p. 2441, also repealed and superseded the amendments proposed in Ga. L. 1990, p. 2445, relating to an emerging crops loan fund.

The constitutional amendment (Ga. L. 1992, p. 3333, § 1) which revised subparagraph (i) to provide for the dedication and deposit of revenues raised from specified sources for the purposes of funding an Indigent Care Trust Fund; to provide that moneys in the fund shall be exclusively used for primary health care programs for medically indigent citizens and children, for expansion of Medicaid eligibility and services, or for programs to support rural and other health care providers who disproportionately serve the medically indigent; and to provide that contributions and revenues deposited to the fund shall not lapse, was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

The constitutional amendment (Ga. L. 1992, p. 3339, §§ 1, 2) which would have redesignated subparagraph (b) as subparagraph (b)(1) and would have added subparagraph (b)(2) with provisions as to a Transportation Trust Fund, was de-

feated at the general election on November 3, 1992.

The constitutional amendment (Ga. L. 1998, p. 1683) which added subparagraph (k), relating to the Brain and Spinal Injury Trust Fund, was approved by a majority of the qualified voters voting at the general election held on November 3, 1998.

The constitutional amendment (Ga. L. 1998, p. 1684) which would have created the Land, Water, Wildlife, and Recreation Heritage Fund, was defeated at the general election held on November 3, 1998.

The constitutional amendment (Ga. L. 1998, p. 1688) which added the second subparagraph (k) (now (l)), relating to a roadside enhancement and beautification fund, was approved by a majority of the qualified voters voting at the general election held on November 3, 1998.

The constitutional amendment (Ga. L. 2002, p. 1503, § 1), which added subparagraph (m), was approved by a majority of the qualified voters voting at the general election held November 5, 2002.

The constitutional amendment (Ga. L. 2006, p. 1112, § 1), which added subparagraph (n), was approved by a majority of the qualified voters voting at the general election held on November 7, 2006.

The constitutional amendment proposed by Ga. L. 2010, p. 1261, § 1, which would have added subparagraph (o) to add a \$10.00 tag fee on private passenger vehicles for state-wide trauma care, was defeated at the general election held on November 2, 2010.

The constitutional amendment (Ga. L. 2014, p. 887, § 1/HR 1183) which inserted “or reckless driving” at the end of the first sentence of subsection (k), was ratified at the general election held on November 4, 2014.

Law reviews. — For article, “Health: Care and Protection of Indigent and Elderly Patients,” see 30 Ga. St. U.L. Rev. 153 (2013).

For comment discussing paragraph (c), see 13 Ga. St. B.J. 50 (1976).

JUDICIAL DECISIONS

Purpose of appropriation control. — The purpose of this and other paragraphs on appropriation control is to end the practice of allocating or earmarking particular taxes for the use by any specific department, and to require the General Assembly to appropriate from the general fund specific amounts for each fiscal year for the support of each department or agency. *Gregory v. Hamilton*, 215 Ga. 735, 113 S.E.2d 395 (1960) (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI).

Conditions on grants for road construction and maintenance. — The General Assembly was not prohibited from imposing as a condition for granting state funds for road construction and maintenance that for a county to be eligible a tax credit must be given on homesteads first and then on tangible personal property (exclusive of motor vehicles and trailers) in accordance with the formulas prescribed in the Act. *Brown v. Wright*, 231 Ga. 686, 203 S.E.2d 487 (1974).

General Assembly may attach reasonable conditions to its monetary

grants to counties for road construction and maintenance. *Brown v. Wright*, 231 Ga. 686, 203 S.E.2d 487 (1974).

Effect of amendment on power of departments to contract. — The 1952 amendment to this paragraph (Ga. L. 1951, p. 849), neither expressly nor by necessary implication, divests the Highway Department (now Department of Transportation) of the power conferred by Ga. Const. 1976, Art. IX, Sec. VI, Para. I(a) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I) to contract for the use of bridge facilities from the State Bridge Building Authority (now Georgia Highway Authority) for highway purposes, and to pay annual or monthly rentals for the use of them during the contract period. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Earmarking of revenue derived from license fees is not constitutionally permissible. — O.C.G.A. § 19-14-21 is part of an enrolled Act (Ga. L. 1987, p. 1133) conclusively presumed to have been

enacted in accordance with constitutional requirements and although subsection (b) of that section is invalid because it violates the proscription against “earmarked” taxes it does not invalidate the remainder of the section. *Collins v. Woodham*, 257 Ga. 643, 362 S.E.2d 61 (1987).

Environmental assurance fee provided for by O.C.G.A. § 12-13-10 is not

motor fuel tax within the meaning of subparagraph (b) of Ga. Const. 1983, Art. III, Sec. IX, Para. VI. *Luke v. Georgia Dep’t of Natural Resources*, 270 Ga. 647, 513 S.E.2d 728 (1999).

Cited in *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947); *Weeks v. Georgia State Hwy. Auth.*, 217 Ga. 14, 120 S.E.2d 620 (1961).

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Purpose of this paragraph is to require General Assembly to make a yearly appropriation of specific sum of money for each department or agency. 1972 Op. Att’y Gen. No. 72-112 (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI).

Authority of Governor to curtail legislative appropriations. — Governor, as director of budget, is authorized to restrict and curtail legislative appropriations where anticipated income of state would otherwise be exceeded. 1952-53 Op. Att’y Gen. p. 276.

This paragraph generally prohibits state organizations from collecting money and using that money for their own programs. 1971 Op. Att’y Gen. No. 71-126 (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI).

Allocation of particular source of income for particular agency precluded. — This paragraph and Ga. Const. 1976, Art. VII, Sec. II, Para. III (see Ga. Const. 1983, Art. VII, Sec. III, Para. II), preclude both the practice of allocating particular sources of income for the use of a particular agency and the allocation of the fees, or any part of the fees, collected by the various examining boards to meet their expenses, and further preclude any implied commitment on the part of the General Assembly to appropriate to the examining boards an amount equal to the total fees generated. 1976 Op. Att’y Gen. No. 76-93 (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI).

Earmarking revenue sources to designated agencies. — A statute which attempts to earmark receipts from certain revenue sources as an appropriation to a certain agency is unconstitutional. 1972 Op. Att’y Gen. No. 72-107.

Collections from delinquent accounts must be paid into general fund. — While this paragraph and Ga. Const. 1976, Art. VII, Sec. II, Para. III (see Ga. Const. 1983, Art. VII, Sec. III, Para. II) do not specifically provide that money recovered for contractual violations or delinquent accounts be paid into the treasury, such money must be paid into the state treasury, and not earmarked. 1971 Op. Att’y Gen. No. 71-126 (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI).

Failure to appropriate full estimated amount committed by para. VI(b), freeing a corresponding amount of estimated available funds for appropriation for other purposes, is unconstitutional. 1980 Op. Att’y Gen. No. 80-30 (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI).

Legislature may authorize courts to assess additional penalties at time bond is set. — The General Assembly may by legislation authorize courts, when assessing additional penalty provided for under paragraph (d), to make such assessment at time bond is set. 1981 Op. Att’y Gen. No. U81-43. (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI).

What are activities incident to maintaining roads. — To construct and maintain a system of public roads, streets, sidewalks, bridges, and appurtenances, and to provide traffic control devices and equipment to control and accommodate the flow of traffic therein would be “activities incident to providing and maintaining an adequate system of public roads and bridges in this State” under the provisions of this paragraph, and Ga. L. 1965, p. 458, § 1 (see now O.C.G.A. § 36-40-41) declares the same within its latitude.

1965-66 Op. Att'y Gen. No. 65-40 (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI).

Method of distribution of funds to Georgia Real Estate Commission. — The lawful method of distribution of funds to the Georgia Real Estate Commission calls for the Secretary of State to exercise the Secretary's discretion in dividing the total appropriation for the joint secretary's office among the various examining boards including the Georgia Real Estate Commission. 1976 Op. Att'y Gen. No. 76-93.

Continuing appropriation for State Ports Authority not allowed. — The General Assembly may not set aside a continuing appropriation for 31 years for the purpose of developing ports under the jurisdiction of the State Ports Authority. 1945-47 Op. Att'y Gen. p. 645.

Department of Transportation may not utilize motor fuel tax funds to construct walkways on bridges for purpose of fishing. 1975 Op. Att'y Gen. No. 75-96.

Department of Transportation is

authorized to construct and maintain airports, but use of funds for that purpose, unless specifically appropriated by the legislature, would be unconstitutional. 1962 Op. Att'y Gen. p. 267.

Department of Transportation not to use motor fuel tax funds for bicycle paths. — Motor fuel tax funds may not lawfully be used by the Department of Transportation for the planning, designing, purchase of right of way and easements, construction, and maintenance of ways for the sole travel of bicycles off the State Highway System. 1973 Op. Att'y Gen. No. 73-133.

Appropriation of interest on motor fuel tax revenues. — Interest earned on motor fuel tax revenues is constitutionally appropriated for activities incident to the construction and maintenance of roads and bridges. 1984 Op. Att'y Gen. No. 84-6.

Subsequent Injury Trust Fund. — The Subsequent Injury Trust Fund is not subject to the requirement that monies be paid into the general fund of the state treasury. 1993 Op. Att'y Gen. No. 93-28.

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Highways, Streets, and Bridges, § 130 et seq.

C.J.S. — 81A C.J.S., States, § 404 et seq.

ALR. — Particularity of specification of purpose required in appropriation bill, 20 ALR 981.

Paragraph VII. Appropriations void, when.

Any appropriation made in conflict with any of the foregoing provisions shall be void.

1976 Constitution. — Art. III, Sec. X, Para. VIII.

JUDICIAL DECISIONS

Cited in State Ports Auth. v. Arnall, 201 Ga. 713, 41 S.E.2d 246 (1947).

SECTION X.
RETIREMENT SYSTEMS

Paragraph

- I. Expenditure of public funds authorized.
- II. Increasing benefits authorized.
- III. Retirement systems covering employees of county boards of education.
- IV. Firemen's pension system.

Paragraph

- V. Funding standards.
- V-A. Limitation on involuntary separation benefits for Governor of the State of Georgia.
- VI. Involuntary separation; part-time service.

Paragraph I. Expenditure of public funds authorized.

Public funds may be expended for the purpose of paying benefits and other costs of retirement and pension systems for public officers and employees and their beneficiaries.

1976 Constitution. — Art. X, Sec. I, Paras. I-III.

JUDICIAL DECISIONS

Payment of retirement benefits to school employees is not an expenditure for an “educational purpose.” — Rather, payment of retirement benefits for county school employees from general county funds is authorized by Ga. Const. 1976, Art. X, Sec. I, Paras. I-III (see Ga. Const. 1983, Art. III, Sec. X, Para. I) and by Ga. Const. 1976, Art. IX, Sec. V, Para. II (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II), as it represents a separate and distinct public purpose. *Lomax v. McBrayer*, 248 Ga. 753, 286 S.E.2d 35 (1982).

Retirement of elected judicial officers. — The Georgia Constitution does not prohibit the award to elected judicial officers of creditable service for retirement purposes based upon accrued but unused annual leave and sick leave. *Arneson v. Board of Trustees*, 257 Ga. 579, 361 S.E.2d 805 (1987).

Cited in *Young v. State*, 132 Ga. App. 790, 209 S.E.2d 96 (1974); *Teachers Retirement Sys. v. City of Atlanta*, 249 Ga. 196, 288 S.E.2d 200 (1982).

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Employees of Southern Interstate Nuclear Board. — Subject to restriction regarding participation in more than one program, employees of Southern Interstate Nuclear Board are eligible for coverage by the Georgia State Employees' Retirement System; a contractual arrangement approved by the Governor would be the proper means of providing

this coverage. 1967 Op. Att'y Gen. No. 67-22.

Supplemental retirement plan at Medical College of Georgia. — It is within the authority of the Board of Regents to establish a supplemental retirement plan at the Medical College of Georgia. 1999 Op. Att'y Gen. No. U99-10.

RESEARCH REFERENCES

Am. Jur. 2d. — 60A Am. Jur. 2d, Pensions and Retirement Funds, § 1166 et seq.

C.J.S. — 78 C.J.S., Schools and School Districts, § 481 et seq.

ALR. — Disciplinary suspension of

public employee as affecting computation of length of service for retirement or pension purposes, 6 ALR2d 506.

Mandatory retirement of public officer or employee based on age, 81 ALR3d 811.

Paragraph II. Increasing benefits authorized.

Public funds may be expended for the purpose of increasing benefits being paid pursuant to any retirement or pension system wholly or partially supported from public funds.

1976 Constitution. — Art. X, Sec. I, Para. V.

JUDICIAL DECISIONS

Cited in *Carter v. Haynes*, 228 Ga. 462, 186 S.E.2d 115 (1971); *Richmond County v. Pierce*, 234 Ga. 274, 215 S.E.2d 665 (1975).

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Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. X, Sec. I, Para. V and antecedent provisions, relating to the ability of the General Assembly to provide for increased retirement benefits, are included in the annotations for this paragraph.

Increases in teacher's retirement benefits arising from state funds. — A constitutional amendment would be necessary to authorize an increase in retirement benefits, to be paid from state funds, to retired teachers in any local system funded through appropriations made by municipal corporations, counties, or any political subdivision. 1974 Op. Att'y Gen. No. 74-14.

A supplemental retirement plan for public employees which does not require a substantial benefit to the employer, in the form of new service or otherwise, violates the prohibitions against governmental gratuities and extra compensation for services rendered. 1996 Op. Att'y Gen. No. U96-21.

Effect of §§ 47-3-120 and 47-3-124 and Ga. Const. 1976, Art. X, Sec. I,

Para. V (see Ga. Const. 1983, Art. III, Sec. X, Para. II). — Upon reading Ga. L. 1975, p. 357, §§ 2 and 3, Ga. L. 1975, p. 1328, § 1 and Ga. L. 1974, p. 1139, § 1 (see now O.C.G.A. §§ 47-3-120 and 47-3-124) within the context of the provisions concerning teacher retirement systems (see now O.C.G.A. Ch. 3, T. 47), and upon considering precipitant events leading to passage of the provisions, it became evident that the aforementioned Georgia laws (see now O.C.G.A. §§ 47-3-120 and 47-3-124) and Ga. Const. 1976, Art. X, Sec. I, Para. V (see Ga. Const. 1983, Art. III, Sec. X, Para. II) were designed to include theretofore excluded local fund retirees under the minimum Teachers Retirement System benefits statute. 1975 Op. Att'y Gen. No. 75-9.

Ga. L. 1975, p. 357, §§ 2 and 3, Ga. L. 1975, p. 1328, § 1 and Ga. L. 1974, p. 1139, § 1 (see now O.C.G.A. §§ 47-3-120 and 47-3-124) were accompanied by and conditioned upon ratification of Ga. Const. 1976, Art. X, Sec. I, Para. V (see Ga. Const. 1983, Art. III, Sec. X, Para. II), an amendment to the Georgia Constitution authorizing the Gen-

eral Assembly to provide by law Teachers Retirement System retirement benefits to teachers retiring with a local retirement fund. 1975 Op. Att'y Gen. No. 75-9.

A retired member of the Teachers Retirement System is entitled to receive the \$9.00 minimum retirement benefits whether the member is retired as a member of the TRS or is receiving minimum retirement benefits by virtue of the member's teaching service under a

local retirement fund. 1975 Op. Att'y Gen. No. 75-27.

Application. — This paragraph should not be applied to persons who neither render services as public school employees nor made the required contributions to the Public School Employees' Retirement System. 1971 Op. Att'y Gen. No. 71-73. (see Ga. Const. 1983, Art. III, Sec. X, Para. II).

RESEARCH REFERENCES

ALR. — Increase of pension benefits as applicable to those already receiving benefits, 118 ALR 992.

Paragraph III. Retirement systems covering employees of county boards of education.

Notwithstanding Article IX, Section II, Paragraph III(a)(14), the authority to establish or modify heretofore existing local retirement systems covering employees of county boards of education shall continue to be vested in the General Assembly.

1976 Constitution. — Art. X, Sec. I, Para. III.

Paragraph IV. Firemen's pension system.

The powers of taxation may be exercised by the state through the General Assembly and the counties and municipalities for the purpose of paying pensions and other benefits and costs under a firemen's pension system or systems. The taxes so levied may be collected by such firemen's pension system or systems and disbursed therefrom by authority of the General Assembly for the purposes therein authorized.

1976 Constitution. — Art. X, Sec. I, Para. IV.

RESEARCH REFERENCES

Am. Jur. 2d. — 60A Am. Jur. 2d, Pensions and Retirement Funds, § 1185 et seq.

Paragraph V. Funding standards.

It shall be the duty of the General Assembly to enact legislation to define funding standards which will assure the actuarial soundness of

any retirement or pension system supported wholly or partially from public funds and to control legislative procedures so that no bill or resolution creating or amending any such retirement or pension system shall be passed by the General Assembly without concurrent provisions for funding in accordance with the defined funding standards.

1976 Constitution. — Art. X, Sec. I, Para. II.

Cross references. — Public retirement systems standards, § 47-20-1 et seq.

Paragraph V-A. Limitation on involuntary separation benefits for Governor of the State of Georgia.

Any other provisions of this Constitution to the contrary notwithstanding, no past, present, or future Governor of the State of Georgia who ceases or ceased to hold office as Governor for any reason, except for medical disability, shall receive a retirement benefit based on involuntary separation from employment as a result of ceasing to hold office as Governor. The provisions of any law in conflict with this Paragraph are null and void effective January 1, 1985. (Ga. Const. 1983, Art. 3, § 10, Para. 5-A, approved by Ga. L. 1984, p. 1714, § 1/SR 307.)

Editor's notes. — The constitutional amendment (Ga. L. 1984, p. 1714, § 1) which added this paragraph was approved

by a majority of the qualified voters voting at the general election held on November 6, 1984.

Paragraph VI. Involuntary separation; part-time service.

(a) Any public retirement or pension system provided for by law in existence prior to January 1, 1985, may be changed by the General Assembly for any one or more of the following purposes:

- (1) To redefine involuntary separation from employment; or
- (2) To provide additional or revise existing limitations or restrictions on the right to qualify for a retirement benefit based on involuntary separation from employment.

(b) The General Assembly by law may define or redefine part-time service, including but not limited to service as a member of the General Assembly, for the purposes of any public retirement or pension system presently existing or created in the future and may limit or restrict the use of such part-time service as creditable service under any such retirement or pension system.

(c) Any law enacted by the General Assembly pursuant to subparagraph (a) or (b) of this Paragraph may affect persons who are members of public retirement or pension systems on January 1, 1985, and who became members at any time prior to that date.

(d) Any law enacted by the General Assembly pursuant to subparagraph (a) or (b) of this Paragraph shall not be subject to any law controlling legislative procedures for the consideration of retirement or pension bills, including, but not limited to, any limitations on the sessions of the General Assembly at which retirement or pension bills may be introduced.

(e) No public retirement or pension system created on or after January 1, 1985, shall grant any person whose retirement is based on involuntary separation from employment a retirement or pension benefit more favorable than the retirement or pension benefit granted to a person whose separation from employment is voluntary. (Ga. Const. 1983, Art. 3, § 10, Para. 6, approved by Ga. L. 1984, p. 1726, § 1/SR 274.)

Editor's notes. — The constitutional amendment (Ga. L. 1984, p. 1726, § 1) which added this paragraph was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

ARTICLE IV.

CONSTITUTIONAL BOARDS AND COMMISSIONS

Section

- I. Public Service Commission.
- II. State Board of Pardons and Paroles.
- III. State Personnel Board.
- IV. State Transportation Board.
- V. Veterans Service Board.
- VI. Board of Natural Resources.
- VII. Qualifications, Compensation, Removal from Office, and Powers and Duties of Members of Constitutional Boards and Commissions.
- VIII. Georgia Citizens Commission on Compensation of Public Officials.

SECTION I.

PUBLIC SERVICE COMMISSION

Paragraph

- I. Public Service Commission.

Paragraph I. Public Service Commission.

(a) There shall be a Public Service Commission for the regulation of utilities which shall consist of five members who shall be elected by the people. The Commissioners in office on June 30, 1983, shall serve until December 31 after the general election at which the successor of each member is elected. Thereafter, all succeeding terms of members shall be for six years. Members shall serve until their successors are elected and qualified. A chairman shall be selected by the members of the commission from its membership.

(b) The commission shall be vested with such jurisdiction, powers, and duties as provided by law.

(c) The filling of vacancies and manner and time of election of members of the commission shall be as provided by law.

1976 Constitution. — Art. IV, Sec. I, Para. I.

Cross references. — Georgia Public Service Commission generally, Ch. 2, T. 46.

Law reviews. — For comment on Georgia Power Co. v. Allied Chem. Corp., 233 Ga. 558, 212 S.E.2d 628 (1975), see 27 Mercer L. Rev. 341 (1975).

JUDICIAL DECISIONS

Effect of paragraph on Commission. — This paragraph does not change the character or nature of the office as to the powers, duties, and functions of the Public Service Commission. It simply makes the Commission a constitutional agency of the state and not merely a creature of the General Assembly. The members of the Commission in office continue with the same powers and duties as then provided by law, or that may be prescribed in the future. It does not clothe the Commission or its members with the robe of the sovereign state nor immunize them from judicial process, in cases where their action is subject to judicial review. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949) (see Ga. Const. 1983, Art. IV, Sec. I, Para. I).

Grant of authority not a divestiture of regulatory power. — The grant of authority to regulate public utilities to the Public Service Commission, to the exclusion of other executive branch agencies, does not mean that the General Assembly has divested itself of its constitutional power to regulate public utilities. *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824 (1984).

Public Service Commission has power to regulate rates and practices of public utilities. *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), cert. denied, 404 U.S. 1062, 92 S. Ct. 732, 30 L. Ed. 2d 750 (1972).

This paragraph fixes sole power for determination of what are reasonable rates in the Public Service Commission. *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 204 S.E.2d 457 (1974) (see Ga. Const. 1983, Art. IV, Sec. I, Para. I).

Function of making telephone rates is legislative in nature, and such rates cannot be judicially fixed by courts. *Southern Bell Tel. & Tel. Co. v. Georgia Pub. Serv. Comm'n*, 203 Ga. 832, 49 S.E.2d 38 (1948).

Residency requirement upheld for candidates. — Requiring appellee candidate to reside in the district for 12 months prior to the general election did not deny

the candidate equal protection under the United States Constitution or the Georgia Constitution as the residency requirement for election to the Georgia Public Service Commission was rationally related to the state's legitimate interests in fostering informed voters and promoting knowledgeable and responsive candidates with ties to the community, and did not place an unreasonable burden on the right of voters to choose a candidate or the right of the candidate to run for public office. *Cox v. Barber*, 275 Ga. 415, 568 S.E.2d 478 (2002), cert. denied, 537 U.S. 1109, 123 S. Ct. 851, 154 L. Ed. 2d 780 (2003).

Compatibility of effect of rate schedule on municipal exercise of discretion. — Any indirect effect which a rate schedule might have upon a municipality's exercise of its discretion in granting franchises is entirely compatible with the authority granted the municipalities by Ga. L. 1976, p. 188, § 1 (see now O.C.G.A. § 36-34-2(7)). *City of Lithonia v. Georgia Pub. Serv. Comm'n*, 238 Ga. 339, 232 S.E.2d 832 (1977).

Included within general power to fix rates is power to limit liability of utility for negligence in curtailment of service. *State Farm Fire & Cas. Co. v. Southern Bell Tel. & Tel. Co.*, 245 Ga. 5, 262 S.E.2d 895 (1980).

Fact that Public Service Commission is constitutional body does not make action against it one against state. *Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618 (1949).

Contract for total energy system subject to regulation. — A contract between a public utility and its landlord to furnish a total energy system (hot and cold water and electricity included) was not a private nonutility contract and was, therefore, subject to regulation by the Public Service Commission. *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n*, 228 Ga. 347, 185 S.E.2d 403 (1971).

Utility cannot avoid regulation of natural gas by conversion into electricity. — Where a public utility would be subject to regulation if it sold only natural gas to a customer, it cannot avoid regula-

tion of its rates by converting the gas into a total energy service, which includes electricity; thus, a utility is also subject to regulation. *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n*, 228 Ga. 347, 185 S.E.2d 403 (1971).

Cited in *Georgia Pub. Serv. Comm'n v.*

City of Albany, 180 Ga. 355, 179 S.E. 369 (1935); *Gas Light Co. v. Georgia Power Co.*, 313 F. Supp. 860 (M.D. Ga. 1970); *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 231 Ga. 339, 201 S.E.2d 423 (1973); *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Manner of election of Commissioners. — Members of the Public Service Commission should be elected in the same manner as the Governor. 1948-49 Op. Att'y Gen. p. 161.

Private contractual agreements between regulated utilities. — Public Service Commission required to give private contractual agreements between regulated utilities only such weight as it deems necessary, and should disregard such agreements if they prove contrary to the public interest. 1960-61 Op. Att'y Gen. p. 429.

No jurisdiction to regulate rates for use of steam. — Absent legislative enactment, the Public Service Commission is without jurisdiction to regulate rates

charged by an electric power company for steam which is generated as a by-product of the company's manufacture of electricity. 1976 Op. Att'y Gen. No. 76-91.

O.C.G.A. § 46-2-5 is constitutional; the Georgia Public Service Commission does not have the authority to declare the statute unconstitutional; the Commission is not free to disregard the statute; the Commission may not select a chairman for a two-year term; and a chairman whose term commences on July 1, 2009, may serve beyond January 16, 2010, only if there are no other commissioners eligible to serve as chairman under O.C.G.A. § 46-2-5(b)(2). 2009 Op. Att'y Gen. No. 2009-4.

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Utilities, § 143 et seq.

C.J.S. — 73B C.J.S., Public Utilities, § 148 et seq.

ALR. — Federal control of public utilities, 8 ALR 969; 10 ALR 956; 11 ALR 1450; 14 ALR 234; 19 ALR 678; 52 ALR 296.

Regulating issuance of securities by public utilities through public service commissions, 41 ALR 889.

Jurisdiction of public service commission over carriers transporting by motor trucks or busses, 103 ALR 268.

Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.

Right of public utility to discontinue line or branch on ground that it is unprofitable, 10 ALR2d 1121.

Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 ALR2d 155.

Community antenna television systems (CATV) as subject to jurisdiction of state public utility or service commission, 61 ALR3d 1150.

SECTION II.

STATE BOARD OF PARDONS AND PAROLES

Paragraph

I. State Board of Pardons and Paroles.

Paragraph

II. Powers and authority.

Law reviews. — For annual survey article on criminal law and procedure, see 46 Mercer L. Rev. 153 (1994).

Paragraph I. State Board of Pardons and Paroles.

There shall be a State Board of Pardons and Paroles which shall consist of five members appointed by the Governor, subject to confirmation by the Senate. The members of the board in office on June 30, 1983, shall serve out the remainder of their respective terms, provided that the expiration date of the term of any such member shall be December 31 of the year in which the member's term expires. As each term of office expires, the Governor shall appoint a successor as herein provided. All such terms of members shall be for seven years. A chairman shall be selected by the members of the board from its membership.

1976 Constitution. — Art. IV, Sec. II, Para. I.

Cross references. — State Board of Pardons and Paroles, § 42-9-1 et seq.

JUDICIAL DECISIONS

Qualification of membership. — This paragraph does not include any qualification of membership or any penalty by forfeiture of office for engaging in another business or profession. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971) (see Ga. Const. 1983, Art. IV, Sec. I, Para. II).

Authority of Governor as to vacancies in office. — The authority given to the Governor to fill a vacancy does not include the right to declare that a vacancy exists, or to accept an undated resignation given years before. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

Parole conditions. — The trial court

erred by requiring defendant to waive defendant's fourth amendment right as a condition of parole, since any attempt by a court to impose its will over the Executive Department by attempting to impose as a part of a criminal sentence conditions operating as a prerequisite of or becoming automatically effective in the event of a subsequent parole of defendant by the State Board of Pardons and Parole would be a nullity and constitute an exercise of power granted exclusively to the Executive. *Stephens v. State*, 207 Ga. App. 645, 428 S.E.2d 661 (1993).

Paragraph II. Powers and authority.

(a) Except as otherwise provided in this Paragraph, the State Board of Pardons and Paroles shall be vested with the power of executive clemency, including the powers to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction.

(b)(1) When a sentence of death is commuted to life imprisonment, the board shall not have the authority to grant a pardon to the convicted person until such person has served at least 25 years in the

penitentiary; and such person shall not become eligible for parole at any time prior to serving at least 25 years in the penitentiary.

(2) The General Assembly may by general law approved by two-thirds of the members elected to each branch of the General Assembly in a roll-call vote provide for minimum mandatory sentences and for sentences which are required to be served in their entirety for persons convicted of armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery and, when so provided by such Act, the board shall not have the authority to consider such persons for pardon, parole, or commutation during that portion of the sentence.

(3) The General Assembly may by general law approved by two-thirds of the members elected to each branch of the General Assembly in a roll-call vote provide for the imposition of sentences of life without parole for persons convicted of murder and for persons who having been previously convicted of murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery or having been previously convicted under the laws of any other state or of the United States of a crime which if committed in this state would be one of those offenses and who after such previous conviction subsequently commits and is convicted of one of those offenses and, when so provided by such Act, the board shall not have the authority to consider such persons for pardon, parole, or commutation from any portion of such sentence.

(4) Any general law previously enacted by the General Assembly providing for life without parole or for mandatory service of sentences without suspension, probation, or parole is hereby ratified and approved but such provisions shall be subject to amendment or repeal by general law.

(c) Notwithstanding the provisions of subparagraph (b) of this Paragraph, the General Assembly, by law, may prohibit the board from granting and may prescribe the terms and conditions for the board's granting a pardon or parole to:

(1) Any person incarcerated for a second or subsequent time for any offense for which such person could have been sentenced to life imprisonment; and

(2) Any person who has received consecutive life sentences as the result of offenses occurring during the same series of acts.

(d) The chairman of the board, or any other member designated by the board, may suspend the execution of a sentence of death until the full board shall have an opportunity to hear the application of the convicted person for any relief within the power of the board.

(e) Notwithstanding any other provisions of this Paragraph, the State Board of Pardons and Paroles shall have the authority to pardon any person convicted of a crime who is subsequently determined to be innocent of said crime or to issue a medical reprieve to an entirely incapacitated person suffering a progressively debilitating terminal illness or parole any person who is age 62 or older. (Ga. Const. 1983, Art 4, § 2, Para. 2; Ga. L. 1994, p. 2015, § 1.)

1976 Constitution. — Art. IV, Sec. II, Para. I; Art. V, Sec. II, Para. II.

Cross references. — Power of judges to suspend or probate sentences, § 17-10-1. State Board of Pardons and Paroles generally, Ch. 9, T. 42. Powers of State Board of Pardons and Paroles, § 42-9-20. Governor without power as to pardons or paroles, § 42-9-56. Restrictions on relief for person serving a second life sentence, § 42-9-39.

Editor's notes. — The constitutional amendment (Ga. L. 1994, p. 2015, § 1) which revised subparagraphs (b) and (e) to authorize the General Assembly to provide by two-thirds vote for mandatory service of sentences for persons convicted of armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, or aggravated sexual battery without possibility of pardon, parole, or commutation during that portion of the sentence, to provide in the same manner for sentences of life without parole for

persons convicted of murder and those who have been convicted a second time of any of the above offenses, and to provide exceptions as to persons convicted of a crime and subsequently determined to be innocent of that crime or determined to be medically incapacitated, and as to certain elderly persons was approved by a majority of the qualified voters voting at the general election held on November 8, 1994.

Administrative Rules and Regulations. — Pardons and paroles, Official Compilation of Rules and Regulations of State of Georgia, Rules of State Board of Pardons and Paroles, Chs. 475-1 through 475-3.

Law reviews. — For article discussing areas in which attorneys may represent clients before the State Board of Pardons and Paroles, see 13 Ga. St. B.J. 46 (1976).

For note on the 1994 amendment of this paragraph, see 11 Ga. St. U.L. Rev. 37 (1994).

JUDICIAL DECISIONS

Effect of pardon is to release the punishment and blot out the guilt. *United States v. Athens Armory*, 35 Ga. 344 (N.D. Ga. 1868).

Effect of reprieve. — A reprieve by the executive is nothing but a temporary suspension for the period named in the respite of the execution of the sentence imposed by the court. *Gore v. Humphries*, 163 Ga. 106, 135 S.E. 481 (1926).

Stay of execution. — The contention that only the Governor can stay the execution of a sentence in a case where such sentence has been suspended by the Governor in the exercise of the Governor's right to suspend the sentence by reprieve is untenable under Ga. L. 1924, p. 195, § 7 (see now O.C.G.A. § 17-10-40). *Gore v. Humphries*, 163 Ga. 106, 135 S.E. 481

(1926) (decided under Ga. Const. 1877, Art. V, Sec. I, Para. XII, relating to the Governor's power to suspend execution of sentences).

Conditional pardon may be granted. *Carmichael v. Banks*, 102 Ga. 217, 29 S.E. 211 (1897).

Paragraph will not be given retroactive application. *Whittle v. Jones*, 198 Ga. 538, 32 S.E.2d 94 (1944), appeal dismissed, 324 U.S. 829, 65 S. Ct. 915, 89 L. Ed. 1396 (1945) (see Ga. Const. 1983, Art. IV, Sec. II, Para. II).

Retroactive application of provision regarding fourth-offender recidivists. — Decision of the State Board of Pardons and Paroles to eliminate plaintiff's parole eligibility which constituted a change in the policy of the Board to grant

parole to persons convicted under the recidivist statute did not violate the ex post facto clause of the United States Constitution. *Metheny v. Hammonds*, 216 F.3d 1307 (11th Cir. 2000), cert. denied, 531 U.S. 1196, 121 S. Ct. 1200, 149 L. Ed. 2d 114 (2001), vacating and remanding *Metheny v. Hammonds*, 39 F. Supp. 2d 1381 (M.D. Ga. 1999).

Court will not rule on validity of paragraph where prior provision would have same effect. *Whittle v. Jones*, 198 Ga. 538, 32 S.E.2d 94 (1944), appeal dismissed, 324 U.S. 829, 65 S. Ct. 915, 89 L. Ed. 1396 (1945) (see Ga. Const. 1983, Art. IV, Sec. II, Para. II).

O.C.G.A. § 17-10-16, the life-without-parole statute, does not violate separation of powers doctrine because it imposes legislative restrictions on the Board of Pardons and Paroles to grant parole. *Freeman v. State*, 264 Ga. 27, 440 S.E.2d 181 (1994).

Authority of board to parole drug traffickers. — Where O.C.G.A. § 16-13-31(d) provides that the adjudication of guilt or imposition of sentence not be suspended, probated, deferred or withheld, and where the term “paroled” is not expressly included, it does not conflict with the parole authority given the State Board of Pardons and Paroles under the Georgia Constitution. *Paras v. State*, 247 Ga. 75, 274 S.E.2d 451 (1981).

Parole conditions. — The trial court erred by requiring defendant to waive the defendant’s fourth amendment right as a condition of parole, since any attempt by a court to impose its will over the Executive Department by attempting to impose as a part of a criminal sentence conditions operating as a prerequisite of or becoming automatically effective in the event of a subsequent parole of defendant by the State Board of Pardons and Parole would be a nullity and constitute an exercise of power granted exclusively to the Executive. *Stephens v. State*, 207 Ga. App. 645, 428 S.E.2d 661 (1993).

Nature of power discretionary. — The power of the board to grant reprieves, pardons, and paroles, to commute penalties, to remove disabilities imposed by law, and to remit parts of sentences is discretionary. *Justice v. State Bd. of Par-*

dons & Paroles, 234 Ga. 749, 218 S.E.2d 45 (1975).

Separate and distinct powers. — An “Order of Restoration of Civil and Political Rights” issued by the Board of Pardons and Paroles did not constitute a pardon of an applicant to become a professional bondsperson, since the Board’s authority to grant pardons is an entirely separate and distinct power from its authority to remove disabilities imposed by law. *Harrison v. Wigington*, 269 Ga. 388, 497 S.E.2d 568 (1998).

Right of condemned prisoner to seek commutation. — This paragraph and Ga. L. 1943, p. 185 (see now O.C.G.A. Ch. 9, T. 42) provide that a person sentenced to the extreme penalty of the law may make application for commutation of that person’s sentence. It is the clear intent of this paragraph and the law that consideration and action upon one application for commutation by the State Board of Pardons and Paroles is all that the prisoner may demand as a matter of right. Whether or not a second application would be considered and acted upon by the board would be a matter for their discretion. *McLendon v. Everett*, 205 Ga. 713, 55 S.E.2d 119 (1949) (see Ga. Const. 1983, Art. IV, Sec. II, Para. II).

Confidentiality provisions of Ga. L. 1975, p. 786, § 4 (see now O.C.G.A. § 42-9-53) apply to information, documents, memoranda, and records of State Board of Pardons and Paroles except those required to be made available to the General Assembly under this paragraph (requirement now deleted), and except the transcripts of any hearing conducted by the board in any matter. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980) (see Ga. Const. 1983, Art. IV, Sec. II, Para. II).

O.C.G.A. § 42-9-53 is constitutional under this paragraph. *Morris v. State*, 246 Ga. 510, 272 S.E.2d 254 (1980) (see Ga. Const. 1983, Art. IV, Sec. II, Para. II).

Remitted fine is recoverable. *Parrott v. Wilson*, 51 Ga. 255 (1874).

Contract to obtain a pardon legitimately is valid. *Formby v. Pryor*, 15 Ga. 258 (1854); *Bird v. Meadows*, 25 Ga. 251 (1858).

Revocation of probation impossible if probation previously terminated.

— Trial court erred in granting the state's motion to revoke defendant's probation for a probation violation as the Georgia Board of Pardons and Paroles had terminated the probationary portion of defendant's sentences and had restored defendant's civil and political rights; the state could not meet its initial burden to show a sentence of probation. *White v. State*, 274 Ga. App. 805, 619 S.E.2d 333 (2005).

Inmate had no due process right to collect testimony from prison staff.

— Death row inmate's suit under 42 U.S.C. § 1983 arising out of a warden's forbidding prison staff to testify for the inmate in a clemency hearing was properly dismissed for failure to state a claim because the Due Process Clause did not guarantee state prisoners a right to acquire such testimony, nor did it bar state officials from limiting prisoners' access to such

testimony, despite a Georgia statute allowing the Board of Pardons and Paroles to collect all available information. *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327 (11th Cir. 2015), cert. denied, stay denied, 136 S. Ct. 25, 2015 U.S. LEXIS 4672, 192 L. Ed. 2d 996 (U.S. 2015).

Cited in *Muckle v. Clarke*, 191 Ga. 202, 12 S.E.2d 339 (1940); *Matthews v. Everett*, 201 Ga. 730, 41 S.E.2d 148 (1947); *Turner v. Wilburn*, 206 Ga. 149, 56 S.E.2d 285 (1949); *Parks v. State*, 206 Ga. 675, 58 S.E.2d 142 (1950); *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Green v. State*, 244 Ga. 755, 262 S.E.2d 68 (1979); *Johns v. State*, 160 Ga. App. 535, 287 S.E.2d 617 (1981); *Charron v. State Bd. of Pardons & Paroles*, 253 Ga. 274, 319 S.E.2d 453 (1984); *Guyton v. State*, 272 Ga. 529, 531 S.E.2d 94 (2000); *Stinski v. State*, 286 Ga. 839, 691 S.E.2d 854 (2010).

OPINIONS OF THE ATTORNEY GENERAL**ANALYSIS****GENERAL CONSIDERATION****POWERS OF BOARD****General Consideration****Section 17-10-7 is unconstitutional.**

— O.C.G.A. § 17-10-7, providing that a habitual criminal shall not be eligible for parole, is unconstitutional and may be ignored. 1954-56 Op. Att'y Gen. p. 519. *Metheny v. Hammonds*, 216 F.3d 1307 (11th Cir. 2000), cert. denied, 531 U.S. 1196, 121 S. Ct. 1200, 149 L. Ed. 2d 114 (2001).

Responsibility to release prisoners with perfect conduct records. — Responsibility of releasing prisoners who have served their minimum terms with perfect conduct records rests on State Board of Pardons and Paroles, and not on the State Board of Corrections (now Department of Offender Rehabilitation) or the director thereof. 1957 Op. Att'y Gen. p. 193.

Language of this paragraph covers misdemeanors, and therefore it would be necessary to change the Constitution in order to eliminate, as a matter of law,

misdemeanor prisoners from consideration for parole. 1963-65 Op. Att'y Gen. p. 3 (see Ga. Const. 1983, Art. IV, Sec. II, Para. II).

Effect of pardon on extraordinary rights. — The right to operate a motor vehicle, to practice a profession, and other extraordinary rights granted and regulated by the state under its police power are not affected by a pardon. 1954-56 Op. Att'y Gen. p. 506.

One pardoned for traffic offense not entitled to reinstatement of driver's license. 1954-56 Op. Att'y Gen. p. 506.

Availability of files to Governor. — It was not the intent of the law that the records of the board be kept secret from the Governor; files relating to a parole action should be made available to the Governor at the Governor's request. 1967 Op. Att'y Gen. No. 67-51.

Not necessary for orders to use particular caption. — The State Board of Pardons and Paroles may entitle or refer to orders authorized to be entered by the

General Consideration (Cont'd)

Constitution or statutes by employing whatever caption it deems appropriate; it is not necessary for the board to employ such words as "reprieve," "pardon," "parole," "commutation," or "remission" in the caption of its orders. 1970 Op. Att'y Gen. No. 70-210.

Powers of Board

Paragraph a limitation on commutation of death penalty. — Georgia Laws 1976, p. 1865 is a limitation on the authority of the State Board of Pardons and Paroles to grant pardons or paroles to persons whose death penalties are commuted by the board after January 1, 1977, or persons who are convicted of armed robbery after January 1, 1977. 1977 Op. Att'y Gen. No. 77-17.

Clemency. — Under current Georgia law, the board may extend clemency only after conviction. 1982 Op. Att'y Gen. No. 82-101.

Meaning of phrase "after conviction." — The phrase "after conviction" as contained in this paragraph does not mean that the power to grant parole exists at any and all times following conviction. 1971 Op. Att'y Gen. No. 71-97 (see Ga. Const. 1983, Art. IV, Sec. II, Para. II).

Board may not review original record of trial for purpose of determining guilt or innocence of defendant, but may consider it on the question of clemency. 1945-47 Op. Att'y Gen. p. 443.

State Board of Corrections may not release inmate into custody of officials of other state. — Neither the Attorney General nor the State Board of Corrections may release an inmate of the Georgia penal system into the custody of officials of another state in order for the inmate to be tried in the criminal courts of the foreign state. 1968 Op. Att'y Gen. No. 68-304.

One under 16 years of age who commits crime may be pardoned. 1948-49 Op. Att'y Gen. p. 626.

Juvenile committed to Department of Human Resources may be pardoned. — A person convicted of a crime before reaching the age of 17 loses the person's right to vote if convicted of a

crime involving moral turpitude even though he is committed to the Department of Human Resources, rather than sentenced to the Board of Corrections; the right to vote and other civil and political rights, however, may be restored by the State Board of Pardons and Paroles. 1975 Op. Att'y Gen. No. 75-17.

Board is not empowered to grant clemency where offense is criminal contempt of court. 1979 Op. Att'y Gen. No. 79-36.

Suspension of sentence in event of parole by other state approved. — Where a prisoner is incarcerated in another state and is serving its and Georgia sentences concurrently, a provision for suspension of the Georgia sentence in the event of a parole by the other state authorities does not usurp the functions of the Board of Pardons and Paroles. 1974 Op. Att'y Gen. No. 74-147.

Conditional release approved. — Under this paragraph and Ga. L. 1943, p. 185 (see now O.C.G.A. Ch. 9, T. 42), the board may, if it deems it necessary and proper in the interest of the prisoner and the public, grant to such prisoner a conditional release providing therein that such release is conditioned upon the prisoner's remaining in a state hospital and continuing the treatment prescribed by the members of the staff until such time as the prisoner has been cured of an illness, or the illness reduced to such point where the physicians in charge of the prisoner's case deem it prudent and safe for the prisoner and the general public that the prisoner be dismissed from the hospital. 1954-56 Op. Att'y Gen. p. 504 (see Ga. Const. 1983, Art. IV, Sec. II, Para. II).

Power to assess fine in lieu of imprisonment. — Board has the power to commute a sentence of imprisonment to present service upon the condition that the prisoner pay a fine in the sum fixed within the law by the board, or upon such other conditions which are not illegal, immoral, or impossible of performance. 1945-47 Op. Att'y Gen. p. 446.

Board has authority to commute sentence from six months in jail to six months in county correctional institution. 1952-53 Op. Att'y Gen. p. 137.

Effect of reprieve. — A reprieve is the withdrawing of any sentence for an inter-

val of time, it does no more than stay the execution of the sentence for a period of time. 1957 Op. Att’y Gen. p. 200.

Reprieve for purpose of medical treatment. — Board may, in its discretion, grant a reprieve of a sentence for a specified period of time to enable a prisoner to obtain medical treatments outside of the confines of a state penal institution. 1967 Op. Att’y Gen. No. 67-205.

When prisoner under reprieve may leave state for medical treatment. — Board may not permit a prisoner to leave the state under a reprieve order so long as board’s own rule prohibits such practice; however, there is no constitutional or statutory provision which would prevent the board from granting a reprieve, for medical purposes, when the members of the board know that the prisoner intends to leave the state for the purpose of securing medical treatment if the board changed its rule. 1967 Op. Att’y Gen. No. 67-205.

Effect of medical treatment on sentence. — Where a prisoner receives a reprieve of the prisoner’s sentence for the purpose of receiving medical treatment,

the prisoner’s sentence does not run during the time the prisoner is outside the penitentiary. 1957 Op. Att’y Gen. p. 200.

Constitutional limitations on power of Board of Pardons and Paroles. — As of January 1, 1995, there are additional constitutional limitations on the power of the Board of Pardons and Paroles to parole which now are the clear prerogative of the General Assembly to proscribe. They include the inability to parole during the mandatory minimum sentence for the seven serious violent felonies set out in O.C.G.A. § 17-10-6.1, the inability to parole for sentences of life without parole as set out in O.C.G.A. §§ 17-10-7(b)(2) and 17-10-16, and the inability to parole for felony recidivists who are convicted for a fourth or subsequent such offense. Other felons and misdemeanants are required to serve the minimum time prescribed in O.C.G.A. § 42-9-45(b) subject to the authority reserved by statute to the board in O.C.G.A. § 42-9-46 to consider for clemency upon complying with certain notice procedures. 1995 Op. Att’y Gen. No. 95-4.

RESEARCH REFERENCES

C.J.S. — 67A C.J.S., Pardon and Parole, § 1 et seq.
ALR. — Power of executive to pardon one committed for contempt, 23 ALR 524; 26 ALR 21; 38 ALR 171; 63 ALR 226.
Constitutionality of statute conferring on court power to suspend sentence, 26 ALR 399; 101 ALR 402; 109 ALR 1048; 132 ALR 819; 158 ALR 1315.
Consent of convict as essential to a pardon, commutation or reprieve, 52 ALR 835.
Pardon as affecting previous offenses or punishment therefor, 57 ALR 443.
Power of executive to pardon one committed for contempt, 63 ALR 226.
Pardon as defense to proceeding for

suspension or cancellation of license of physician, surgeon, or dentist, 126 ALR 257.
Pardon as preventing disbarment of attorney or removal of officer or as nullifying disbarment or removal, 143 ALR 172; 70 ALR2d 268.
Offenses and convictions covered by pardon, 35 ALR2d 1261.
Pardon as restoring public office or license or eligibility therefor, 58 ALR3d 1191.
Validity, construction, application, and effect of statute requiring conditions, in addition to expiration of time, for reinstatement of suspended or revoked driver’s license, 2 ALR5th 725.

SECTION III.

STATE PERSONNEL BOARD

Paragraph	Paragraph
I. State Personnel Board.	II. Veterans preference.

Paragraph I. State Personnel Board.

(a) There shall be a State Personnel Board which shall consist of five members appointed by the Governor, subject to confirmation by the Senate. The members of the board in office on June 30, 1983, shall serve out the remainder of their respective terms. As each term of office expires, the Governor shall appoint a successor as herein provided. All such terms of members shall be for five years. Members shall serve until their successors are appointed and qualified. A member of the State Personnel Board may not be employed in any other capacity in state government. A chairman shall be selected by the members of the board from its membership.

(b) The board shall provide policy direction for a State Merit System of Personnel Administration and may be vested with such additional powers and duties as provided by law. State personnel shall be selected on the basis of merit as provided by law.

1976 Constitution. — Art. IV, Sec. VI, Para. I.

Cross references. — Veterans' preference in employment, Ga. Const. 1983, Art.

IV, Sec. III, Para. II. State Merit System of Personnel Administration generally, § 45-20-1 et seq.

JUDICIAL DECISIONS

General Assembly was authorized to provide systems for public employment. — Ga. Const. 1983, Art. IV, Sec. III, Para. I left it to the General Assembly to create a state merit system by the enactment of laws regarding selection of state personnel based on merit; legislation providing systems for public employment was subject to amendment or even repeal, and so the 1996 and 2000 amendments to O.C.G.A. § 45-20-2(15) (see paragraph (12)) were not unconstitutional. *SEIU v. Perdue*, 280 Ga. 379, 628 S.E.2d 589 (2006).

Director was employee not official.

— Summary judgment for community service board on a former executive director's breach of employment contract claim was reversed because the trial court erred in determining that the director was an official instead of an employee under the State of Georgia Merit Protection System; community service boards constituted state agencies as local units of the Department of Human Resources, and any state agency expressly had the power to contract on any subject matter within the agency's interest. *Ashe v. Clayton County Cmty. Serv. Bd.*, 262 Ga. App. 738, 586 S.E.2d 683 (2003) (Unpublished).

OPINIONS OF THE ATTORNEY GENERAL

Employment as attorney for private client prohibited. — A member of the State Personnel Board is prohibited from representing a private client for a fee in a court of law or in any other

adversarial proceeding where such representation might defeat the official public actions of another public officer. 1991 Op. Att'y Gen. 91-25.

RESEARCH REFERENCES

C.J.S. — 67 C.J.S., Officers and Public Employees, § 66.

ineligibility to office is to be determined, 143 ALR 1026.

ALR. — Time as of which eligibility or

Paragraph II. Veterans preference.

Any veteran who has served as a member of the armed forces of the United States during the period of a war or armed conflict in which any branch of the armed forces of the United States engaged, whether under United States command or otherwise, and was honorably discharged therefrom, shall be given such veterans preference in any civil service program established in state government as may be provided by law. Any such law must provide at least ten points to a veteran having at least a 10 percent service connected disability as rated and certified by the Veterans Administration, and all other such veterans shall be entitled to at least five points.

1976 Constitution. — Art. IV, Sec. VI, Para. II.

§ 43-1-9. Veterans preference in scoring civil service examinations, §§ 45-2-21, 45-2-22.

Cross references. — Veterans preference before state examining boards,

JUDICIAL DECISIONS

Policy behind paragraph. — Veterans' preference has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations. *Boykin v. Strickland*, 245 Ga. 294, 264 S.E.2d 225 (1980); *Dash v. De-*

partment of Human Resources, 153 Ga. App. 633, 266 S.E.2d 305 (1980).

Public policy supporting reasonableness of class preference for veterans applies equally to hiring and layoffs. *Boykin v. Strickland*, 245 Ga. 294, 264 S.E.2d 225 (1980).

Cited in *Brown v. State Merit Sys. of Personnel Admin.*, 245 Ga. 239, 264 S.E.2d 186 (1980).

OPINIONS OF THE ATTORNEY GENERAL

No conflict between paragraph and sections providing for licensure examinations. — There is no conflict between the preference in employment granted veterans under this paragraph, and the extra points granted to veterans when taking licensure examinations offered by the various state examining boards under Ga. L. 1968, p. 1213, § 1 (see now O.C.G.A. § 43-1-9, et seq.), since the two provisions speak of separate types of veterans' preferences. 1978 Op. Att'y

Gen. No. 78-69. (see Ga. Const. 1983, Art. IV, Sec. III, Para. II).

First prerequisite in determining veteran's eligibility under this paragraph is his or her service. 1945-47 Op. Att'y Gen. p. 469. (see Ga. Const. 1983, Art. IV, Sec. III, Para. II).

Preferences under federal civil service laws. — This paragraph is sufficiently broad in scope and intent to embrace within it all persons accorded preferences under the provisions of the

federal civil service laws. 1945-47 Op. Att'y Gen. p. 469. (see Ga. Const. 1983, Art. IV, Sec. III, Para. II).

Change in veterans' preference rules. — Absolute veterans' preference in reductions-in-force in the classified service of the state merit system can constitutionally be amended only by appropriate action of the General Assembly. 1982 Op. Att'y Gen. No. 82-48.

The General Assembly has authority to decrease or otherwise amend current vet-

erans' preference in reduction-in-force situations and such amendment could affect both current and future employees. 1982 Op. Att'y Gen. No. 82-88.

Including wives and widows. — The preference under state civil service systems accorded veterans by this paragraph includes wives of disabled veterans and widows of deceased veterans. 1945-47 Op. Att'y Gen. p. 469. (see Ga. Const. 1983, Art. IV, Sec. III, Para. II).

RESEARCH REFERENCES

C.J.S. — 81A C.J.S., States, §§ 193, 194.

ALR. — Character of service or connection with military or naval service necessary to entitle one to benefit of veterans'

preference statute in relation to civil service, 87 ALR 1002.

Constitutionality of state veterans' public employment preference laws, 161 ALR 494.

SECTION IV.

STATE TRANSPORTATION BOARD

Paragraph

I. State Transportation Board; commissioner.

Paragraph I. State Transportation Board; commissioner.

(a) There shall be a State Transportation Board composed of as many members as there are congressional districts in the state. The member of the board from each congressional district shall be elected by a majority vote of the members of the House of Representatives and Senate whose respective districts are embraced or partly embraced within such congressional district meeting in caucus. The members of the board in office on June 30, 1983, shall serve out the remainder of their respective terms. The General Assembly shall provide by law the procedure for the election of members and for filling vacancies on the board. Members shall serve for terms of five years and until their successors are elected and qualified.

(b) The State Transportation Board shall select a commissioner of transportation, who shall be the chief executive officer of the Department of Transportation and who shall have such powers and duties as provided by law.

1976 Constitution. — Art. IV, Sec. VIII, Para. I.

Cross references. — State Transportation Board generally, § 32-2-20 et seq.

JUDICIAL DECISIONS

Cited in *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510 (1970); *Outdoor Adv. Ass'n v. DOT*, 186 Ga. App. 550, 367 S.E.2d 827 (1988).

OPINIONS OF THE ATTORNEY GENERAL

There must be a commissioner of transportation duly elected and qualified, in order to carry on certain functions of the Department of Transportation as its chief executive officer. 1970 Op. Att'y Gen. No. 70-198.

RESEARCH REFERENCES

ALR. — Legislative power to prescribe qualifications for or conditions of eligibility to constitutional office, 34 ALR2d 155. Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved, 91 ALR 242.

SECTION V.

VETERANS SERVICE BOARD

Paragraph

I. Veterans Service Board; commissioner.

Paragraph I. Veterans Service Board; commissioner.

(a) There shall be a State Department of Veterans Service and Veterans Service Board which shall consist of seven members appointed by the Governor, subject to confirmation by the Senate. The members in office on June 30, 1983, shall serve out the remainder of their respective terms. As each term of office expires, the Governor shall appoint a successor as herein provided. All such terms of members shall be for seven years. Members shall serve until their successors are appointed and qualified.

(b) The board shall appoint a commissioner who shall be the executive officer of the department. All members of the board and the commissioner shall be veterans of some war or armed conflict in which the United States has engaged. The board shall have such control, duties, powers, and jurisdiction of the State Department of Veterans Service as shall be provided by law.

1976 Constitution. — Art. IV, Sec. V, Veterans Service and Veterans Service Board, § 38-4-1 et seq.
Para. I.

Cross references. — Department of

JUDICIAL DECISIONS

Cited in Goebel v. Hodges, 83 Ga. App. 574, 64 S.E.2d 207 (1951); Toombs v. Fortson, 241 F. Supp. 65 (N.D. Ga. 1965).

OPINIONS OF THE ATTORNEY GENERAL

Compensation of Veterans Service Board must be determined by General Assembly. 1954-56 Op. Att'y Gen. p. 635.

RESEARCH REFERENCES

ALR. — Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.

SECTION VI.

BOARD OF NATURAL RESOURCES

Paragraph

I. Board of Natural Resources.

Paragraph I. Board of Natural Resources.

(a) There shall be a Board of Natural Resources which shall consist of one member from each congressional district in the state and five members from the state at large, one of whom must be from one of the following named counties: Chatham, Bryan, Liberty, McIntosh, Glynn, or Camden. All members shall be appointed by the Governor, subject to confirmation by the Senate. The members of the board in office on June 30, 1983, shall serve out the remainder of their respective terms. As each term of office expires, the Governor shall appoint a successor as herein provided. All such terms of members shall be for seven years. Members shall serve until their successors are appointed and qualified. Insofar as it is practicable, the members of the board shall be representative of all areas and functions encompassed within the Department of Natural Resources.

(b) The board shall have such powers and duties as provided by law.

1976 Constitution. — Art. IV, Sec. IV, Para. I.

Cross references. — Department of Natural Resources, Ch. 2, T. 12.

Law reviews. — For note, "Regulation

of Artificial Lakes and Recreational Subdivisions in Georgia," recommending methods for future regulation, see 8 Ga. St. B.J. 580 (1972).

JUDICIAL DECISIONS

Cited in *Stephens v. Stewart*, 118 Ga. App. 811, 165 S.E.2d 572 (1968); *Young v. Young*, 252 Ga. 564, 315 S.E.2d 878 (1984).

RESEARCH REFERENCES

C.J.S. — 81A C.J.S., States, § 84. ineligibility to office is to be determined,
ALR. — Time as of which eligibility or 143 ALR 1026.

SECTION VII.

QUALIFICATIONS, COMPENSATION, REMOVAL
FROM OFFICE, AND POWERS AND DUTIES
OF MEMBERS OF CONSTITUTIONAL
BOARDS AND COMMISSIONS

Paragraph	Paragraph
I. Qualifications, compensation, and removal from office.	II. Powers and duties.

Paragraph I. Qualifications, compensation, and removal from office.

The qualifications, compensation, and removal from office of members of constitutional boards and commissions provided for in this article shall be as provided by law.

1976 Constitution. — Art. IV, Sec. I, Para. I; Art. IV, Sec. II, Para. I; Art. IV, Sec. IV, Para. I; Art. IV, Sec. V, Para. I; Art. IV, Sec. VIII, Para. I.	amendment (Ga. L. 1997, p. 1713) creating the Georgia Citizens Commission on Compensation of Public Officials was defeated at the 1998 November general election.
Editor’s notes. — The constitutional	

Paragraph II. Powers and duties.

The powers and duties of members of constitutional boards and commissions provided for in this article, except the Board of Pardons and Paroles, shall be as provided by law.

1976 Constitution. — Art. IV, Sec. I, Para. I; Art. IV, Sec. IV, Para. I; Art. IV, Sec. V, Para. I; Art. IV, Sec. VIII, Para. I.

JUDICIAL DECISIONS

O.C.G.A. § 17-10-16, the life-without-parole statute, does not violate the separation of powers doctrine because it imposes legislative restrictions on the Board of Pardons and Paroles to grant	parole. <i>Freeman v. State</i> , 264 Ga. 27, 440 S.E.2d 181 (1994). Cited in <i>Charron v. State Bd. of Pardons & Paroles</i> , 253 Ga. 274, 319 S.E.2d 453 (1984).
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SECTION VIII.

GEORGIA CITIZENS COMMISSION ON COMPENSATION
OF PUBLIC OFFICIALS

Editor's notes. — The constitutional amendment (Ga. L. 1997, p. 1713) creating the Georgia Citizens Commission on

Compensation of Public Officials was defeated at the 1998 November general election.

ARTICLE V.

EXECUTIVE BRANCH

Section

- I. Election of Governor and Lieutenant Governor.
- II. Duties and Powers of Governor.
- III. Other Elected Executive Officers.
- IV. Disability of Executive Officers.

Law reviews. — For article, “State Government: Organization of the Executive Branch Generally,” see 29 Ga. St. U.L. Rev. 162 (2012).

SECTION I.

ELECTION OF GOVERNOR AND LIEUTENANT GOVERNOR

Paragraph

- I. Governor: term of office; compensation and allowances.
- II. Election for Governor.
- III. Lieutenant Governor.

Paragraph

- IV. Qualifications of Governor and Lieutenant Governor.
- V. Succession to executive power.
- VI. Oath of office.

Law reviews. — For note, “Perdue v. Baker: Who Has the Ultimate Power over Litigation on Behalf of the State of Georgia — the Governor or the Attorney General?,” see 21 Ga. St. U.L. Rev. 751 (2005).

Paragraph I. Governor: term of office; compensation and allowances.

There shall be a Governor who shall hold office for a term of four years and until a successor shall be chosen and qualified. Persons holding the office of Governor may succeed themselves for one four-year term of office. Persons who have held the office of Governor and have succeeded themselves as hereinbefore provided shall not again be eligible to be elected to that office until after the expiration of four years from the conclusion of their term as Governor. The compensation and allowances of the Governor shall be as provided by law.

1976 Constitution. — Art. V, Sec. I, Para. I.

Editor’s notes. — The constitutional amendment (Ga. L. 1997, p. 1713) creating the Georgia Citizens Commission on Compensation of Public Officials was de-

feated at the 1998 November general election.

Cross references. — Salaries of public officers and employees generally, Ch. 7, T. 45. Governor generally, Ch. 12, T. 45.

JUDICIAL DECISIONS

Provision of this paragraph allowing Governor to succeed position in office will be given its plain and unambiguous meaning. *Irwin v. Busbee*, 241 Ga. 567, 247 S.E.2d 103 (1978) (see Ga. Const. 1983, Art. V, Sec. I, Para. I).

Removal of public officer. — Provision of Ga. Const. 1983, Art. V, Sec. II, Para. I that executive power shall be vested in a Governor does not imply authority in the Governor to remove a public

officer during the officer's tenure of office. *Holder v. Anderson*, 160 Ga. 433, 128 S.E. 181 (1925) (decided under Ga. Const. 1976, Art. V, Sec. II, Para. VIII).

Cited in *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947); *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595 (1970); *Henderson v. Maddox*, 227 Ga. 195, 179 S.E.2d 770 (1971); *Frier v. City of Douglas*, 233 Ga. 775, 213 S.E.2d 607 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Purpose of succession provision. — The provision that the Governor shall hold office for a term of four years and until a successor shall be chosen and qualified was a recognition by the framers of the Constitution that contingencies might happen which had not been specifically dealt with, the purpose being to avoid a vacancy in office when such contingency occurred. 1945-47 Op. Att'y Gen. p. 302.

Extended tenure until successor chosen and qualified. — This paragraph imposes upon incumbent Governor obligation of extended tenure of office until the Governor's successor has been chosen and qualified. 1965-66 Op. Att'y Gen. No. 66-256. (see Ga. Const. 1983, Art. V, Sec. I, Para. I).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Governor, § 1.

C.J.S. — 81A C.J.S., States, § 211 et seq.

ALR. — Construction and effect of constitutional or statutory provisions disqualifying one for public office because of previous tenure of office, 59 ALR2d 716.

Paragraph II. Election for Governor.

An election for Governor shall be held on Tuesday after the first Monday in November of 1986, and the Governor-elect shall be installed in office at the next session of the General Assembly. An election for Governor shall take place quadrennially thereafter on said date unless another date be fixed by the General Assembly. Said election shall be held at the places of holding general elections in the several counties of this state, in the manner prescribed for the election of members of the General Assembly, and the electors shall be the same.

1976 Constitution. — Art. V, Sec. I, Para. II.

Cross references. — When elections

to be held, § 21-2-9. Responsibilities of General Assembly in installation of Governor, § 45-12-1.

JUDICIAL DECISIONS

Cited in Wood v. Arnall, 189 Ga. 362, 6 S.E.2d 722 (1939); Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883 (1947); Jones v. Fortson, 223 Ga. 7, 152 S.E.2d 847 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Governor, § 2.

Paragraph III. Lieutenant Governor.

There shall be a Lieutenant Governor, who shall be elected at the same time, for the same term, and in the same manner as the Governor. The Lieutenant Governor shall be the President of the Senate and shall have such executive duties as prescribed by the Governor and as may be prescribed by law not inconsistent with the powers of the Governor or other provisions of this Constitution. The compensation and allowances of the Lieutenant Governor shall be as provided by law.

1976 Constitution. — Art. V, Sec. I, Para. VI.

Editor’s notes. — The constitutional amendment (Ga. L. 1997, p. 1713) creating the Georgia Citizens Commission on Compensation of Public Officials was de-

feated at the 1998 November general election.

Cross references. — Election of Lieutenant Governor, § 21-2-9. Salaries and fees for public officers and employees generally, Ch. 7, T. 45.

JUDICIAL DECISIONS

Function of Lieutenant Governor in event of vacancy in office of Governor. — The Lieutenant Governor does not succeed to the office of Governor in the event of a vacancy, rather the executive power devolves upon the Lieutenant Governor so that government can continue to

function until a Governor is chosen by the people as provided by law. Henderson v. Maddox, 227 Ga. 195, 179 S.E.2d 770 (1971).

Cited in Wood v. Arnall, 189 Ga. 362, 6 S.E.2d 722 (1939).

OPINIONS OF THE ATTORNEY GENERAL

Lieutenant Governor is a constitutional officer and is elected in the same manner as the Governor and the other executive officers referred to in Ga. Const. 1976, Art. V, Sec. III, Para. I (see Ga. Const. 1983, Art. V, Sec. III, Para. I). 1948-49 Op. Att’y Gen. p. 161.

Lieutenant Governor is entitled to subsistence and mileage expenses actually incurred in the performance of the Lieutenant Governor’s official business on the same basis as other officers of the state government are paid. 1948-49 Op. Att’y Gen. p. 564.

RESEARCH REFERENCES

C.J.S. — 81A C.J.S., States, § 258. primarily executive or legislative?, 70 ALR. — Is office of lieutenant governor ALR 1095.

Paragraph IV. Qualifications of Governor and Lieutenant Governor.

No person shall be eligible for election to the office of Governor or Lieutenant Governor unless such person shall have been a citizen of the United States 15 years and a legal resident of the state six years immediately preceding the election and shall have attained the age of 30 years by the date of assuming office.

1976 Constitution. — Art. V, Sec. I, Para. VII.

Cross references. — Other disabilities to holding office, Ga. Const. 1983, Art. II, Sec. II, Para. III, Ga. Const. 1983, Art. III,

Sec. II, Para. IV, and §§ 16-10-9, 21-2-7, 21-2-8, 45-2-1 et seq., and 45-5-2. Eligibility for single elective office only, § 21-2-136.

JUDICIAL DECISIONS

Maturity requirement not a violation of equal protection clause. — In light of the fact that the Lieutenant Governor may be called upon to exercise the powers of the office of Governor, a similar maturity requirement for the Lieutenant Governor is eminently reasonable, and the mere fact that other state officers, such as the Attorney General, may serve upon reaching 25, does not render the instant age requirement a violation of the equal protection clause (U.S. Const., amend. 14). *Traylor v. Democratic Party*, 241 Ga. 429, 246 S.E.2d 192 (1978).

Maturity requirement not a violation of right of association. — The fact that a candidate under 30 may not run for

Lieutenant Governor does not deny the first amendment right of association to those voters who might wish to “associate” with such a candidate by voting for that candidate. *Traylor v. Democratic Party*, 241 Ga. 429, 246 S.E.2d 192 (1978).

Function of Lieutenant Governor in event of vacancy in office of Governor. — The Lieutenant Governor does not succeed to the office of Governor in the event of a vacancy, rather the executive power devolves upon the Lieutenant Governor so that the government can continue to function until a Governor is chosen by the people as provided by law. *Henderson v. Maddox*, 227 Ga. 195, 179 S.E.2d 770 (1971).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Governor, § 2.

ALR. — Time as of which eligibility or ineligibility to office is to be determined, 88 ALR 812; 143 ALR 1026.

Nonregistration as affecting one’s qualification to hold public office, 128 ALR 1117.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 ALR3d 1048.

Validity of age requirement for state public office, 90 ALR3d 900.

Paragraph V. Succession to executive power.

(a) In case of the temporary disability of the Governor as determined in the manner provided in Section IV of this article, the Lieutenant Governor shall exercise the powers and duties of the Governor and

receive the same compensation as the Governor until such time as the temporary disability of the Governor ends.

(b) In case of the death, resignation, or permanent disability of the Governor or the Governor-elect, the Lieutenant Governor or the Lieutenant Governor-elect, upon becoming the Lieutenant Governor, shall become the Governor until a successor shall be elected and qualified as hereinafter provided. A successor to serve for the unexpired term shall be elected at the next general election; but, if such death, resignation, or permanent disability shall occur within 30 days of the next general election or if the term will expire within 90 days after the next general election, the Lieutenant Governor shall become Governor for the unexpired term. No person shall be elected or appointed to the office of Lieutenant Governor for the unexpired term in the event the Lieutenant Governor shall become Governor as herein provided.

(c) In case of the death, resignation, or permanent disability of both the Governor or the Governor-elect and the Lieutenant Governor or the Lieutenant Governor-elect or in case of the death, resignation, or permanent disability of the Governor and there shall be no Lieutenant Governor, the Speaker of the House of Representatives shall exercise the powers and duties of the Governor until the election and qualification of a Governor at a special election, which shall be held within 90 days from the date on which the Speaker of the House of Representatives shall have assumed the powers and duties of the Governor, and the person elected shall serve out the unexpired term.

1976 Constitution. — Art. V, Sec. I, Para. VIII.

Cross references. — Power of General Assembly to provide for succession to office of Governor, Ga. Const. 1983, Art. III,

Sec. VI, Para. II. Determination of disability, Ga. Const. 1983, Art. V, Sec. IV, Para. II. Succession for the unexpired term only, § 45-5-3.

JUDICIAL DECISIONS

Declaration by General Assembly of result of election to fill vacancy. — The General Assembly has considered that even as to an election to fill a vacancy in the office of Governor, ascertainment and declaration of the result should be made by that body, according to the regular method of filling the office permanently. *Wood v. Arnall*, 189 Ga. 362, 6 S.E.2d 722 (1939).

Cited in *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947); *Traylor v. Democratic Party*, 241 Ga. 429, 246 S.E.2d 192 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Governor's absence from state does not constitute "disability" under this paragraph. 1967 Op. Att'y Gen. No. 67-293. (see Ga. Const. 1983, Art. V, Sec. I, Para. V).

Lieutenant Governor does not

serve term as Governor while exercising executive powers, but rather the Lieutenant Governor becomes acting Governor until a successor can be elected and qualified to fill the unexpired term of Governor; the person who is elected and

subsequently qualified to fill the unexpired term is specifically referred to in the Constitution as “Governor,” and the person is elected for the unexpired term. 1948-49 Op. Att’y Gen. p. 403.

If Lieutenant Governor does not desire to become candidate for unexpired term of Governor, the Lieutenant Governor is not required to resign the office after having served as acting Governor, but may continue to serve as Lieutenant Governor until the four-year term to which the Lieutenant Governor was elected expires. 1948-49 Op. Att’y Gen. p. 403.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Governor, § 11 et seq.

C.J.S. — 81A C.J.S., States, § 179 et seq.

ALR. — Power to pardon or commute sentence as one which devolves upon the Lieutenant Governor during the absence or disability of the Governor, 32 ALR 1162.

Devolution, in absence of Governor, of veto and approval powers, upon Lieutenant Governor or other officer, 136 ALR 1053.

Paragraph VI. Oath of office.

The Governor and Lieutenant Governor shall, before entering on the duties of office, take such oath or affirmation as prescribed by law.

1976 Constitution. — Art. V, Sec. I, Para. IX.

Cross references. — Requirement that executives of the several states take oath to support Constitution of United States, U.S. Const., art. VI, cl. 3. Penalty for violation of oath, § 16-10-1. Oath generally, §§ 45-3-1, 45-12-4.

SECTION II.

DUTIES AND POWERS OF GOVERNOR

Paragraph	Paragraph
I. Executive powers.	VII. Special sessions of the General Assembly.
II. Law enforcement.	VIII. Filling vacancies.
III. Commander in chief.	IX. Appointments by Governor.
IV. Veto power.	X. Information from officers and employees.
V. Writs of election.	
VI. Information and recommendations to the General Assembly.	

Law reviews. — For article, “The Status of Administrative Agencies under the Georgia Constitution,” see 40 Ga. L. Rev. 1109 (2006).

JUDICIAL DECISIONS

Powers of Governor and Attorney General in litigation. — Construed together, Ga. Const. 1983, Art. V and O.C.G.A. §§ 45-15-3, 45-15-6, 45-15-35, and 45-12-26, do not vest either the Georgia Governor or the Attorney General with the exclusive power to control legal proceedings involving the State of Georgia; instead, the Governor and Attorney General have concurrent powers over litigation.

tion in which the state is a party. *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003).

Powers of governor. — Because, pursuant to Ga. Const. Art. 5, § 2, part of defendant Governor’s job was to ensure the enforcement of Georgia’s statutes, he was properly named as a party in an action challenging the constitutionality of Georgia’s Carry Law, O.C.G.A. § 16-11-127, filed by plaintiff gun owners. *GeorgiaCarry.Org, Inc v. Georgia*, 687 F.3d 1244 (11th Cir. 2012).

Paragraph I. Executive powers.

The chief executive powers shall be vested in the Governor. The other executive officers shall have such powers as may be prescribed by this Constitution and by law.

1976 Constitution. — Art. IV, Sec. VI, Para. I; Art. V, Sec. I, Para. I.

JUDICIAL DECISIONS

Removal of public officer. — Provision that executive power shall be vested in a Governor does not imply authority in the Governor to remove a public officer during tenure of office. *Holder v. Anderson*, 160 Ga. 433, 128 S.E. 181 (1925).

Powers of Governor and Attorney General. — Construed together, Ga. Const. 1983, Art. V and O.C.G.A. §§ 45-15-3, 45-15-6, 45-15-35, and 45-12-26, do not vest either the Georgia Governor or the Attorney General with exclusive power to control legal proceedings involving the State of Georgia; instead, the Governor and Attorney General have concurrent powers over litigation in which the state is a party. *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003).

Paragraph II. Law enforcement.

The Governor shall take care that the laws are faithfully executed and shall be the conservator of the peace throughout the state.

1976 Constitution. — Art. IV, Sec. VI, Para. I; Art. V, Sec. II, Para. II.

JUDICIAL DECISIONS

Authority of Governor to remove public officer. — This paragraph does not imply authority in the Governor to remove a public officer during tenure of office. *Holder v. Anderson*, 160 Ga. 433, 128 S.E. 181 (1925) (see Ga. Const. 1983, Art. V, Sec. II, Para. II).

Cited in *Kryder v. State*, 212 Ga. 272, 91 S.E.2d 612 (1956); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

Paragraph III. Commander in chief.

The Governor shall be the commander in chief of the military forces of this state.

1976 Constitution. — Art. V, Sec. II, Para. I.

Cross references. — Powers of Governor as commander in chief, §§ 38-2-6,

38-2-7, 38-2-110, 38-3-51, and 45-12-27 et seq.

Law reviews. — For note, “Rethinking the Role and Regulation of Private Mili-

tary Companies: What the United States and United Kingdom Can Learn from Shared Experiences in the War on Terror,” see 39 Ga. J. Int’l & Comp. L. 445 (2011).

JUDICIAL DECISIONS

Cited in Maddox v. Fortson, 226 Ga. 71, 172 S.E.2d 595 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d, Military, and Civil Defense, § 27 et seq.

Paragraph IV. Veto power.

Except as otherwise provided in this Constitution, before any bill or resolution shall become law, the Governor shall have the right to review such bill or resolution intended to have the effect of law which has been passed by the General Assembly. The Governor may veto, approve, or take no action on any such bill or resolution. In the event the Governor vetoes any such bill or resolution, the General Assembly may, by a two-thirds’ vote, override such veto as provided in Article III of this Constitution.

1976 Constitution. — Art. V, Sec. II, Paras. VI, VII.

Cross references. — Veto effective against bills passed by two-thirds vote of General Assembly, Ga. Const. 1983, Art. III, Sec. V, Para. XI. Veto ineffective

against proposed Constitution changes, Ga. Const. 1983, Art. X, Sec. I, Para. V. Effective date of Acts, §§ 1-3-4, 1-3-4.1.

Law reviews. — For article, “History of the Veto Power in Georgia,” see 8 Ga. St. B.J. 513 (1972).

JUDICIAL DECISIONS

When bill has been approved, it becomes operative from that date. Walker v. City of Rome, 16 Ga. App. 817, 86 S.E. 658 (1913).

Approval by operation of this paragraph as affecting time of expression of legislative intent. — An Act not approved by the Governor, but which became effective by operation of this paragraph on April 12, must be considered as being a later expression of the legislative intent than an Act passed at the same session, approved on April 10 of the same year, the effective date of which was July 1 of the

next year. Gunn v. Balkcom, 228 Ga. 802, 188 S.E.2d 500 (1972) (see Ga. Const. 1983, Art. V, Sec. II, Para. IV).

Last approved Act of several inconsistent Acts passed on same day controls. Wright v. Overstreet, 122 Ga. 633, 50 S.E. 487 (1905); County of Butts v. Strahan, 151 Ga. 417, 107 S.E. 163 (1921).

Right to veto bill after adjournment based on practice of past executives. Solomon v. Commissioners of Cartersville, 41 Ga. 157 (1870); Temple Baptist Church v. Georgia Term. Co., 128 Ga. 669, 58 S.E. 157 (1907).

Publication of Act in newspaper is unnecessary. Epstin v. Levenson & Co., 79 Ga. 718, 4 S.E. 328 (1887).
Cited in Maddox v. Fortson, 226 Ga. 71, 172 S.E.2d 595 (1970); Keener v. MacDougall, 232 Ga. 273, 206 S.E.2d 519 (1974).

OPINIONS OF THE ATTORNEY GENERAL

Veto power does not permit Governor to change effective date of Act of the General Assembly from one fixed in Act. 1945-47 Op. Att’y Gen. p. 296.

Effect of partial approval of appropriation bill. — The Governor may approve or disapprove any part of an appropriation bill, even though they all are included in the same Act; the parts given approval will be valid and the parts disapproved will be invalid. 1945-47 Op. Att’y Gen. p. 628.

Limitation on veto of individual appropriations. — The Governor’s power to veto individual appropriations does not include the power to reduce an appropriation. 2000 Op. Att’y Gen. No. 2000-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Statutes, § 30 et seq.

C.J.S. — 82 C.J.S., Statutes, § 54 et seq.

ALR. — Vote necessary to pass bill over veto, 2 ALR 1593.

Computation of time allowed for approval or disapproval of bill by governor, 54 ALR 339.

Power of executive to sign bill after adjournment, or during recess of Legislature, 64 ALR 1468.

Is Sunday to be included in computation of period within which bill must be presented to governor?, 71 ALR 1363.

Validity and effect of provision of appropriation bill subjecting expenditure or payment of amounts appropriated to approval of Governor or other officer not otherwise authorized, 91 ALR 1511.

Disapproval by governor of a bill in part or approval with modifications, 99 ALR 1277.

Validity of veto as affected by failure to give reasons for vetoing or objections to measure vetoed, 119 ALR 1189.

Failure of Governor to sign bill until after the date at which it is to become effective, 146 ALR 693.

Paragraph V. Writs of election.

The Governor shall issue writs of election to fill all vacancies that may occur in the Senate and in the House of Representatives.

1976 Constitution. — Art. V, Sec. II, Para. III.

Cross references. — Vacancies in office generally, Ch. 5, T. 45.

Paragraph VI. Information and recommendations to the General Assembly.

At the beginning of each regular session and from time to time, the Governor may give the General Assembly information on the state of the state and recommend to its consideration such measures as the Governor may deem necessary or expedient.

1976 Constitution. — Art. V, Sec. II, Para. III.

Paragraph VII. Special sessions of the General Assembly.

(a) The Governor may convene the General Assembly in special session by proclamation which may be amended by the Governor prior to the convening of the special session or amended by the Governor with the approval of three-fifths of the members of each house after the special session has convened; but no laws shall be enacted at any such special session except those which relate to the purposes stated in the proclamation or in any amendment thereto.

(b) The Governor shall convene the General Assembly in special session for all purposes whenever three-fifths of the members to which each house is entitled certify to the Governor in writing, with a copy to the Secretary of State, that in their opinion an emergency exists in the affairs of the state. The General Assembly may convene itself if, after receiving such certification, the Governor fails to do so within three days, excluding Sundays.

(c) Special sessions of the General Assembly shall be limited to a period of 40 days unless extended by three-fifths' vote of each house and approved by the Governor or unless at the expiration of such period an impeachment trial of some officer of state government is pending, in which event the House shall adjourn and the Senate shall remain in session until such trial is completed.

1976 Constitution. — Art. V, Sec. II, Para. III.

Cross references. — Continuity of

government during emergency, Ga. Const. 1983, Art. III, Sec. VI, Para. II, and §§ 38-3-52 and 38-3-53.

JUDICIAL DECISIONS

Requirement that subject of session be stated in proclamation is imperative; approval by the Governor of an Act enacted at a session, not within the scope of the object stated, cannot make it valid. *Jones v. State*, 151 Ga. 502, 107 S.E. 765 (1921); *McDonald v. State*, 152 Ga. 223, 109 S.E. 656 (1921); *Bibb County v. Williams*, 152 Ga. 489, 110 S.E. 275 (1922).

Exercise of Governor's prerogative to convene General Assembly on extraordinary occasion not reviewable. *Bunger v. State*, 146 Ga. 672, 92 S.E. 72 (1917).

Standing to attack statute as invalid under paragraph. — In an action for mandamus where the duty imposed upon the officer was merely subordinate and ministerial in character, and the act to be performed was not one that was

actually prohibited by the Constitution, and no material personal or property right of the treasurer would be affected by requiring its performance according to the statute, an officer had no interest in defeating the statute, and therefore could not attack it as invalid under this paragraph. *Mallet v. Harper*, 182 Ga. 506, 185 S.E. 798 (1936) (see Ga. Const. 1983, Art. V, Sec. II, Para. VII).

Constitutionality of Near Beer Act. — The Near Beer Act of 1908 (Ga. L. 1908, p. 1112) related to the object stated in the proclamation. *Carroll v. Wright*, 131 Ga. 728, 63 S.E. 260 (1908).

Constitutionality of Liquor Store Act. — The General Assembly did not violate this paragraph in the passage of what is commonly known as the Liquor Store Act (Ga. L. 1937-38, Ex. Sess., p. 103, Art. 3, Ch. 4, T. 3). *Shadrick v.*

Bledsoe, 186 Ga. 345, 198 S.E. 535 (1938) (see Ga. Const 1983, Art. V, Sec. II, Para. VII).

Constitutionality of Act making it duty of trial judge to fix sentence. — Act (Ga. L. 1937-38, Ex. Sess., p. 326, now repealed) making it the duty of the trial judge to fix the sentence in criminal cases,

and giving the judge the power to place the defendant on probation, was related to the object stated in the Governor's proclamation concerning a called session, as "Laws fixing and imposing sentences in criminal cases; and probation of persons convicted." *Williams v. MacFeeley*, 186 Ga. 145, 197 S.E. 225 (1938).

OPINIONS OF THE ATTORNEY GENERAL

Meaning of "three-fifths of members elected." — This paragraph provides for "three-fifths of the members elected" as a prerequisite for the convening of an extraordinary session of the legislature; this necessarily means three-fifths actually elected by the people

to serve as members of the General Assembly, and persons who had resigned or were otherwise disqualified would not detract from the total number previously elected. 1945-47 Op. Att'y Gen. p. 347. (see Ga. Const. 1983, Art. V, Sec. II, Para. VII).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Governor, § 4 et seq. Am. Jur. 2d, States, Territories, and Dependencies, § 46.

C.J.S. — 81A C.J.S., States, §§ 111, 112.

Paragraph VIII. Filling vacancies.

(a) When any public office shall become vacant by death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law; and persons so appointed shall serve for the unexpired term unless otherwise provided by this Constitution or by law.

(b) In case of the death or withdrawal of a person who received a majority of votes cast in an election for the office of Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, or Commissioner of Labor, the Governor elected at the same election, upon becoming Governor, shall have the power to fill such office by appointing, subject to the confirmation of the Senate, an individual to serve until the next general election and until a successor for the balance of the unexpired term shall have been elected and qualified.

1976 Constitution. — Art. IV, Sec. II, Para. I; Art. IV, Sec. IV, Para. I; Art. IV, Sec. V, Para. I; Art. IV, Sec. VI, Para. I; Art. V, Sec. II, Para. IV; Art. V, Sec. III, Para. I.

Cross references. — Determining disability of executive officers, Ga. Const. 1983, Art. V, Sec. IV, Para. II. Vacancies in office generally, see Ch. 5, T. 45. Incapac-

ity of Commissioner of Insurance, § 45-12-23. Filling of vacancy in office for which advice and consent of Senate required, § 45-12-52.

Editor's notes. — The constitutional amendments (Ga. L. 1984, p. 1716, § 1) and (Ga. L. 1988, p. 2100, § 2) which would have revised subparagraph (b) to delete the reference to the State School

Superintendent were defeated at the general elections on November 6, 1984, and on November 8, 1988.

Law reviews. — For article discussing appointment and removal power of Gover-

nor, see 14 Ga. B.J. 171 (1951). For article, “Legislative Delegation of Executive Power of Appointment to Private Organizations Held Unconstitutional,” see 16 Ga. St. B.J. 129 (1980).

JUDICIAL DECISIONS

This paragraph confers no power to create a vacancy by any declaration or judgment that one exists; there must be an actual vacancy before the power or duty of filling it arises. *Patten v. Miller*, 190 Ga. 123, 8 S.E.2d 757 (1940); *Mulcay v. Murray*, 219 Ga. 747, 136 S.E.2d 129 (1964); *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971) (see Ga. Const. 1983, Art. V, Sec. II, Para. VIII).

Paragraph refers only to filling vacancy in office. — Although this paragraph and former Code 1933, § 40-301 (see now O.C.G.A. § 45-12-50) required the Governor to fill vacancies in office by appointment, this requirement did not extend to or embrace filling a vacancy in term, but had reference solely to filling a vacancy in office. *Roan v. Rodgers*, 201 Ga. 696, 40 S.E.2d 551 (1946) (see Ga. Const. 1983, Art. V, Sec. II, Para. VIII).

Quo warranto denied challenging appointment of judges. — Trial court’s denial of the challenger’s petition for a writ of quo warranto was affirmed because the newly created positions on the Georgia Court of Appeals qualified as vacancies under Ga. Const. 1983, Art. VI, Sec. VII, Para. III; thus, the governor had the authority to appoint judges to the vacancies created by amended O.C.G.A. § 15-3-1(a). *Clark v. Deal*, No. S16X0560, 2016 Ga. LEXIS 314 (Apr. 26, 2016).

Intra-county request for judicial assistance. — Requesting and receiving intra-county judicial assistance did not unconstitutionally create a judgeship as the juvenile court judges who assisted the superior court did not become superior court judges; thus, no judicial position constitutionally required to be filled by election under Ga. Const. 1983, Art. VI, Sec. VII, Para. I, or by gubernatorial appointment until election under Ga. Const. 1983, Art. V, Sec. II, Para. VIII, was created by the exercise of O.C.G.A. § 15-1-9.1(b)(2)(C). *Earl v. Mills*, 278 Ga. 128, 598 S.E.2d 480 (2004).

Delegation by General Assembly of power to make appointments unconstitutional. — The General Assembly may, within constitutional limitations, establish qualifications for public office and designate a governmental appointing authority; but it cannot delegate the appointive power to a private organization, thus, where the Medical Association of Georgia, a private organization, controls the appointment of the members of the State Board of Medical Examiners under Ga. L. 1971, p. 689, § 1 (see now O.C.G.A. § 43-34-22) which provides that the Governor must appoint from its nominees, the Act violates this paragraph. *Rogers v. Medical Ass’n*, 244 Ga. 151, 259 S.E.2d 85 (1979) (decided prior to 1997 amendment).

Requirements for effective resignation. — A resignation of a public office, to be effective, must be made with the intention of relinquishing the office, accompanied by the act of relinquishment. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

Requirement that appointee tender undated resignation illegal. — The Governor does not have the constitutional right to create a vacancy in an office by requiring the prospective appointee, either before or immediately after such appointment, to tender an undated resignation from such office, although it was not then contemplated by either party that the resignation would then and there take effect, but might at some remote uncertain day in the future be “accepted” by the Governor. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).

Vacancy in office of Attorney General. — There is no specific provision in the Constitution relating to the manner of filling a vacancy in the office of Attorney General, but this paragraph is sufficiently broad in scope to cover the subject. *Wood v. Arnall*, 189 Ga. 362, 6 S.E.2d 722 (1939) (see Ga. Const. 1983, Art. V, Sec. II, Para. VIII).

Act providing for appointment of additional judge by Governor constitutional. (Ga. L. 1920, p. 96). *Ross v. Jones*, 151 Ga. 425, 107 S.E. 160 (1921).

Cited in *Stanley v. Sims*, 185 Ga. 518, 195 S.E. 439 (1937); *Kaigler v. Floyd*, 187 Ga. 441, 200 S.E. 784 (1939); *Britton v. Bowden*, 188 Ga. 806, 5 S.E.2d 47 (1939);

Stephens v. Reid, 189 Ga. 372, 6 S.E.2d 728 (1939); *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595 (1970); *Perdue v. Palmour*, 278 Ga. 217, 600 S.E.2d 370 (2004); *DeKalb County Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 751 S.E.2d 827 (2013).

OPINIONS OF THE ATTORNEY GENERAL

This paragraph does not extend to or embrace filling vacancy in term, but has reference solely to filling vacancy in office. 1965-66 Op. Att'y Gen. No. 66-231. (see Ga. Const. 1983, Art. V, Sec. II, Para. VIII).

Offices requiring majority vote. — The Secretary of State, Attorney General, State School Superintendent, Commissioner of Agriculture, and Commissioner of Labor must be elected by a majority vote. 1997 Op. Att'y Gen. No. U97-20.

Special election necessary when general election does not fill vacancy. — When there is a failure of election to fill the office in a general election, in the absence of some specific provision of law to the contrary, a special election is necessary to fill the office. 1969 Op. Att'y Gen. No. 69-179.

Governor has the authority to fill the office of State Treasurer (now director of the Office of Treasury and Fiscal Services) if such office is vacated by resignation. 1972 Op. Att'y Gen. No. 72-18.

Duration of appointment to office of director of the Office of Treasury and Fiscal Services. — Since there is no provision in the law providing for mid-term elections to replace resigned State Treasurer (now director of the Office

of Treasury and Fiscal Services), the Governor's appointment of a State Treasurer (now director) would be for the remainder of the unexpired term. 1972 Op. Att'y Gen. No. 72-18.

Withdrawal of elected candidate prior to taking oath. — Where the elected Commissioner of Labor withdrew prior to taking the oath of office and another person was appointed to serve until the next general election in 1992, the proper ballot caption for the office for the 1992 primary and general elections was: "For Commissioner of Labor (To Succeed Al Scott for the Unexpired Term of Joe Tanner, withdrawn)." 1991 Op. Att'y Gen. No. 91-16.

Filling unexpired term of Commissioner of Labor. — Since the Commissioner of Labor is routinely elected at the same time as the Governor and holds his or her office for the same term, an election which must be held to fill the balance of the unexpired term after the Commissioner withdraws is one "that arises from some exigency or special need outside the usual routine," which would be categorized as a "special election" under Georgia law. The Georgia Election Code certainly authorizes, but does not require, a special primary in this situation. 1992 Op. Att'y Gen. No. 92-11.

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Governor, § 6 et seq.

C.J.S. — 81A C.J.S., States, § 177.

ALR. — Conclusiveness of Governor's decision in removing officers, 52 ALR 7; 92 ALR 998.

Validity of delegation to private persons or organizations of power to appoint or nominate to public office, 97 ALR2d 361.

Paragraph IX. Appointments by Governor.

The Governor shall make such appointments as are authorized by this Constitution or by law. If a person whose confirmation is required by the Senate is once rejected by the Senate, that person shall not be renominated by the Governor for appointment to the same office until the expiration of a period of one year from the date of such rejection.

1976 Constitution. — Art. V, Sec. II, Para. V.

Cross references. — Vacancies in of-

fice generally, Ch. 5, T. 45. Filling of vacancy in office for which advice and consent of Senate required, § 45-12-52.

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Cited in DeKalb County Sch. Dist. v. Ga. State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827 (2013).

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Rejection of appointment by Senate. — A person whose appointment has been affirmatively rejected by the Senate is not eligible to be reappointed to succeed oneself in that office for at least one year following the Senate rejection. 2003 Op. Att’y Gen. No. 03-5.

Senate’s declining to consider appointments. — Where the Senate de-

clined to consider and vote on gubernatorial appointments, as to those appointments made pursuant to the Governor’s authority under the Constitution or under O.C.G.A. § 45-12-52(b), because there was no affirmative rejection, the appointees are not disqualified from reappointment. 2003 Op. Att’y Gen. No. 03-5.

Paragraph X. Information from officers and employees.

The Governor may require information in writing from constitutional officers and all other officers and employees of the executive branch on any subject relating to the duties of their respective offices or employment.

1976 Constitution. — Art. V, Sec. II, Para. VIII.

Cross references. — Appointment of replacement officers, Ga. Const. 1983, Art. V, Sec. II, Para. VIII. Ethics and Efficiency

in Government Act, see Ch. 11, T. 28. When offices deemed vacated and filling vacancies, § 45-5-1. Code of ethics for government service, § 45-10-1.

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Qualification for membership. — This paragraph does not include any qualification of membership or any penalty by forfeiture of office for engaging in another business or profession. Partain v. Maddox, 227 Ga. 623, 182 S.E.2d 450 (1971).

Requirement that appointee tender

undated resignation illegal. — The Governor does not have the constitutional right to create a vacancy in an office by requiring the prospective appointee, either before or immediately after such appointment, to tender an undated resignation from such office, although it was not

then contemplated by either party that the resignation would then and there take effect, but might at some remote uncertain day in the future be “accepted” by the

Governor. *Partain v. Maddox*, 227 Ga. 623, 182 S.E.2d 450 (1971).
Cited in *Maddox v. Fortson*, 226 Ga. 71, 172 S.E.2d 595 (1970).

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Availability to Governor of files of State Board of Pardons and Paroles. — It was not the intent of the law that the records of the State Board of Pardons and Paroles be kept secret from the Governor;

files relating to a parole action should be made available to the Governor at the Governor’s request. 1967 Op. Att’y Gen. No. 67-51.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, § 289 et seq.
ALR. — Conclusiveness of governor’s decision in removing officers, 52 ALR 7; 92 ALR 998.

Power to suspend or lay off public officers or employees for a temporary period without pay as an economy and not a disciplinary measure, 111 ALR 432.

SECTION III.

OTHER ELECTED EXECUTIVE OFFICERS

Paragraph	Paragraph
I. Other executive officers, how elected.	and allowances of other executive officers.
II. Qualifications.	IV. Attorney General; duties.
III. Powers, duties, compensation,	

Law reviews. — For note, “Perdue v. Baker: Who Has the Ultimate Power over Litigation on Behalf of the State of Georgia — the Governor or the Attorney General?,” see 21 Ga. St. U.L. Rev. 751 (2005).

Paragraph I. Other executive officers, how elected.

The Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, and Commissioner of Labor shall be elected in the manner prescribed for the election of members of the General Assembly and the electors shall be the same. Such executive officers shall be elected at the same time and hold their offices for the same term as the Governor.

1976 Constitution. — Art. V, Sec. III, Para. I, Art. VI, Sec. X, Para. I.

Cross references. — Election of executive officers generally, Ga. Const. 1983,

Art. V, Sec. I, Para. II, and § 21-2-9.

Editor’s notes. — The constitutional amendments (Ga. L. 1984, p. 1716, § 2) and (Ga. L. 1988, p. 2100, § 3) which

would have revised Paragraph I to delete the reference to the State School Superintendent were defeated at the general elec-

tions on November 6, 1984, and November 8, 1988.

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Distinction between county officers and state executive officers. — Holders of county offices under Ga. Const. 1976, Art. IX, Sec. I, Para. VIII (see Ga. Const. 1983, Art. IX, Sec. I, Para. III), are not executive officers of the state within the meaning of this paragraph. *Houlihan v.*

Saussy, 206 Ga. 1, 55 S.E.2d 557 (1949) (see Ga. Const. 1983, Art. V, Sec. III, Para. I).

Cited in *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947); *State v. Burroughs*, 149 Ga. App. 183, 254 S.E.2d 144 (1979).

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Manner of election of Lieutenant Governor. — Under Ga. Const. 1976, Art. V, Sec. I, Para. VI (see Ga. Const. 1983, Art. V, Sec. I, Para. III), it is clear that the Lieutenant Governor is classified as a constitutional officer and is elected in the same manner as the Governor and the other executive officers referred to in this paragraph. 1948-49 Op. Att’y Gen. p. 161. (see Ga. Const. 1983, Art. V, Sec. III, Para. I).

Duration of appointment to office of director of the Office of Treasury and Fiscal Services. — Since there is no provision in the law providing for mid-term elections to replace a resigned State Treasurer (now director of the Office of Treasury and Fiscal Services), the Governor’s appointment of a State Treasurer (now director of the Office of Treasury and Fiscal Services) would be for the remainder of the unexpired term. 1972 Op. Att’y Gen. No. 72-18.

Filling unexpired term of Commissioner of Labor. — Since the Commissioner of Labor is routinely elected at the same time as the Governor and holds his

or her office for the same term, an election which must be held to fill the balance of the unexpired term after the Commissioner withdraws is one “that arises from some exigency or special need outside the usual routine,” which would be categorized as a “special election” under Georgia law. The Georgia Election Code certainly authorizes, but does not require, a special primary in this situation. 1992 Op. Att’y Gen. No. 92-11.

No duty or authority is conferred upon Commissioner of Agriculture by Constitution; to the contrary, the expressed authority is reserved in the General Assembly to prescribe the duties, authority, and salaries of the executive officers. 1958-59 Op. Att’y Gen. p. 4.

Authority of General Assembly to create autonomous agricultural services. — The General Assembly does not have the authority to abolish the office of the Commissioner of Agriculture, but it has the authority to curtail the activities of the Commissioner of Agriculture by creating autonomous agricultural services. 1958-59 Op. Att’y Gen. p. 4.

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Elections, § 281 et seq. 38 Am. Jur. 2d, Governor, §§ 4, 8.

C.J.S. — 81A C.J.S., States, § 152 et seq.

Paragraph II. Qualifications.

(a) No person shall be eligible to the office of the Secretary of State, Attorney General, State School Superintendent, Commissioner of In-

surance, Commissioner of Agriculture, or Commissioner of Labor unless such person shall have been a citizen of the United States for ten years and a legal resident of the state for four years immediately preceding election or appointment and shall have attained the age of 25 years by the date of assuming office. All of said officers shall take such oath and give bond and security, as prescribed by law, for the faithful discharge of their duties.

(b) No person shall be Attorney General unless such person shall have been an active-status member of the State Bar of Georgia for seven years.

1976 Constitution. — Art. V, Sec. III, Para. IV; Art. VI, Sec. XIII, Para. I.

Cross references. — Disabilities to holding office, Ga. Const. 1983, Art. II, Sec. II, Para. III; Ga. Const. 1983, Art. III, Sec. II, Para. IV; §§ 16-10-9, 21-2-7, and 21-2-8; Ch. 2, T. 45; and § 45-5-2. Qualifications for specific offices, Commissioner of Agriculture, § 2-2-2; State School Su-

perintendent, § 20-2-31; Commissioner of Labor, § 34-2-3. Eligibility for single elective office only, § 21-2-136.

Editor's notes. — The constitutional amendment (Ga. L. 1988, p. 2100, § 4) which would have revised subparagraph (a) to delete the reference to the State School Superintendent was defeated at the general election on November 8, 1988.

JUDICIAL DECISIONS

Age at time of election. — The word “election” as it appears in this provision means the day votes are cast, not the day when they are finally tabulated and certified by the Secretary of State. *Poythress v.*

Moses, 250 Ga. 452, 298 S.E.2d 480 (1983) (decided under Ga. Const. 1976, Art. VI, Sec. XIII, Para. I, relating to qualifications of Attorney General and other officials.).

RESEARCH REFERENCES

ALR. — Time as of which eligibility or ineligibility to office is to be determined, 88 ALR 812; 143 ALR 1026.

Nonregistration as affecting one's qualification to hold public office, 128 ALR 1117.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 ALR3d 1048.

Validity of age requirement for state public office, 90 ALR3d 900.

Paragraph III. Powers, duties, compensation, and allowances of other executive officers.

Except as otherwise provided in this Constitution, the General Assembly shall prescribe the powers, duties, compensation, and allowances of the above executive officers and provide assistance and expenses necessary for the operation of the department of each.

1976 Constitution. — Art. V, Sec. III, Para. II; Art. VI, Sec. X, Para. II.

of public officers and employees generally, Ch. 7, T. 45.

Cross references. — Salaries and fees

JUDICIAL DECISIONS

Cited in *Tucker v. Wilson*, 198 Ga. 474, 31 S.E.2d 657 (1944).

OPINIONS OF THE ATTORNEY GENERAL

Payment of membership dues. — Departments, institutions, or agencies can pay dues and membership fees in various state and national organizations from appropriated funds. 1968 Op. Att’y Gen. No. 68-110.

No duty or authority is conferred upon Commissioner of Agriculture by Constitution; to the contrary, the expressed authority is reserved in the General Assembly to prescribe the duties, au-

thority, and salaries of the executive officers. 1958-59 Op. Att’y Gen. p. 4.

Authority of General Assembly to create autonomous agricultural services. — The General Assembly does not have the authority to abolish the office of the Commissioner of Agriculture, but it has the authority to curtail the activities of the Commissioner of Agriculture by creating autonomous agricultural services. 1958-59 Op. Att’y Gen. p. 4.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Officers and Employees, §§ 298 et seq., 431 et seq.

C.J.S. — 81A C.J.S., States, §§ 206 et seq., 254 et seq.

Paragraph IV. Attorney General; duties.

The Attorney General shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.

1976 Constitution. — Art. VI, Sec. X, Para. II.

Cross references. — Office of Attorney General, Ch. 15, T. 45.

Law reviews. — For annual survey of administrative law, see 38 Mercer L. Rev.

17 (1986). For article, “The Office of the Attorney General of Georgia,” see 23 Ga. St. B.J. 176 (1987). For article, “Researching Georgia Law,” see 34 Ga. St. U.L. Rev. 741 (2015).

JUDICIAL DECISIONS

Legal advice to, and prosecution of, state officers or employees. — There is no conflict between the attorney general’s giving legal advice to officers or employees of the Department of Labor and prosecuting department officers or employees who violate the laws. Such a dual role is authorized. *Brown v. State*, 177 Ga. App. 284, 339 S.E.2d 332 (1985).

Dual role in representation before Health Planning Review Board. —

The Assistant Attorney General fulfilled a constitutionally and statutorily mandated dual role in representing both the State Health Planning and Development Agency and the Health Planning Review Board, but the Assistant Attorney General’s dual role as prosecutor and legal advisor to the Review Board did not taint the opportunity of each party to present its case in full before the Review Board. *North Fulton Community Hosp. v. State*

Health Planning & Dev. Agency, 168 Ga. App. 801, 310 S.E.2d 764 (1983).

Representation of Department of Community Affairs. — The trial court did not err in granting state senator's plea in bar to charges of making a false writing where there was no criminal charge pending, only the knowledge that public monies allocated for one purpose had been expended for another and an attempt to resolve all matters, civil and criminal,

which had occurred between state senator and the Department of Community Affairs (DCA) before the date of the signing of the release and where DCA was represented by the Attorney General in the matter of the DCA grant investigation and release. *State v. Dean*, 212 Ga. App. 724, 442 S.E.2d 830 (1994).

Cited in *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970).

OPINIONS OF THE ATTORNEY GENERAL

When Attorney General becomes active participant in capital felony prosecution. — The Attorney General becomes an active participant in a capital felony prosecution only after an appeal from a conviction for a capital felony has been perfected in the Supreme Court of Georgia. 1968 Op. Att'y Gen. No. 68-171.

Attorney General not authorized to participate in motion for new trial in capital felony prosecution. — Since the motion for a new trial is considered as a preappellate procedure, then until an appeal is perfected in the Supreme Court of Georgia the Attorney General is not authorized to actively participate in these proceedings. 1968 Op. Att'y Gen. No. 68-171.

Duty of Attorney General to represent two agencies suing each other. — The Attorney General may not appoint counsel to permit the Georgia Real Estate Commission to sue the Secretary of State and the joint-secretary of the state examining boards in the use of current appropriations made by the legislature among

the various licensing boards, because serious ethical problems would result since the Attorney General is the legal advisor to the entire executive department of the state government and would be obligated to represent both agencies involved. 1976 Op. Att'y Gen. No. 76-93.

Use of outside legal representation. — The Department of Labor may not employ its own general counsel or otherwise provide itself with legal advice or representation other than through the Attorney General. 1984 Op. Att'y Gen. No. 84-48.

Attorneys employed by state agencies. — Although state agencies may employ persons with legal training and experience to serve as administrative legal service officers, those persons may not provide legal advice or representation to the agency, and no attorney-client relationship or privilege arises between the legal services officer and other agency officers or employees, or the agency itself. 1995 Op. Att'y Gen. No. 95-1.

RESEARCH REFERENCES

Am. Jur. 2d. — 7 Am. Jur. 2d, Attorney General, § 6 et seq.

C.J.S. — 7A C.J.S., Attorney General, § 23 et seq.

ALR. — Right of Attorney General to represent or serve administrative officer or body to exclusion of attorney employed by such officer or body, 137 ALR 818.

SECTION IV.

DISABILITY OF EXECUTIVE OFFICERS

Paragraph

- I. "Elected constitutional executive officer," how defined.
- II. Procedure for determining disability.

Paragraph

- III. Effect of determination of disability.

Cross references. — Filling of vacancies in office generally, Ch. 5, T. 45, and § 45-12-50 et seq.

RESEARCH REFERENCES

C.J.S. — 67 C.J.S., Officers and Public Employees, § 209 et seq. 81A C.J.S., States, § 192 et seq.
ALR. — Power to pardon or commute sentence as one which devolves upon the Lieutenant Governor during the absence or disability of the Governor, 32 ALR 1162.

Paragraph I. "Elected constitutional executive officer," how defined.

As used in this section, the term "elected constitutional executive officer" means the Governor, the Lieutenant Governor, the Secretary of State, the Attorney General, the State School Superintendent, the Commissioner of Insurance, the Commissioner of Agriculture, and the Commissioner of Labor.

1976 Constitution. — Art. V, Sec. IV, Para. I.
Editor's notes. — The constitutional amendments (Ga. L. 1984, p. 1716, § 3) and (Ga. L. 1988, p. 2100, § 5) which would have revised Paragraph I to delete the reference to the State School Superintendent were defeated at the general elections on November 6, 1984, and November 8, 1988.

Paragraph II. Procedure for determining disability.

Upon a petition of any four of the elected constitutional executive officers to the Supreme Court of Georgia that another elected constitutional executive officer is unable to perform the duties of office because of a physical or mental disability, the Supreme Court shall by appropriate rule provide for a speedy and public hearing on such matter, including notice of the nature and cause of the accusation, process for obtaining witnesses, and the assistance of counsel. Evidence at such hearing shall include testimony from not fewer than three qualified physicians in private practice, one of whom must be a psychiatrist.

1976 Constitution. — Art. V, Sec. IV, Para. I.

Paragraph III. Effect of determination of disability.

If, after hearing the evidence on disability, the Supreme Court determines that there is a disability and that such disability is permanent, the office shall be declared vacant and the successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof. If it is determined that the disability is not permanent, the Supreme Court shall determine when the disability has ended and when the officer shall resume the exercise of the powers of office. During the period of temporary disability, the powers of such office shall be exercised as provided by law.

1976 Constitution. — Art. V, Sec. IV, Para. I. power and duties upon finding of temporary disabilities, Ch. 5A, T. 45.

Cross references. — Assumption of

ARTICLE VI.

JUDICIAL BRANCH

- Section
- I. Judicial Power.
 - II. Venue.
 - III. Classes of Courts of Limited Jurisdiction.
 - IV. Superior Courts.
 - V. Court of Appeals.
 - VI. Supreme Court.
 - VII. Selection, Term, Compensation, and Discipline of Judges.
 - VIII. District Attorneys.
 - IX. General Provisions.
 - X. Transition.

Cross references. — Procedure for judge to exercise power outside own court, § 15-1-9.1. State courts of counties, Ch. 7, T. 15. Magistrate courts, Ch. 10, T. 15.

Law reviews. — For article, “An Overview of the New Georgia Constitution,” see 35 Mercer L. Rev. 1 (1983). For annual

survey of law on trial practice and procedure, see 35 Mercer L. Rev. 315 (1983). For article, “See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum,” see 26 Ga. St. U.L. Rev. 361 (2010).

SECTION I.

JUDICIAL POWER

- | Paragraph | Paragraph |
|--|---|
| I. Judicial power of the state. | VI. Judicial circuits; courts in each county; court sessions. |
| II. Unified judicial system. | VII. Judicial circuits, courts, and judgeships, law changed. |
| III. Judges; exercise of power outside own court; scope of term “judge.” | VIII. Transfer of cases. |
| IV. Exercise of judicial power. | IX. Rules of evidence; law prescribed. |
| V. Uniformity of jurisdiction, powers, etc. | X. Authorization for pilot projects. |

JUDICIAL DECISIONS

Magistrate’s power in dispossessory proceeding. — Magistrate court had the authority to enter an order in a dispossessory action directing the landlord to perform repairs to the tenant’s apartment, as a magistrate court was entitled to

exercise such powers as were necessary in aid of its jurisdiction, or to protect or effectuate its judgments. *H. J. Russell & Co. v. Manuel*, 264 Ga. App. 273, 590 S.E.2d 250 (2003).

Paragraph I. Judicial power of the state.

The judicial power of the state shall be vested exclusively in the following classes of courts: magistrate courts, probate courts, juvenile

courts, state courts, superior courts, Court of Appeals, and Supreme Court. Magistrate courts, probate courts, juvenile courts, and state courts shall be courts of limited jurisdiction. In addition, the General Assembly may establish or authorize the establishment of municipal courts and may authorize administrative agencies to exercise quasi-judicial powers. Municipal courts shall have jurisdiction over ordinance violations and such other jurisdiction as provided by law. Except as provided in this paragraph and in Section X, municipal courts, county recorder’s courts and civil courts in existence on June 30, 1983, and administrative agencies shall not be subject to the provisions of this article. The General Assembly shall have the authority to confer “by law” jurisdiction upon municipal courts to try state offenses. (Ga. Const. 1983, Art. 6, § 1, Para. 1; Ga. L. 1990, p. 2440, § 1/HR 861.)

1976 Constitution. — Art. VI, Sec. I, Para. I; Art. VI, Sec. IV, Para. XI; Art. VI, Sec. VI, Para. I; Art. VI, Sec. VII, Para. I.

Cross references. — State courts, § 15-7-1 et seq. Magistrate courts, § 15-10-1 et seq.

Editor’s notes. — The constitutional amendment (Ga. L. 1990, p. 2440, § 1) which added the last sentence was approved by a majority of the qualified voters voting at the general election held on November 6, 1990.

Law reviews. — For article, “Court Reform in the Twentieth Century: A Critique of the Court Unification Controversy,” see 27 Emory L.J. 559 (1978). For annual survey on criminal law and procedure, see 42 Mercer L. Rev. 141 (1990). For article, “The City Court of Atlanta and the 1983 Georgia Constitution: Is the Judicial Engine Souped Up or Blown Up?,” see 15 Ga. St. U.L. Rev. 941 (1999).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
POWERS OF LEGISLATURE
PROBATE COURTS

General Consideration

Distinction between legislative and judicial functions. — Legislative power is that which declares what the law shall be; judicial is that which declares what law is, and applies it to past transactions and existing cases; the one makes the law, the other expounds and judicially administers it; the one prescribes a rule of civil conduct, the other interprets and enforces it in a case in litigation. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

Intra-county request for judicial assistance did not create class of court. — Intra-county request for judicial assistance under O.C.G.A. § 15-1-9.1(b)(2)(C) did not create a separate court, but was a

constitutionally-permitted request for intra-county judicial assistance where the request and the response set out the matters to be handled by the two juvenile court judges who had agreed to assist the superior court; accordingly, the intra-county request and response were neither an unconstitutional creation of a class of court in violation of Ga. Const. 1983, Art. VI, Sec. I, Para. I, nor an unconstitutional usurpation of legislative authority by members of the judiciary in violation of Ga. Const. 1983, Art. VI, Sec. I, Para. VII. *Earl v. Mills*, 278 Ga. 128, 598 S.E.2d 480 (2004).

Determining the meaning of the Constitution is the exclusive function of the courts. *Thompson v. Talmadge*,

General Consideration (Cont'd)

201 Ga. 867, 41 S.E.2d 883 (1947).

If any department of government, including the judiciary, acts beyond bounds of its authority, such action is void. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

Legislation may not give court's power to agency. — Trial court properly ruled that O.C.G.A. § 17-10-6, which authorized the Georgia Sentence Review Panel to review and reduce sentences, was unconstitutional as the Georgia General Assembly does not have the constitutional authority to divest the trial courts of Georgia of their traditional jurisdiction over sentencing by creating a quasi-appellate tribunal (such as the Panel) to review and alter the otherwise lawful sentences imposed by those trial courts. *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008).

For distinction between courts and administrative agencies, see *Bentley v. Chastain*, 242 Ga. 348, 249 S.E.2d 38 (1978).

Courts enumerated in this paragraph are constitutional courts and may not be interfered with by legislation. *Chatham County v. Mulling*, 248 Ga. 878, 286 S.E.2d 735 (1982) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Only state courts may try persons charged with violating state laws. *City of Atlanta v. Landers*, 212 Ga. 111, 90 S.E.2d 583 (1955).

Cost of enforcement of state law cannot be considered in administration of justice. *City of Atlanta v. Landers*, 212 Ga. 111, 90 S.E.2d 583 (1955).

Action by judges during judicial convention. — Passage of rule of practice by judges of the superior courts in convention cannot be classified as exercise of "judicial power". *Moyers v. State*, 186 Ga. 446, 197 S.E. 846 (1938).

Judiciary has no authority to review internal procedure of legislature. — If in the exercise of power to enact laws, the General Assembly merely fails to observe certain rules of internal procedure, the judiciary would not be authorized to review such action, and the same would be true as to any action of the

officers of that body within the sphere of their jurisdiction. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

Constitution does not fix salary of ordinary (now probate judge), which is paid out of the county treasury. *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949).

Validity of title to office created by law is a judicial question. *Thompson v. Talmadge*, 201 Ga. 867, 41 S.E.2d 883 (1947).

Power to create additional positions on municipal court is not conferred upon municipal court judge, but lies at discretion of the county commission. The judge of the municipal court has only the power to recommend individuals to fill court positions. *Chatham County v. Mulling*, 248 Ga. 878, 286 S.E.2d 735 (1982).

Failure to consider need for judge pro tempore may be abuse of discretion. — Failure of a county commissioner to consider the need of a municipal court for a judge pro tempore and additional deputies where municipal court was overburdened and understaffed amounted to an arbitrary and capricious gross abuse of discretion and a failure to exercise the discretion required by law. *Chatham County v. Mulling*, 248 Ga. 878, 286 S.E.2d 735 (1982).

Judge not "policymaker." — A juvenile court judge pro tempore was a state official and, as such, could not be the "official policymaker" responsible for establishing an alleged unconstitutional custom or policy on behalf of a county which was the defendant in a federal civil rights action. *Bendiburg v. Dempsey*, 692 F. Supp. 1354 (N.D. Ga. 1988).

Municipal court jurisdiction over state misdemeanor offenses. — In providing that municipal courts shall have jurisdiction over ordinance violations and such other jurisdiction as provided by law, Ga. Const. 1983, Art. VI, Sec. I, Para. I authorizes the General Assembly to vest municipal courts with jurisdiction over state misdemeanor offenses. *Kolker v. State*, 260 Ga. 240, 391 S.E.2d 391 (1990).

Jurisdiction over foreign plaintiff's contract action. — When an out-of-state seller sued an in-state buyer in Georgia,

despite a provision in the parties' contract for the jurisdiction of the courts of Texas, and the seller did not respond, the courts of Georgia had subject matter jurisdiction under O.C.G.A. § 15-7-4(a)(2); Ga. Const. 1983, Art. VI, Sec. I, Para. I; Ga. Const. 1983, Art. VI, Sec. III, Para. I; and Ga. Const. 1983, Art. VI, Sec. IV, Para. I; the parties waived the forum selection clause by either filing suit in Georgia or not responding. *Euler-Siac S.P.A. (Creamar Spa) v. Drama Marble Co.*, 274 Ga. App. 252, 617 S.E.2d 203 (2005).

City Court of Atlanta does not violate the exclusivity and uniformity provisions. — The City Court of Atlanta, under 1996 Ga. Laws 627, does not violate the exclusivity and uniformity provisions of the Georgia Constitution. The court rejected the defendant's contention that the phrase "system of state courts" found in the preamble of the 1996 Act amounts to an unconstitutional attempt by the General Assembly to place the City Court of Atlanta in the class of "state court," under Ga. Const. 1983, Art. VI, Sec. I, Para. I, while restricting its jurisdiction. *Wickham v. State*, 273 Ga. 563, 544 S.E.2d 439 (2001).

Venue for the Atlanta City Court did not need to be shown to be in Fulton County or DeKalb County as venue was coextensive with city territorial limits and need not be shown to lie in either county. *State v. Walker*, 276 Ga. 756, 585 S.E.2d 77 (2003).

Recorder's court jurisdiction over state misdemeanor traffic offenses. — Under the 1983 Georgia Constitution, the recorder's courts continue to possess limited jurisdiction over state misdemeanor traffic offenses until otherwise provided by law. *Wojcik v. State*, 260 Ga. 260, 392 S.E.2d 525 (1990).

Appeal from violation of city ordinance lies in superior court. — Where uniform traffic citation and complaint form was used to charge an offense in a constitutional city court, but the solicitor general (now district attorney) subsequently amended the form to allege a violation of a city ordinance, jurisdiction of an appeal lay in the superior court rather than the Court of Appeals. *Parnell v. City of Atlanta*, 173 Ga. App. 602, 327 S.E.2d 569 (1985).

Juvenile courts are courts of record; therefore, they are authorized to grant new trials. *In re T.A.W.*, 265 Ga. 106, 454 S.E.2d 134 (1995).

Proof that a criminal offense occurred within the city limits of Atlanta is sufficient to establish venue in the City Court of Atlanta; to the extent that *Walker v. State*, 258 Ga. App. 354 (2002) conflicts with this holding, it is overruled. *Gardner v. State*, 261 Ga. App. 425, 582 S.E.2d 566 (2003).

Superior court judge was state employee. — Trial court did not err in determining that a deceased Georgia superior court judge was a State of Georgia employee but not a county employee for purposes of the exclusive remedy provision under O.C.G.A. § 34-9-11(a) of the Georgia Workers' Compensation Act in a claim by the judge's widow against county sheriffs, arising from the murder of the judge while in a courtroom, as the judge was vested with the judicial power of the State of Georgia under Ga. Const. 1983, Art. VI, Sec. I, Para. I and was defined as a "state official" pursuant to O.C.G.A. § 45-7-4(a)(20) for compensation purposes; the fact that the county asserted that the widow could obtain workers compensation benefits and that it offered her the judge's funeral expenses, both of which sums the widow refused, or that it contributed a supplemental amount to the judge's salary, did not make the judge a county employee. *Freeman v. Barnes*, 282 Ga. App. 895, 640 S.E.2d 611 (2006).

Cited in *Porter v. Calhoun County Bd. of Comm'rs*, 252 Ga. 446, 314 S.E.2d 649 (1984); *Ward v. State*, 188 Ga. App. 372, 373 S.E.2d 65 (1988); *Kolker v. State*, 193 Ga. App. 306, 387 S.E.2d 597 (1989); *Fathers Are Parents Too, Inc. v. Hunstein*, 202 Ga. App. 716, 415 S.E.2d 322 (1992); *Waller v. State*, 231 Ga. App. 323, 498 S.E.2d 362 (1998); *Nguyen v. State*, 282 Ga. 483, 651 S.E.2d 681 (2007); *Hendry v. Hendry*, 292 Ga. 1, 734 S.E.2d 46 (2012).

Powers of Legislature

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. I, Para. I and antecedent provisions, relating to enumeration of courts of the state,

Powers of Legislature (Cont'd)

are included in the annotations for this paragraph.

This paragraph does not authorize legislature to take away jurisdiction of superior courts, given by Ga. Const. 1976, Art. VI, Sec. IV, Para. I (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I). *Williams v. State*, 138 Ga. 168, 74 S.E. 1083 (1912).

Additional terms of superior courts may be created. *Burge v. Mangum*, 134 Ga. 307, 67 S.E. 857 (1910).

Nonuniform city courts may be created. *Western Union Tel. Co. v. Jackson*, 98 Ga. 207, 25 S.E. 264 (1896); *Welborne v. Donaldson*, 115 Ga. 563, 41 S.E. 999 (1902); *Clark v. Black*, 136 Ga. 812, 72 S.E. 251 (1911).

Organization and manner of payment of salaries of judge and officers thereof may be provided for. *Clark v. Eve*, 134 Ga. 788, 68 S.E. 598 (1910); *Clark v. Black*, 136 Ga. 812, 72 S.E. 251 (1911); *Macon, D. & S.R.R. v. Calhoun*, 138 Ga. 165, 74 S.E. 1030 (1912).

This paragraph does not bar creation of tribunals for special purposes but rather authorizes General Assembly to create additional courts. *Tax Assessors v. Chitwood*, 235 Ga. 147, 218 S.E.2d 759 (1975) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

General Assembly's power to prescribe territorial limits. — This paragraph empowers the General Assembly to prescribe territorial limits within which courts may be established and within which the courts shall exercise jurisdiction. *Strickland v. Houston*, 173 Ga. 615, 161 S.E. 262 (1931) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Power to appoint judges cannot be delegated to municipal corporations. — The creation of state courts involves the appointment of judges and court officers; this function cannot be delegated to municipal corporations. *City of Atlanta v. Landers*, 212 Ga. 111, 90 S.E.2d 583 (1955).

Nonelected senior judges. — There is no merit to the argument that the authorization for the service of senior judges conflicts with Ga. Const. 1983, Art.

VI, Sec. I, Para. I, vesting judicial power in designated courts, because creation of the position of senior judge does not establish a separate judicial forum. *Smith v. Langford*, 271 Ga. 221, 518 S.E.2d 884 (1999).

Act granting board of commissioners of county power to fix salary of municipal court judge constitutional. *Feagin v. Freeney*, 192 Ga. 868, 17 S.E.2d 61 (1941).

Power of municipality to punish as municipal offense that which is also state offense must be conferred by general law and the grant of such power must be clearly expressed. Furthermore, the act which the municipality seeks to punish as a municipal offense must be such as affects the peace and good order of the municipality and contain some characterizing ingredient not contained in the state offense. *Gordon v. Green*, 228 Ga. 505, 186 S.E.2d 719 (1972).

Under this paragraph, legislature is authorized to create school courts or school tribunals and confer jurisdiction on them to hear and determine school controversies. *Boatright v. Yates*, 211 Ga. 125, 84 S.E.2d 195 (1954) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Courts to assist in administration of school system. — Under the provisions of this paragraph, the General Assembly is empowered to create a court, or courts, which has jurisdiction of all controversies arising in the administration of the common school system, as created by the School Laws of 1919 (Ga. L. 1919, p. 288), and to give to any party a right to appeal successively from the decision of the county board of education to the State School Superintendent, and from the judgment of the State School Superintendent to the State Board of Education, whose judgment should be final. *Board of Educ. v. Board of Educ.*, 173 Ga. 203, 159 S.E. 712 (1931).

Power of superior court judge to pay attorney fees in capital felony cases. — The legislature by authorizing payment of certain fees and expenses of appointed attorneys in capital felony cases created an expense of court, and the judges of the superior courts have the inherent power and authority to order it

paid out of the county treasury. *Bibb County v. Hancock*, 211 Ga. 429, 86 S.E.2d 511 (1955).

Cases from an abolished county court may be transferred to superior court. *Redd v. Davis*, 59 Ga. 823 (1877).

Inspection of private institutions by grand jury constitutional. — Georgia Laws 1916, p. 126, now repealed, providing for inspection of private sanitariums and convents by members of grand jury, do not violate this paragraph. *Sister Felicitas v. Hartridge*, 148 Ga. 832, 98 S.E. 538 (1919) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Act removing county site valid. *Orr v. James*, 159 Ga. 237, 125 S.E. 468 (1924).

Probate Courts

Editor's notes. — Some of the cases noted under this heading were decided under Ga. Const. 1976, Art. VI, Sec. VI, Para. I and antecedent provisions, relating to the probate court.

Paragraph does not fix salaries. — Although this paragraph provides for the establishment of courts of ordinary (now probate courts), and prescribes their powers and term of office, it does not fix their salary, which is paid out of the county treasury. *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949).

Court of equity to interfere with probate court only when remedies at law inadequate. — While under former Code 1933, § 113-2203 (see now O.C.G.A. § 53-7-160) a court of equity had concurrent jurisdiction with the ordinary (now probate judge) over the settlement of accounts of administrators, and under former Code 1933, § 37-403 (see now O.C.G.A. § 23-2-91) equity, upon the application of an interested person, will assume jurisdiction to prevent loss, yet this paragraph vested in the ordinary (now probate judge) jurisdiction of probate, and, hence, equity would exercise jurisdiction in such matters only when available remedies at law were inadequate. *Hamrick v. Hamrick*, 206 Ga. 564, 58 S.E.2d 145 (1950); *L.L. Minor Co. v. Perkins*, 246 Ga. 6, 268 S.E.2d 637 (1980) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Equity can only exercise its current jurisdiction over the administration of estates when complete and adequate remedies at law are unavailable. *Powell v. Thorsen*, 248 Ga. 697, 285 S.E.2d 699 (1982).

This paragraph confers jurisdiction of subject matter on superior court by consent of parties. *Hartford Accident & Indem. Co. v. Cohran*, 106 Ga. App. 14, 126 S.E.2d 289 (1962) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Appeal to the superior court from preliminary ruling violated this paragraph and former Code 1933, § 113-603 (see now O.C.G.A. § 53-3-1). *Hartley v. Holwell*, 202 Ga. 724, 44 S.E.2d 896 (1947) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Paragraph does not exclude remedy by certiorari. — This paragraph gives the right of appeal from the court of ordinary (now probate court) but does not exclude the remedy by certiorari. *Seagraves v. Powell Co.*, 143 Ga. 572, 85 S.E. 760 (1915) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Where either appeal or certiorari is proper, movant may elect which one to pursue. *Pierce v. Felts*, 146 Ga. 809, 92 S.E. 541 (1917).

Under this paragraph and former Code 1933, § 113-603 (see now O.C.G.A. § 53-3-1) only court of ordinary (now probate court) had original jurisdiction over probate of wills, and the provisions for appeal in such cases were not intended to invade this original jurisdiction. *Hartley v. Holwell*, 202 Ga. 724, 44 S.E.2d 896 (1947) (see Ga. Const. 1983, Art. VI, Sec. I, Para. I).

Court of ordinary (now probate court) has no jurisdiction to determine dire need of widow in action to sell property in which the widow owned life estate. *Castleberry v. Horne*, 220 Ga. 691, 141 S.E.2d 394 (1965).

For jurisdiction of ordinary (now probate judge) over homesteads, see *Dunagan v. Stadler*, 101 Ga. 474, 29 S.E. 440 (1897).

Appeal not authorized. — Ruling by court of ordinary (now probate court) striking some but not all of grounds of caveat to application to probate will is not

Probate Courts (Cont'd)

decision authorizing appeal. *Hartley v. Holwell*, 202 Ga. 724, 44 S.E.2d 896 (1947).

Person who is not qualified voter is not eligible to office of ordinary (now

probate judge). *Lee v. Byrd*, 169 Ga. 622, 151 S.E. 28 (1929).

No distinction needs to be made in pleadings between ordinary (now probate judge) and court of ordinary (now probate court). *Trust Co. v. Smith*, 54 Ga. App. 518, 188 S.E. 469 (1936).

OPINIONS OF THE ATTORNEY GENERAL

Municipal corporations cannot try for state offenses. — The only courts with authority or jurisdiction to try state offenses, or persons charged with violation of state laws, are state courts; the trial of a state case is a function of the state, and municipal corporations have no right to inflict punishment for violations of the criminal laws of this state. 1958-59 Op. Att'y Gen. p. 216.

Juvenile courts cannot require specialized services for handicapped or abused children. — Juvenile courts are without authority to compel state agencies or local school systems to provide or fund specialized services for handicapped or abused children, although a child involved is a handicapped child within the meaning of 20 U.S.C. § 1401 et seq., the Education for All Handicapped Act. 1989 Op. Att'y Gen. No. U89-6.

Judge of probate court is both judicial and county officer. 1948-49 Op. Att'y Gen. p. 482.

Judge of probate court not qualified also to hold public office of county attorney; it is self-evident that the duties of the two public offices in many instances would be conflicting and would be incompatible. 1962 Op. Att'y Gen. p. 61.

A probate court may exercise state

judicial power over misdemeanor traffic offenses occurring within the corporate limits of a municipal corporation where the charter of the municipal corporation authorizes a municipal court but no such court is in existence. The arresting officer in a misdemeanor traffic case is responsible for returning those charges to the proper court with jurisdiction to hear the matter, but, if the citation is erroneously returned to the incorrect court, that court should promptly act to transfer the matter to a court with jurisdiction to consider the charges. 1989 Op. Att'y Gen. No. U89-30.

O.C.G.A. § 40-13-29 does not prohibit the probate court from exercising state judicial power in any county simply because of the existence of a municipal court within the corporate limits of a municipal corporation within that county. 1989 Op. Att'y Gen. No. U89-30.

Probate court judges may not exercise jurisdiction over cases involving possession of one ounce or less of marijuana, either by virtue of Ga. Const. 1976, Art. VI, Sec. IV, Para. XI (see Ga. Const. 1983, Art. VI, Sec. X, Para. I) or by virtue of their undisputed authority over misdemeanor traffic cases. 1981 Op. Att'y Gen. No. 81-25.

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Courts, § 16 et seq.

C.J.S. — 21 C.J.S., Courts, § 164 et seq.

ALR. — Power of court to prescribe rules of pleadings, practice, or procedure, 110 ALR 22; 158 ALR 705.

Paragraph II. Unified judicial system.

All courts of the state shall comprise a unified judicial system.

1976 Constitution. — Art. VI, Sec. I, Para. II.

Cross references. — Uniformity of courts, Ga. Const. 1983, Art. VI, Sec. I, Para. V. Rules of court generally, §§ 15-1-5 and 15-2-18.

Law reviews. — For article, “Regula-

tion of the Legal Profession — Judicial or Legislative?,” see 10 Ga. St. B.J. 589 (1974). For article, “Court Reform in the Twentieth Century: A Critique of the Court Unification Controversy,” see 27 Emory L.J. 559 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Courts, §§ 8 et seq., 65 et seq.

Paragraph III. Judges; exercise of power outside own court; scope of term “judge.”

Provided the judge is otherwise qualified, a judge may exercise judicial power in any court upon the request and with the consent of the judges of that court and of the judge’s own court under rules prescribed by law. The term “judge,” as used in this article, shall include Justices, judges, senior judges, magistrates, and every other such judicial office of whatever name existing or created.

1976 Constitution. — Art. VI, Sec. III, Para. I; Art. VI, Sec. IV, Paras. IX, X; Art. VI, Sec. XIII, Para. II.

Cross references. — Grounds for disqualification, §§ 15-1-8 and 15-1-9. Request for assistance, § 15-1-9.1.

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. IV, Para. X and antecedent provisions, relating to alternating of judges in city courts, state courts, and superior courts, are included in the annotations for this paragraph.

This paragraph applies to only constitutional city courts. Paulk v. State, 2 Ga. App. 660, 58 S.E. 1108 (1907) (see Ga. Const. 1983, Art. VI, Sec. I, Para. III).

Purpose of this paragraph is to avoid delay, expense, and inconvenience when the judge of either court is disqualified to perform any duties which the law places upon that person as judge. McCullough v. McCullough, 208 Ga. 776, 69 S.E.2d 764 (1952) (see Ga. Const. 1983, Art. VI, Sec. I, Para. III).

Paragraph applies only to cases actually pending. Cox v. State, 19 Ga. App. 283, 91 S.E. 422 (1917) (see Ga. Const. 1983, Art. VI, Sec. I, Para. III).

Substitution of judges not restricted as to type of cases. — There is neither language nor implication in this paragraph that restricts the substitution of judges there provided for to any type of cases, to term matters, or to chambers matters. McCullough v. McCullough, 208 Ga. 776, 69 S.E.2d 764 (1952) (see Ga. Const. 1983, Art. VI, Sec. I, Para. III).

When another judge is to be substituted. — Whenever a party to any proceeding makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against the party or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings. Stevens v. Wakefield, 160 Ga. App. 353, 287 S.E.2d 49 (1981), overruled on other grounds, 249 Ga. 254, 290 S.E.2d 58 (1982).

The term “sentencing judge” in O.C.G.A. § 42-8-34(g) refers to the office

and not to the person. *Smith v. State*, 250 Ga. App. 128, 550 S.E.2d 683 (2001), overruled on other grounds, *Lewis v. McDougal*, 276 Ga. 861, 583 S.E.2d 859 (2003).

Objection to appointment of magistrate waived. — Where there was a serious doubt that the purported appointment by a single judge was equivalent to designation “upon the request and with the consent of the judges of that court and of the judge’s own court under rules prescribed by law,” but there was no objection to the appointment of the magistrate to sit as a superior court judge prior to the commencement of the divorce trial upon which appeal was based, the issue was not preserved for appellate review. *Troncone v. Troncone*, 261 Ga. 662, 409 S.E.2d 516 (1991).

Judge of superior court cannot attest affidavit to begin prosecution in city court. *Edmondson v. State*, 123 Ga. 194, 51 S.E. 301 (1905).

Other cases cannot be tried by regular trial judge during time of trial. *Butler v. State*, 112 Ga. 76, 37 S.E. 119 (1900).

Where superior court judge undertakes to preside in case pending in city court in which the regular judge is not disqualified, the trial is a nullity. *Ivey v. State*, 112 Ga. 175, 37 S.E. 398 (1900).

State judge disqualifying self. — Utilization of procedure for reassigning case provided in this paragraph was within discretion of state court judge who disqualified herself; the matter being one of judicial administration, the choice implemented deprived the plaintiffs of nothing to which they were entitled under principles of due process. *Stevens v. Wakefield*, 163 Ga. App. 40, 292 S.E.2d 516 (1982) (see Ga. Const. 1983, Art. VI, Sec. I, Para. III).

Intra-county judicial assistance. — Requesting and receiving intra-county judicial assistance was permitted under Ga. Const. 1983, Art. VI, Sec. I, Para. III, and did not unconstitutionally create a judgeship as the juvenile court judges who assisted the superior court did not become superior court judges; thus, no judicial position constitutionally required to be

filled by election under Ga. Const. 1983, Art. VI, Sec. VII, Para. I, or by gubernatorial appointment until election under Ga. Const. 1983, Art. V, Sec. II, Para. VIII, was created by the exercise of O.C.G.A. § 15-1-9.1(b)(2)(C). *Earl v. Mills*, 278 Ga. 128, 598 S.E.2d 480 (2004).

Valid Act may authorize city court judge to sit in other city courts. *Georgia, Fla. & Ala. Ry. v. Sasser*, 130 Ga. 394, 60 S.E. 997 (1908).

City court judge empowered to preside for superior court county judge. — City Court of Camilla being a constitutional city court, its judge was empowered under this paragraph to preside in place of superior court judge of county. *Galloway v. Mitchell County Elec. Membership Corp.*, 190 Ga. 428, 9 S.E.2d 903 (1940) (see Ga. Const. 1983, Art. VI, Sec. I, Para. III).

Superior court judge emeritus without jurisdiction to certify appeal pursuant to Art. 2, Ch. 6, T. 5 except when authorized. — Because a superior court judge emeritus had not been granted constitutional or statutory authority to serve as a superior court judge, except when the Governor was authorized to call upon the judge to do so or the judge is selected to serve as such in a civil case under the provisions of former Code 1933, §§ 24-2623-24-2626 (see now O.C.G.A. §§ 15-6-13 and 15-6-14), it necessarily follows that a superior court judge emeritus not within these exceptions was wholly without jurisdiction or power to certify a bill of exceptions (see now O.C.G.A. § 5-6-49) in a case tried by a superior court judge. *Chambers v. Wynn*, 217 Ga. 381, 122 S.E.2d 571 (1961) (decided under Ga. Const. 1945, Art. VI, Sec. XIII, Para. II, relating to emeritus justices and judges.).

Nonelected senior judges. — Even though the position of senior judge is not an elected one, Ga. Const. 1983, Art. VI, Sec. I, Para. III allows a senior judge to exercise judicial power in the superior courts when the assistance of a senior judge is necessary. O.C.G.A. §§ 15-1-9.2 and 47-8-61 are simply the statutory enactments pursuant to this constitutional provision. *Smith v. Langford*, 271 Ga. 221, 518 S.E.2d 884 (1999).

Paragraph IV. Exercise of judicial power.

Each court may exercise such powers as necessary in aid of its jurisdiction or to protect or effectuate its judgments; but only the superior and appellate courts shall have the power to issue process in the nature of mandamus, prohibition, specific performance, quo warranto, and injunction. Each superior court, state court, and other courts of record may grant new trials on legal grounds.

1976 Constitution. — Art. I, Sec. I, Para. VIII; Art. VI, Sec. IV, Paras. II, V, VI.

Cross references. — New trial generally, Ch. 5, T. 5. Writs of mandamus, prohibition, and quo warranto, Ch. 6, T. 9.

Law reviews. — For article, “Contempt of Court in Georgia,” see 23 Ga. St. B.J. 66 (1987). For article, “The Civil Jurisdiction of State and Magistrate Courts,” see 24 Ga. St. B.J. 29 (1987).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION NEW TRIAL

General Consideration

Only power and authority given to superior courts to correct errors in inferior courts is by writ of certiorari. Rushing v. City of Plains, 152 Ga. App. 884, 264 S.E.2d 319 (1980).

Power to issue injunctions. — Superior courts are empowered to issue injunctions, Ga. Const. 1983, Art. VI, Sec. I, Para. IV and O.C.G.A. § 15-6-8, and nothing in O.C.G.A. § 48-4-40(1) deprives the superior courts of that power in the arena of redemption of property following a tax sale. Am. Lien Fund, LLC v. Dixon, 286 Ga. 562, 690 S.E.2d 415 (2010).

This paragraph does not give any right to issue distress warrants. Woolsey v. Lawshe, 1 Ga. App. 817, 57 S.E. 1039 (1907) (see Ga. Const. 1983, Art. VI, Sec. I, Para. IV).

Mandate of this paragraph and provisions of former Code 1933, § 64-101 (see now O.C.G.A. § 9-6-20) gave judge of superior court power to issue writs of mandamus, and made it the judge’s duty to do so from any cause whereby a defect of legal justice would ensue if a mandamus was not issued, and if there was no other specific legal remedy. Wofford Oil Co. v. City of Calhoun, 183 Ga. 511, 189 S.E. 5 (1936) (see Ga. Const.

1983, Art. VI, Sec. I, Para. IV).

Rights conferred by this paragraph need not be mentioned in local Act creating city court. Daughtry v. State, 115 Ga. 819, 42 S.E. 248 (1902) (see Ga. Const. 1983, Art. VI, Sec. I, Para. IV).

Enjoining arbitration proceeding on res judicata grounds. — Trial court was empowered to protect a judgment it entered by enjoining an arbitration proceeding on the grounds of res judicata and collateral estoppel. Mitcham v. Blalock, 268 Ga. 644, 491 S.E.2d 782 (1997). But see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Probate court. — Probate court erred by allowing the objections of a bank and a decedent’s parents solely on the basis of adverse title and by denying a year’s support to the widow when the widow failed to meet the resulting burden of proof, because the probate court lacked the jurisdiction under Ga. Const. 1983, Art. VI, Sec. III, Para. I and O.C.G.A. § 15-9-30 to determine that the relevant money-market account and real property were not part of the estate; despite the jurisdictional limitation and the lack of an appropriate objection, the probate court proceeded to conduct a hearing as to the amount necessary for the widow’s sup-

General Consideration (Cont'd)

port, thereby inappropriately placing upon the widow a burden of proof that was contrary to O.C.G.A. § 53-3-7(a) and otherwise lacking in the absence of the jurisdictionally defective objections to the petition. *In re Mahmoodzadeh*, 314 Ga. App. 383, 724 S.E.2d 797 (2012).

Petition seeking to require superior court judge to enter order. — Although there may occasionally appear to be a need to file an original petition in the Supreme Court to issue process in the nature of mandamus, and perhaps quo warranto or prohibition, where a superior court judge is named as the respondent, such as where the petitioner seeks to require the judge to enter an order in a matter allegedly pending more than 30 days in violation of O.C.G.A. § 15-6-21(a), such a petition may in fact be filed in the appropriate superior court. Being the respondent, the superior court judge will disqualify, another superior court judge will be appointed to hear and determine the matter, and the final decision may be appealed to the Supreme Court for review. *Brown v. Johnson*, 251 Ga. 436, 306 S.E.2d 655 (1983).

Excessive fines findings required. — Where the trial court did not make findings regarding, or even specifically mentioning, the factors that must be considered in analyzing an excessive fines claim, vacation and remand for a new order including findings of fact and conclusions of law on those factors was required. *Mitchell v. State*, 236 Ga. App. 335, 511 S.E.2d 880 (1999).

Power to review when question cannot be raised in trial court. — When a question cannot be raised in the trial court, the Court of Appeals has inherent power to review to avoid clear injustice where it appears prejudicial error has occurred necessitating reversal of the trial court's judgment. *Evans v. Belth*, 193 Ga. App. 757, 388 S.E.2d 914 (1989).

Discretion in reviewing allegation of error. — For the purpose of protecting its judgments on appellate review, the Court of Appeals may, in the exercise of sound discretion, elect to review any one or more of the several assertions of error

contained within a single enumeration and to treat the remaining assertions of error therein as abandoned. *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Ga. Const. 1983, Art. VI, Sec. I, Para. IV is not authority for an appellate court to protect an appellate adjudication from further appellate review by declining to reach the merits of an allegation of error sufficiently set forth pursuant to the Appellate Practice Act, O.C.G.A. § 5-6-40 et seq. *Felix v. State*, 271 Ga. 534, 523 S.E.2d 1 (1999).

Appellate court lacked authority to exercise appellate jurisdiction where recent case law made it no longer appropriate for the appellate court to invoke the broad inherent and constitutional power of a court to take those acts necessary in aid of its jurisdiction under Ga. Const. 1983, Art. VI, Sec. I, Para. IV. *St. Paul Reinsurance Co. v. Ross*, 254 Ga. App. 190, 561 S.E.2d 489 (2002).

Order to comply with settlement agreement. — State court order declaring that defendants had not defaulted with respect to a settlement agreement and ordering the parties to comply with the terms of the agreement did not constitute a final judgment where the order did not expressly provide either that the action was dismissed or that plaintiffs receive judgment in accordance with the terms of the agreement. *Zeitman v. McBrayer*, 201 Ga. App. 767, 412 S.E.2d 287 (1991).

Rule to protect appellate judgments. — As a general appellate rule adopted as necessary to protect or effectuate appellate judgments, it is the state of an appellate record and transcript duly before the appellate court at the time of the original disposition of the appeal, and not the state of the record as amended in an attempt to support an appellate position argued on motion for reconsideration, that is controlling as to the adequacy of the record for purposes of appellate review. *Williams v. Food Lion, Inc.*, 213 Ga. App. 865, 446 S.E.2d 221 (1994); *Perimeter Realty v. GAPI, Inc.*, 243 Ga. App. 584, 533 S.E.2d 136 (2000).

Appellate order reinstated. — Trial court's failure to comply with Court of Appeals' order to reach final determina-

tion of the merits of appellant's appeal by the dismissal thereof warranted remand to the superior court for compliance with the directions originally mandated by the court. *Walton v. State*, 207 Ga. App. 787, 429 S.E.2d 158 (1993).

Standing. — Citizen lacked standing to seek to have the State Bar institute disciplinary action against attorney in a case where the Office of General Counsel had decided not to proceed. *Scanlon v. State Bar*, 264 Ga. 251, 443 S.E.2d 830, cert. denied, 513 U.S. 1018, 115 S. Ct. 581, 130 L. Ed. 2d 495 (1994).

Magistrate court lacks injunctive relief authority. — As injunctive relief was only within the jurisdiction of appellate and superior courts, pursuant to Ga. Const. 1983, Art. VI, Sec. I, Para. IV, and magistrate courts had jurisdiction in matters that were not vested in the superior courts, pursuant to O.C.G.A. § 15-10-2, a magistrate court exceeded its authority when it imposed injunctive relief against property owners upon finding that they violated a county zoning ordinance, which allowed the owners to seek relief from the void sentence at any time in the superior court; the owners had illegally operated a paving business on their property, and the magistrate had ordered the removal of all of the paving equipment within a set time in order to avoid a daily fine. *Adams v. Madison County Planning & Zoning*, 271 Ga. App. 333, 609 S.E.2d 681 (2005).

Dismissal of petition for writs of mandamus and prohibition. — In an original action brought before the Supreme Court of Georgia, the Court dismissed a petition for writs of mandamus and prohibition filed by a prosecutor regarding a criminal prosecution because the prosecutor was not entitled to use the writs to circumvent the statutory limitations on the State's ability to appeal under O.C.G.A. §§ 5-7-1 and 5-7-2. *Howard v. Fuller*, No. S08O0357, 2007 Ga. LEXIS 873 (Nov. 30, 2007).

Contempt finding improper. — Order holding an attorney in contempt pursuant to O.C.G.A. § 15-11-5 and otherwise was improper because, inter alia, the trial court immediately imposed punishment and did not provide the attorney the opportunity to speak in the attorney's own

behalf, the attorney was not put on notice that a continuation of the offending conduct would have constituted contempt, it was highly unlikely that the attorney's allegedly offending conduct should have had any impact on the deliberations of the factfinder, a juvenile judge, and the trial court acted without warning and had obviously lost the court's patience with the attorney and the attorney's client and imposed sanctions for contempt when other actions might have achieved the same result without the disruption to the case that these contempt citations had caused. *In re Hughes*, 299 Ga. App. 66, 681 S.E.2d 745 (2009).

Dismissal of petition required under O.C.G.A. § 9-10-14. — Georgia Supreme Court dismissed an inmate's petition for a writ of mandamus because the inmate was not incarcerated in Georgia, thus, the filing requirements of O.C.G.A. § 9-10-14(b) were not applicable to the inmate and the inmate should have filed the petition initially with a Georgia superior court. *Gay v. Owens*, 292 Ga. 480, 738 S.E.2d 614 (2013).

Cited in *Graham v. Cavender*, 252 Ga. 123, 311 S.E.2d 832 (1984); *Talley v. State*, 200 Ga. App. 442, 408 S.E.2d 463 (1991); *Queen v. State*, 207 Ga. App. 138, 427 S.E.2d 107 (1993); *In re Siemon*, 264 Ga. 641, 449 S.E.2d 832 (1994); *Ellerbee v. State*, 215 Ga. App. 312, 450 S.E.2d 443 (1994); *Thorp v. State*, 217 Ga. App. 275, 457 S.E.2d 234 (1995); *Rabern v. State*, 221 Ga. App. 874, 473 S.E.2d 547 (1996); *Waldrip v. Head*, 272 Ga. 572, 532 S.E.2d 380 (2000); *Holmes v. State*, 273 Ga. 644, 543 S.E.2d 688 (2001); *Giles v. Vastakis*, 262 Ga. App. 483, 585 S.E.2d 905 (2003); *Bynum v. State*, 289 Ga. App. 636, 658 S.E.2d 196 (2008); *In re Jefferson*, 283 Ga. 216, 657 S.E.2d 830 (2008); *Clark v. Chapman*, 301 Ga. App. 117, 687 S.E.2d 146 (2009); *Owens v. Hill*, 295 Ga. 302, 758 S.E.2d 794 (2014); *Holman v. State*, 329 Ga. App. 393, 765 S.E.2d 614 (2014).

New Trial

Legislature barred from interfering with courts in power to grant new trials. — This paragraph and Ga. Const. 1976, Art. I, Sec. II, Para. IV (see Ga. Const. 1983, Art. I, Sec. II, Para. III)

New Trial (Cont'd)

constitute insuperable barriers to legislative control or interference with courts in exercise of their powers to grant new trials. *CTC Fin. Corp. v. Holden*, 221 Ga. 809, 147 S.E.2d 427 (1966) (see Ga. Const. 1983, Art. VI, Sec. I, Para. IV).

New trials are granted by superior court as a court, and not by the presiding judge in capacity as a judge. *Allen v. State*, 102 Ga. 619, 29 S.E. 470 (1897).

Municipal courts may hear motions for new trial. — In a dispossessory action, a municipal court erred in holding that it lacked jurisdiction to hear a motion for new trial under O.C.G.A. § 5-5-1. The municipal's court enacting legislation, 1983 Ga. Laws 4453-4454, § 33, as well as Ga. Const. 1983, Art. VI, Sec. I, Para. IV, gave it such jurisdiction. *Nelson v. Powell*, 293 Ga. App. 227, 666 S.E.2d 598 (2008).

No appeal from jury verdict in county court to jury in superior court. — As this section is not self-executing, an appeal does not lie from the verdict of a jury in the county court to a jury in the superior court. *Davison v. Bush*, 8 Ga. App. 34, 68 S.E. 495 (1910) (see Ga. Const. 1983, Art. VI, Sec. I, Para. IV).

Until approval of trial judge is given, a verdict does not become binding in a case where a motion for a new trial contains the general grounds. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Appellate court must assume knowledge on trial judge's part as to duty to approve verdict. — In interpreting the language of an order overruling a motion for a new trial, an appellate court must presume that the trial judge knew the rule as to the obligation to approve the jury's verdict devolving upon the judge, and that in overruling the motion the judge did exercise this discretion, unless the language of the order indicates to the contrary and that the court agreed to the verdict against the judge's own judgment and against the dictates of the judge's own conscience, merely because the judge did not feel that the judge had the duty or authority to override the findings of the jury upon disputed issues of

fact. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Rules of discretion of judge and jury independent of each other. — The rules of law governing (1) the right of the jury to originally fix the damages; (2) the right of the appellate court to grant a new trial where the verdict is alleged to be excessive or inadequate; and (3) the right of a trial judge to grant a new trial where in the judge's discretion the judge thinks the verdict "unfair, unjust, contrary to the evidence, excessive, or too small," exist apart from and independent of each other. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

General rule of noninterference with refusal to order new trial on ground of inadequate damages. — Where a trial judge refuses to order a new trial on the ground of inadequate damages in a tort action, the appellate court will interfere with that discretion only in case of manifest abuse. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Appellate court must approve when no evidence of bias or mistake. — Where the amount of a verdict, though less than an appellate court would have approved, did not afford such evidence of bias, passion, prejudice, or mistake as to justify setting it aside as inadequate, the appellate court must affirm it. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

When jury verdict to be set aside for inadequate damages. — Where the item of damage complained of in a motion for a new trial could only be measured by the enlightened conscience of intelligent jurors, and the amount assessed is substantial, the appellate court ought not to set aside the verdict of the jury on the ground of inadequacy simply because the damages are inadequate, unless it clearly appears that the verdict is so small as to afford evidence of a gross mistake or undue bias, or so small as to support a convincing inference of gross mistake or undue bias, or so small as to justify an inference of gross mistake or undue bias. *Brown v. Service Coach Lines*, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Magistrate courts are not courts of record with the power to grant new

trials; thus, a motion for a new trial in the magistrate court did not toll the time for filing an appeal to state or superior court.

Bowen v. Ball, 215 Ga. App. 640, 451 S.E.2d 502 (1994).

OPINIONS OF THE ATTORNEY GENERAL

Power to order pre-sentence psychological evaluations. — A superior court may order psychological evaluations

of criminal defendants prior to sentencing and at county expense. 1985 Op. Att’y Gen. No. U85-29.

RESEARCH REFERENCES

Am. Jur. 2d. — 14 Am. Jur. 2d, Certiorari, § 1 et seq. 52 Am. Jur. 2d, Mandamus, §§ 1 et seq., 11 et seq.

C.J.S. — 21 C.J.S., Courts, § 1 et seq.

ALR. — Adequacy of remedy by appeal in criminal cases to preclude prohibition sought on the ground of lack or loss of jurisdiction, 141 ALR 1262.

Discretion of appellate court to refuse exercise of its original jurisdiction to issue writs of mandamus, 165 ALR 1431.

Jury trial waiver as binding on later state civil trial, 48 ALR4th 747.

Paragraph V. Uniformity of jurisdiction, powers, etc.

Except as otherwise provided in this Constitution, the courts of each class shall have uniform jurisdiction, powers, rules of practice and procedure, and selection, qualifications, terms, and discipline of judges. The provisions of this Paragraph shall be effected by law within 24 months of the effective date of this Constitution.

1976 Constitution. — Art. VI, Sec. VII, Para. II; Art. VI, Sec. IX, Para. I.

Cross references. — Effective date of Constitution, Ga. Const. 1983, Art. XI, Sec. I, Para. VI.

Law reviews. — For article, “Regula-

tion of the Legal Profession — Judicial or Legislative?,” see 10 Ga. St. B.J. 589 (1974).

For comment on *Jones v. Boykin*, 185 Ga. 606, 196 S.E. 900 (1937), see 1 Ga. B.J. 38 (1939).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
UNIFORMITY
SUPREME COURT PROCEDURE

General Consideration

This paragraph requires uniformity of jurisdiction as to subject matter alone and not over person or territory. *Starnes v. Mutual Loan & Banking Co.*, 102 Ga. 597, 29 S.E. 452 (1897); *Bibb County v. Hancock*, 211 Ga. 429, 86 S.E.2d 511 (1955) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

This paragraph forbids Acts authorizing irregular practices by the superior courts. *Law v. McCord*, 143 Ga. 822, 85 S.E. 1025 (1915) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

Phrase “except as otherwise provided in this Constitution” takes care of any lack of uniformity between single judge and multi-judge circuits. *Fulton*

General Consideration (Cont'd)

County v. Woodside, 222 Ga. 90, 149 S.E.2d 140 (1966).

Uniformity of proceedings and practice in state courts may be established by General Assembly but such uniformity is not required. *McSears v. State*, 247 Ga. 48, 273 S.E.2d 847 (1981).

City Court of Atlanta does not violate the exclusivity and uniformity provisions. — The City Court of Atlanta, under 1996 Ga. Laws 627, does not violate the exclusivity and uniformity provisions of the Georgia Constitution. The court rejected the defendant's contention that the phrase "system of state courts" found in the preamble of the 1996 Act amounts to an unconstitutional attempt by the General Assembly to place the City Court of Atlanta in the class of "state court," under Ga. Const. 1983, Art. VI, Sec. I, Para. V, while restricting its jurisdiction. *Wickham v. State*, 273 Ga. 563, 544 S.E.2d 439 (2001).

Legislature has provided for uniform practice in courts of record by passage of Ga. L. 1966, p. 609, § 1 (see now O.C.G.A. Ch. 11, T. 9) and by providing that it shall apply in all courts of record. The legislature cannot, then, proceed to declare that the practice in some courts of record shall be different. *Gresham v. Symmers*, 227 Ga. 616, 182 S.E.2d 764 (1971).

General Assembly is authorized to reduce juries in state courts from 12 to six without violating this paragraph. *McSears v. State*, 247 Ga. 48, 273 S.E.2d 847 (1981) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

Number of sessions of superior courts may be increased. *Mulherin v. Kennedy*, 120 Ga. 1080, 48 S.E. 437 (1904); *Burge v. Mangum*, 134 Ga. 307, 67 S.E. 857 (1910).

General Assembly cannot strip powers of superior court judge. — General Assembly may not enact any law stripping any superior court judge of jurisdiction and powers conferred upon the judge by the Constitution. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).

Judges of superior court are co-equal in jurisdiction and authority. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).

Magistrate judges and variance by local law. — As the constitution permits selection and terms of offices of magistrate judges to be varied by local law, the provisions of O.C.G.A. §§ 15-10-20, 15-10-23, 15-10-100, 15-10-105 and Ga. L. 1983, p. 4027, are not unconstitutional. *In re Magistrate Court*, 262 Ga. 334, 418 S.E.2d 42 (1992).

Judges in multi-judge circuits have coequal jurisdiction and authority, yet are subject to reasonable rules designed to expedite the business of the court by adopting a manner or method for distribution of the business of the court among the judges. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).

Georgia Constitution does not require random and equal distribution of cases among the judges of a multi-judge circuit; it merely requires certain uniformity among courts. *Lumpkin v. Johnson*, 270 Ga. 392, 509 S.E.2d 621 (1998).

There is no constitutional requirement of uniformity among judges within one court, since the term "courts" refers to the entire court and not to the judge or judges of the court. *Cobb County v. Campbell*, 256 Ga. 519, 350 S.E.2d 466 (1986).

Lawyer serving as superior court judge subject to disbarment. — That a lawyer was also a judge of the superior court and hence a constitutional officer and must have practiced law seven years at the time of the lawyer's election and was prohibited from practicing law while serving as judge, did not mean that the lawyer cannot at the same time be disbarred and the lawyer's license to practice law canceled as was provided in former Code 1933, Ch. 5, T. 9 (see now O.C.G.A. Art. 2, Ch. 19, T. 15). The two proceedings were provided for the accomplishment of entirely different results. Each must be pursued to accomplish the result which it was intended to accomplish. *Gordon v. Clinkscales*, 215 Ga. 843, 114 S.E.2d 15 (1960).

Assignments can restrict authority of judge, but not of courts. — Assign-

ment of nonjury, or criminal, or jury, or other kinds of cases to judge does restrict the judge's authority and powers to that type of cases during that assignment, but this in no way limits, detracts from, or otherwise controls the jurisdiction of the court which is a separate entity from and larger in scope than the judge or judges of that court. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).

Cited in *McDonald v. Vaughn*, 130 Ga. 398, 60 S.E. 1060 (1908); *Meyers v. Whittle*, 171 Ga. 509, 156 S.E. 120 (1930); *Wages v. Morgan*, 174 Ga. 158, 162 S.E. 380 (1932); *Jones v. Boykin*, 185 Ga. 606, 196 S.E. 900 (1938); *Moyers v. State*, 186 Ga. 446, 197 S.E. 846 (1938); *Robert v. Steed*, 207 Ga. 41, 60 S.E.2d 134 (1950); *City of Atlanta v. Sims*, 210 Ga. 605, 82 S.E.2d 130 (1954); *Gordon v. Clinkscales*, 215 Ga. 843, 114 S.E.2d 15 (1960); *Burpee v. Logan*, 216 Ga. 434, 117 S.E.2d 339 (1960); *Simmons v. State*, 226 Ga. 110, 172 S.E.2d 680 (1970); *Sellers v. Home Furnishing Co.*, 235 Ga. 831, 222 S.E.2d 34 (1976); *Hopkins v. Hopkins*, 237 Ga. 845, 229 S.E.2d 751 (1976); *State v. Andrews*, 240 Ga. 531, 242 S.E.2d 153 (1978); *Williams v. Richmond County*, 241 Ga. 89, 243 S.E.2d 55 (1978); *McKeighan v. Long*, 154 Ga. App. 171, 268 S.E.2d 674 (1980).

Uniformity

Editor's notes — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. IX, Para. I and antecedent provisions are included in the annotations for this paragraph.

Superior court has jurisdiction of cases transferred from abolished city court. *Macon, D. & S.R.R. v. Calhoun*, 138 Ga. 165, 74 S.E. 1030 (1912); *Macon, D. & S.R.R. v. Calhoun*, 11 Ga. App. 338, 75 S.E. 343 (1912).

Practice of either City Court of Atlanta or City Court of Savannah may be changed to adapt to existing conditions. *Welborne v. State*, 114 Ga. 793, 40 S.E. 857 (1902).

Right to adapt to existing conditions is subject to the limitation of Ga. Const. 1877, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *Binns v. Ficklen*, 130 Ga.

377, 60 S.E. 1051 (1908).

Justice court and court of notary public are identical. *Western Union Tel. Co. v. Carter*, 11 Ga. App. 499, 75 S.E. 842 (1912).

Civil Court of Fulton County is not subject to rules of uniformity laid down in this paragraph. *McBrayer v. Automobile Fin., Inc.*, 95 Ga. App. 116, 97 S.E.2d 184 (1957) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

Paragraph not violated by Code 1895, § 2372 relating to benevolent institutions. *Kennedy v. Meara*, 127 Ga. 68, 56 S.E. 243 (1906) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

Local Act creating the Municipal Court of Macon and permitting oral charges to the jury does not violate this paragraph. *Robinson v. Odom*, 168 Ga. 81, 147 S.E. 569 (1929) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

Act establishing county criminal courts (Ga. L. 1929, p. 394) does not violate this paragraph. *Jordan v. State*, 172 Ga. 857, 159 S.E. 235 (1931) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

Supreme Court Procedure

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. II, Para. VII and antecedent provisions, relating to the Supreme Court's power to make rules as to hearing and determining cases, are included in the annotations for this paragraph.

Supreme Court had authority under this paragraph to determine cases under such regulations as were prescribed by it. This was so because this paragraph prevailed over former Code 1933, § 24-3801 (see now O.C.G.A. § 15-2-4). *Fuller v. State*, 232 Ga. 581, 208 S.E.2d 85 (1974) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

Validity of laws setting rules of practice and procedure. — The rules of procedure and practice recommended by the Supreme Court pursuant to Ga. L. 1945, p. 145 (see now O.C.G.A. § 15-2-18), are matters over which the legislature has always exercised jurisdiction. This paragraph does not change the jurisdiction but refers only to rules for the operation of the

Supreme Court Procedure (Cont'd)

Supreme Court which the Supreme Court alone can adopt. The 1953 amendment, Ga. L. 1953, Nov.-Dec. Sess. p. 279 (now repealed) is valid. *Gordy v. Dunwody*, 210 Ga. 810, 83 S.E.2d 7 (1954) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

This paragraph does not invest Supreme Court with power to prescribe rules of procedure and practice in trial courts. *Gordy v. Dunwody*, 210 Ga.

810, 83 S.E.2d 7 (1954) (see Ga. Const. 1983, Art. VI, Sec. I, Para. V).

Supreme Court cannot adopt questions presented for review in appellant's brief as being specifications of error since the brief is not a part of the record but a requirement of the court under its authority to make rules for the determination of cases. *Windsor v. Southeastern Adjusters, Inc.*, 221 Ga. 329, 144 S.E.2d 739 (1965).

RESEARCH REFERENCES

ALR. — Construction and application of constitutional provision against special or local laws regulating practice in courts of justice, 135 ALR 365.

Power of court to prescribe rules of pleading, practice, or procedure, 158 ALR 705.

Paragraph VI. Judicial circuits; courts in each county; court sessions.

The state shall be divided into judicial circuits, each of which shall consist of not less than one county. Each county shall have at least one superior court, magistrate court, a probate court, and, where needed, a state court and a juvenile court. The General Assembly may provide by law that the judge of the probate court may also serve as the judge of the magistrate court. In the absence of a state court or a juvenile court, the superior court shall exercise that jurisdiction. Superior courts shall hold court at least twice each year in each county.

1976 Constitution. — Art. VI, Sec. III, Para. I; Art. VI, Sec. IV, Para. VIII; Art. VI, Sec. VI, Para. I.

Cross references. — Superior courts, Ch. 6, T. 15. Probate courts, Ch. 9, T. 15. Magistrate courts, Ch. 10, T. 15. Parental rights in juvenile proceedings, Ch. 11, T. 15.

Law reviews. — For article, "The Selection and Tenure of Judges," see 2 Ga. St. B.J. 281 (1966).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
TIME OF HEARING

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. III, Para. I and antecedent provisions are included in the annotations for this paragraph.

Jurisdiction of superior court judges is coextensive with the limits of this state. *Burge v. Mangum*, 134 Ga. 307, 67 S.E. 857 (1910).

Legislature and judges have no authority to alter superior court jurisdiction. — The Constitution has vested

all the judicial power in the courts of the state, and neither the legislature nor a judge, nor the judges of a superior court have authority to limit or expand the jurisdiction and authority of a superior court. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).

Court may be presided over by more than one judge. — There is only one superior court in each county, but the court may be presided over by more than one judge, and the court may be divided into divisions, each presided over by a different judge. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).

Judges in multi-judge circuits have coequal jurisdiction and authority, yet are subject to reasonable rules designed to expedite the business of the court by adopting a manner or method for distribution of the business of the court among the judges. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).

Judges of the superior court are coequal in jurisdiction and authority. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).

Paragraph does not prohibit increase in number of sittings. — This paragraph requires at least two sittings of the superior court in each county, but does not prohibit more sittings to be held, nor does it prohibit two or more sections of the superior court presided over by different judges sitting at the same time. *Bone v. State*, 86 Ga. 108, 12 S.E. 205 (1890); *Burge v. Mangum*, 134 Ga. 307, 67 S.E. 857 (1910); *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

Special term of court for trial of criminal offenses may be authorized. *Grinad v. State*, 34 Ga. 270 (1866); *Spann v. State*, 47 Ga. 553 (1873).

Court may be presided over by more than one judge. — There is only one superior court in each county, but the court may be presided over by more than one judge, and the court may be divided into divisions, each presided over by a different judge. *Fulton County v.*

Woodside, 222 Ga. 90, 149 S.E.2d 140 (1966).

Judge may receive guilty plea in county other than where crime committed. — A judge of the superior court has jurisdiction under this paragraph to receive a plea of guilty in a county of the judge's circuit other than the county in which the crime is alleged to have been committed. *Thompson v. Lynn*, 215 Ga. 165, 109 S.E.2d 522 (1959) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

Lack of uniformity in disposing of cases permitted. — This paragraph, in stating that the legislature shall have authority to regulate the manner in which the judges in multi-judge circuits shall dispose of the business of the court, permits lack of uniformity in this respect in multi-judge circuits. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

This paragraph is not violated by local Act authorizing sections of the court to sit in certain counties. *Bone v. State*, 86 Ga. 108, 12 S.E. 205 (1890) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

Local Act permitting Governor to appoint judge for a state circuit does not violate this paragraph. *Ross v. Jones*, 151 Ga. 425, 107 S.E. 160 (1921) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

Election held under paragraph not affected by paragraph providing for filling vacancy in unexpired term. — An election held at the time prescribed by this paragraph and Ga. Const. 1976, Art. VI, Sec. III, Para. II (see Ga. Const. 1983, Art. VI, Sec. VII, Para. I) to fill the office for the next ensuing four-year term is not affected by the provisions of Ga. Const. 1976, Art. VI, Sec. III, Para. III (see Ga. Const. 1983, Art. VI, Sec. VII, Para. III), which provide not for the election of a judge for the next ensuing four-year term, but for the filling of a vacancy for the portion of the unexpired term occasioned by the death or resignation of the incumbent. *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

General Consideration (Cont'd)

Cited in *Luangkhot v. State*, 292 Ga. 423, 736 S.E.2d 397 (2013).

Time of Hearing

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. IV, Para. VIII and antecedent provisions, relating to the power of superior courts to hear matters at any time in vacation, or term, are included in the annotations for this paragraph.

This paragraph enlarges jurisdiction of judges of superior court as to hearing and determination of matters in vacation. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

Judge empowered to rule on demurrers (now motions to dismiss) at any time. — Under the broad power conferred by this paragraph, the judges of the superior court are authorized, on reasonable notice to the parties, to hear, determine, and enter a final judgment on demurrers (now motions to dismiss) in vacation, at chambers, at interlocutory hearings, or at any time, whether before or after the appearance day of an action. *Reardon v. Bland*, 206 Ga. 633, 58 S.E.2d 377 (1950) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

Judge may set aside judgment rendered in vacation. — Under the terms of this paragraph the judge is empowered, for sufficient cause and on proper pleading, to vacate and set aside any order or judgment which the judge was theretofore authorized by law to render in vacation and which the judge did actually render during the same vacation period, and to this extent it is self-executing; in such case the judge will act as a court of general jurisdiction where previously the judge's authority or jurisdiction may have been limited or conditional. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

Any judgment authorized by this paragraph may be attended by presumption of regularity. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VI).

Presumption of proper notice operative even when judgment rendered in vacation. — Where the record is silent as to notice, reasonable and proper notice to the parties will be presumed under the principle that any judgment of a court of general jurisdiction will be presumed valid until the contrary appears. This presumption prevails in favor of judgments rendered in vacation, as well as those rendered in term, where the matter so dealt with in vacation was one of which the judge had jurisdiction in vacation to the same extent as in term. *Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur*, 192 Ga. 817, 16 S.E.2d 753 (1941).

Right of new party to preparation time may be waived. — The right of a new party, who was not made a party defendant until the date of trial and judgment, to have the same time within which to prepare for trial as if the new party had been one of the original parties to the cause may be waived. *Barfield v. Aiken*, 209 Ga. 483, 74 S.E.2d 100 (1953).

Parties to mandamus action in which there are issues of fact may waive their right to jury trial either tacitly or expressly. *City of Atlanta v. McLennan*, 240 Ga. 407, 240 S.E.2d 881 (1977).

Waiver of jury trial at first trial of civil case applies to retrials of same case. *City of Atlanta v. McLennan*, 240 Ga. 407, 240 S.E.2d 881 (1977).

Judgment at chambers requires reasonable notice. — The power of the superior courts to determine issues by final judgment at chambers in any county in the judicial circuit when a jury verdict is not required may be exercised only after reasonable notice to the parties. *Hinson v. Hinson*, 218 Ga. 447, 128 S.E.2d 487 (1962).

Cited in *Bush v. Reeves*, No. 1:05-CV-1315-TWT, 2005 U.S. Dist. LEXIS 38050 (N.D. Ga. Dec. 22, 2005).

OPINIONS OF THE ATTORNEY GENERAL

Superior court judges' salaries are within purview of recommendations of State Commission on Compensation. 1971 Op. Att'y Gen. No. 71-173.1.

Judge eligible for emeritus appointment not required to make contribution to retirement fund. — If a superior court judge who is eligible for emeritus appointment is appointed or elected to another office of profit or trust,

the judge is not required to make further contributions to the Superior Court Judges Retirement Fund while holding such other office. 1976 Op. Att'y Gen. No. U76-9.

Since superior court judges are elected officials, they are not covered by workers' compensation law. 1980 Op. Att'y Gen. No. 80-71.

RESEARCH REFERENCES

C.J.S. — 21 C.J.S., Courts, §§ 149, 164, 166, 210.

Paragraph VII. Judicial circuits, courts, and judgeships, law changed.

The General Assembly may abolish, create, consolidate, or modify judicial circuits and courts and judgeships; but no circuit shall consist of less than one county.

1976 Constitution. — Art. VI, Sec. I, Para. II; Art. VI, Sec. III, Para. I; Art. VI, Sec. VII, Para. I; Art. VI, Sec. XVI, Para. I.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. XVI, Para. I and antecedent provisions, which authorized the General Assembly to abolish only those courts which were not specifically mentioned in the Constitution, are included in the annotations for this paragraph.

Legislature cannot abolish or diminish the jurisdiction of courts established by the Constitution; this does not prohibit the legislature from abolishing these courts by merger of counties. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931).

Legislation may not give court's power to agency. — Trial court properly ruled that O.C.G.A. § 17-10-6, which authorized the Georgia Sentence Review Panel to review and reduce sentences, was unconstitutional as the Georgia General

Assembly does not have the constitutional authority to divest the trial courts of Georgia of their traditional jurisdiction over sentencing by creating a quasi-appellate tribunal (such as the Panel) to review and alter the otherwise lawful sentences imposed by those trial courts. *Sentence Review Panel v. Moseley*, 284 Ga. 128, 663 S.E.2d 679 (2008).

Exclusive jurisdiction of the superior court cannot be divested. *Williams v. State*, 138 Ga. 168, 74 S.E. 1083 (1912).

In merging contiguous counties, incidental abolishment of courts permitted. — It is the duty of the court to construe the constitutional provision providing for merger of counties as conferring, by necessary implication, upon the legislature the power of enacting legislation for merging of contiguous counties, although the incidental effect of such Acts

may be to supersede constitutional courts and abolish constitutional officers existing in the counties merged at the dates when the merger Acts become effective. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931).

Intra-county request for judicial assistance. — Intra-county request for judicial assistance under O.C.G.A. § 15-1-9.1(b)(2)(C) did not create a separate court, but was a constitutionally-permitted request for intra-county judicial assistance where the request and the response set out the matters to be handled by the two juvenile court judges who had agreed to assist the superior court; accordingly, the intra-county request and response were neither an unconstitutional creation of a class of court in violation of Ga. Const. 1983, Art. VI, Sec. I, Para. I, nor an unconstitutional usurpation of legislative authority by members of the judiciary in violation of Ga. Const. 1983, Art. VI, Sec. I, Para. VII. *Earl v. Mills*, 278 Ga. 128, 598 S.E.2d 480 (2004).

Power to transfer cases. — The legislature has implied power to transfer cases of the abolished court to another existing court. *Macon, D. & S.R.R. v. Calhoun*, 138 Ga. 165, 74 S.E. 1030 (1912).

Intermediate appellate court erred in reversing a trial court's denial of a health care providers' motion for summary judgment in a wrongful death claim; although the trial court lacked jurisdiction to allow an exception to O.C.G.A. § 51-4-2(a) to authorize a guardian to bring the wrongful death claim, Ga. Const. 1983, Art. VI,

Sec. I, Para. VIII required that the trial court's ruling be vacated and the case remanded with direction to transfer the case to superior court. *Blackmon v. Tenet Healthsystem Spalding, Inc.*, 284 Ga. 369, 667 S.E.2d 348 (2008).

Construction of this paragraph and Ga. Const. 1976, Art. IX, Sec. I, Para. XI (see Ga. Const. 1983, Art. IX, Sec. I, Para. II). — In construing provisions in this paragraph and Ga. Const. 1976, Art. IX, Sec. I, Para. XI (see Ga. Const. 1983, Art. IX, Sec. I, Para. II), their meaning is that the legislature cannot abolish constitutional courts and constitutional officers where the purpose of the Act is to accomplish this alone. But where the Constitution grants to the legislature the power to merge contiguous counties, which is done in conformity to the power, and where the merging Act has the incidental effect of superseding certain courts existing in the merged county by those of the county into which the merged county is absorbed, and of abolishing certain offices held under general provisions of the Constitution in the county absorbed, such merger Act is not unconstitutional and void because it is in conflict with the provision of the Constitution inhibiting the abolition of constitutional courts and officers. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931) (see Ga. Const. 1983, Art. VI, Sec. I, Para. VII).

Cited in *Nobles v. State*, 81 Ga. App. 229, 58 S.E.2d 496 (1950); *Granger v. State*, 235 Ga. 681, 221 S.E.2d 451 (1975); *Chatham County v. Mulling*, 248 Ga. 878, 286 S.E.2d 735 (1982); *Bush v. Reeves*, No. 1:05-CV-1315-TWT, 2005 U.S. Dist. LEXIS 38050 (N.D. Ga. Dec. 22, 2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Courts, §§ 4 et seq., 8 et seq.

C.J.S. — 21 C.J.S., Courts, § 166 et seq.

Paragraph VIII. Transfer of cases.

Any court shall transfer to the appropriate court in the state any civil case in which it determines that jurisdiction or venue lies elsewhere.

1976 Constitution. — Art. VI, Sec. II, Para. IV.

Cross references. — Transfers and changes of venue in magistrate court pro-

ceedings, Uniform Rules for the Magistrate Courts, Rule 18.

Law reviews. — For annual survey on trial practice and procedure, see 38 Mer-

cer L. Rev. 383 (1986). For article, “The Civil Jurisdiction of State and Magistrate Courts,” see 24 Ga. St. B.J. 29 (1987).

JUDICIAL DECISIONS

Improper venue. — Trial court erred in dismissing an employee’s breach of contract suit against a corporation based on improper venue where the appropriate remedy would have been to transfer the case to another court with proper venue as provided by Ga. Sup. Ct. R. 19.1 and Ga. Const. 1983, Art. VI, Sec. I, Para. VIII. *Farrell v. HRC Armco, Inc.*, 253 Ga. App. 633, 560 S.E.2d 107 (2002).

Where the decedent’s grandniece filed a caveat to the probate of the will in solemn form on grounds of undue influence and contract to make a will and then filed an identical complaint in the superior court, the superior court was an improper venue for the contract to make a will action, as the co-executors did not live in the county where the action was filed as was required under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; as a result, the case had to be transferred to the appropriate superior court as provided under Ga. Const. 1983, Art. VI, Sec. I, Para. VIII. *SunTrust Bank v. Peterson*, 263 Ga. App. 378, 587 S.E.2d 849 (2003).

Venue proper. — Venue was appropri-

ate in the trial court and the court’s finding to the contrary was erroneous, but the error was harmless given that the trial court retained the case instead of transferring the case, the third-party defendant was not dismissed from the case, and the trial court correctly granted summary judgment to the third-party defendant on a separate basis. *Bostick v. CMM Props.*, 327 Ga. App. 137, 755 S.E.2d 895 (2014).

Cited in *Long v. Bruner*, 171 Ga. App. 124, 318 S.E.2d 818 (1984); *Unger v. Bryant Equip. Sales & Servs., Inc.*, 173 Ga. App. 364, 326 S.E.2d 483 (1985); *Edwards v. Edmondson*, 173 Ga. App. 353, 326 S.E.2d 550 (1985); *Bosma v. Gunter*, 258 Ga. 664, 373 S.E.2d 368 (1988); *Douglas v. Gilbert*, 195 Ga. App. 796, 395 S.E.2d 9 (1990); *McDonald v. MARTA*, 251 Ga. App. 2306, 554 S.E.2d 226 (2001); *In re Estate of Dasher*, 259 Ga. App. 201, 575 S.E.2d 921 (2002); *Live Oak Consulting, Inc. v. Dep’t of Cmty. Health*, 281 Ga. App. 791, 637 S.E.2d 455 (2006); *Ford v. Hanna*, 292 Ga. 500, 739 S.E.2d 309 (2013); *In the Interest of M. F.*, 298 Ga. 138, 780 S.E.2d 291 (2015).

Paragraph IX. Rules of evidence; law prescribed.

All rules of evidence shall be as prescribed by law.

1976 Constitution. — There was no similar provision in the 1976 Constitution.

Cross references. — Evidence generally, T. 24.

Paragraph X. Authorization for pilot projects.

The General Assembly may by general law approved by a two-thirds’ majority of the members of each house enact legislation providing for, as pilot programs of limited duration, courts which are not uniform within their classes in jurisdiction, powers, rules of practice and procedure, and selection, qualifications, terms, and discipline of judges for such pilot courts and other matters relative thereto. Such legislation shall name the political subdivision, judicial circuit, and existing courts

affected and may, in addition to any other power, grant to such court created as a pilot program the power to issue process in the nature of mandamus, prohibition, specific performance, quo warranto, and injunction. The General Assembly shall provide by general law for a procedure for submitting proposed legislation relating to such pilot programs to the Judicial Council of Georgia or its successor. Legislation enacted pursuant to this Paragraph shall not deny equal protection of the laws to any person in violation of Article I, Section I, Paragraph II of this Constitution. (Ga. Const. 1983, Art. VI, § 1, Para. X, approved by Ga. L. 1994, p. 2020, § 1/HR 712.)

Editor's notes. — The constitutional amendment (Ga. L. 1994, p. 2020, § 1) authorizing the General Assembly to enact general legislation providing for, as pilot programs of limited duration, courts which are not uniform within their classes

in jurisdiction, powers, rules of practice and procedure, and selection, qualifications, terms, and discipline of judges was approved by a majority of the qualified voters voting at the general election held on November 8, 1994.

SECTION II.

VENUE

Paragraph

- I. Divorce cases.
- II. Land titles.
- III. Equity cases.
- IV. Suits against joint obligors, co-partners, or joint trespassers.

Paragraph

- V. Suits against maker, endorser, etc.
- VI. All other cases.
- VII. Venue in third-party practice.
- VIII. Power to change venue.

Law reviews. — For article discussing 1976 to 1977 developments in the law of venue in Georgia, see 29 Mercer L. Rev. 265 (1977).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972). For note, "Venue in

Multidefendant Civil Practice in Georgia," see 6 Ga. State U.L. Rev. 427 (1990). For note, "Getting Personal With Our Neighbors—A Survey of Southern States' Exercise of General Jurisdiction and A Proposal for Extending Georgia's Long-Arm Statute," see 25 Ga. St. U.L. Rev. 1177 (2009).

JUDICIAL DECISIONS

Venue will be determined as of the date of filing as long as service is subsequently perfected upon a defendant within a reasonable time period. *Perry v. Perry*, 245 Ga. 298, 264 S.E.2d 228 (1980).

Venue for partnerships. — Venue in a suit against a limited partnership was improper in a county to which the limited partnership's sole connection was that the

county was the residence of one of its limited partners. *Nolan Rd. W., Ltd. v. PNC Realty Holding Corp.*, 274 Ga. 742, 559 S.E.2d 447 (2002).

Resort to a bill of peace does not enable a party to circumvent the initial requirement of venue as governed by the constitutional provisions of this section. *Summit Ins. Co. v. Mulherin*, 233

Ga. 606, 212 S.E.2d 788 (1975) (see Ga. Const. 1983, Art. VI, Sec. I, Para. X).

Venue in action where there is counterclaim, cross-claim, or third-party claim for interpleader is proper only in county of residence where one of claimants resides. *Kelly v. Citizens & S. Nat'l Bank*, 160 Ga. App. 405, 287 S.E.2d 343 (1981).

Interpleader does not effect change of provisions of state Constitution regarding venue of civil cases. *Kelly v. Citizens & S. Nat'l Bank*, 160 Ga. App. 405, 287 S.E.2d 343 (1981).

Permissive joinder of causes does

not alleviate venue requirements. — Statute such as former O.C.G.A. § 46-7-12 authorizing the permissive joinder of two causes of action did not obviate the necessity of compliance with the applicable constitutional venue requirements as to each; thus, if the claim asserted against the codefendants or third parties was essentially independent rather than one ancillary to the main action, it must satisfy within itself the constitutional venue requirements. *Thomas v. Bobby Stevens Hauling Contractors*, 165 Ga. App. 710, 302 S.E.2d 585 (1983).

RESEARCH REFERENCES

ALR. — Place of holding sessions of trial court as affecting validity of its proceedings, 43 ALR 1516; 18 ALR3d 572.

Retroactive operation and effect of venue statute, 41 ALR2d 798.

Place where claim or cause of action "arose" under state venue statute, 53 ALR4th 1104.

Paragraph I. Divorce cases.

Divorce cases shall be tried in the county where the defendant resides, if a resident of this state; if the defendant is not a resident of this state, then in the county in which the plaintiff resides; provided, however, a divorce case may be tried in the county of residence of the plaintiff if the defendant has moved from that same county within six months from the date of the filing of the divorce action and said county was the site of the marital domicile at the time of the separation of the parties, and provided, further, that any person who has been a resident of any United States army post or military reservation within the State of Georgia for one year next preceding the filing of the petition may bring an action for divorce in any county adjacent to said United States army post or military reservation. (Ga. Const. 1983, Art. 6, § 2, Para. 1; Ga. L. 1990, p. 2430, § 1/HR 585.)

1976 Constitution. — Art. VI, Sec. XIV, Para. I.

Cross references. — Exclusive jurisdiction in the superior court, Ga. Const. 1983, Art. VI, Sec. IV, Para. I and § 19-5-1. Residency requirements, § 19-5-2.

Editor's notes. — The constitutional amendment (Ga. L. 1990, p. 2430, § 1) which rewrote Paragraph I was approved by a majority of the qualified voters voting

at the general election held on November 6, 1990.

Law reviews. — For article, "Current Problems With Venue in Georgia," see 12 Ga. St. B.J. 71 (1975). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981).

For comment on *Musgrove v. Musgrove*, 213 Ga. 610, 100 S.E.2d 577 (1957), up-

holding validity of divorce decree granted in county other than residence of defendant when defendant waived process and consented to trial elsewhere, see 20 Ga.

B.J. 548 (1958). For comment on Register v. Stone's Independent Oil Distrib., Inc., 227 Ga. 123, 179 S.E.2d 68 (1971), see 8 Ga. St. B.J. 428 (1972).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

REQUIREMENTS OF DIVORCE ACTIONS

1. VENUE GENERALLY

PROPER COUNTY

RESIDENCE AND DOMICILE

JURISDICTION

1. IN GENERAL

2. ATTACHMENT OF JURISDICTION

3. EFFECT OF LACK OF JURISDICTION

General Consideration

Impleading of a third-party defendant under this section is an ancillary "suit" or "case" so it must satisfy within itself the venue requirements of the Constitution but is an ancillary proceeding with its venue resting upon that of the main action. Register v. Stone's Indep. Oil Distribs., Inc., 227 Ga. 123, 179 S.E.2d 68 (1971), commented on in 8 Ga. St. B.J. 428 (1972) (see Ga. Const. 1983, Art. VI, Sec. II, Para. I).

Cited in Thomas v. Lambert, 187 Ga. 616, 1 S.E.2d 443 (1939); Jones v. State, 70 Ga. App. 431, 28 S.E.2d 373 (1943); Tatum v. Tatum, 203 Ga. 406, 46 S.E.2d 915 (1948); Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962); Ward v. Ward, 223 Ga. 868, 159 S.E.2d 81 (1968); Hunt v. Hunt, 225 Ga. 276, 168 S.E.2d 321 (1969); Dunlap v. Dunlap, 234 Ga. 304, 215 S.E.2d 674 (1975); Alcorn v. Alcorn, 245 Ga. 1, 262 S.E.2d 778 (1980); Reno v. Reno, 247 Ga. 560, 277 S.E.2d 511 (1981); Ledford v. Bowers, 248 Ga. 804, 286 S.E.2d 293 (1982); Browne v. Browne, 258 Ga. 636, 373 S.E.2d 366 (1988).

Requirements of Divorce Actions

1. Venue Generally

Purpose. — The purpose of the state constitution's venue requirement is to protect defendants in divorce actions from having to respond in a foreign, and per-

haps hostile court. Williams v. Williams, 259 Ga. 788, 387 S.E.2d 334 (1990).

Where a defendant in a divorce action lives outside of Georgia, the action may be brought in the plaintiff's county of residence. A trial court's finding that venue over a divorce action was improper in Fulton County was error and was reversed where, although the wife had returned to Britain, the husband continued to maintain his residency in Fulton County. Cooke v. Cooke, 277 Ga. 731, 594 S.E.2d 370 (2004).

Provisions not mandatory or exhaustive. — The provisions of the state constitution relating to venue in divorce cases are neither mandatory nor exhaustive. Williams v. Williams, 259 Ga. 788, 387 S.E.2d 334 (1990).

Conferring venue by consent. — Under certain circumstances both jurisdiction of the person and venue can be conferred by consent. Ledford v. Bowers, 248 Ga. 804, 286 S.E.2d 293 (1982).

Waiver of objection to venue. — Husband's affidavit waived any objection to venue in an uncontested divorce proceeding where the husband was a Chatham County resident and the wife was a resident of Clayton County, and they had agreed to obtain the divorce in Clayton County to save money. Williams v. Williams, 259 Ga. 788, 387 S.E.2d 334 (1990).

Separation agreement was not waiver of venue. — Husband did not waive the defense of improper venue by

signing a separation agreement that purported to settle the rights of the parties but did not contain any mention of venue. *Bonner v. Bonner*, 272 Ga. 545, 533 S.E.2d 72 (2000).

In an action for divorce it is necessary to allege correct venue, as prescribed by this paragraph, and to make affirmative proof thereof. *Johnson v. Johnson*, 188 Ga. 800, 4 S.E.2d 807 (1939) (see Ga. Const. 1983, Art. VI, Sec. II, Para. I).

Improper venue meant void judgment. — A judgment of divorce in which the venue was improper was void. *Thorpe v. Thorpe*, 268 Ga. 724, 492 S.E.2d 887 (1997).

To authorize a valid judgment in a divorce action the allegation of venue must be supported by evidence. *Stewart v. Stewart*, 195 Ga. 460, 24 S.E.2d 672 (1943).

Effect of dismissal of divorce suit in another state prior to suit in this state on plaintiff's statement of residency. — The pendency of a suit for divorce in another state, which was dismissed only a short time before filing of a suit for divorce in this state, does not disprove the positive testimony of the plaintiff that the plaintiff had been a bona fide resident of this state for 12 months prior to the filing of the plaintiff's suit. *Bellamy v. Bellamy*, 187 Ga. 804, 2 S.E.2d 413 (1939).

Proper venue. — Contrary to the wife's claim, venue was proper in Houston County because the record showed that the wife gave the marital address as the wife's place of residence and the residence was located in Houston County. *Rymuza v. Rymuza*, 292 Ga. 98, 734 S.E.2d 384 (2012).

Proper County

Divorce must be brought in defendant's county of residence. — Where both parties are residents of this state, a divorce is invalid unless the suit is brought in the county where the defendant resides. *Moody v. Moody*, 194 Ga. 843, 22 S.E.2d 837 (1942); *Musgrove v. Musgrove*, 213 Ga. 610, 100 S.E.2d 577 (1957), commented on in 20 Ga. B.J. 548 (1958).

Proper venue when one spouse in penitentiary. — Where husband was confined in a penitentiary in a county other than that in which he and his wife resided, the venue was in the latter county. *McLeod v. McLeod*, 144 Ga. 359, 87 S.E. 286 (1915).

Venue for marriage annulment. — As to venue of suit to annul marriage with nonresident, see *Cale v. Davis*, 135 Ga. 185, 68 S.E. 1101 (1910).

The residence of an individual cannot be shifted to another county where the individual has a business, so that the latter county may be the proper venue of a suit against the individual because of a tort committed by the individual's agents in the county where the tort was committed. *Youmans v. Hickman*, 179 Ga. 684, 177 S.E. 238 (1934).

A decree in a suit brought in a county other than that in which the defendant was a resident is void. *Allen v. Allen*, 218 Ga. 364, 127 S.E.2d 902 (1962).

Divorce suit void for failure to sue in defendant's county of residence. — Where husband in divorce suit alleged that wife was not a resident of this state, and wife in her answer alleged she was a resident of this state, but of a different county than that in which suit had been brought, verdict in favor of divorce was void, for the reason that the husband could sue only in the county of his wife's residence; and if the answer of the wife be taken as true, and if she was in fact a nonresident of the state, there having been no service by publication or otherwise, the judgment for divorce would also be void. *Jones v. Jones*, 181 Ga. 747, 184 S.E. 271 (1936).

There is no inhibition against impleading a party who resides in county other than that in which main action pends. *Register v. Stone's Indep. Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971), commented on in 8 Ga. St. B.J. 428 (1972).

Different venue possible in suits for separate maintenance and divorce. — Since venue for divorce lies only in county of residence of defendant, in a suit for separate maintenance, venue may be

Proper County (Cont'd)

proper for the main claim and improper for a counterclaim for divorce where parties reside in different counties. *Herring v. Herring*, 246 Ga. 462, 271 S.E.2d 857 (1980).

Residence and Domicile

Nonresident cannot acquire domicile by residing on United States military reservation. — While former Code 1933, § 30-107 (see now O.C.G.A. § 19-5-2), in conferring jurisdiction in divorce suits, might not exact citizenship, the word “resident” as used therein was equivalent to domicile; and a nonresident of Georgia cannot acquire a Georgia domicile, such as would authorize the bringing of a divorce suit, under the statute by residing on or within a United States military reservation. *Darbie v. Darbie*, 195 Ga. 769, 25 S.E.2d 685 (1943).

General Assembly cannot declare a person domiciled and residing in one county a resident of and domiciliary of another county. — The General Assembly has no right to provide that a natural person, an individual, who lives and has a domicile and residence in one county, and the individual’s domicile and residence is fixed there under the law as it stands, should be deemed also to be a resident, for certain purposes, of another county. A general law may fix the general place of the individual’s residence; but when the individual has a residence and domicile fixed and established in accordance with the law, the legislature cannot declare that the individual may also be a resident of another county at the same time. *Youmans v. Hickman*, 179 Ga. 684, 177 S.E. 238 (1934).

Change of domicile. — To effect a change of domicile there must be an avowed intent which may be shown by declarations or acts equivalent thereto, and an actual removal. Temporary absence from the county by a man who has no family does not operate to change the man’s domicile. *Bellamy v. Bellamy*, 187 Ga. 804, 2 S.E.2d 413 (1939).

Jurisdiction**1. In General**

Allegation of jurisdiction essential. — Allegation of the jurisdictional requirements set forth in this paragraph and O.C.G.A. § 19-5-2 is essential to applications for divorce. *Rice v. Rice*, 223 Ga. 363, 155 S.E.2d 393 (1967) (see Ga. Const. 1983, Art. VI, Sec. II, Para. I).

Jurisdiction and venue distinguished. — Jurisdiction means the power of a court to render a binding judgment in the case, and venue means the place of trial. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

Plaintiff must prove by evidence jurisdiction. — The essential allegations in a petition for divorce, including jurisdiction, must be established by evidence, and the burden of proving such allegations rests upon the plaintiff. *Johnson v. Johnson*, 222 Ga. 433, 150 S.E.2d 684 (1966).

Parties cannot by waiver or agreement confer jurisdiction upon the court where the essential jurisdictional matters stated in this paragraph are absent. *Stewart v. Stewart*, 195 Ga. 460, 24 S.E.2d 672 (1943) (see Ga. Const. 1983, Art. VI, Sec. II, Para. I).

Duty of court to dismiss case when jurisdiction does not exist. — Since no valid judgment can be rendered in a divorce case where the court is without jurisdiction, it is the duty of the court, when apprised of the fact that it has no jurisdiction, to dismiss the case at any stage of the proceeding, with or without motion therefor. *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953).

Responsibility to prove jurisdiction. — Petitioner in divorce action carries the burden of proving the jurisdiction of the court, and this duty is no less incumbent upon the defendant who asks for alimony; in neither instance can jurisdiction be conferred by consent or by waiver. *Jones v. Jones*, 181 Ga. 747, 184 S.E. 271 (1936); *Stewart v. Stewart*, 195 Ga. 460, 24 S.E.2d 672 (1943).

Parties cannot later attack divorce decree as void for lack of jurisdiction

after having conceded and confirmed court's jurisdiction. — While the parties cannot confer jurisdiction on the court, where the record shows that the parties affirmatively conceded and confirmed the jurisdiction of the court with respect to the person and subject matter, and the court rendered a divorce decree in the case, neither party can thereafter attack the decree as being void for lack of jurisdiction over the person or the subject matter. *Herring v. Herring*, 246 Ga. 462, 271 S.E.2d 857 (1980).

A divorce granted by a court having no jurisdiction of the subject matter and of the parties is a nullity. *Harmon v. Harmon*, 209 Ga. 474, 74 S.E.2d 75 (1953).

2. Attachment of Jurisdiction

Jurisdiction attached when person served with process while sojourning in county where court located. — Even though the allegations showed that the defendant was a resident of a foreign jurisdiction, yet where the defendant was personally served with process while sojourning within the state and county in which the court was located, where the petitioner resided, the court acquired jurisdiction under this paragraph and O.C.G.A. §§ 9-10-33, and 50-2-21. *Miller v. Miller*, 216 Ga. 535, 118 S.E.2d 85 (1961) (see Ga. Const. 1983, Art. VI, Sec. II, Para. I).

If defendant in suit acknowledges service of suit, the presumption is that judgment rendered is based upon proper allegations and proof of jurisdiction as to the parties. *Hardin v. Hardin*, 218 Ga. 39, 126 S.E.2d 216 (1962).

Jurisdiction was litigated. — Where in an action for divorce brought by wife, the husband appeared and filed an answer denying allegations as to residence and also filed a plea to the jurisdiction, the question as to jurisdiction was litigated despite the fact that he had not appeared to defend the action in person, and the result was binding on the husband, in the absence of fraud, accident, or mistake, unmixed with negligence on his part. *Johnson v. Johnson*, 188 Ga. 800, 4 S.E.2d 807 (1939).

Divorce decree could not be set aside for want of jurisdiction. — Defendant husband, having participated in divorce suit, having admitted jurisdiction of the court, and having obtained the benefit of the decree by another marriage, could not afterwards have the verdict and decree set aside for want of jurisdiction. *Davis v. Davis*, 191 Ga. 333, 11 S.E.2d 884 (1940).

3. Effect of Lack of Jurisdiction

This provision of the constitution states indispensable essentials for jurisdiction. — Lack of jurisdiction renders the divorce decree null and void. *Gates v. Gates*, 197 Ga. 11, 28 S.E.2d 108 (1943) (see Ga. Const. 1983, Art. VI, Sec. II, Para. I).

Effect of lack of evidence of residence of plaintiff in county of suit. — Where the record in a divorce case fails to contain any averment or evidence as to the residence of the plaintiff husband in the county where suit was brought against a resident of another state, it was error to refuse a new trial on general grounds. *Wade v. Wade*, 195 Ga. 748, 25 S.E.2d 683 (1943).

Lack of jurisdiction sufficient ground of attack on divorce decree. — In an original suit in equity for decree declaring void and of no effect verdict and decree in divorce suit, on grounds that court was without jurisdiction of the case, because at the time of filing of suit for divorce defendant was a resident of Clayton County, whereas the suit was brought in Fulton County, the alleged want of jurisdiction was sufficient ground of attack upon verdict and decree of divorce as void and ineffectual. *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940).

Suit to modify divorce judgment not ratification of judgment void for lack of jurisdiction. — Fact that plaintiff husband had brought a petition to modify divorce judgment void for lack of jurisdiction, in which he was unsuccessful and where he filed no exception, would not create such a ratification of the judgment as to make valid that which was void, nor would the fact that the husband, without excepting to the original judgment, had paid alimony in pursuance of the judg-

Jurisdiction (Cont'd)**3. Effect of Lack of****Jurisdiction** (Cont'd)

ment for several years, affect the result. *Jones v. Jones*, 181 Ga. 747, 184 S.E. 271 (1936).

Where it appears upon the face of the record that the court was without jurisdiction of a divorce case the judgment was void ab initio; and being void the defendant would not be guilty of contempt of court for failing to pay alimony awarded by said judgment. *Johnson v. Johnson*, 222 Ga. 433, 150 S.E.2d 684 (1966).

Divorce decrees without jurisdiction are nullities; a divorce granted by a court having no jurisdiction of the subject matter and of the parties is a nullity. *Johnson v. Johnson*, 222 Ga. 433, 150 S.E.2d 684 (1966).

Failure to make proof of venue will render a verdict for divorce subject to be set aside by proper procedure, and such proof is essential, even though the absence of this jurisdictional averment may be supplied by amendment. *Wade v. Wade*, 195 Ga. 748, 25 S.E.2d 683 (1943).

OPINIONS OF THE ATTORNEY GENERAL

Venue for divorce proceedings against person confined in penitentiary. — A husband's confinement under penitentiary sentence in another county is not a voluntary change of domicile and proper venue of his wife's subsequent divorce proceeding against him would be the

county where he resided before confinement. 1958-59 Op. Att'y Gen. p. 88.

Venue cannot be waived and no court other than that specified has any right to act in the divorce proceeding. — 1958-59 Op. Att'y Gen. p. 88.

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 1 et seq., 170 et seq.

C.J.S. — 27A C.J.S., Divorce, § 91 et seq.

ALR. — Estoppel to assert invalidity of decree of divorce for lack of domicile at divorce forum or failure to obtain jurisdiction of person of defendant, 140 ALR 914; 153 ALR 941; 175 ALR 538.

Venue of divorce action in particular county as dependent on residence or domicile for specified length of time, 54 ALR2d 898.

Validity and construction of statutory provision relating to jurisdiction of court for purpose of divorce for servicemen, 73 ALR3d 431.

Paragraph II. Land titles.

Cases respecting titles to land shall be tried in the county where the land lies, except where a single tract is divided by a county line, in which case the superior court of either county shall have jurisdiction.

1976 Constitution. — Art. VI, Sec. XIV, Para. II.

Cross references. — Exclusive jurisdiction in the superior court, Ga. Const. 1983, Art. VI, Sec. IV, Para. I and § 44-2-60. Venue in county in which land lies, § 44-2-67. Venue to foreclose mort-

gages, § 44-14-180.

Law reviews. — For article, "Current Problems With Venue in Georgia," see 12 Ga. St. B.J. 71 (1975).

For comment on *Chase v. Endsley*, 165 Ga. 292, 140 S.E. 876 (1927), see 1 Ga. L. Rev. 49 (1927). For comment, "Are Fannie

Mae and Freddie Mac State Actors? State Action, Due Process, and Nonjudicial Foreclosure,” see 65 Emory L.J. 107 (2015).

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EQUITABLE ACTIONS

General Consideration

This paragraph does not include actions in which plaintiff must first seek aid of equity to perfect plaintiff’s title. Schuehler v. Pait, 239 Ga. 520, 238 S.E.2d 65 (1977) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

This section may not be altered or changed by the legislature or the courts and the adoption of procedural devices for adjudicating claims of various parties in the same action does not effect a change in the venue requirements of the Constitution. Pemberton v. Purifoy, 128 Ga. App. 892, 198 S.E.2d 356 (1973) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Applicability of exception proviso. — The exception of this paragraph applied to condemnation proceedings under former Civil Code 1895, § 4651 (see now O.C.G.A. § 22-1-8). Whitney v. Central Ga. Power Co., 134 Ga. 213, 67 S.E. 197, 19 Ann. Cas. 982 (1910) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Case of ejectment or complaint for land. — If the allegations in a petition are sufficient to show that the plaintiff can recover on the plaintiff’s title alone without the aid of a court of equity, the case is one of ejectment or complaint for land; but if this is not the case, and equitable aid is necessary, the petition is equitable in character. Cook v. Grimsley, 175 Ga. 138, 165 S.E. 30 (1932).

When court is without jurisdiction to grant equitable relief. — In a suit which is strictly an action respecting the title to lands, and which is brought in the county in which the land is situated, the court has no jurisdiction to grant equitable relief as to a defendant who is a resident of another county in this state. Cook v. Grimsley, 175 Ga. 138, 165 S.E. 30 (1932).

Basis of action ascertained from pleader’s intention. — A rule, perhaps the cardinal rule, by which to determine whether an action is based on equity or title to land is to ascertain the intention of the pleader. Where the pleader’s intention is not clearly manifest as to what form of action is relied on in the petition, the courts will prima facie presume that the pleader’s purpose was to serve his best interest and will construe the pleadings so as to uphold and not to defeat the action. Cook v. Grimsley, 175 Ga. 138, 165 S.E. 30 (1932).

An Act changing county lines cannot legally deprive a county of its county site. County of DeKalb v. City of Atlanta, 132 Ga. 727, 65 S.E. 72 (1909).

Merger of equity and common law. — This paragraph was not affected by merger of equitable and common law jurisdictions of superior court. Clayton v. Stetson, 101 Ga. 634, 28 S.E. 983 (1897) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Jurisdiction and venue distinguished. — Jurisdiction means the power of a court to render a binding judgment in the case, and venue means the place of trial. Williams v. Fuller, 244 Ga. 846, 262 S.E.2d 135 (1979).

General Assembly cannot declare individual resident of another county in contradiction of the general law. — The General Assembly has no right to provide that a natural person, an individual, who lives and has a domicile and residence in one county, and a domicile and residence is fixed there under the law as it stands, should be deemed also to be a resident, for certain purposes, of another county. A general law may fix the general place of residence; but when a person has a residence and domicile fixed and established in accordance with the law, the

General Consideration (Cont'd)

legislature cannot declare that the person may also be a resident of another county at the same time. *Youmans v. Hickman*, 179 Ga. 684, 177 S.E. 238 (1934).

Special finding by jury as to ownership in actions for trespass. — In actions for trespass to realty, ownership of the premises is incidentally involved, and while in such cases a special finding by the jury as to ownership is not required, the incorporation of such a finding into the verdict will not vitiate it, if the verdict is in other particulars regular and proper. *Anderson v. Black*, 191 Ga. 627, 13 S.E.2d 650 (1941).

Venue properly established. — Because a neighbor's claims were incidental to that of the adjoining landowner's, the suit was properly brought in the neighbor's home county, thus supporting a denial of the neighbor's motion for a change of venue. *Norton v. Holcomb*, 285 Ga. App. 78, 646 S.E.2d 94 (2007), cert. denied, 2007 Ga. LEXIS 654 (Ga. 2007).

Cited in *Madronah Sales Co. v. Wilburn*, 180 Ga. 837, 181 S.E. 173 (1935); *Metropolitan Life Ins. Co. v. Hall*, 191 Ga. 294, 12 S.E.2d 53 (1940); *Anderson v. Black*, 199 Ga. 59, 33 S.E.2d 298 (1945); *Brown v. Mathis*, 201 Ga. 740, 41 S.E.2d 137 (1947); *Brunswick Peninsular Corp. v. Daugharty*, 203 Ga. 454, 47 S.E.2d 275 (1948); *Larkins v. Boyd*, 205 Ga. 69, 52 S.E.2d 307 (1949); *Dooley v. Scoggins*, 208 Ga. 200, 66 S.E.2d 62 (1951); *Dependable Ins. Co. v. Gibbs*, 218 Ga. 305, 127 S.E.2d 454 (1962); *Register v. Stone's Indep. Oil Distribs.*, 122 Ga. App. 335, 177 S.E.2d 92 (1970); *Southall v. Carter*, 229 Ga. 240, 190 S.E.2d 517 (1972); *Peacock v. Nat'l Bank & Trust Co.*, 241 Ga. 280, 244 S.E.2d 816 (1978); *Tingle v. Georgia Power Co.*, 147 Ga. App. 775, 250 S.E.2d 497 (1978); *Lake Lanier Islands Dev. Auth. v. Village Harbor, Inc.*, 152 Ga. App. 705, 264 S.E.2d 23 (1979).

Actions at Law

Distinction between suits to establish title and suits to recover land. — There is a distinction between suits to establish title to land or to establish the evidence of title, and suits to recover the

land upon legal title; the former being suits in equity, and the latter actions at law. *Owenby v. Stancil*, 190 Ga. 50, 8 S.E.2d 7 (1940).

Place of trial. — Generally, cases respecting title to land shall be tried in the superior court where the land lies. *Pearson v. George*, 211 Ga. 18, 83 S.E.2d 593 (1954).

Law governing title and disposition of land is exclusively subject to laws of the state where it is situated. — Such a rule is essential to the sovereignty of the state over the land within its borders. Where a court has no jurisdiction of the subject matter of a suit, the parties cannot waive it. *King v. King*, 203 Ga. 811, 48 S.E.2d 465 (1948).

This paragraph concerns actions at law, such as ejectment and statutory substitutes, in which the plaintiff asserts a presently enforceable legal title against the possession of the defendant, for the recovery of land or recovery of the land and mesne profits. This paragraph does not apply to suits in equity to establish title to land or to establish evidence of title. *Owenby v. Stancil*, 190 Ga. 50, 8 S.E.2d 7 (1940); *Stolaman v. Stolaman*, 220 Ga. 799, 142 S.E.2d 70 (1965); *Grand Lodge, I.O.O.F. v. City of Thomasville*, 226 Ga. 4, 172 S.E.2d 612 (1970) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

The test as to whether a suit to recover land is one of ejectment and is a "case respecting title to land" within the purview of the venue provisions of this paragraph is whether the plaintiff can recover on the plaintiff's title alone or whether the plaintiff must ask the aid of a court of equity in order to recover. *Owenby v. Stancil*, 190 Ga. 50, 8 S.E.2d 7 (1940); *Screven County v. Reddy*, 208 Ga. 730, 69 S.E.2d 186 (1952); *White v. Gordon*, 213 Ga. 730, 101 S.E.2d 759 (1958); *State Hwy. Dep't v. Georgia S. & Fla. Ry.*, 216 Ga. 547, 117 S.E.2d 897 (1961); *Grand Lodge, I.O.O.F. v. City of Thomasville*, 226 Ga. 4, 172 S.E.2d 612 (1970) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Action in ejectment brought in proper county. — An action in ejectment wherein the plaintiff claims title to the land in question on the basis of the plain-

tiff's abstract of title, which the plaintiff incorporated in the plaintiff's petition by amendment, and seeks to recover the described tract of land and damages for the cutting of timber thereon, sought no equitable relief and was properly brought in the county where the land lies. *White v. Gordon*, 213 Ga. 730, 101 S.E.2d 759 (1958).

Statutory adverse possession. — A landowner's suit is clearly not in equity where the landowner seeks to establish legal title by adverse possession as a matter of law in reliance on a statute. Venue is constitutionally in the county in which the land lies, as provided in O.C.G.A. § 44-5-168(b)(1). *Hayes v. Howell*, 251 Ga. 580, 308 S.E.2d 170 (1983).

A statutory partition action under former Code 1933, § 85-1504 (see now O.C.G.A. § 44-6-160) was a case "respecting title to land" under this paragraph since it can bestow title on both parties and divest both parties of title, and must be brought in the county where the land laid. *Schuehler v. Pait*, 239 Ga. 520, 238 S.E.2d 65 (1977) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

A petition stating a case at law for recovery of land, where no equitable relief is sought, is a case respecting title to land, and under this paragraph properly brought in the county where the land lies. *Strickland v. Jenkins*, 198 Ga. 15, 31 S.E.2d 18 (1944).

Other proceeding adjudicating title to property properly brought in county where land lies. — A petition by the widow and sole heir at law of a named person who died intestate with no administration on his estate, alleging that before her husband's death, he had purchased a tract of land, paid the purchase money, and entered into possession of the land, and that since his death other claimants had entered into possession thereof, where the plaintiff merely sought to recover the land with mesne profits, and the suit was filed in the county where the land lies, stated a cause of action. *Strickland v. Jenkins*, 198 Ga. 15, 31 S.E.2d 18 (1944).

The allegations of the petition showing an actual controversy, in which petitioner and one of the defendants were claiming title to realty under separate chains of

title, coupled with a prayer for a declaratory judgment adjudicating title to the property to be in petitioner, were sufficient to constitute an action respecting title to land under this paragraph and the petition was properly brought in the county where the land lies. *Shaw v. Crawford*, 207 Ga. 67, 60 S.E.2d 143 (1950) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Situation where action cannot be brought in county land lies. — Where a petition shows that the defendant has legal title to the land and seeks to set up a perfect equity in the plaintiff, and prays that the property be decreed to be that of the plaintiff, such action cannot be brought in the county where the land lies if the defendant is not a resident thereof. *Screven County v. Reddy*, 208 Ga. 730, 69 S.E.2d 186 (1952).

Equitable Actions

A suit to establish title to land, or to establish the evidence of title, is one that must be brought in equity, but suits to recover land upon legal title are actions at law. The common test as to whether an action to recover land is an action respecting title to land within the venue provision of the Constitution is whether the plaintiff can recover on the plaintiff's title alone, or whether the plaintiff must seek the aid of a court of equity in order to recover. *Payne v. Terhune*, 212 Ga. 169, 91 S.E.2d 348 (1956).

Nonjudicial foreclosure proceedings are not cases respecting title to land. — A suit seeking a rule nisi to require defendants to show cause why a nonjudicial foreclosure proceeding should not be allowed to proceed is not a case respecting title to land within the meaning of this paragraph, and is without any jurisdictional basis in the Supreme Court. *Graham v. Tallent*, 235 Ga. 47, 218 S.E.2d 799 (1975) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Striking prayer for equitable relief and praying for legal remedy does not result in suit respecting title to land. — Suit by assignee of obligee of a bond for title for an accounting and setoff against the purchase price of rents, ap-

Equitable Actions (Cont'd)

pointment of a receiver to collect rents, specific performance and other relief, should have been brought in the county wherein the obligor under the bond for title resided, and not in the county of the tenant's residence; nor did plaintiff's striking of plaintiff's prayer of injunction, and praying for possession of the premises, make the suit one respecting title to land, to be tried in the county where the land lies, as only after relief in equity decreeing title in plaintiff would the plaintiff have an action at law for recovery of the land. *Bradley v. Burns*, 188 Ga. 434, 4 S.E.2d 147 (1939).

In rem jurisdiction by state's courts over property of nonresident. — While a petition to cancel a deed or lien or to remove a cloud on the title to land is not a suit "respecting titles to land," within the meaning of this paragraph, so as to give jurisdiction against a resident of another county of this state to the superior court of the county where the land lies, still, if the only defendant in an equitable petition for relief in rem is a nonresident of the state, the courts of this state may take jurisdiction for the purpose of applying any recognized equitable principle affecting property located in this state, such as the removal of a cloud on the title, the cancellation or foreclosure of liens thereon, and may grant an order or decree operating in rem with reference to such property, and having the effect of excluding the nonresident from an interest therein. *Sweat v. Arline*, 186 Ga. 460, 197 S.E. 893 (1938) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

A petition to set aside and cancel a deed is not a suit respecting title to land as must be brought in the county where the land lies, but must be brought, if the defendant resides in this state, in the county of defendant's residence. *Borden v. I.B.C. Corp.*, 220 Ga. 688, 141 S.E.2d 449 (1965).

Establishment of boundary line not a case respecting title to land. — Petition predicated upon the ownership by the plaintiff of certain described lands upon which the defendants allegedly committed acts of trespass, and which of necessity

required the ascertainment and establishment of the boundary line in controversy, was a case in equity seeking injunctive relief against trespass to land, and was not a case respecting title to land within the venue provisions of this paragraph, and the case was properly brought in the county of the residence of a defendant against whom substantial equitable relief is prayed, as required by Ga. Const. 1976, Art. VI, Sec. XIV, Para. III (see Ga. Const. 1983, Art. VI, Sec. II, Para. III). *Dawson v. Altamaha Land Co.*, 215 Ga. 700, 113 S.E.2d 129 (1960); *Georgia Power Co. v. Harrison*, 253 Ga. 212, 318 S.E.2d 306 (1984) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Where equitable relief is sought in conjunction with a boundary-line dispute (i.e., removal of a fence and ejectment from a disputed strip of land), the county of the defendant's residence is the proper venue forum. *Beauchamp v. Knight*, 261 Ga. 608, 409 S.E.2d 208 (1991).

Action against multiple defendants to restrain continuing trespass maintainable in county of residence of one defendant. — Where a petition for injunction brought in the county where one defendant resides, seeks to restrain a continuing trespass which all of the defendants are committing, the court is not without jurisdiction to grant such relief, even though all except the one defendant are residents of other counties in the state. *Bennett v. Bagwell & Stewart, Inc.*, 214 Ga. 115, 103 S.E.2d 561 (1958).

A bill in equity to enjoin a trespass upon realty by felling timber is not a suit respecting the title to land as must be brought in the county where the land lies. The proper venue of such a case is the county of the residence of a defendant against whom substantial relief is prayed. *Powell v. Cheshire*, 70 Ga. 357, 48 Am. R. 572 (1883); *Chase v. Endsley*, 165 Ga. 292, 140 S.E. 876 (1927), commented on in 1 Ga. L. Rev. 49 (1927).

Actions to cancel deed based on fraud and coercion. — An action to cancel a deed conveying land, alleging the deed to have been obtained by fraud and coercion, is not a suit respecting the title to land within the meaning of this paragraph, but is an equitable action, and

must be brought in the county of the residence of the defendants, as required by Ga. Const. 1976, Art. VI, Sec. XIV, Para. III (see Ga. Const. 1983, Art. VI, Sec. II, Para. III). *Hawkins v. Pierotti*, 232 Ga. 631, 208 S.E.2d 452 (1974) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Exception contained in § 9-10-30 does not affect venue of suit brought against nonresident of county suit brought in. — The exception contained in former Code 1933, § 3-202 (see now O.C.G.A. § 9-10-30) to the effect that injunction suits to stay pending proceedings may be filed in the county where the proceedings were pending, provided no relief was prayed as to matters not included in such litigation, did not affect the venue of a suit, in which independent relief was sought against one who was a nonresident of the county in which the suit was brought, and who was not a party to the suit there pending. *Terhune v. Pettit*, 195 Ga. 793, 25 S.E.2d 660 (1943).

A petition for interpleader is an equitable proceeding within this paragraph. *Terhune v. Pettit*, 195 Ga. 793, 25 S.E.2d 660 (1943) (see Ga. Const. 1983, Art. VI, Sec. II, Para. II).

Removal of cloud on title based on

certain year's support was equity action. — Suit to remove from the record a certain year's support proceeding as a cloud upon the title of described land in plaintiff's possession was one in equity and not one respecting title to land, and should have been brought in the county of a defendant against whom substantial relief was sought; since the suit was brought in a county where neither defendant resided, the court was without jurisdiction of the subject matter and such jurisdiction could not be conferred by consent or waived by the parties. *Sweatman v. Roberts*, 213 Ga. 112, 97 S.E.2d 320 (1957).

Venue improper in nuisance action. — Action brought by plaintiff landowner against defendant landowner for conducting road construction without adequate barriers, causing silt and debris to leave defendant's land, enter a river, and flow onto plaintiff landowner's property was in the nature of a nuisance making venue proper in the county in which defendant landowner resided under Ga. Const. 1983, Art. VI, Sec. II, Para. III; venue was improper in the county in which the land lay under Ga. Const. 1983, Art. VI, Sec. II, Para. II. *Hopkins v. Baker*, 258 Ga. App. 14, 572 S.E.2d 716 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 77 Am. Jur. 2d, Venue, § 10 et seq.

C.J.S. — 92A C.J.S., Venue, §§ 20 et seq., 61 et seq.

ALR. — Jurisdiction of action at law for damages for tort concerning real property in another state or country, 42 ALR 196; 30 ALR2d 1219.

Leasehold as real property or an interest in real property within statute relating to venue, 104 ALR 235.

Right to maintain single suit to foreclose separate mortgages, securing same debt or portions thereof, upon real property in different counties, 110 ALR 1477.

Venue of action relating to real property as affected by joining cause of action or prayer for personal relief, 120 ALR 790.

Venue of suit for partition of land, 128 ALR 1232.

Judgment in action for damages to real

property situated in another state or county as conclusive in respect of title, 158 ALR 362.

Location of land as governing venue of action for damages for fraud in sale of real property, 163 ALR 1312.

Venue of action involving real estate situated in two or more counties or districts, 169 ALR 1245.

Consent decree as affecting title to real estate in another state, 2 ALR2d 1188.

Lien as estate or interest in land within venue statute, 2 ALR2d 1261.

Venue of suit to enjoin nuisance, 7 ALR2d 481.

Venue of action to set aside as fraudulent conveyance of real property, 37 ALR2d 568.

Venue of action for rescission or cancellation of contract relating to interests in land, 77 ALR2d 1014.

Independent venue requirements as to cross complaint or similar action by defen-

dant seeking relief against a codefendant or third party, 100 ALR2d 693.

Paragraph III. Equity cases.

Equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed.

1976 Constitution. — Art. VI, Sec. XIV, Para. III.

Cross references. — Vesting of exclusive jurisdiction over equity cases in superior courts, Ga. Const. 1983, Art. VI, Sec. IV, Para. I, and § 23-1-1.

Law reviews. — For article, “Current Problems With Venue in Georgia,” see 12 Ga. St. B.J. 71 (1975). For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

For comment on Chase v. Endsley, 165 Ga. 292, 140 S.E. 876 (1927), see 1 Ga. L. Rev. 49 (1927). For comment on Bennett v. Bagwell & Stewart, Inc., 214 Ga. 115, 103 S.E.2d 561 (1958), holding that as a nuisance is a continuing trespass, a court in equity will enjoin it in the county of the resident defendant even though he is only an agent or employee of the nonresident defendant, see 21 Ga. B.J. 564 (1959).

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ACTIONS ANCILLARY TO ACTION AT LAW

General Consideration

This constitutional provision applies to domestic corporations as well as individuals. Grimaud v. Knox-Georgia Homes, Inc., 210 Ga. 514, 81 S.E.2d 476 (1954) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

This paragraph is mandatory, and cannot be altered by legislative enactment or any rule of construction. Bradley v. Burns, 188 Ga. 434, 4 S.E.2d 147 (1939) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

No legislative or judicial tinkering can add to, take from, or vary this provision. Hanson v. Williams, 170 Ga. 779, 154 S.E. 240 (1930).

This paragraph may not be altered or changed by the legislature or the courts and the adoption of procedural devices for adjudicating claims of various parties in the same action does not effect a change in the venue requirements of the Constitution. Pemberton v. Purifoy, 128 Ga. App. 892, 198 S.E.2d 356 (1973) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

General Assembly cannot declare a person’s domicile and residence in contradiction to general law. — The General Assembly has no right to provide that a natural person, an individual, who lives and has a domicile and residence in one county, and the individual’s domicile and residence is fixed there under the law as it stands, should be deemed also to be a

resident, for certain purposes, of another county. A general law may fix the general place of residence; but when an individual has a residence and domicile fixed and established in accordance with the law, the legislature cannot declare that the individual may also be a resident of another county at the same time. *Youmans v. Hickman*, 179 Ga. 684, 177 S.E. 238 (1934).

This paragraph is inapplicable to a defendant who is a nonresident of this state. *Moody v. Mendenhall*, 238 Ga. 689, 234 S.E.2d 905 (1977) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Construction of other Acts. — The courts in construing an Act of the General Assembly will, if possible, ascribe to it a meaning so as to make it square with this paragraph. *Newman Motors, Inc. v. Arrington*, 194 Ga. 569, 22 S.E.2d 163 (1942) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Removal of trustee not case contemplated by paragraph. — An application to remove a trustee, addressed to the judge at chambers, was not “a case” within the meaning of this paragraph. This paragraph relates only to equitable petitions filed in the superior court and upon which a trial by jury may or must be had. *Heath v. Miller*, 117 Ga. 854, 44 S.E. 13 (1903), overruled on other grounds, 224 Ga. 440, 162 S.E.2d 294 (1968) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

An action to enjoin a foreclosure under a power of sale must be brought in the county where the defendant resides. *Nylen v. Barbaris*, 232 Ga. 79, 205 S.E.2d 303 (1974).

Cited in *DeLacy v. Hurst, Purnell & Co.*, 83 Ga. 223, 9 S.E. 1052 (1889); *Bishop v. Brown*, 138 Ga. 771, 76 S.E. 89 (1912); *Clark v. Hilliard*, 19 Ga. App. 514, 91 S.E. 926 (1917); *Amsler & Ferguson v. Lamar & Rankin Drug Co.*, 146 Ga. 635, 92 S.E. 55 (1917); *Babson v. McEachin*, 147 Ga. 143, 93 S.E. 292 (1917); *Bank of East Point v. Dupre*, 152 Ga. 547, 110 S.E. 240 (1922); *Mansfield v. Gray*, 153 Ga. 414, 112 S.E. 646 (1922); *Holmes v. Holmes*, 153 Ga. 790, 113 S.E. 81 (1922); *Burkhalter v. Minter-Smith Hdwe. Co.*, 160 Ga. 307, 127 S.E. 852 (1925); *Georgia Creosoting Co. v. Moody*, 41 Ga. App. 701, 154 S.E. 294

(1930); *Sanders v. Hinton*, 171 Ga. 702, 156 S.E. 812 (1931); *South Ga. Trust Co. v. Barlow*, 172 Ga. 166, 157 S.E. 326 (1931); *Mallory v. Clay County*, 173 Ga. 59, 159 S.E. 578 (1931); *Palmer v. Carson Naval Stores Co.*, 177 Ga. 734, 171 S.E. 262 (1933); *Tribble v. Knight*, 178 Ga. 804, 174 S.E. 626 (1934); *John Hancock Mut. Life Ins. Co. v. Baskin*, 179 Ga. 86, 175 S.E. 251 (1934); *Cone v. Davis*, 179 Ga. 749, 177 S.E. 558 (1934); *Sweat v. Arline*, 186 Ga. 460, 197 S.E. 893 (1938); *Kinney v. Crow*, 186 Ga. 851, 199 S.E. 198 (1938); *Marshall v. Marthin*, 192 Ga. 613, 15 S.E.2d 861 (1941); *Behr v. City of Macon*, 194 Ga. 334, 21 S.E.2d 169 (1942); *Hanleiter v. Spearman*, 200 Ga. 289, 36 S.E.2d 780 (1946); *Brown v. Mathis*, 201 Ga. 740, 41 S.E.2d 137 (1947); *Continental Carriers, Inc. v. Reese*, 203 Ga. 433, 46 S.E.2d 927 (1948); *Rylee v. Abernathy*, 210 Ga. 673, 82 S.E.2d 220 (1954); *Seckinger v. Citizens & S. Nat'l Bank*, 213 Ga. 586, 100 S.E.2d 587 (1957); *State Hwy. Dep't v. Southern Ry.*, 215 Ga. 71, 108 S.E.2d 699 (1959); *Gunby v. Harper*, 216 Ga. 94, 114 S.E.2d 856 (1960); *North Am. Acceptance Corp. v. Ramey*, 217 Ga. 476, 123 S.E.2d 253 (1961); *Youmans v. Steele*, 217 Ga. 747, 125 S.E.2d 215 (1962); *Oxford v. Sanders*, 217 Ga. 820, 125 S.E.2d 483 (1962); *Dependable Ins. Co. v. Gibbs*, 218 Ga. 305, 127 S.E.2d 454 (1962); *Pearson v. Walker*, 218 Ga. 469, 128 S.E.2d 328 (1962); *Modern Homes Constr. Co. v. Mack*, 218 Ga. 795, 130 S.E.2d 725 (1963); *Rossville Crushed Stone, Inc. v. Massey*, 219 Ga. 467, 133 S.E.2d 874 (1963); *Modern Homes Constr. Co. v. Burke*, 219 Ga. 710, 135 S.E.2d 383 (1964); *Kimsey v. Caudell*, 109 Ga. App. 271, 135 S.E.2d 903 (1964); *Gibson v. Hodges*, 222 Ga. 434, 150 S.E.2d 651 (1966); *Niedernhofer v. DeLoach*, 222 Ga. 535, 150 S.E.2d 662 (1966); *Bloodworth v. Bloodworth*, 225 Ga. 379, 169 S.E.2d 150 (1969); *Midland Nat'l Life Ins. Co. v. Emerson*, 121 Ga. App. 427, 174 S.E.2d 211 (1970); *J.D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 175 S.E.2d 847 (1970); *Register v. Stone's Indep. Oil Distribs.*, 122 Ga. App. 335, 177 S.E.2d 92 (1970); *Chamblee Constr. Co. v. Pickett*, 227 Ga. 421, 181 S.E.2d 32 (1971); *Stanfield v. Brewton*, 228 Ga. 92, 184 S.E.2d 352 (1971); *Hallmark Properties*,

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Inc. v. Slater, 229 Ga. 432, 192 S.E.2d 157 (1972); Pope v. Cokinos, 231 Ga. 79, 200 S.E.2d 275 (1973); Graham v. Tallent, 235 Ga. 47, 218 S.E.2d 799 (1975); Schuehler v. Pait, 239 Ga. 520, 238 S.E.2d 65 (1977); Scott v. Atlanta Dairies Coop., 239 Ga. 721, 238 S.E.2d 340 (1977); Peacock v. Nat'l Bank & Trust Co., 241 Ga. 280, 244 S.E.2d 816 (1978); Shaheen v. Dunaway Drug Stores, Inc., 246 Ga. 790, 273 S.E.2d 158 (1980); Dennard v. Freeport Minerals Co., 250 Ga. 330, 297 S.E.2d 222 (1982); Georgia Power Co. v. Harrison, 253 Ga. 212, 318 S.E.2d 306 (1984); Miller v. Bryant, 266 Ga. 584, 468 S.E.2d 762 (1996); Abrams v. Massell, 262 Ga. App. 761, 586 S.E.2d 435 (2003).

Proper Venue

The test for determining venue of an equitable action in Georgia is not made to depend on the technical name given to the parties defendant. Bennett v. Blackshear Mfg. Co., 183 Ga. 240, 187 S.E. 865 (1936).

Venue of equity actions. — Venue of equitable petition to enjoin levy of an execution and advertisement of land levied upon, and to set aside the judgment on which it issued, and where no complaint of misconduct on the part of the levying officer is alleged, is the county of the residence of the judgment plaintiff, if a resident of this state. Harrington v. Bryan, 169 Ga. 382, 150 S.E. 555 (1929); Whiteley v. Downs, 174 Ga. 839, 164 S.E. 318 (1932).

This also applies to a prayer for cancellation of a transfer of execution by the levying officer, the marshal and the clerk of the superior court being mere nominal parties. Interstate Bond Co. v. Lee, 182 Ga. 238, 184 S.E. 866 (1936).

Venue of petition for injunction, cancellation of deeds, and other equitable relief, in which it is sought to have a conveyance of land delivered up and cancelled, may be brought in the county of the residence of the grantee or in that of the grantor. Planters Cotton Oil Co. v. McCurley, 199 Ga. 104, 33 S.E.2d 270 (1945).

Assuming that O.C.G.A. § 53-7-54(b) created a cause of action against

third-parties, as the trust created by the statute was a creature of equity jurisdiction, under Ga. Const. 1983, Art. VI, Sec. II, Para. III, venue for such actions was in the county where a defendant resided. Thus, where a contempt petition was filed pursuant to the statute, the motion to transfer venue filed by two lawyers and their law firm should have been granted as neither lawyer resided in the forum county and their law firm was not located in that county. Rader v. Levenson, 290 Ga. App. 227, 659 S.E.2d 655 (2008).

Venue of action against public nuisance. — In an injunctive action solely against the owner of the property on which an alleged public nuisance is being operated, the action must be brought in the county of the residence of the defendant, as required by Ga. Const. 1983, Art. VI, Sec. II, Para. III. This is true even though O.C.G.A. § 3-10-8 states that the action is to be filed in the county where the nuisance exists, since the constitutional mandate must control. Chancey v. Hancock, 225 Ga. 715, 171 S.E.2d 302 (1969); Hopkins v. Baker, 258 Ga. App. 14, 572 S.E.2d 716 (2002).

Place of filing petition for interpleader when claimants reside in different counties. — A petition for interpleader is an equitable proceeding. Substantial relief is prayed, so far as the stakeholders are concerned, against each of the persons claiming the fund; and, therefore, where the claimants reside in different counties, the petition may be properly filed in the county of the residence of either. The same principle is applicable where the original action is brought in a jurisdiction where the stakeholder is subject to suit, and the stakeholder's response is in the nature of interpleader, and one of the claimants to the stakeholder's funds is subject to the court's jurisdiction though other claimants reside in different counties. Williams v. Overstreet, 230 Ga. 112, 195 S.E.2d 906 (1973).

Venue proper in county of any one of two or more defendants of different counties. — If substantial relief prayed is against two or more defendants residing in different counties, the suit may be brought in the county of the resi-

dence of either. *O'Hara v. Jacobs*, 191 Ga. 5, 11 S.E.2d 199 (1940).

Where plaintiff administratrix alleged that defendants entered into a conspiracy to fraudulently procure transfer to them by decedent of all of the decedent's real and personal estate, that the confederates had made a division of the fruits of their conspiracy and accordingly prayed for appropriate substantial equitable relief against each for benefit of the estate, the defendants were properly joined in the equitable suit and venue of that suit was laid in a county where any one of the defendants resided against whom substantial equitable relief was prayed. *Hayes v. Hayes*, 214 Ga. 624, 106 S.E.2d 790 (1959).

Injunctions. — Fact of praying for an injunction against a defendant does not in all events confer right to file the equitable petition in county of defendant's residence, or to draw to that county residents of other counties. *Carter v. Grogan*, 230 Ga. 249, 196 S.E.2d 434 (1973).

Injunction to restrain continuing trespass. — Where a petition for injunction, brought in the county where one defendant resides, seeks relief against joint trespasses by all of the defendants, the court is not without jurisdiction, even though all except one defendant are residents of other counties of the state, and even though the resident defendant, as an employee or agent of other defendants, may have been acting only under their command or authority in the commission of the trespasses. *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940).

This is true, even though the resident defendant may have been acting only as agent of or under the command, direction, or authority of the other defendants in the commission of the trespasses. *Baggett v. Linder*, 208 Ga. 590, 68 S.E.2d 469 (1952).

Where a petition for injunction brought in county where one defendant resides, seeks to restrain a continuing trespass which all defendants are committing, the court is not without jurisdiction to grant relief, even though all except the one defendant are residents of other counties in the state. *Bennett v. Bagwell & Stewart, Inc.*, 214 Ga. 115, 103 S.E.2d 561 (1958), commented on in 21 Ga. B.J. 564 (1959).

Bankruptcy trustee of insolvent corporation seeking to recover unpaid stock subscriptions. — A trustee in bankruptcy of an insolvent corporation may recover unpaid stock subscriptions from any number of persons in one equitable action, and may bring the action in the county of the residence of any of the defendants. *Sanders v. Culpepper*, 226 Ga. 598, 176 S.E.2d 83 (1970).

Venue proper as to all parties. — Where a nonresident admits jurisdiction and the defendant against whom substantial relief is prayed is a resident and a second defendant is a joint obligor of the first, venue is proper as to all parties. *Cheek v. Savannah Valley Prod. Credit Ass'n*, 244 Ga. 768, 262 S.E.2d 90 (1979).

Venue in county in which cause of action originated. — A motor common carrier may be a nonresident corporation, yet since it is engaged in doing business in this state, and has agents in the state for that purpose, it is a resident of this state and a resident of the county in which the cause of action originated, so far as the right to bring a suit against it for a cause of action originating in that county is concerned, and, being a resident of that county for purpose of suit, a joint tort-feasor, notwithstanding that the joint tort-feasor may reside in another county of this state, may be sued jointly with the motor common carrier in the county in which the cause of action originated. *A.G. Boone Co. v. Owens*, 51 Ga. App. 739, 181 S.E. 519 (1935).

An action against a motor common carrier, except where the Constitution of this state otherwise provides, may be brought and maintained in any county or militia district where the action could be brought if the defendant were a railroad company being sued upon a like cause of action, and if the defendant or defendants or any of them cannot be found for service in the county or militia district where the action is brought the second original or originals may issue and service may be made in any other county where the service can be made upon the defendant or defendants or defendant's, its, or their agents; a motor common carrier, doing business as such within this state by being engaged in the business of trucking, hauling, and trans-

Proper Venue (Cont'd)

porting with automobile trucks over various public highways, is subject to be sued, as is a railroad company, in any county in this state in which the cause of action originated, for damages for an injury to person or property by the operation of the vehicles of such motor common carrier, although it may not have an agent in that county upon whom service of the suit may be perfected. *A.G. Boone Co. v. Owens*, 51 Ga. App. 739, 181 S.E. 519 (1935).

Proceeding exempt from filing in county instituted in. — When an alleged landlord sued out a statutory proceeding to eject an alleged tenant for non-payment of rent, the latter could file a suit in equity against the alleged landlord to enjoin the dispossessory proceeding where the tenant denied that the relation of landlord and tenant existed between the tenant and the plaintiff in such proceeding, but alleged that the tenant held under plaintiff under a contract of sale, and in the same suit, in a proper case, could seek specific performance by the plaintiff in such proceeding, of the contract of sale without being required to file a counter-affidavit to such proceeding and to give the bond required by the statute to arrest such proceeding, and without being required to file the tenant's suit for equitable relief in the county where such proceeding was instituted. *Harvey v. Atlanta & Lowry Nat'l Bank*, 164 Ga. 625, 139 S.E. 147 (1927).

Jurisdiction of probate court and superior court hinges on type of action. — If a will expressly creates a trust, and imposes special fiduciary duties on the person named executor, not as executor but as trustee, and the executor has expressly or impliedly assented to the gift and taken over the property as trustee, it is plain that the person is not amenable to a proceeding in the court of ordinary (now probate court), brought by a legatee for an accounting and settlement with respect to the trust; but relief must be sought by equitable suit in the superior court where the defendant resides. *McDowell v. McDowell*, 68 Ga. App. 363, 22 S.E.2d 851 (1942).

Boundary-line dispute. — Where equitable relief is sought in conjunction with

a boundary-line dispute (i.e., removal of a fence and ejectment from a disputed strip of land), the county of the defendant's residence is the proper venue forum. *Beauchamp v. Knight*, 261 Ga. 608, 409 S.E.2d 208 (1991).

A bill in equity to enjoin a trespass upon realty by felling timber is not a suit respecting title to land as must be brought in the county where the land lies. The proper venue of such a case is the county of the residence of a defendant against whom substantial relief is prayed. *Powell v. Cheshire*, 70 Ga. 357, 48 Am. R. 572 (1883); *Chase v. Endsley*, 165 Ga. 292, 140 S.E. 876 (1927), commented on in 1 Ga. L. Rev. 49 (1927).

Venue in county where at least one of the defendants against whom substantial relief is prayed resides. — An equitable action against three defendants, two resident and one nonresident, seeking to have equity decree title in the plaintiffs to land lying in the county of the suit, not being one respecting title to land, must be brought in the county where one of the defendants against whom substantial relief is prayed resides. *Empire Land Co. v. Stokes*, 212 Ga. 707, 95 S.E.2d 283 (1956).

If the proceeding to foreclose the lien in the case was one in equity, the suit ought to be brought in the county of the residence of a defendant against whom substantial relief is prayed. *Middleton v. Westmoreland*, 164 Ga. 324, 138 S.E. 852 (1927).

Venue in foreclosure proceedings. — While a statutory mortgage on real property must be foreclosed in the county where the property lies, the rule is different where a deed is executed by a borrower to secure a note given to the lender, and the deed is foreclosed as an equitable mortgage on land lying in a different county from that where the vendor lives. In the former case, of a statutory mortgage, generally no title to the land passes from the mortgagor to the mortgagee, but in the latter case it does, and may be foreclosed as an equitable mortgage in the county of the residence of the vendor. *Kitchens v. Molton*, 172 Ga. 690, 158 S.E. 570 (1931).

Venue of suit to foreclose lien for materials, see *Atkinson v. Wingate*

Plumbing Co., 20 Ga. App. 480, 93 S.E. 122 (1917).

Venue of an equitable action to restrain the exercise of a power of sale contained in a security deed by a resident agent of the grantee, who is a resident of another county, is in the county of the residence of the grantee, and a suit for injunction against the resident agent and the grantee in the county of the agent's residence cannot be sustained. *Grace v. Interstate Bond Co.*, 193 Ga. 810, 20 S.E.2d 131 (1942).

Venue of a suit by a creditor of an intestate person against the administrator is the county of the defendant's residence, and not the county of the administrator's appointment where the administrator resides in a different county. *Hopkins v. Kidd*, 192 Ga. 791, 16 S.E.2d 570 (1941).

Corporation subject to equity suit in county of principal office. — A corporation of this state is not subject to a suit for equitable relief by injunction in a county other than that fixed by its charter as the county of its principal office, and this is true although the suit embraces also a claim for past damages. *Caldwell v. Swift & Co.*, 174 Ga. 313, 162 S.E. 814 (1932); *Grimaud v. Knox-Georgia Homes, Inc.*, 210 Ga. 514, 81 S.E.2d 476 (1954).

In a representative capacity, an executrix must be sued in equity, if sued alone, in the county of the executrix's residence. *Hopkins v. Kidd*, 192 Ga. 791, 16 S.E.2d 570 (1941).

Real estate agents. — The joining as defendant of a real estate agent as to whom there is no charge of the commission of any unlawful act against the plaintiff irreparable in damages, and against whom only incidental relief is sought, in an equitable action against the nonresident principal, who is the only defendant against whom substantial equitable relief is sought, will not afford jurisdiction in the county of the residence of the agent. *Payne v. Hightower*, 198 Ga. 421, 31 S.E.2d 816 (1944).

Wills. — If all the parties interested in a will are nonresidents of the state, the executor may file the bill in the county where the administration is pending, as the Code gives equity concurrent jurisdic-

tion with the courts of ordinary (now probate court) in the administration of estates and permits the executor to apply to equity for direction. As jurisdiction of the administration of the estate is vested in the court of ordinary (now probate court) of the county of the domicile of the deceased, the court of equity for that county can take jurisdiction for the purpose of construing the will or for directing the administration, and service on such nonresidents can be made by publication. *Barker v. Wilkinson*, 222 Ga. 329, 149 S.E.2d 698 (1966).

Multiple claims arising from same transaction. — Where a plaintiff brings suit in the same county on two claims arising from the same transaction and the Georgia Constitution designates that county as the venue for one of those claims, the trial court has the discretion to entertain both claims. *Natpar Corp. v. E.T. Kassinger, Inc.*, 258 Ga. 102, 365 S.E.2d 442 (1988).

Where a joint obligor claim and an equitable claim arose from the same transaction, and involved the same parties and witnesses and substantially the same proof, venue with regard to both claims was proper in the county where only one of the joint obligors lived, despite the fact that the other joint obligor was the only defendant against whom equitable relief was prayed. *Natpar Corp. v. E.T. Kassinger, Inc.*, 258 Ga. 102, 365 S.E.2d 442 (1988).

Statutory adverse possession. — A landowner's suit is clearly not in equity where the landowner seeks to establish legal title by adverse possession as a matter of law in reliance on a statute. Venue is constitutionally in the county in which the land lies, as provided in O.C.G.A. § 44-5-168(b)(1). *Hayes v. Howell*, 251 Ga. 580, 308 S.E.2d 170 (1983).

Substantial Relief Requirement

As to equitable jurisdiction of a nonresident defendant, see *Fourth Nat'l Bank v. Mooty*, 143 Ga. 137, 84 S.E. 546 (1915); *Bird v. Trapnell*, 147 Ga. 50, 92 S.E. 872 (1917); *Atlanta, B. & Atl. Ry. v. Smith*, 148 Ga. 282, 96 S.E. 562 (1918); *Sayer v. Bennett*, 159 Ga. 369, 125 S.E. 855 (1924).

Substantial Relief**Requirement (Cont'd)**

Suit subject to dismissal where substantial relief is sought only against nonresident defendant. — Mere fact of praying for injunction against defendant does not in all events confer right to file equitable petition in county of defendant's residence, or to draw to that county residents of other counties; thus, where substantial relief is sought only against nonresident defendant, suit is subject to dismissal for want of jurisdiction. *Newport Timber Corp. v. Floyd*, 247 Ga. 535, 277 S.E.2d 646 (1981).

Substantial relief rule. — Generally, suits for equitable relief must be brought in the county of the residence of a defendant against whom substantial relief is prayed. *Waters v. Waters*, 167 Ga. 389, 145 S.E. 460 (1928); *Bradley v. Burns*, 188 Ga. 434, 4 S.E.2d 147 (1939); *Harper v. Gunby*, 215 Ga. 466, 111 S.E.2d 85 (1959).

Substantial relief sought against multiple defendants. — An equitable petition asking substantial relief against both defendants may be brought in the county of either. *Georgia Power Co. v. City of Rome*, 172 Ga. 14, 157 S.E. 283 (1931).

Venue was proper in Echols County, even though the complaint sought additional relief against the DeKalb County Tax Commissioner, who resided in DeKalb County, as the complaint sought substantial relief against the Echols County Tax Commissioner and the commissioner resided in Echols County; the complaint sought declaratory and injunctive relief seeking to prevent the duplicate collection of ad valorem taxes by the two tax commissioners. *Scott v. Prime Sales & Leasing, Inc.*, 276 Ga. App. 283, 623 S.E.2d 167 (2005).

A person who would have equity must do equity, hence equity, having the parties before the court rightfully, will proceed to give full relief to all parties in reference to the subject matter, provided the court has jurisdiction thereof. *Pearson v. George*, 211 Ga. 18, 83 S.E.2d 593 (1954).

Construction of substantial relief. — Properly construed, "substantial relief" mentioned in this paragraph and in for-

mer Civil Code 1910, § 5527 (see now O.C.G.A. § 9-10-30) referred to substantial equitable relief. *Wright v. Trammell*, 176 Ga. 84, 166 S.E. 866 (1932); *Huckabee Auto Co. v. Norris*, 190 Ga. 515, 9 S.E.2d 840 (1940) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Common substantial equitable relief between resident and nonresident required. — This paragraph has been uniformly construed to mean that in order to join a nonresident in a suit, substantial equitable relief must be common to the nonresident and the resident defendant. This means that regardless of substantial relief sought against the resident defendant and other substantial equitable relief sought against the nonresident, the nonresident cannot be joined. *I. Perlis & Sons v. National Sur. Corp.*, 218 Ga. 667, 129 S.E.2d 915 (1963) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Collateral or incidental relief not sufficient to give jurisdiction. — If relief is sought against a resident defendant, which is merely collateral or incidental, this will not suffice to give the court jurisdiction. The relief prayed for against a defendant must be substantial. *Beacham v. Cullens*, 194 Ga. 739, 22 S.E.2d 508 (1942).

Substantial equitable relief must be prayed. — The essential fact necessary to confer equitable jurisdiction in a county is not that the defendant residing therein shall have an interest, or a substantial interest, but that substantial relief shall be prayed against such defendant. If substantial relief is prayed against a defendant residing in the county in which an equity case is brought, the equity case "shall be tried" there. *Bennett v. Blackshear Mfg. Co.*, 183 Ga. 240, 187 S.E. 865 (1936); *Planters Cotton Oil Co. v. McCurley*, 199 Ga. 104, 33 S.E.2d 270 (1945).

An indispensable prerequisite to joining a nonresident in an equity suit is a prayer for substantial equitable relief which is common to the resident and nonresident defendants. *Martin v. Bennett*, 221 Ga. 482, 145 S.E.2d 517 (1965); *Madray v. Ogden*, 225 Ga. 806, 171 S.E.2d 560 (1969).

The question is not whether the defendant was a proper or necessary

party to the suit, but rather did the petition seek substantial equitable relief against it. That it may properly be made a party does not determine the other inquiry; it is a question of proper venue, not proper parties. *Carlson v. Hall County Planning Comm'n*, 233 Ga. 286, 210 S.E.2d 815 (1974).

In a suit in equity, all persons whose rights and interests are sought to be affected are necessary party defendants and where they are joined as such they are parties against whom substantial equitable relief is prayed within the meaning of the rule as to venue in equity cases. *Huey v. National Bank*, 177 Ga. 64, 169 S.E. 491 (1933); *Summit Ins. Co. v. Mulherin*, 233 Ga. 606, 212 S.E.2d 788 (1975).

Absence of jurisdiction appears on the face of the pleading when there is no prayer for substantial equitable relief that is common to both defendants. *Martin v. Bennett*, 221 Ga. 482, 145 S.E.2d 517 (1965).

Where rights of the resident defendant are only incidentally involved by the grant of the relief sought by the plaintiff, the resident defendant is not a party against whom substantial relief is prayed. *Summit Ins. Co. v. Mulherin*, 233 Ga. 606, 212 S.E.2d 788 (1975).

Court properly granted motion to dismiss for lack of jurisdiction. — Where the sole equitable relief sought in petition is a recovery *ex delicto* against nonresident defendants, to be set-off against amounts constituting the basis of several suits in the city court, and the alleged acts of the several nonresidents for which a recovery is sought are matters not included in the subject matter of city court suits, the court did not err in sustaining a demurrer (now motion to dismiss) thereto. *Askew v. Bassett Furn. Co.*, 172 Ga. 700, 158 S.E. 577 (1931).

Showing of substantial relief. — While, under this section, an equity case must be brought in the county where a defendant resides against whom substantial relief is prayed, and the mere fact that a defendant residing in the county has a substantial pecuniary interest in the litigation, and is a proper or necessary party

thereto, will not confer jurisdiction upon the courts of that county where it is not alleged that the resident defendant is doing or threatening to do an illegal act; however, where the petition, brought by minority stockholders of a corporation, alleges that the deceased owner of the controlling stock had pledged stock to the corporation as security for an indebtedness and that the defendants, the heirs at law, one of whom resides in the county where the suit is filed, have entered into a fraudulent scheme and conspiracy with the administrators of the deceased and directors of the corporation, to sell the stock so as to defeat the lien of the corporation thereon, and such petition seeks discovery of the terms of the proposed sale, and to enjoin such threatened fraudulent sale of stock, and to enjoin the bank, a resident corporation of the county in which the suit was filed, from surrendering possession of stock certificate, the petition sought such substantial relief against the defendants residing in the county where it was filed as to confer jurisdiction upon the superior court of that county. *Screven Oil Mill v. Hudmon*, 214 Ga. 414, 105 S.E.2d 328 (1958) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Prayer for substantial relief required for injunctive relief. — Where a defendant corporation is a domestic corporation and a resident of a county different from the plaintiff's, the superior court of the plaintiff's county would have no jurisdiction to grant injunctive relief against it, if no substantial relief is prayed against the resident defendant. *Screven County v. Reddy*, 208 Ga. 730, 69 S.E.2d 186 (1952).

Suit in county of residence of attorney who allegedly had contingent interest in estate. — Where a suit instituted by an administrator against heirs at law and their attorney alleged a contingent interest of the attorney in the subject matter of suit; and, though contingent upon recovery for clients, it was a substantial interest in the property alleged to be in the hands of the administrator for distribution among the heirs, and afforded grounds for equitable relief against the attorney as suit was in equity, venue was properly laid in the county of the residence of the attorney at law. *Reynolds v.*

Substantial Relief**Requirement (Cont'd)**

Ingraham, 179 Ga. 398, 175 S.E. 918 (1934).

Cancellation of a security deed was “substantial relief” against a resident defendant where plaintiff alleged that the deed was a sham for tax purposes, that there was never any agreement to repay the money used to buy the property, and that defendants, one a county resident and the other a nonresident, were involved in a collusive effort to foreclose on the property and sell it. *Stephenson v. Edwards*, 259 Ga. 173, 377 S.E.2d 840 (1989).

**Actions By and Against
Nonresidents**

Attachment of jurisdiction in quasi-in rem suit. — Where the plaintiff who obtained an alleged fraudulent judgment was a nonresident of the state and had caused the writ based on the judgment to be levied upon the property of the defendant located in Floyd County, plaintiff was subjected to the jurisdiction of the court in Floyd County for the purpose of a suit quasi-in rem to set aside the judgment and cancel the entry of the writ on the execution docket, as a cloud upon the plaintiff’s title. *Turner v. Koske*, 173 Ga. 390, 160 S.E. 398 (1931).

Jurisdiction over nonresidents on account of joinder of resident defendant. — It was not contemplated by the framers of the Constitution, in fixing the venue of equity suits, that nonresidents could be made to litigate in one county issues between them and the plaintiffs solely on account of the joinder of a resident defendant against whom there was a prayer for equitable relief. The mere fact of praying for an injunction against a defendant does not in all events confer the right to file the equitable petition in the county of that defendant’s residence, or to draw to that county residents of other counties. *Mandeville v. Mandeville*, 207 Ga. 125, 60 S.E.2d 460 (1950) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

In order to confer on the court of a particular county jurisdiction to hear and determine an issue between the plaintiff

and a nonresident defendant, it is essential that the plaintiff present a case showing grounds for the equitable relief sought against the resident defendant. *Mandeville v. Mandeville*, 207 Ga. 125, 60 S.E.2d 460 (1950).

Separate and distinct equitable causes of action do not give rise to jurisdiction. — A separate and distinct equitable cause of action against a resident defendant will not give the superior court of the county of such residence jurisdiction of a nonresident defendant against whom the plaintiff has another, independent, separate, and distinct equitable cause of action. *Jones v. Hudgins*, 218 Ga. 43, 126 S.E.2d 414 (1962).

When paragraph inapplicable. — Where a suit in equity is brought against a sole nonresident defendant of this state, seeking to cancel and set aside certain deeds as a cloud upon the title of the petitioner, and containing a prayer for general relief, a court of equity, under the prayer for general relief, may decree title to be in the petitioner; in such a case, this paragraph is inapplicable and the question is whether any court of equity in this state has jurisdiction. *Hale v. Turner*, 185 Ga. 516, 195 S.E. 423 (1937) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Others cannot allow court to obtain jurisdiction of nonresident defendants. — The court cannot gain jurisdiction of any defendants who are nonresidents of the state, by reason of including in the petition the superintendent of banks (now commissioner of banking and finance), the judge of a city court, and an attorney at law. *Askew v. Bassett Furn. Co.*, 172 Ga. 700, 158 S.E. 577 (1931).

**Equitable Actions and Actions at
Law**

Distinction between suits to establish title and suits to recover land. — There is a distinction between suits to establish title to land or to establish the evidence of title, and suits to recover the land upon legal title; the former being suits in equity, and the latter actions at law. *Owenby v. Stancil*, 190 Ga. 50, 8 S.E.2d 7 (1940).

The common test as to whether an action to recover land is an action

respecting title to land within the venue provision of the Constitution is whether the plaintiff can recover on the plaintiff's title alone, or whether the plaintiff must seek the aid of a court of equity in order to recover. *Payne v. Terhune*, 212 Ga. 169, 91 S.E.2d 348 (1956).

Suits alleging fraud and coercion.

— An action to cancel a deed conveying land, alleging the deed to have been obtained by fraud and coercion, is not a suit respecting title to land within the meaning of Ga. Const. 1976, Art. VI, Sec. XIV, Para. II (see Ga. Const. 1983, Art. VI, Sec. II, Para. II), but is an equitable action, and must be brought in the county of the residence of the defendants, as required by this paragraph. *Hawkins v. Pierotti*, 232 Ga. 631, 208 S.E.2d 452 (1974) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Ascertainment and establishment of boundary line case in equity and not one respecting title to land.

— Petition predicated upon ownership by plaintiff of certain described lands upon which defendants allegedly committed acts of trespass, and which of necessity required ascertainment and establishment of the boundary line in controversy, was a case in equity seeking injunctive relief against trespass to land, and was not a case respecting title to land, within the venue provisions of Ga. Const. 1976, Art. VI, Sec. XIV, Para. II (see Ga. Const. 1983, Art. VI, Sec. II, Para. II), and the case was properly brought in the county of the residence of a defendant against whom substantial equitable relief was prayed, as required by this paragraph. *Dawson v. Altamaha Land Co.*, 215 Ga. 700, 113 S.E.2d 129 (1960) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Suit to remove cloud on title arising from certain year's support proceeding.

— Suit to remove from record a certain year's support proceeding as a cloud upon title of described land in plaintiff's possession was one in equity and not one respecting title to land, and should have been brought in the county of a defendant against whom substantial relief was sought; since the suit was brought in a county where neither defendant resided, the court was without jurisdiction

of the subject matter and such jurisdiction could not be conferred by consent or waived by the parties. *Sweatman v. Roberts*, 213 Ga. 112, 97 S.E.2d 320 (1957).

Other equitable proceedings.

— Suit by assignee of obligee of a bond for title for an accounting and setoff against the purchase price of rents, appointment of a receiver to collect rents, specific performance and other relief, should have been brought in the county wherein the obligor under the bond for title resided, and not in the county of the tenant's residence; nor did plaintiff's striking of the plaintiff's prayer of injunction, and praying for possession of the premises, make the suit one respecting title to land, to be tried in the county where the land lay, as only after relief in equity decreeing title in plaintiff would the plaintiff have an action at law for recovery of the land. *Bradley v. Burns*, 188 Ga. 434, 4 S.E.2d 147 (1939).

Contract set asides based on mental incapacity or insanity.

— A petition filed in the court where a judgment was rendered to set aside the judgment on the ground of mental incapacity to enter into contract and of insanity existing at the time the judgment was rendered is not "an equity case" as is contemplated by the Constitution of Georgia. *Perry v. Fletcher*, 174 Ga. 180, 162 S.E. 285 (1932).

Jurisdiction

1. In General

Jurisdiction and venue distinguished.

— Jurisdiction means the power of a court to render a binding judgment in the case, and venue means the place of trial. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

The domicile of transient persons as fixed by former Civil Code 1910, § 2182 (see now O.C.G.A. § 19-2-2) was a sufficient residence within the meaning of this paragraph. *Crawford v. Wilson*, 142 Ga. 734, 83 S.E. 667 (1914) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Essential fact necessary to confer jurisdiction is not that a defendant residing in county has substantial interest in litigation, but whether or not substantial equitable relief is prayed against such

Jurisdiction (Cont'd)**1. In General (Cont'd)**

defendant. *Newport Timber Corp. v. Floyd*, 247 Ga. 535, 277 S.E.2d 646 (1981).

Waiver permissible. — This paragraph confers a personal privilege on the defendant which may be waived by the defendant. *Thomason v. Thompson*, 129 Ga. 440, 59 S.E. 236, 26 L.R.A. (n.s.) 536 (1907) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Amendment. — An amendment to a bill will not be allowed if one of the effects of the amendment would be to compel defendants to come to trial in a different county from that of their residence. *Jordan v. Jordan*, 16 Ga. 446 (1854); *Johnson v. Griffin*, 80 Ga. 551, 7 S.E. 94 (1888).

The trial court properly sustained the ground of demurrer (now motion to dismiss) which set up its want of jurisdiction, because no substantial relief was prayed against the only resident defendant. *White v. North Ga. Elec. Co.*, 139 Ga. 587, 77 S.E. 789 (1913); *Middlebrooks v. Barron*, 150 Ga. 701, 105 S.E. 298 (1920); *Glenn v. Cauthen*, 150 Ga. 784, 105 S.E. 365 (1920); *Willie v. Willie*, 154 Ga. 688, 115 S.E. 257 (1922).

A bill is not demurrable (now motion to dismiss) on the ground that land lying in another county was involved in the litigation. *Fulgham v. Pate*, 77 Ga. 454 (1886).

Collateral relief against real estate agent does not confer jurisdiction. — Where the relief prayed against a resident real estate agent is collateral to and dependent upon the granting of the main relief sought against the executor, residing in another county, the superior court of that county has no jurisdiction of the case. *Martin v. Gaissert*, 134 Ga. 34, 67 S.E. 536 (1910).

2. Jurisdiction Satisfied

Upon showing defendant and respondent as joint wrongdoers and substantial relief sought jurisdiction established. — Where the allegations of the amended petition are sufficient to show that the original defendant and the respondent are joint wrongdoers and substantial equitable relief is sought against

both, there is no merit in the contention that the superior court of the county does not have jurisdiction of the respondent. *Hardin v. Homeyer*, 213 Ga. 321, 99 S.E.2d 136 (1957).

Venue in licensing actions against state board. — Venue of contractors' action seeking to restrain the Georgia State Licensing Board for Residential and General Contractors and a county from enforcing a licensing law, O.C.G.A. § 43-41-1 et seq., was proper in Muscogee County because there was substantial equitable relief sought that was common to the Board and to the resident county; the complaint alleged that enforcement of the licensing law by both the Board and the county would cause irreparable injury to the contractors, and it asked that preliminary and permanent injunctions be issued against both the county and the Board enjoining and restraining them from exercising any of the powers, rights, or duties respecting enforcement of the licensing law. *Ga. State Licensing Bd. for Residential & Gen. Contrs. v. Allen*, 286 Ga. 811, 692 S.E.2d 343 (2010).

3. Residence of One Defendant Determined Venue.

In suit against coexecutors, the residence of one defendant determined venue. *Shropshire v. Rainey*, 150 Ga. 566, 104 S.E. 414 (1920).

In suit against joint trespassers, the residence of one defendant determined venue. *Townsend v. Brinson*, 117 Ga. 375, 43 S.E. 748 (1903).

In suit for accounting by guardian, the residence of one defendant determined venue. *Bass v. Wolff & Hopp*, 88 Ga. 427, 14 S.E. 589 (1892).

In suit by partner on partnership transaction, the residence of one partner determined venue. *Jackson v. Southern Flour & Grain Co.*, 146 Ga. 453, 91 S.E. 481 (1917).

Bill of interpleader filed where claimants reside. *Millsap v. Waco Mercantile Co.*, 145 Ga. 95, 88 S.E. 673 (1916).

Action for marshalling of assets by executor of insolvent estate. *Ragan v. Smith*, 142 Ga. 398, 83 S.E. 119 (1914).

In action where partial assignment of wages of employee enforced. *King v.*

Atlantic Coast Line R.R., 160 Ga. 842, 129 S.E. 86 (1925).

In action where insurance company is defendant. Porter v. State Mut. Life Ins. Co., 145 Ga. 543, 89 S.E. 609 (1916).

In action against superintendent of banks (now commissioner of banking and finance). Sayer v. Bennett, 159 Ga. 369, 125 S.E. 855 (1924).

Specific performance, cancellation, and injunction in county where some of defendants reside was proper. Wynne v. Lumpkin, 35 Ga. 208 (1886); Lester v. Matthews, 58 Ga. 403 (1877); Taylor v. Colley, 138 Ga. 41, 74 S.E. 694 (1912); Chosewood v. Jones, 146 Ga. 804, 92 S.E. 646 (1917); Bird v. Trapnell, 147 Ga. 50, 92 S.E. 872 (1917).

Trustees and shareholders of a bankrupt industrial corporation may be sued in the county of the residence of any one of the defendants. Carlisle v. Ottley, 143 Ga. 797, 85 S.E. 1010, 1917C L.R.A. 393, 1917A Ann. Cas. 573 (1915).

An action for cancellation of a deed, where grantee resides outside this state and the grantor resides within this state, should be brought in the county of the residence of the latter. Thomas v. Calhoun Nat'l Bank, 157 Ga. 475, 121 S.E. 808 (1924).

4. Lack of Jurisdiction

Grounds for dismissal for lack of jurisdiction. — A motion to dismiss for lack of jurisdiction is properly granted by the trial court where an equitable action is brought: (1) in which in personam relief is prayed against a nonresident of Georgia; and (2) in which no substantial relief is prayed against a resident of the county where the action is brought. Roberts v. Markin, 225 Ga. 352, 168 S.E.2d 576 (1969).

Joinder of a resident defendant did not give jurisdiction. — A nonresident cannot be made to litigate in one county issues between the nonresident and a plaintiff solely on account of joinder of a resident defendant against whom there is a prayer for equitable relief. Beacham v. Cullens, 194 Ga. 739, 22 S.E.2d 508 (1942).

Suit subject to dismissal for want of jurisdiction. — Where the only substantial relief sought is against nonresident defendants, and the sole resident defendant individually has no connection with the alleged cause of action, and no act or claim by the defendant is involved except as agent of the other defendants, the suit is subject to dismissal for want of jurisdiction. Carter v. Grogan, 230 Ga. 249, 196 S.E.2d 434 (1973).

Jury's finding not authorized by evidence. — The evidence did not authorize a finding by a jury that defendant resided in the county in which suit for injunction and damages was brought when such suit was brought. Grimaud v. Knox-Georgia Homes, Inc., 210 Ga. 514, 81 S.E.2d 476 (1954).

Nonresident defendant lacked substantial interest. — An equitable petition against two defendants residing in different counties in this state, brought in the county of the residence of one of them, where it is apparent that the only substantial relief sought is against the nonresident defendant, is subject to dismissal for want of jurisdiction. Beacham v. Cullens, 194 Ga. 739, 22 S.E.2d 508 (1942).

Where the interests of the plaintiff and the resident defendant are identical and the allegations of the petition fail to show any justiciable controversy between the plaintiff and the resident defendant in which the nonresident defendant has any substantial interest, on motion of the nonresident defendant, setting out that it is a resident of a named county in this state and subject to suit only in the superior court of that county, the petition will be dismissed as to such nonresident defendant for want of jurisdiction. Maryland Cas. Co. v. City of Adel, 87 Ga. App. 138, 73 S.E.2d 237 (1952).

Where defendants filed a complaint in equity to set aside a default judgment rendered against them in a previous civil action, the trial court lacked personal jurisdiction and venue was improper, since a complaint in equity to set aside a judgment must be brought in the county in which a defendant resides against whom substantial relief is prayed. Franks v. Horton, 244 Ga. 611, 261 S.E.2d 570 (1979).

Jurisdiction (Cont'd)**4. Lack of Jurisdiction** (Cont'd)

Dismissal proper where suit brought in county other than defendant's residence. — While a written motion to dismiss an equitable petition will not be granted unless every material fact on which the motion is founded is apparent in the petition, yet there is no deviation from this rule in dismissing a petition on written motion specifically raising the question of lack of jurisdiction where it appears that the only defendant against whom substantial relief is prayed is a resident of a county other than that in which the petition is brought. *Payne v. Hightower*, 198 Ga. 421, 31 S.E.2d 816 (1944).

Where the only defendant was a resident of one county, when the plaintiff instituted a suit against the defendant for equitable relief in the superior court of another county, and the petition prayed for relief as to matters not included in the defendant's pending application to probate a will in solemn form, the court did not err in sustaining the defendant's plea to the jurisdiction of the court and in dismissing the plaintiff's suit. *Spiller v. Chapman*, 216 Ga. 456, 117 S.E.2d 536 (1960).

Cross actions. — When to a suit at law, by the transferee against the maker of a promissory note, an answer in the nature of a cross action was filed praying equitable relief against the original payee, who resided in a county other than the one wherein the suit was pending, it was error to sustain a motion making such transferor a party, over the transferor's objection that the court had no jurisdiction to do so, or to grant the relief sought. *Huckabee Auto Co. v. Norris*, 190 Ga. 515, 9 S.E.2d 840 (1940).

Where, to an action at law brought by a resident of Polk County against a defendant residing in Fulton County, an answer in the nature of a cross action was filed, in which substantial equitable relief was prayed against the plaintiff and a third party who was also a resident of Polk County, it was erroneous to make the latter a party over the latter's objection, and to refuse the third party's motion to

dismiss the cross action as to the third party, the ground of such objection and motion being that the court had no jurisdiction to grant as to the third party the relief sought. *Terhune v. Pettit*, 195 Ga. 793, 25 S.E.2d 660 (1943).

An equitable petition against two defendants residing in this state, brought in the county where one of them resides, from which together with the prayers it is apparent that the only substantial relief sought is against the nonresident defendant, and that the sole resident defendant individually has no connection with the alleged cause of action, and no act or claim by the resident defendant is involved except as agent of the other defendant, is subject to dismissal for want of jurisdiction. *Payne v. Hightower*, 198 Ga. 421, 31 S.E.2d 816 (1944).

Contracting company's residence did not give jurisdiction. — Fact that plaintiff, as surety, guaranteed performance of contract by contracting company, as principal, would not give the superior court of the county of residence of the contracting company jurisdiction on petition of the surety to hear and determine controversy between the contracting company and the city for which the work was to be performed as to whether or not there had been a breach of contract on the part of the contracting company, nor would fact that plaintiff and contracting company had entered into a separate contract by application for the performance bond give plaintiff any right to compel the city to join in a suit with reference to this separate contract, since the city was not a party to the application and had no interest therein. *Maryland Cas. Co. v. City of Adel*, 87 Ga. App. 138, 73 S.E.2d 237 (1952).

The Superior Court of Murray County did not have jurisdiction to entertain a case for a declaratory judgment where all of the party defendants except one defendant, against whom no substantial equitable relief was prayed, were nonresidents of Murray County; the equitable feature of the case is removed, leaving the action solely one at law under Ga. L. 1945, p. 137, § 1 (see now O.C.G.A. § 9-4-2). The venue of such an action is in the county where the de-

defendant resides, Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI). The nonresident defendants not being of the class of persons who may be sued in counties other than the counties of their residence as permitted in Ga. Const. 1976, Art. VI, Sec. XIV, Paras. IV and V (see Ga. Const. 1983, Art. VI, Sec. II, Paras. IV and V), the court was without jurisdiction to enter a declaratory judgment as to their rights. *Harper v. Gunby*, 215 Ga. 466, 111 S.E.2d 85 (1959).

Error in finding venue under § 33-4-1. — Where an owner's suit did not arise out of a title insurance company's business as an insurer, pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. III, the trial court erred in finding venue under O.C.G.A. § 33-4-1(2); in addition, the grant of an interlocutory injunction was error because there was no showing that the title company had any opportunity to challenge the applicability of an amendment to add a quiet title action under O.C.G.A. § 23-3-62 to the complaint. *First Am. Title Ins. Co. v. Broadstreet*, 260 Ga. App. 705, 580 S.E.2d 676 (2003).

Dismissal proper in dispute over insurance policy. — Columbia County Superior Court did not have personal jurisdiction over an insurance policy beneficiary who resided in another county sufficient to impose equitable relief against the beneficiary, pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. III. Joinder of the beneficiary was not proper even if jurisdiction was proper as to the insurer under O.C.G.A. § 33-4-1(4) because the complaint did not seek equitable relief common to both the non-resident beneficiary and the insurer. *Skaliy v. Metts*, 287 Ga. 777, 700 S.E.2d 357 (2010).

5. Waiver of Jurisdiction

This paragraph guarantees a personal privilege, which may be waived, so far as the rights of the parties themselves are concerned, but not so as to prejudice third persons. *Scardina v. Scardina*, 229 Ga. 341, 191 S.E.2d 52 (1972) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

"Waiver" defined. — The only way in which former Code 1933, § 3-202 (see now

O.C.G.A. § 9-10-30) can be reconciled with this paragraph is on the idea of waiver, in that a plaintiff by voluntarily instituting a suit gave to the court of the county where it was so instituted jurisdiction of the plaintiff's person, sufficient to answer all the ends of justice respecting the suit originally instituted. *Terhune v. Pettit*, 195 Ga. 793, 25 S.E.2d 660 (1943) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Significance of waiver. — Only through waiver or voluntary submission to the courts of another county may a trial take place in a county other than that of the defendant's residence. *Hanson v. Williams*, 170 Ga. 779, 154 S.E. 240 (1930); *Terhune v. Pettit*, 195 Ga. 793, 25 S.E.2d 660 (1943).

Connection and reconciling paragraph with other sections. — Since former Code 1933, § 3-202 (see now O.C.G.A. § 9-10-30) can be reconciled with this paragraph as to venue of equity cases only on the ground of waiver, then former Code 1933, § 24-112 (see now O.C.G.A. § 15-1-2), and particularly the latter portion thereof, was directly on point in a case where third parties were involved. *Terhune v. Pettit*, 195 Ga. 793, 25 S.E.2d 660 (1943) (see Ga. Const. 1983, Art. VI, Sec. II, Para. III).

Plaintiffs estopped by their action to deny jurisdiction of court. — Where the plaintiffs themselves brought the petition, and invoked the aid of a court of equity to enjoin certain acts by the bank, and filed the suit in the county of residence of the bank against which substantial relief was prayed, and the petition alleged that title to the land in controversy was in the plaintiffs, and the court was asked to decree that the title was legally in them, and was not subject to the payment of the indebtedness of another to the bank, the plaintiffs, having invoked the jurisdiction in equity of the court in such county, were estopped from denying that the court had jurisdiction to entertain the case; and if the title to the land in another county is involved in the litigation, it is only incidentally so, and on account of the fact that the plaintiffs themselves brought the question into the case. *Manry v. Farmers' Bank*, 177 Ga.

Jurisdiction (Cont'd)**5. Waiver of Jurisdiction (Cont'd)**

370, 170 S.E. 30 (1933).

Actions Ancillary to Action at Law

Prayers for ancillary equitable relief against a resident defendant do not operate to confer jurisdiction over nonresidents. *Summit Ins. Co. v. Mulherin*, 233 Ga. 606, 212 S.E.2d 788 (1975).

Temporary injunctive relief against resident defendant in effort to preserve status quo pending resolution

of claim against nonresident defendants was merely ancillary to claim against nonresident defendants and did not render the action equitable in nature. *Summit Ins. Co. v. Mulherin*, 233 Ga. 606, 212 S.E.2d 788 (1975).

An action not otherwise equitable is not made so by a plea setting up purely defensive matter of an equitable nature, in the absence of prayers for some affirmative equitable remedy. This is true even though such answer might call for the application of equitable principles. *Summit Ins. Co. v. Mulherin*, 233 Ga. 606, 212 S.E.2d 788 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 77 Am. Jur. 2d, Venue, §§ 22, 23.

ALR. — Guardianship of incompetent or infant as affecting venue of action, 111 ALR 167.

Proper county for bringing replevin, or similar possessory action, 60 ALR2d 487.

Venue of action for specific performance of contract pertaining to real property, 63 ALR2d 456.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party, 100 ALR2d 693.

Paragraph IV. Suits against joint obligors, copartners, or joint trespassers.

Suits against joint obligors, joint tort-feasors, joint promisors, copartners, or joint trespassers residing in different counties may be tried in either county.

1976 Constitution. — Art. VI, Sec. XIV, Para. IV.

Cross references. — Actions against certain codefendants residing in different counties, § 9-10-31. Venue in juvenile proceedings, § 15-11-15.

Law reviews. — For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act (Ch. 11 of T. 9), see 4 Ga. St. B.J. 355 (1968). For article, "Current Problems With Venue in Georgia," see 12 Ga. St. B.J. 71 (1975). For article surveying Georgia cases in the area of trial practice and procedure from June 1977 through May 1978, see 30 Mercer L. Rev. 239 (1978). For article surveying judicial developments in Georgia's trial practice and procedure laws, see 31 Mercer L. Rev. 249 (1979). For annual survey on trial practice

and procedure, see 42 Mercer L. Rev. 469 (1990). For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005).

For note criticizing strict venue requirement that third party defendants be impleaded in the counties of their residence in light of *Register v. Stone's Independent Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971), see 23 Mercer L. Rev. 667 (1972). For note discussing venue for actions against joint trespassers residing in different counties, see 12 Ga. L. Rev. 553 (1978).

For comment on *Stroud v. Doolittle*, 213 Ga. 32, 96 S.E.2d 876 (1957), a suit against joint tort-feasors in which the dismissal of the cause of action against the resident defendant ended the court's

jurisdiction over the nonresident defendant, see 20 Ga. B.J. 260 (1957). For comment on *Bennett v. Bagwell & Stew-*

art, 214 Ga. 115, 103 S.E.2d 561 (1958), see 21 Ga. B.J. 564 (1959).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JURISDICTION

- 1. LACK OF JURISDICTION
- 2. LOSS OF JURISDICTION
- 3. JURISDICTION BY ESTOPPEL OR DEFAULT

VENUE

- 1. IN GENERAL
- 2. JOINT TORTFEASORS
- 3. PARTNERSHIPS AND LIMITED PARTNERSHIPS
- 4. CORPORATIONS
- 5. JOINT TRESPASSERS
- 6. PRINCIPALS AND SURETIES
- 7. JOINT OBLIGORS

General Consideration

Paragraph permits joinder of non-resident tortfeasor. — This paragraph provides the right to bring an action in the county of the residence of a resident of Georgia and join as a defendant a tort-feasor who is a nonresident of the state if the nonresident can be lawfully served with process. *Record Truck Line v. Harrison*, 109 Ga. App. 653, 137 S.E.2d 65, aff'd, 220 Ga. 289, 138 S.E.2d 578 (1964) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

This provision only comes into play when two resident defendants are involved. *Bergen v. Martindale-Hubbell, Inc.*, 245 Ga. 742, 267 S.E.2d 10 (1980) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

The constitutional provision regarding joint tort-feasors applies only to resident joint tort-feasors. *Dodd v. Simpson*, 191 Ga. App. 369, 381 S.E.2d 585 (1989).

General Assembly's authority to fix residence of corporation. — The General Assembly may fix the residence of a corporation under Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI) and there appears to be no reason it cannot also fix the residence of a corporation under this paragraph. *White v. Fireman's Fund Ins. Co.*, 233 Ga. 919, 213 S.E.2d 879 (1975)

(see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Jurisdiction and venue distinguished. — Jurisdiction means the power of a court to render a binding judgment in the case, and venue means the place of trial. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

In a borrower's suit asserting various claims against a lender, which was a citizen of Delaware and California, and an appraiser in connection with a loan that encumbered the borrower's property with a debt that exceeded the property's value, jurisdiction under 28 U.S.C. § 1332 did not exist where the borrower and the appraiser were both citizens of Georgia; the fact that the borrower may have filed the suit in an inappropriate venue under Ga. Const. 1983, Art. VI, Sec. II, Para. IV did not render the appraiser's joinder fraudulent under the doctrine of fraudulent pleading because such a pleading of jurisdictional facts did not destroy diversity, as the appraiser was still a resident of Georgia. *Austin v. Ameriquest Mortg. Co.*, 510 F. Supp. 2d 1218 (N.D. Ga. Feb. 27, 2007).

The constitutional venue provisions may not be altered or changed by the legislature or the courts and the adoption of procedural devices for adjudicating claims of various parties in the same action does not effect a change in the

General Consideration (Cont'd)

venue requirements of the Constitution. *Pemberton v. Purifoy*, 128 Ga. App. 892, 198 S.E.2d 356 (1973); *Haley v. Citizens & S. Nat'l Bank*, 141 Ga. App. 13, 232 S.E.2d 362 (1977).

"Trespass" broadly employed. — The word "trespass" is employed in a broad sense, and comprehends any misfeasance, transgression, or offense which damages another person's health, reputation, or property. *Cox v. Strickland*, 120 Ga. 104, 47 S.E. 912, 1 Ann. Cas. 870 (1904); *Williams v. Inman*, 1 Ga. App. 321, 57 S.E. 1009 (1907).

Trespass includes libels. *Howe v. Bradstreet Co.*, 135 Ga. 564, 69 S.E. 1082 (1911).

Threatened trespass enjoined pursuant to this paragraph. *Baker v. Davis*, 127 Ga. 649, 57 S.E. 62 (1907) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Where answer of resident defendant has been stricken and case is in default as to the resident defendant, a verdict against both the resident and non-resident defendant is authorized. *Smith v. Ross*, 168 Ga. App. 817, 310 S.E.2d 567 (1983).

Waiver of jurisdiction. — Once a timely objection to jurisdiction and venue has been raised by a nonresident defendant in an action where Ga. Const. 1983, Art. VI, Sec. II, Para. IV is the sole basis for the court's jurisdiction over the nonresident, affirmative conduct inconsistent with the objection is necessary to support a finding that it has been waived. *Owens v. Pollock*, 214 Ga. App. 107, 447 S.E.2d 325 (1994).

Cited in *Powell v. Perry*, 63 Ga. 417 (1879); *Graham v. Marks & Co.*, 95 Ga. 38, 21 S.E. 986 (1894); *Harrell v. Williams*, 11 Ga. App. 552, 75 S.E. 904 (1912); *Lee v. Perry*, 19 Ga. App. 48, 90 S.E. 988 (1916); *McConnon & Co. v. Martin*, 33 Ga. App. 392, 126 S.E. 272 (1925); *Georgia Creosoting Co. v. Moody*, 41 Ga. App. 701, 154 S.E. 294 (1930); *Felton v. Macon County*, 43 Ga. App. 651, 159 S.E. 730 (1931); *Wilson Bros. v. Heard*, 46 Ga. App. 497, 167 S.E. 913 (1933); *Gazaway v. Nicholson*, 190 Ga. 345, 9 S.E.2d 154 (1940); *Hays v. Jones*, 81 Ga. App. 597, 59

S.E.2d 404 (1950); *A.K. Adams & Co. v. Douglas-Coffee County Hosp. Auth.*, 209 Ga. 62, 70 S.E.2d 730 (1952); *Grimaud v. Knox-Georgia Homes, Inc.*, 210 Ga. 514, 81 S.E.2d 476 (1954); *Rylee v. Abernathy*, 210 Ga. 673, 82 S.E.2d 220 (1954); *Schwarcz v. Charlton County*, 211 Ga. 923, 89 S.E.2d 881 (1955); *Dawson v. Altamaha Land Co.*, 215 Ga. 700, 113 S.E.2d 129 (1960); *Trailmobile, Inc. v. Combs*, 105 Ga. App. 699, 125 S.E.2d 574 (1962); *Dependable Ins. Co. v. Gibbs*, 218 Ga. 305, 127 S.E.2d 454 (1962); *Concrete Coring Contractors v. Mechanical Contractors & Eng'rs*, 220 Ga. 714, 141 S.E.2d 439 (1965); *Hinson v. First Nat'l Bank*, 221 Ga. 408, 144 S.E.2d 765 (1965); *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967); *Register v. Stone's Indep. Oil Distribs.*, 225 Ga. 490, 169 S.E.2d 781 (1969); *Midland Nat'l Life Ins. Co. v. Emerson*, 121 Ga. App. 427, 174 S.E.2d 211 (1970); *J.H. Ewing & Sons v. Montgomery*, 124 Ga. App. 836, 186 S.E.2d 335 (1971); *Shell v. Watts*, 125 Ga. App. 542, 188 S.E.2d 269 (1972); *Bibb County v. McDaniel*, 127 Ga. App. 129, 192 S.E.2d 544 (1972); *Shell v. Watts*, 127 Ga. App. 378, 193 S.E.2d 566 (1972); *Carter v. Grogan*, 230 Ga. 249, 196 S.E.2d 434 (1973); *Williamson v. Perret's Farms, Inc.*, 128 Ga. App. 687, 197 S.E.2d 754 (1973); *Jere Power Car Land, Inc. v. Moss*, 134 Ga. App. 523, 215 S.E.2d 288 (1975); *Graham v. Tallent*, 235 Ga. 47, 218 S.E.2d 799 (1975); *Daniel & Daniel, Inc. v. Cosmopolitan Co.*, 137 Ga. App. 383, 224 S.E.2d 44 (1976); *Wilhite v. Mays*, 140 Ga. App. 816, 232 S.E.2d 141 (1976); *Logan Paving Co. v. Liles Constr. Co.*, 141 Ga. App. 81, 232 S.E.2d 575 (1977); *Davis v. Correct Mfg. Corp.*, 143 Ga. App. 460, 238 S.E.2d 553 (1977); *Sylvester Motor & Tractor Co. v. Farmers Bank*, 153 Ga. App. 614, 266 S.E.2d 293 (1980); *Fosgate v. American Mut. Liab. Ins. Co.*, 154 Ga. App. 510, 268 S.E.2d 780 (1980); *Georgia Power Co. v. Busbin*, 159 Ga. App. 416, 283 S.E.2d 647 (1981); *National Bank v. Moore*, 159 Ga. App. 729, 285 S.E.2d 78 (1981); *Cassells v. Bradlee Mgt. Servs., Inc.*, 161 Ga. App. 325, 291 S.E.2d 48 (1982); *Trammell v. Eberhardt*, 162 Ga. App. 753, 293 S.E.2d 32 (1982); *Dennard v. Freeport Minerals Co.*, 250 Ga. 330, 297 S.E.2d 222 (1982);

Georgia Power Co. v. Harrison, 253 Ga. 212, 318 S.E.2d 306 (1984); Unger v. Bryant Equip. Sales & Servs., Inc., 255 Ga. 53, 335 S.E.2d 109 (1985); Currahee Constr. Co. v. Rabun County Sch. Dist., 180 Ga. App. 471, 349 S.E.2d 487 (1986); Gay v. Piggly Wiggly S., Inc., 183 Ga. App. 175, 358 S.E.2d 468 (1987); Watkins v. M & M Clays, Inc., 199 Ga. App. 54, 404 S.E.2d 141 (1991); Calhoun County Hosp. Auth. v. Walker, 205 Ga. App. 259, 421 S.E.2d 777 (1992); Johnson v. Woodard, 208 Ga. App. 41, 429 S.E.2d 701 (1993); Zepp v. Toporek, 211 Ga. App. 169, 438 S.E.2d 636 (1994); Sikes v. Norton, 185 Bankr. 945 (Bankr. N.D. Ga. 1995); HD Supply, Inc. v. Garger, 299 Ga. App. 751, 683 S.E.2d 671 (2009).

Jurisdiction

1. Lack of Jurisdiction

Instance of lack of jurisdiction. — Fact that plaintiff, as surety, guaranteed performance of a contract by a contracting company, as principal, would not give superior court of county of residence of contracting company jurisdiction on petition of the surety to hear and determine the controversy between contracting company and city for which the work was to be performed as to whether or not there had been a breach of contract on the part of the contracting company, nor would the fact that plaintiff and contracting company had entered into separate contract by application for performance bond give plaintiff any right to compel the city to join in a suit with reference to this separate contract, since the city was not a party to the application and had no interest therein. Maryland Cas. Co. v. City of Adel, 87 Ga. App. 138, 73 S.E.2d 237 (1952).

Reason jurisdiction of action by common carrier and insurance company lacking. — Common carrier that negligently injured a person, and the insurance company that issued the carrier an indemnity policy under provisions of former Code 1933, § 68-612, were neither joint tort-feasors nor joint contractors, so as to bring them within the provisions of this paragraph, since the liability of the carrier to the injured person arose from a tort in the commission of which the insur-

ance company was not concerned, while the insurance company's obligation to pay damages caused by the carrier's negligence was a contractual duty not assumed by the carrier. Bolin v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 92 Ga. App. 726, 89 S.E.2d 831 (1955) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

2. Loss of Jurisdiction

Must be able to prove claim against resident defendant. — In order to maintain suit against nonresident joint tort-feasor, it is necessary that a cause of action be alleged and proven against resident defendant. Chitty v. Jones, 210 Ga. 439, 80 S.E.2d 694 (1954); Stroud v. Doolittle, 213 Ga. 32, 96 S.E.2d 876 (1957), commented on in 20 Ga. B.J. 260 (1957).

Where suit is brought against two defendants, one of whom resides in the county, the court has no jurisdiction of nonresident defendant unless resident co-defendant is liable in the action. Timberlake Grocery Co. v. Cartwright, 146 Ga. App. 746, 247 S.E.2d 567 (1978).

The test as to whether a verdict is authorized against a nonresident joint obligor is whether a verdict is authorized against the resident joint obligor. Woods v. Universal C.I.T. Credit Corp., 110 Ga. App. 394, 138 S.E.2d 593 (1964), aff'd sub nom. Scarboro v. Universal C.I.T. Credit Corp., 364 F.2d 10 (5th Cir. 1966).

Where suit is brought against two alleged joint tort-feasors in county where one of them resides, the other being a nonresident, and where on trial of case resident defendant is found by jury not liable, the court is without jurisdiction to render a judgment against the nonresident defendant, and if such judgment is rendered it may be arrested or set aside upon motion. Southern Nitrogen Co. v. Manuel, 110 Ga. App. 597, 139 S.E.2d 453 (1964), overruled on other grounds, Crawford v. Randle, 191 Ga. App. 112, 381 S.E.2d 77 (1989).

Lack of jurisdiction defense when unable to prove claim against resident defendant. — Only time defense of lack of jurisdiction over person of nonresident defendants because of their nonres-

Jurisdiction (Cont'd)**2. Loss of Jurisdiction (Cont'd)**

idency would be valid in an action against joint tortfeasors is in event of judgment in favor of resident joint defendant, whereby the court would lose jurisdiction as to the nonresident joint defendants unless they expressly or impliedly waive this defense. *Lansky v. Goldstein*, 136 Ga. App. 607, 222 S.E.2d 62 (1975).

Proof needs to show jurisdiction in action against residents and nonresidents. — While in most cases a bare allegation of the defendant's residence within the county will suffice to meet the requirements of alleging the facts upon which venue depends, in an action against residents and nonresidents where venue as to the nonresidents depends upon the relief sought against the residents, a plea to the jurisdiction will be sustained where the petition does not set forth a cause of action against the resident defendant. *Martin v. Approved Bancredit Corp.*, 224 Ga. 550, 163 S.E.2d 885 (1968), overruled on other grounds, *Cochran v. McCollum*, 233 Ga. 104, 210 S.E.2d 13 (1974).

Allegation sufficient by nonresidents to raise question of jurisdiction. — Where two alleged tort-feasors are sued jointly and severally, the demurrer (now failure to state a claim) of the nonresident defendant that the petition sets out no cause of action against the nonresident defendant is sufficient to raise the question of whether the nonresident should be dismissed from the suit on a jurisdictional ground that no cause of action is set out against the resident defendant and that the nonresident defendant is accordingly entitled to be sued in the county of the nonresident defendant's own residence. *Harrell v. Gardner*, 115 Ga. App. 171, 154 S.E.2d 265 (1967).

Joint tort-feasors may be sued residing in different counties or may be sued together in the county of either. — But in order to maintain such a suit where one of the defendants is a nonresident, it is essential that a cause of action be alleged and proven against the resident defendant. *Richards & Assocs. v. Studstill*, 212 Ga. 375, 93 S.E.2d 3 (1956), later appeal, 96 Ga. App. 270, 99 S.E.2d 558 (1957).

Facts rendering motion to arrest judgment proper. — Where the only two defendants against whom a verdict was rendered resided out of the county, and the finding of the jury was in favor of the one defendant on account of whose residence in the county of the suit the court acquired jurisdiction, it was proper to arrest the judgment, on motion of the defendants against whom the verdict was returned. *Pickron v. Garrett*, 73 Ga. App. 61, 35 S.E.2d 540 (1945).

Motion in arrest of judgment proper remedy where jurisdiction lost. — Where action is brought in county of residence of one defendant, and on trial of case no judgment is taken against the resident defendant, the court loses jurisdiction as to any nonresident defendant unless jurisdiction thereof is waived, either expressly or impliedly by the conduct of the defendant. A motion in arrest of judgment has been held to be a proper remedy where jurisdiction has been lost, and not waived. *Berger v. Noble*, 81 Ga. App. 759, 59 S.E.2d 761 (1950).

Jurisdiction against nonresident defendant lost. — Where joint tort-feasors residing in different counties are sued in county of one, and on trial of case the resident defendant is discharged and a verdict returned solely against the nonresident defendant, the court is without jurisdiction to enter a judgment against the nonresident defendant. *O'Neill v. Western Mtg. Corp.*, 153 Ga. App. 151, 264 S.E.2d 691 (1980).

An action may be maintained against joint tortfeasors who reside in different counties in the county of residence of either, but if there is no liability against the resident defendant, the latter necessarily is not a joint tortfeasor or a joint obligor with the nonresident defendant, and the court, with respect to the person of the nonresident defendant, has no jurisdiction to render a verdict and judgment against the nonresident. *Register v. Sanders*, 103 Ga. App. 368, 119 S.E.2d 294 (1961).

Must be able to obtain jurisdiction. — Where there is an inability to obtain jurisdiction over the only one of two or more defendants alleged to be resident of forum county because of nonresidency,

there is no jurisdiction. *Register v. Sanders*, 103 Ga. App. 368, 119 S.E.2d 294 (1961).

Suits against joint tortfeasor, joint obligors, or joint trespassers, may be brought in county of residence of any, but if no judgment is taken against a resident defendant, the court loses venue as to the nonresident defendant unless the issue of venue is waived. *Timberlake Grocery Co. v. Cartwright*, 146 Ga. App. 746, 247 S.E.2d 567 (1978).

Loss of jurisdiction of nonresident defendants occasioned by finding of nonliability of resident defendants.

— Where a single suit is brought against several joint tort-feasors in a county where one of them is a resident, and where the others reside outside the county, and, where on the trial of the case, the resident defendant is found not liable by the jury, and the nonresident defendants are found liable, the court is without jurisdiction to enter judgment against the nonresident defendants. *Southeastern Truck Lines v. Rann*, 214 Ga. 813, 108 S.E.2d 561 (1959).

Petition dismissible for want of jurisdiction where the interests of the plaintiff and the resident defendant are identical and the allegations of the petition fail to show any justiciable controversy between the plaintiff and the resident defendant in which the nonresident defendant has any substantial interest, on motion of the nonresident defendant, setting out that it is a resident of a named county in this state and subject to suit only in the superior court of that county, the petition will be dismissed as to such nonresident defendant for want of jurisdiction. *Maryland Cas. Co. v. City of Adel*, 87 Ga. App. 138, 73 S.E.2d 237 (1952).

Court without jurisdiction to enter declaratory judgment. — Superior Court of Murray County did not have jurisdiction to entertain a case for declaratory judgment where all parties defendant except one, against whom no substantial equitable relief was prayed, were nonresidents of Murray County; the equitable feature of the case is removed, leaving the action solely one at law under Ga. L. 1945, p. 137, § 1 (see now O.C.G.A. § 9-4-2). The venue of such an action is in

the county where the defendant resides, Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI). The nonresident defendants not being of the class of persons who may be sued in counties other than the counties of their residence as permitted in Ga. Const. 1976, Art. VI, Sec. XIV, Paras. IV and V (see Ga. Const. 1983, Art. VI, Sec. II, Paras. IV and V), the court was without jurisdiction to enter a declaratory judgment as to their rights. *Harper v. Gunby*, 215 Ga. 466, 111 S.E.2d 85 (1959).

3. Jurisdiction by Estoppel or Default

Default judgment insufficient basis for jurisdiction. — Default with judgment based thereon, which is unsupported by a verdict, and which carries no finding of damages as to a resident defendant, is insufficient to furnish a venue base on which the verdict against the nonresident can rest. *Woods v. Long Mfg., N.C., Inc.*, 150 Ga. App. 499, 258 S.E.2d 592 (1979), cert. denied, 245 Ga. 162, 264 S.E.2d 230 (1980).

Verdict against both resident and nonresident defendant is authorized where resident defendant is in default. *Woods v. Universal C.I.T. Credit Corp.*, 110 Ga. App. 394, 138 S.E.2d 593 (1964), aff'd sub nom. *Scarboro v. Universal C.I.T. Credit Corp.*, 364 F.2d 10 (5th Cir. 1966).

Default of nonresident defendant irrelevant. — The default of the nonresident defendants, which otherwise would have constituted a waiver of the defenses specified in paragraph (b)(1) of Ga. L. 1966, p. 609, § 12 (see now O.C.G.A. § 9-11-12) was irrelevant to the issue of jurisdiction of nonresident defendants, and would not estop them from asserting the fact of their nonresidency in the event of a judgment in favor of the resident defendant. *Lansky v. Goldstein*, 136 Ga. App. 607, 222 S.E.2d 62 (1975).

A nonresident defendant, even if in default, will not be subject to a final judgment until the resident defendant is found liable. *Woods v. Long Mfg., N.C., Inc.*, 150 Ga. App. 499, 258 S.E.2d 592 (1979), cert. denied, 245 Ga. 162, 264 S.E.2d 230 (1980).

Jurisdiction (Cont'd)

3. Jurisdiction by Estoppel or Default (Cont'd)

Jurisdiction issue waived by non-resident defendant invoking ruling of court. — Want of jurisdiction of the person is waived and such jurisdiction is admitted where nonresident defendant, after discharge of resident defendant, invokes ruling of the court on the merits of case. A ruling by the trial court on a motion for a new trial made by such nonresident defendant is such a ruling on the merits. *Berger v. Noble*, 81 Ga. App. 759, 59 S.E.2d 761 (1950).

Effect of voluntary submission of person to court's jurisdiction. — An equitable petition instituted against a nonresident of a county and against the sheriff of the county in which suit is brought, seeking to set aside a judgment obtained by such nonresident against petitioner in the same superior court, on ground that the judgment is void, and seeking to cancel the execution issuing on such judgment and to restrain the sheriff from proceeding with levy thereof and the sale of petitioner's property thereunder, is properly brought in the superior court of the county of residence of the sheriff, in which was rendered the judgment sought to be set aside, the nonresident having submitted itself to jurisdiction of the court by institution of suit therein against petitioner, and the petitioner not seeking any relief as to matters outside of such litigation. *Napier v. Bank of La Fayette*, 183 Ga. 865, 189 S.E. 822 (1937).

Venue

1. In General

O.C.G.A. § 15-21-56 does not overrule constitutional provisions. — The provisions of Ga. L. 1949, p. 1168, §§ 4-6 (see now O.C.G.A. § 15-21-56) are not sufficient to overrule provisions of Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI), providing that civil actions shall be brought in county of the defendant's residence. However, where there are joint defendants, such an action may be brought in the county of residence of ei-

ther. *Banks County v. Stark*, 88 Ga. App. 368, 77 S.E.2d 33 (1953).

O.C.G.A. §§ 9-11-13(g) and 9-11-14 are not in conflict with this paragraph; of course, even if they were, the venue provisions of the Constitution would be controlling and cannot be extended or limited by those sections. *Lester Witte & Co. v. Cobb Bank & Trust Co.*, 248 Ga. 235, 282 S.E.2d 296 (1981) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Actions to which paragraph applicable. — This paragraph determines the venue of an action to restrain joint defendants from cutting timber and committing other waste, and to secure the appointment of a receiver to take charge of the timber already cut. *McPhaul v. Fletcher*, 111 Ga. 878, 36 S.E. 938 (1900); *Burch v. King*, 14 Ga. App. 153, 80 S.E. 664 (1914) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Proper service required to achieve venue. — Equity will grant relief against a judgment where the joint defendant on a note who was sued at the defendant's residence was not properly served. *Austell v. McLarin*, 51 Ga. 467 (1874).

This paragraph applies to cases in which one or more joint obligors are railroad companies. *Waycross Air-Line R.R. v. Offerman & W.R.R.*, 114 Ga. 727, 40 S.E. 738 (1902) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Applies to actions for injuries against a foreign railroad company operating in this state and an engineer in its employment. *Southern Ry. v. Grizzle*, 124 Ga. 735, 53 S.E. 244, 110 Am. St. R. 191 (1906).

This paragraph applies to joint assaults on a passenger by a conductor and a third person. *Central of Ga. Ry. v. Brown*, 113 Ga. 414, 38 S.E. 989, 84 Am. St. R. 250 (1901) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Venue of separate actions not determined by this paragraph, hence guarantor by separate contract could not be joined with debtor. *Sims v. Clark*, 91 Ga. 302, 18 S.E. 158 (1893) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Venue between maker and party promising to sign note is not determined by this paragraph. *Adams v.*

Williams, 125 Ga. 430, 54 S.E. 99 (1906) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Venue for action against owner of realty and contractor placing improvements thereon is not determined by this paragraph. *Mauch v. Rosser*, 126 Ga. 268, 55 S.E. 32 (1906); *Atkinson v. Wingate Plumbing Co.*, 20 Ga. App. 480, 93 S.E. 122 (1917) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

An individual defendant who lives outside the state does not “reside” in Georgia so as to be subject to the joint obligor venue provisions, and venue against the nonresident individual is proper only where authorized by the long-arm statute. *Goodman v. Vilston, Inc.*, 197 Ga. App. 718, 399 S.E.2d 241 (1990).

Multiple claims arising from same transaction. — Where a plaintiff brings suit in the same county on two claims arising from the same transaction and the Georgia Constitution designates that county as the venue for one of those claims, the trial court has the discretion to entertain both claims. *Natpar Corp. v. E.T. Kassinger, Inc.*, 258 Ga. 102, 365 S.E.2d 442 (1988).

Where a joint obligor claim and an equitable claim arose from the same transaction, and involved the same parties and witnesses and substantially the same proof, venue with regard to both claims was proper in the county where only one of the joint obligors lived, despite the fact that the other joint obligor was the only defendant against whom equitable relief was prayed. *Natpar Corp. v. E.T. Kassinger, Inc.*, 258 Ga. 102, 365 S.E.2d 442 (1988).

Venue under Child Custody Intra-state Jurisdiction Act. — Boyfriend, who had been appointed temporary guardian of child, was not the child’s “legal custodian” as that term was used in the Georgia Child Custody Intrastate Jurisdiction Act, O.C.G.A. § 19-9-20 et seq., and, thus, the provisions of the Act, including its venue provisions, did not apply; accordingly, the trial court erred in dismissing the grandmother’s petition for custody of the child on the ground that venue was not proper in the county where

the mother was incarcerated but would have been proper where the temporary guardian, the boyfriend, resided, as application of the general venue rules governing venue in civil cases, contained in the Georgia Constitution, showed that since the mother was a necessary party to the grandmother’s custody action, filing the action in the county where the mother was incarcerated was proper. *Gordon v. Gordon*, 269 Ga. App. 224, 603 S.E.2d 732 (2004).

Dismissal warranted. — If upon trial of a joint action plaintiff fails to prove a joint undertaking, and dismisses as to the resident defendant, the other defendant may secure a dismissal of the action although the defendant has pleaded to the merits. *Maddox v. Brooks*, 17 Ga. App. 644, 87 S.E. 911 (1916).

2. Joint Tortfeasors

Joint tortfeasors and joint trespassers synonymous for venue purposes. — Joint trespassers having been held to be synonymous with joint tortfeasors, venue lies under this paragraph against all joint tortfeasors in the county of residence of any of the joint tortfeasors. *Lester Witte & Co. v. Cobb Bank & Trust Co.*, 248 Ga. 235, 282 S.E.2d 296 (1981) (decided prior to insertion in paragraph of specific reference to “joint tortfeasors”; see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

It does not matter whether joint tortfeasors are cross-defendants, third-party defendants, or both. — This paragraph does not concern itself with whether joint tortfeasors are cross-defendants, third-party defendants, or a combination of the two. It merely provides that suits against joint tortfeasors residing in different counties may be brought in either county. *Lester Witte & Co. v. Cobb Bank & Trust Co.*, 248 Ga. 235, 282 S.E.2d 296 (1981) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

A state department or agency can be considered a joint tortfeasor with other resident defendants for venue purposes. *Gault v. National Union Fire Ins. Co.*, 208 Ga. App. 134, 430 S.E.2d 63 (1993).

Department of Transportation employee as joint tortfeasor. — Venue

Venue (Cont'd)**2. Joint Tortfeasors (Cont'd)**

against an employee of the Department of Transportation may be had in a county only if the employee is an alleged joint tortfeasor with a defendant resident in that county. *Gault v. National Union Fire Ins. Co.*, 208 Ga. App. 134, 430 S.E.2d 63 (1993).

Injury created joint tortfeasors. — Although liability insurance carrier was not a joint tortfeasor for venue purposes because the cause of action against it arose in contract, and the alleged negligent acts of its client and others were separate, where the injury or death was single and indivisible, the tortfeasors were joint, and venue proper as to one tortfeasor was proper as to all. *Gault v. National Union Fire Ins. Co.*, 208 Ga. App. 134, 430 S.E.2d 63 (1993).

Estate not nominal party despite its insolvency. — Defendant tortfeasor did not constitute a “nominal party” for venue purposes merely because of insolvency; although an estate named in a suit as a defendant and a joint tortfeasor with a city was insolvent, the estate was not a nominal party on this basis, and venue was proper in the county of residence of the estate’s administrator. *Banks v. City of Hampton*, 280 Ga. App. 432, 634 S.E.2d 192 (2006).

An individual defendant may be sued in a county other than the county of residence when sued as a joint tortfeasor with a foreign corporation operating as a motor common carrier in this state and having an agent, office, and place of doing business in the county where the suit is brought, as a foreign corporation doing business in this state may be treated for the purpose of being sued, as a resident of any county in which it has an agent, office, and place of doing business, and venue of a suit against such joint tort-feasors may be laid in the county of either of them. *Jones v. Chandler*, 88 Ga. App. 103, 76 S.E.2d 237 (1953).

Suit against joint wrongdoers together and in county of either permissible. — Where the defendant carrier and the individual defendant were joint

tort-feasors, venue of the suit as to both could be laid in the county of either of them pursuant to this paragraph and under such circumstances, the provision of Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI) to the effect that a defendant is entitled to be sued in the county of the defendant’s residence does not apply. *Jones v. Chandler*, 88 Ga. App. 103, 76 S.E.2d 237 (1953) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Where one seeks to sell property of another at public auction under no authority for doing so other than power therefor which is contained in a forged security deed, one’s act is a positive wrong against the owner of such property, and all who participate in such an unlawful undertaking are joint wrongdoers and they may be sued together for the purpose of preventing consummation of the wrong in any county of this state where one of them resides. *Budget Charge Accounts, Inc. v. George*, 214 Ga. 312, 104 S.E.2d 434 (1958).

Where a third-party complaint is sued out in main case against two alleged tort-feasors in county of residence of one of them, this paragraph gives county of residence of either tort-feasor jurisdiction of the action. *Shell v. Watts*, 127 Ga. App. 378, 193 S.E.2d 566 (1972) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Joint tort-feasors required to show proof of status. — Joint tort-feasors residing in different counties of the state may be sued together in the county of either, but in order to maintain such a suit, it is necessary for the plaintiff to allege and prove that the defendants are in fact joint tort-feasors. *Richards & Assocs. v. Studstill*, 212 Ga. 375, 93 S.E.2d 3 (1956), later appeal, 96 Ga. App. 270, 99 S.E.2d 558 (1957).

Allegation and proof of action against resident defendant necessary. — While joint tort-feasors residing in different counties of this state may be sued in the county of residence of either, the cause of action must be alleged and proved against the resident defendant, and the nonresident defendant has standing to raise these questions. *Ryder Auto. Leasing Co. v. Tate*, 112 Ga. App. 18, 143 S.E.2d 411 (1965).

Defendants jointly liable for conversion can be sued in county of either residence. — A foreign railroad company operating in this state and an engineer in its employment may be jointly sued in the county in which the cause of action originated, even though the residence of the engineer is in another county in this state. *Jones v. Chandler*, 88 Ga. App. 103, 76 S.E.2d 237 (1953).

Where the petition in a trover action alleges that named defendants have possession of described articles of personal property to which the plaintiff claims title and refuse to deliver the same to plaintiff, such averments directly and in express terms charge defendants jointly with the tortious act of conversion, and hence, all defendants may be sued together in a county where any of them resides. *Screven Oil Mill v. Crosby*, 94 Ga. App. 238, 94 S.E.2d 146 (1956).

Suit against nonresident corporation can be brought in county corporation doing business. — Although a motor common carrier may be a nonresident corporation, yet since it is engaged in doing business in this state, and has agents in the state for that purpose, it is, as in the case of a nonresident railroad corporation doing business in this state, so far as the right to sue is concerned, a resident of this state, and a resident of the county in which the cause of action originated, so far as the right to bring a suit against it for a cause of action originating in that county is concerned, and, being a resident of that county for the purpose of suit, a joint tort-feasor, notwithstanding that the tort-feasor may reside in another county of this state, may be sued, jointly with the motor common carrier, in said county under this provision of the state Constitution. *Jones v. Chandler*, 88 Ga. App. 103, 76 S.E.2d 237 (1953) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

It is not essential that joint tort-feasors owed same duty or should be guilty of same act of negligence, but it is sufficient if each owed a separate and distinct duty to person injured, provided only that the separate acts of negligence concurred in proximately causing the injury. *Albany Coca-Cola Bottling Co. v. Shiver*, 63 Ga. App. 755, 12

S.E.2d 114 (1940), later appeal, 67 Ga. App. 359, 20 S.E.2d 181 (1942); *Brooks v. Douglas*, 154 Ga. App. 54, 267 S.E.2d 495 (1980).

Suits against joint obligors may be tried in the county wherein either defendant resides. *Midtown Properties, Inc. v. George F. Richardson, Inc.*, 139 Ga. App. 182, 228 S.E.2d 303 (1976).

Although a judgment was not taken against a nonresident defendant, resident defendants waived any issue regarding venue by failing to raise it even after the verdict. *Parker v. Kennon*, 242 Ga. App. 627, 530 S.E.2d 527 (2000).

Suit appropriate in any venue where jurisdiction can be obtained over nonresident. — Where residents and nonresidents are joint obligors or joint tort-feasors, suit against them may be brought in any county in state in which jurisdiction can be obtained over nonresident defendant. *Nelson Assocs. v. Grubbs*, 135 Ga. App. 947, 219 S.E.2d 607 (1975).

Residence of Metropolitan Atlanta Rapid Transit Authority varies. — Under Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI), the General Assembly may fix the residence of Metropolitan Atlanta Rapid Transit Authority for venue purposes when it is sued alone, but this paragraph provides the venue when MARTA is sued as a joint tort-feasor. *Glover v. Donaldson*, 243 Ga. 479, 254 S.E.2d 857 (1979) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Venue in county of codefendant's residence permissible. — Despite the provision of Ga. L. 1965, p. 2243, as amended by Ga. L. 1971, p. 2092, that suits may be brought against MARTA only in the Superior Court of Fulton County where MARTA is sued as a joint tort-feasor, venue may be proper in another county where a codefendant resides. *Glover v. Donaldson*, 243 Ga. 479, 254 S.E.2d 857 (1979).

An ex-spouse filed a tort action against the defendants in a county where two of them did not reside. As one defendant admitted that venue was proper as to that defendant, venue was proper as to the other defendants as well. *Walker v. Walker*, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Venue (Cont'd)**2. Joint Tortfeasors (Cont'd)**

County of original action venue of suit against nonresident third-party defendant. — Where a third-party complaint is brought against two alleged joint tort-feasors, one of whom is a resident of the county in which the original action was brought, the nonresident third-party defendant may be jointly sued in the county of the original action. *Shell v. Watts*, 229 Ga. 474, 192 S.E.2d 265 (1972).

Venue lost following dismissal of party. — In a personal injury action by the passenger against the estate of the driver of the vehicle in which the passenger was riding and the owner of a truck, venue over the nonresident truck owner vanished when the passenger dismissed the owner from the main action, notwithstanding a pending cross-claim for wrongful death against the owner by the estate, a joint tortfeasor which had consented to judgment against it. *Airgrowers, Inc. v. Tomlinson*, 230 Ga. App. 415, 496 S.E.2d 528 (1998).

Trial court, in a tort case, lacked venue when it granted summary judgment in favor of the security interest holder on the same day that it dismissed the insurer from the action with prejudice; once the resident insurer was dismissed from the action, venue under Ga. Const. 1983, Art. VI, Sec. II, Para. IV could not be maintained against the nonresident bank. *Colony Bank Worth v. Caterpillar Fin. Servs. Corp.*, 281 Ga. App. 397, 636 S.E.2d 119 (2006).

Teenager's motion to remand was properly denied as: (1) a police officer was the only defendant who resided in Toombs County; (2) venue in Toombs County "vanished" when the officer was granted summary judgment, so the teenager could not rely on the joint tortfeasor venue provision of the Georgia Constitution; (3) the newspaper defendants did not have an office in Toombs County so as to preclude venue there pursuant to O.C.G.A. § 14-2-510(b)(3); (4) although the newspaper defendants transacted business in Toombs County, they did not maintain an office there; and (5) venue was not properly based on O.C.G.A. § 14-11-1108(b),

even though some defendants were limited liability companies. *Torrance v. Morris Publ'g Group, LLC*, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Claims involving third parties. — If a claim asserted against codefendants or third parties is essentially independent rather than one ancillary to main action, it must satisfy within itself constitutional venue requirements. *Register v. Stone's Indep. Oil Distribs.*, 122 Ga. App. 335, 177 S.E.2d 92 (1970), rev'd on other grounds, 227 Ga. 123, 179 S.E.2d 68 (1971), commented on in 23 Mercer L. Rev. 667 (1972).

Suit by defendant seeking contribution from third-party plaintiff must be brought in third-party defendant's residence. — Even though this paragraph allows actions against joint trespassers to be brought in county of residence of either, a defendant seeking contribution as a third-party plaintiff cannot bring the action in a county other than that of the residence of the third-party defendant. *Register v. Stone's Indep. Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971), commented on in 23 Mercer L. Rev. 667 (1972). (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Directed verdict for resident tort-feasor. — Where a party is sued outside the party's county of residence as an alleged joint tort-feasor, a directed verdict in favor of the resident alleged joint tort-feasor makes the venue improper and the party must be sued again in the party's county of residence. *Smith v. United Ins. Co. of Am.*, 169 Ga. App. 751, 315 S.E.2d 265 (1984).

Action against company in county where agent resides. — Where evidence presented at trial supported the conclusion that appellant, through agents residing in various counties of the state, was the nexus of a conspiracy involving all the individual defendants and calculated to damage appellee's business, the trial court did not err in refusing to dismiss the suit for improper venue since civil conspirators are liable as joint tort-feasors and suits against joint tort-feasors residing in different counties may be tried in any of those counties. *American Family Life As-*

urance Co. v. Queen, 171 Ga. App. 870, 321 S.E.2d 750 (1984).

Consent judgment. — Where a single suit is brought against several joint tortfeasors in a county where one of them is a resident, and the others reside outside the county, a consent judgment and an agreement not to enforce it constitute a finding that the resident is liable and do not deprive the trial court of jurisdiction over the nonresident defendants in the county where suit was brought. Motor Convoy, Inc. v. Brannen, 194 Ga. App. 795, 391 S.E.2d 671, aff'd, 260 Ga. 340, 393 S.E.2d 262 (1990).

Waiver of venue. — Where a nonresident defendant waived its existing venue defense to facilitate entry of judgment, it could not withdraw that waiver because its expectations were subsequently disappointed. Robinson v. Star Gas of Hawkinsville, Inc., 243 Ga. App. 112, 533 S.E.2d 97 (2000).

O.C.G.A. § 9-10-31(c) was not a proper exercise of the legislature's authority to enact laws which allowed the superior and state courts to change venue; furthermore, because O.C.G.A. § 9-10-31.1(a) vested power to change venue in the court, and not in a defendant, as did O.C.G.A. § 9-10-31(c), O.C.G.A. § 9-10-31.1(a) was proper under Ga. Const. 1983, Art. VI, Sec. II, Para. VIII, and did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. IV. EHCA Cartersville, LLC v. Turner, 280 Ga. 333, 626 S.E.2d 482 (2006).

Constitutional joint tortfeasor venue provision did not apply. — In a mortgage broker's breach of contract action against a limited liability company, the trial court erred in denying a motion to transfer to a proper venue filed by the mortgage broker president, who was added as a defendant, because the constitutional joint tortfeasor venue provision, Ga. Const. 1983, Art. VI, Sec. II, Para. IV, did not apply to subject the president to trial with the broker on the LLC's counterclaim in Coweta County since the broker did not reside in Coweta County; as an individual resident of DeKalb County, the president was entitled under the constitutional venue provisions to be sued in DeKalb County, Ga. Const. 1983, Art. VI,

Sec. II, Para. VI. M&M Mortg. Co. v. Grantville Mill, LLC, 302 Ga. App. 46, 690 S.E.2d 630 (2010).

3. Partnerships and Limited Partnerships

Constitutional and statutory provisions as to venue of suits against partners apply to a limited partnership. Farmers Hdwe. of Athens, Inc. v. L.A. Properties, Ltd., 136 Ga. App. 180, 220 S.E.2d 465 (1975).

Venue of suits between partners. See Sloan v. Cooper, 54 Ga. 486 (1875).

One partner must reside in county regardless of where doing business.

— A partnership may be sued in any county in which one partner resides but it cannot be sued in a county where none of the partners reside even if the partnership may be doing business in the latter county. King Bros. & Co. v. Passmore, 18 Ga. App. 514, 89 S.E. 1103 (1916); Farmers Hdwe. of Athens, Inc. v. L.A. Properties, Ltd., 136 Ga. App. 180, 220 S.E.2d 465 (1975).

Citizenship is not controlling factor. — A partnership may be sued in any county in which one of the partners has such a residence as will confer upon courts of that county jurisdiction over the partner's person, regardless of the place of the partner's citizenship. Nelson Assocs. v. Grubbs, 135 Ga. App. 947, 219 S.E.2d 607 (1975).

There is no basis for a distinction as to partners who may be sued in county of either. Nelson Assocs. v. Grubbs, 135 Ga. App. 947, 219 S.E.2d 607 (1975).

Suit was not proper where nonresidents' business transacted. — In the case of a suit brought against six members of a joint venture, four of whom were Georgians and two of whom were Texans, as to the resident joint defendants, suit was not proper in the county where the business of the nonresidents was transacted but had to be brought in the county where residents resided. The Texans were not "residents" for venue purposes and "nonresidents" for long-arm purposes; they were simply nonresidents. Weitzel v. Griffin & Assocs., 192 Ga. App. 89, 383 S.E.2d 653 (1989).

Venue (Cont'd)

4. Corporations

Residence of nonresident corporation for suit purposes. — A nonresident corporation is for purposes of suit a resident of the county in Georgia in which it has an office, agent, and place of business and a joint action lies against it and a resident of Georgia in the county in which the corporation has an agent, office, and place of business even though the joint defendant resides in another county. *Quinton v. American Thread Co.*, 74 Ga. App. 436, 40 S.E.2d 95 (1946); *Nelson Assocs. v. Grubbs*, 135 Ga. App. 947, 219 S.E.2d 607 (1975).

Place of venue for enjoining continuing nuisance. — Where corporation which owned rendering plant in first county, and its president and sole owner were residents of second county, but main foreman at rendering plant was a resident of first county and the foreman gave all orders and directions for work to be done at rendering plant during absence of president, superior court of first county had jurisdiction of action against corporation, president, and main foreman at rendering plant, as alleged joint tort-feasors, to enjoin operation of rendering plant as an alleged continuing nuisance. *Bennett v. Bagwell & Stewart, Inc.*, 214 Ga. 115, 103 S.E.2d 561 (1958), commented on in 21 Ga. B.J. 564 (1959).

Resident defendant acting under direction of another. — Where a petition for injunction, brought in county where one defendant resides, seeks relief against joint trespasses by all defendants, the court is not without jurisdiction, even though all except the one defendant are residents of other counties of the state. This is true even though the resident defendant may have been acting only as agent of or under the command, direction, or authority of the other defendants in the commission of the trespasses. *Hoch v. Candler*, 190 Ga. 390, 9 S.E.2d 622 (1940); *Baggett v. Linder*, 208 Ga. 590, 68 S.E.2d 469 (1952).

Temporary presence of nonresident tort-feasor in state is not such residence within meaning of state Constitution as will authorize joining in suit against the

nonresident in county where the nonresident is found and served, other joint tort-feasors who reside in a different county or counties of this state. *Benton Rapid Express v. Johnson*, 202 Ga. 597, 43 S.E.2d 667 (1947).

When corporation sued as joint tort-feasor deemed of different county. — Corporation which is sued as a joint tort-feasor and is deemed to be a resident of the same county as other joint tort-feasors which it is joined with and is also considered to be a resident of another county in which neither of the other joint tort-feasors reside is a resident of a "different" county within the meaning of this paragraph. *Richards v. Johnson*, 219 Ga. 771, 135 S.E.2d 881 (1964) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Venue in a borrower's action for fraud against a corporate lender was proper in Coffee County where the lender was a foreign corporation registered to do business in Georgia, and although its registered office was in Fulton County, it transacted business in Coffee County. *Chrysler Credit Corp. v. Brown*, 198 Ga. App. 653, 402 S.E.2d 753 (1991).

Facility operated in county. — Trial court's order that venue was proper in Twiggs County was proper in a declaratory judgment action between an owner and a corporation arising from leases between the parties for facilities because one of the facilities at issue was located in Twiggs County and the corporation's subsidiary, a co-defendant, had an office and transacted business in Twiggs County. *Mariner Healthcare, Inc. v. Foster*, 280 Ga. App. 406, 634 S.E.2d 162 (2006).

5. Joint Trespassers

Intent. — The constitutional venue provision as to joint trespassers was evidently intended to declare what might be venue in suits where persons were jointly liable for tort. *Georgia Power Co. v. Blum*, 80 Ga. App. 618, 57 S.E.2d 18 (1949).

Meaning of word "trespass." — The meaning of word "trespass" is broad enough so that an action against persons jointly maintaining a nuisance can be brought in the county of the residence of either under this paragraph. *J.D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 175 S.E.2d

847 (1970) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

A suit against joint trespassers, residing in different counties, may be tried in either county. *Minhinnett v. Jackson*, 45 Ga. App. 207, 164 S.E. 96 (1932).

As where it was sufficiently alleged that defendants were joint trespassers; and the venue of the suit as to both defendants was in the county of the residence of either. *Flowers, Inc. v. Chamblee*, 165 Ga. 703, 141 S.E. 907 (1928).

Trespass to acquire timber. — One who makes a written instrument purporting to convey to another sawmill rights in certain timber on lands of a third person may be sued as a joint trespasser with person taking the conveyance who enters upon the land under the writing and cuts the sawmill timber thereon. *Pickron v. Garrett*, 73 Ga. App. 61, 35 S.E.2d 540 (1945).

Joint action against county and Department of Transportation permitted. — Where a county and Department of Transportation joined in damaging private property for use of public without first paying adequate compensation, a right of action arose in favor of the owner of the property, and the owner could have brought a joint action against the County and the Department of Transportation. *State Hwy. Bd. v. Ward*, 42 Ga. App. 220, 155 S.E. 384 (1930).

6. Principals and Sureties

Sureties sued in county of administrator. *Bishop v. Pinson*, 33 Ga. App. 269, 125 S.E. 880 (1924).

Principal sued in county of surety's residence. — Under this paragraph,

principal and surety may be sued together in the county of the surety's residence. *White v. Hart*, 35 Ga. 269 (1866); *Lumpkin v. Calloway*, 101 Ga. 226, 28 S.E. 622 (1897) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

A surety who pays the note is entitled to the same rights as to venue as is the principal. *Anderson v. Armistead*, 18 Ga. App. 387, 89 S.E. 525 (1916).

Pursuant to this paragraph, proper venue of building contractor and surety on bond was determined. *O'Connell v. Stoddard*, 27 Ga. App. 452, 108 S.E. 622 (1921) (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV).

Venue in an action against the guarantor of unpaid promissory notes was not lost merely because no final judgment for money damages was entered against resident joint obligors where summary judgment was granted against all joint obligors and final judgment for money damages was entered against only the guarantor, who resided in another county, and the others could not satisfy the liability of their debt. *Hodge Residential, Inc. v. Bankers First Fed. Savs. & Loan Ass'n*, 199 Ga. App. 474, 405 S.E.2d 302 (1991).

7. Joint Obligors

Waiver of defense. — In an action against joint obligors residing in different counties, a nonresident's failure to object to improper venue prior to the entry of summary judgment against the nonresident constituted a waiver of the defense that the court lacked jurisdiction following the entry of summary judgment for the resident joint obligor. *Taylor v. Career Concepts, Inc.*, 184 Ga. App. 551, 362 S.E.2d 128 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 77 Am. Jur. 2d, Venue, §§ 33, 34.

ALR. — Plaintiff's bona fide belief in cause of action against defendant whose presence in action is necessary to justify venue as against another defendant as sustaining venue against latter notwith-

standing failure to establish cause of action, or dismissal of action, against former, 93 ALR 949.

Venue of action for partnership dissolution, settlement, or accounting, 33 ALR2d 914.

Venue of claim for contribution or in-

demnity arising from payment of a judgment or claim in a motor vehicle accident case, 84 ALR2d 994.

Sufficiency of contractual designation of place of performance to fix venue at that place, under statute authorizing or requiring such venue, 97 ALR2d 934.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party, 100 ALR2d 693.

Paragraph V. Suits against maker, endorser, etc.

Suits against the maker and endorser of promissory notes, or drawer, acceptor, and endorser of foreign or inland bills of exchange, or like instruments, residing in different counties, shall be tried in the county where the maker or acceptor resides.

1976 Constitution. — Art. VI, Sec. XIV, Para. V.

Cross references. — Negotiable instruments generally, Art. 3, T. 11.

Law reviews. — For article discussing aspects of third party practice (impleader) under the Georgia Civil Practice Act (Ch. 11, T. 9), see 4 Ga. St. B.J. 355 (1968). For article, "Current Problems With Venue in Georgia," see 12 Ga. St. B.J. 71 (1975). For annual survey of commercial law, see 43 Mercer L. Rev. 119 (1991).

For note discussing some complications of filing suit against a nonresident in a multiparty action or against a resident who might implead a nonresident under the venue rules, see 11 Ga. L. Rev. 149 (1976). For note advocating modification of constitutional venue provisions so as to avoid limitations on applicability of joinder and impleader provisions of Civil Practice Act (Ch. 11, T. 9), see 11 Ga. L. Rev. 546 (1977).

JUDICIAL DECISIONS

Jurisdiction and venue distinguished. — Jurisdiction means the power of a court to render a binding judgment in the case, and venue means the place of trial. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

The constitutional venue provisions may not be altered or changed by the legislature or the courts and the adoption of procedural devices for adjudicating claims of various parties in the same action, does not effect a change in the venue requirements of the Constitution. *Pemberton v. Purifoy*, 128 Ga. App. 892, 198 S.E.2d 356 (1973); *Haley v. Citizens & S. Nat'l Bank*, 141 Ga. App. 13, 232 S.E.2d 362 (1977).

Venue needs clear proof beyond reasonable doubt. — Jury instructions set forth in O.C.G.A. § 17-2-2(c) violated the habeas petitioner's due process rights when Ga. Const. 1983, Art. VI, Sec. II, Para. V made venue an essential element of malice murder, and the instruction's

mandate that jurors had to consider the cause of death to have occurred where the body was found improperly shifted the burden of proving otherwise onto the defendant. *Owens v. McLaughlin*, 733 F.3d 320 (11th Cir. 2013).

Where drawer of check and endorsers thereon are residents of different counties, joint suit against drawer and endorsers must be brought in county of drawer's residence, in the absence of a waiver by the drawer of jurisdiction over the drawer's person. *Pioneer Prods., Inc. v. Sinclair*, 92 Ga. App. 95, 88 S.E.2d 43 (1955).

Suit instituted against drawer of check in county other than place of business or incorporation lacked requisite jurisdiction. — Where check was drawn by defendant corporation incorporated in one county and having and maintaining an office and place of business in another county, payable to the order of the endorsers, a partnership composed of

partners resident in a third county, and plaintiff instituted suit upon the check against the drawer and the endorser in a city court in the third county, that court was without jurisdiction of the defendant drawer. *Pioneer Prods., Inc. v. Sinclair*, 92 Ga. App. 95, 88 S.E.2d 43 (1955).

Resident defendant must have substantial equitable interest. — The Superior Court of Murray County did not have jurisdiction to entertain a case for a declaratory judgment where all of the parties defendant except one defendant, against whom no substantial equitable relief was prayed, were nonresidents of Murray County, the equitable feature of the case is removed, leaving the action solely one at law under Ga. L. 1945, p. 137, § 13 (see now O.C.G.A. Ch. 4, T. 9). The venue of such an action is in the

county where the defendant resides, Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI). The nonresident defendants not being of the class of persons who may be sued in counties other than the counties of their residence as permitted by Ga. Const. 1976, Art. VI, Sec. XIV, Para. IV (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV), and this paragraph, the court was without jurisdiction to enter a declaratory judgment as to their rights. *Harper v. Gunby*, 215 Ga. 466, 111 S.E.2d 85 (1959) (see Ga. Const. 1983, Art. VI, Sec. II, Para. V).

Cited in *Midland Nat'l Life Ins. Co. v. Emerson*, 121 Ga. App. 427, 174 S.E.2d 211 (1970); *Register v. Stone's Indep. Oil Distribs.*, 122 Ga. App. 335, 177 S.E.2d 92 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 77 Am. Jur. 2d, Venue, §§ 26, 33.

C.J.S. — 92A C.J.S., Venue, §§ 111 et seq., 121 et seq.

ALR. — Different or same venue or place of trial of proceeding or issue, and effect thereof, in respect of main action and ancillary garnishment or attachment, 139 ALR 1478.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party, 100 ALR2d 693.

Waiver by national bank of statutory right to be sued in district where established or in which it is located, 1 ALR3d 904.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like, 34 ALR3d 804.

Liability of surety on infant's contract or obligation, where contract is disaffirmed by infant, 44 ALR3d 1417.

Paragraph VI. All other cases.

All other civil cases, except juvenile court cases as may otherwise be provided by the Juvenile Court Code of Georgia, shall be tried in the county where the defendant resides; venue as to corporations, foreign and domestic, shall be as provided by law; and all criminal cases shall be tried in the county where the crime was committed, except cases in the superior courts where the judge is satisfied that an impartial jury cannot be obtained in such county.

1976 Constitution. — Art. VI, Sec. XIV, Para. VI.

Cross references. — Venue in civil cases generally, § 9-10-30 et seq. Venue of actions against corporations, § 14-2-510. Venue in juvenile proceedings,

§ 15-11-15. Venue in criminal cases generally, § 17-2-2. Venue of actions against insurance companies, § 33-4-1.

Law reviews. — For article, "Criminal Venue and Related Problems," see 2 Ga. St. B.J. 331 (1966). For article summariz-

ing law relating to jurisdiction and venue over domestic and foreign corporations in Georgia, and service therein, see 21 Mercer L. Rev. 457 (1970). For article discussing venue problems in juvenile court practice and suggesting solutions, see 23 Mercer L. Rev. 341 (1972). For article, "Current Problems With Venue in Georgia," see 12 Ga. St. B.J. 71 (1975). For article discussing venue and jurisdictional requirements for third-party practice, see 13 Ga. L. Rev. 13 (1978). For article surveying judicial developments in Georgia's trial practice and procedure laws, see 31 Mercer L. Rev. 249 (1979). For article surveying developments in Georgia criminal law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 95 (1981). For article surveying developments in Georgia local government law from

mid-1980 through mid-1981, see 33 Mercer L. Rev. 187 (1981). For article surveying developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981). For survey article on recent developments in Georgia juvenile law, see 34 Mercer L. Rev. 395 (1982). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005).

For comment on *Collier v. Duffell*, 165 Ga. 421, 141 S.E. 194 (1927), see 1 Ga. L. Rev. 50 (1927). For comment, "Jurisdiction over Nonresidents in Georgia: *Crowder v. Ginn*," see 17 Ga. L. Rev. 201 (1982). For comment, "Inappropriate Forum or Inappropriate Law? A Choice of Law Solution to the Jurisdictional Stand-off Between the United States and Latin America," see 60 Emory L.J. 1437 (2011).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DETERMINING VENUE

1. IN GENERAL
2. CIVIL ACTIONS
3. CRIMINAL ACTIONS
4. CORPORATIONS GENERALLY
5. FOREIGN CORPORATIONS

IMPARTIAL JURY REQUIREMENT

General Consideration

This paragraph is a venue provision which defines location of suits in state court. *Scott v. Crescent Tool Co.*, 296 F. Supp. 147 (N.D. Ga. 1968) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

O.C.G.A. § 16-9-121 is constitutional. — O.C.G.A. § 16-9-125 complies with Ga. Const. 1983, Art. VI, Sec. II, Para. VI; since the crime of identity fraud, as defined by O.C.G.A. §§ 16-9-121 and 16-9-125, when read in para materia, takes place in the county where the victim and his or her personal information are located, there is no constitutional bar to trying the defendant in that county. *State v. Mayze*, 280 Ga. 5, 622 S.E.2d 836 (2005).

O.C.G.A. § 19-9-62 constitutional. — O.C.G.A. § 19-9-62(a) did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. VI; a

trial court correctly ruled that it had subject matter jurisdiction over a father's post-decree child custody modification action pursuant to O.C.G.A. § 19-9-62 and that personal jurisdiction over the mother was unnecessary in order for it to address the requested modification. *Devito v. Devito*, 280 Ga. 367, 628 S.E.2d 108 (2006).

Applies to in personam cases. — This paragraph comprehends cases in which a judgment in personam may be recovered, not cases respecting title to land. *Wall v. Federal Land Bank*, 240 Ga. 236, 240 S.E.2d 76 (1977) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Jurisdiction and venue distinguished. — Jurisdiction means the power of a court to render a binding judgment in the case, and venue means the place of trial. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

In a borrower's suit asserting various claims against a lender, which was a citizen of Delaware and California, and an appraiser in connection with a loan that encumbered the borrower's property with a debt that exceeded the property's value, jurisdiction under 28 U.S.C. § 1332 did not exist where the borrower and the appraiser were both citizens of Georgia; the fact that the borrower may have filed the suit in an inappropriate venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI did not render the appraiser's joinder fraudulent under the doctrine of fraudulent pleading because such a pleading of jurisdictional facts did not destroy diversity, as the appraiser was still a resident of Georgia. *Austin v. Ameriquest Mortg. Co.*, 510 F. Supp. 2d 1218 (N.D. Ga. Feb. 27, 2007).

Venue in criminal case is a jurisdictional fact which must be proved. *Wright v. State*, 219 Ga. App. 119, 464 S.E.2d 216 (1995).

General Assembly cannot declare persons domiciled and residing in one county residents of and domiciliaries of another county. — The General Assembly has no right to provide that a natural person, an individual, who lives and has a domicile and residence in one county, and the person's domicile and residence is fixed there under the law as it stands, should be deemed also to be a resident, for certain purposes, of another county. A general law may fix the general place of the person's residence; but when the person has a residence and domicile fixed and established in accordance with the law, the legislature cannot declare that the person may also be a resident of another county at the same time. *Youmans v. Hickman*, 179 Ga. 684, 177 S.E. 238 (1934).

The constitutional venue provisions may not be altered or changed by the legislature or the courts and the adoption of procedural devices for adjudicating claims of various parties in the same action does not effect a change in the venue requirements of the Constitution. *Pemberton v. Purifoy*, 128 Ga. App. 892, 198 S.E.2d 356 (1973); *Haley v. Citizens & S. Nat'l Bank*, 141 Ga. App. 13, 232 S.E.2d 362 (1977).

The residence of an individual cannot be shifted to another county where the individual has a business, so that the latter county may be the proper venue of a suit against the individual because of a tort committed by the individual's agents in the county where the tort was committed. *Youmans v. Hickman*, 179 Ga. 684, 177 S.E. 238 (1934).

Trial by court with jurisdiction is constitutional right. — It is not within the power of the General Assembly, by any exercise of its legitimate legislative functions, to impose limitations and restrictions which deprive the defendant of the defendant's constitutional right to be tried in a court that has jurisdiction of the defendant's case. *Parks v. State*, 212 Ga. 433, 93 S.E.2d 663 (1956).

The doctrine of forum non conveniens has never been expressly sanctioned in the Georgia courts. *Smith v. Board of Regents*, 165 Ga. App. 565, 302 S.E.2d 124 (1983).

Change of venue based on forum non conveniens improper. — Because the relevant constitutional and statutory authority places venue, absent certain specified circumstances, squarely and solely in the county of the defendant's residence, and because Georgia's courts have not seen fit generally to invoke the doctrine of forum non conveniens, the trial court erred in granting defendant's motion to dismiss based on forum non conveniens. *Smith v. Board of Regents*, 165 Ga. App. 565, 302 S.E.2d 124 (1983).

Venue rights may be waived. — The venue rights established under the Georgia Constitution may be waived. *Holcomb v. Ellis*, 259 Ga. 625, 385 S.E.2d 670 (1989).

O.C.G.A. § 17-2-2(b) does not violate this paragraph. — Section 17-2-2(b), establishing venue when crime is committed on or immediately adjacent to boundary line between two counties, is not in violation of this paragraph, providing that criminal trials be held in county in which crime was committed. *Adsitt v. State*, 248 Ga. 237, 282 S.E.2d 305 (1981) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Applicability of paragraph to federal court proceedings. — This state

General Consideration (Cont'd)

constitutional limitation, while not a substantive right in a federal court, should be preserved whenever possible, so long as it does not jeopardize valid federal interests. *United States ex rel. Std. Mach. & Fabricating Co. v. Collins & Co. Gen. Contractors*, 648 F. Supp. 967 (M.D. Ga. 1986).

Cited in *Citizens & S. Bank v. Taggart*, 164 Ga. 351, 138 S.E. 898 (1927); *Collier v. Duffell*, 165 Ga. 421, 141 S.E. 194 (1927); *Wimberly v. Harris*, 47 Ga. App. 442, 170 S.E. 817 (1933); *Nalley & Co. v. Moore*, 51 Ga. App. 718, 181 S.E. 429 (1935); *McGinty v. Gormley*, 181 Ga. 644, 183 S.E. 804 (1935); *Speed Oil Co. v. Aycock*, 188 Ga. 46, 2 S.E.2d 666 (1939); *State Hwy. Dep't v. Parker*, 75 Ga. App. 237, 43 S.E.2d 172 (1947); *Hays v. Jones*, 81 Ga. App. 597, 59 S.E.2d 404 (1950); *A.K. Adams & Co. v. Douglas-Coffee County Hosp. Auth.*, 209 Ga. 62, 70 S.E.2d 730 (1952); *Bell v. Stevens*, 100 Ga. App. 281, 111 S.E.2d 125 (1959); *Wallace v. State*, 216 Ga. 180, 115 S.E.2d 338 (1960); *Pistor v. State*, 219 Ga. 161, 132 S.E.2d 183 (1963); *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967); *Steadham v. State*, 224 Ga. 78, 159 S.E.2d 397 (1968); *Register v. Stone's Indep. Oil Distribs.*, 225 Ga. 490, 169 S.E.2d 781 (1969); *Stinnett v. Ellis*, 121 Ga. App. 279, 173 S.E.2d 454 (1970); *Register v. Stone's Indep. Oil Distribs., Inc.*, 227 Ga. 123, 179 S.E.2d 68 (1971); *McGuire v. McGuire*, 228 Ga. 782, 187 S.E.2d 859 (1972); *Southall v. Carter*, 229 Ga. 240, 190 S.E.2d 517 (1972); *Shell v. Watts*, 229 Ga. 474, 192 S.E.2d 265 (1972); *Pope v. Cokinos*, 231 Ga. 79, 200 S.E.2d 275 (1973); *Railey v. State Farm Mut. Auto. Ins. Co.*, 129 Ga. App. 875, 201 S.E.2d 628 (1973); *Jolly v. Egerton*, 132 Ga. App. 243, 207 S.E.2d 634 (1974); *Ogden Equip. Co. v. Talmadge Farms, Inc.*, 132 Ga. App. 834, 209 S.E.2d 260 (1974); *Europa Hair, Inc. v. Browning*, 133 Ga. App. 753, 212 S.E.2d 862 (1975); *Tecumseh Prods. Co. v. Sears Roebuck & Co.*, 134 Ga. App. 102, 213 S.E.2d 522 (1975); *Graham v. Tallent*, 235 Ga. 47, 218 S.E.2d 799 (1975); *Daniel & Daniel, Inc. v. Stewart Bros.*, 139 Ga. App. 372, 228 S.E.2d 586 (1976); *Scott v. Atlanta Dairies Coop.*, 239 Ga. 721, 238 S.E.2d 340 (1977);

Davis v. State, 240 Ga. 763, 243 S.E.2d 12 (1978); *Insurance Co. v. Dills*, 145 Ga. App. 183, 243 S.E.2d 549 (1978); *Bergen v. Martindale-Hubbell, Inc.*, 245 Ga. 742, 267 S.E.2d 10 (1980); *Shaheen v. Dunaway Drug Stores, Inc.*, 246 Ga. 790, 273 S.E.2d 158 (1980); *Seymour v. Seymour*, 156 Ga. App. 293, 274 S.E.2d 690 (1980); *Parham v. Baldwin County Dep't of Family & Children Servs.*, 161 Ga. App. 436, 288 S.E.2d 354 (1982); *In re C.R.*, 160 Ga. App. 873, 288 S.E.2d 589 (1982); *In re R.A.S.*, 249 Ga. 236, 290 S.E.2d 34 (1982); *Troop Constr. Corp. v. Davis*, 249 Ga. 830, 294 S.E.2d 503 (1982); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518 (11th Cir. 1983); *Potts v. Zant*, 575 F. Supp. 374 (N.D. Ga. 1983); *Smith v. United Ins. Co. of Am.*, 169 Ga. App. 751, 315 S.E.2d 265 (1984); *Edwards v. Edmondson*, 173 Ga. App. 353, 326 S.E.2d 550 (1985); *Buchanan v. State*, 173 Ga. App. 554, 327 S.E.2d 535 (1985); *Robinson v. State*, 182 Ga. App. 423, 356 S.E.2d 55 (1987); *Schiefelbein v. State*, 258 Ga. 623, 373 S.E.2d 354 (1988); *Lewis v. Jarvis*, 207 Ga. App. 246, 427 S.E.2d 596 (1993); *Sikes v. Norton*, 185 Bankr. 945 (Bankr. N.D. Ga. 1995); *Robinson v. Star Gas of Hawkinsville, Inc.*, 243 Ga. App. 112, 533 S.E.2d 97 (2000); *Abrams v. Massell*, 262 Ga. App. 761, 586 S.E.2d 435 (2003); *Honeycutt v. Honeycutt*, 284 Ga. 42, 663 S.E.2d 232 (2008).

Determining Venue**1. In General**

There is no authority that special venue statutes are exclusive and the inference in the cases is that they are cumulative of other venue statutes. *Jahncke Serv., Inc. v. Department of Transp.*, 134 Ga. App. 106, 213 S.E.2d 150 (1975), later appeal, 137 Ga. App. 179, 223 S.E.2d 228 (1976).

Venue as jurisdictional fact. — Generally, criminal trials shall be tried in the county where the crime was committed, and venue is a jurisdictional fact that must be proven as part of the general case. *McGee v. State*, 209 Ga. App. 261, 433 S.E.2d 374 (1993), overruled on other grounds, *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000).

Evidence as to venue, though slight, is sufficient where there is no conflicting evidence. *Wilkes v. State*, 238 Ga. 57, 230 S.E.2d 867 (1976).

“Residence” of state agency. — In the absence of statutory direction, the “residence” of a state agency for purposes of venue must be determined based upon the general meaning of the term. *Hoffman v. Department of Cors.*, 218 Ga. App. 363, 460 S.E.2d 882 (1995).

In sexual harassment action alleging that the Department of Correction was a joint tort-feasor in incidents occurring prior to enactment of the Georgia Tort Claims Act, it was reasonable to establish venue based on the “residence” of the department in Fulton County, i.e., the site of the state capitol and seat of government as well as the location of the principal offices of the department. *Hoffman v. Department of Cors.*, 218 Ga. App. 363, 460 S.E.2d 882 (1995).

Venue for sheriff’s office in action based on O.C.G.A. § 15-16-21. — Trial court erred in finding that venue was proper in Dougherty County, Georgia and in denying the defendants’ motion to dismiss on that basis because proper venue for the case against the state defendants for noncompliance with O.C.G.A. § 15-16-21(b)(1) and (g) was in Fulton County, Georgia, as although the defendants maintained offices throughout the State of Georgia, the defendants’ principal offices were located in Fulton County. *Ga. Dep’t of Human Servs. v. Dougherty County*, 330 Ga. App. 581, 768 S.E.2d 771 (2015).

Resident defendant must be found liable for court to enter judgement against nonresident defendants. — Where a single suit is brought against several joint tort-feasors in a county where one of them is a resident, and where the others reside in another county of the state, and where on the trial of the case the resident defendant is found not liable by the jury, and the nonresident defendants are found liable, the judge is without jurisdiction to enter judgment against the nonresident defendants. *Evans v. Garrett*, 72 Ga. App. 846, 35 S.E.2d 387 (1945).

Apparent venue negated by police subterfuge. — Police officers’ activities in

maneuvering appellant into a county for the sole purpose of obtaining venue constituted a subterfuge and impermissibly conferred apparent venue over the defendant in that county. *McCarty v. State*, 152 Ga. App. 726, 263 S.E.2d 700 (1979).

Sole proprietorship. — The county of residence of a sole proprietorship is the county of residence of its proprietor. *Dowis v. Watson*, 161 Ga. App. 749, 289 S.E.2d 558 (1982).

Venue will be determined as of date of filing as long as service is subsequently perfected upon defendant within a reasonable time period. *Franek v. Ray*, 239 Ga. 282, 236 S.E.2d 629 (1977).

For purposes of venue and other jurisdictional questions, party’s residence at time of filing suit is determining factor. *Franek v. Ray*, 239 Ga. 282, 236 S.E.2d 629 (1977).

Codefendant’s right to challenge venue. — A nonresident codefendant who asserts the county of residence in the nonresident’s answer may admit that the trial court is the proper venue without waiving the right to challenge venue later if the resident codefendant is dismissed from the case; there is no waiver in that instance because the earliest a defense of improper venue can be properly raised by the nonresident defendant is when the resident defendant has been adjudged not liable to the plaintiff and is dismissed from the case. *Nadew v. Alemu*, 217 Ga. App. 438, 457 S.E.2d 709 (1995).

An action for a writ of possession under O.C.G.A. § 44-14-231 is not a “civil action” within the meaning of Ga. Const. 1983, Art. VI, Sec. II, Para. VI, and thus venue is proper in a county other than that of the defendant’s residence. *McClintock v. Wellington Trade, Inc.*, 252 Ga. 563, 315 S.E.2d 428 (1984).

Affidavit as to residence not controverted by other evidence. — Trial court did not err in finding improper venue where evidence that defendant’s spouse was a resident of Jackson County and that defendant practiced medicine in Jackson County was irrelevant, and evidence that the defendant spent several nights at the defendant’s spouse’s residence in Jackson County did not refute the defendant’s affidavit stating the defendant’s intent to

Determining Venue (Cont'd)**1. In General (Cont'd)**

remain a resident of DeKalb County. *Lance v. Safwat*, 170 Ga. App. 694, 318 S.E.2d 86 (1984).

2. Civil Actions

All civil cases other than those specifically excepted shall be tried in the county where the defendant resides. *Shell v. Watts*, 125 Ga. App. 542, 188 S.E.2d 269, rev'd on other grounds, 229 Ga. 474, 192 S.E.2d 265 (1972); *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

Where a personal judgment may be recovered. — General provision that all other civil cases shall be tried in county where defendant resides comprehends cases in which judgment in personam may be recovered; this construction is inevitable from the application of the rule of ejusdem generis, as well as from the clear import of the words themselves in the connection in which they are employed. *Moss v. Strickland*, 138 Ga. 539, 75 S.E. 622 (1912); *Bennett v. Wheatley*, 154 Ga. 591, 115 S.E. 83 (1922); *Wilson v. Healey Real Estate & Imp. Co.*, 203 Ga. 52, 45 S.E.2d 656 (1947).

The constitutional scheme seems to be that the venue of every action not respecting title to land, wherein a personal judgment may be recovered, shall be the county of residence of the defendant in the action, or, if there be more than one, then in the county of one of them. *Wilson v. Healey Real Estate & Imp. Co.*, 203 Ga. 52, 45 S.E.2d 656 (1947).

Paragraph's intent. — Upon the whole, what is meant by this part of the Constitution is this: that all civil cases are to be tried in the county in which the defendant resides — the county in which the defendant resides should be ascertained by the law of residence, which may happen to be in existence at the time when the case arises, or perhaps at the time when the case is to be tried. *Martin & Thompson, Inc. v. Allen*, 188 Ga. 42, 2 S.E.2d 668 (1939).

Venue is in county where defendant resides. — Under the Constitution and statutes of this state, venue of civil actions

against natural persons, unless within specified exceptions, is the county where the defendant resides. *Harmon v. Wiggins*, 48 Ga. App. 469, 172 S.E. 847 (1934).

In a mortgage broker's breach of contract action against a limited liability company, the trial court erred in denying a motion to transfer to a proper venue filed by the mortgage broker president, who was added as a defendant, because the constitutional joint tortfeasor venue provision, Ga. Const. 1983, Art. VI, Sec. II, Para. IV, did not apply to subject the president to trial with the broker on the LLC's counterclaim in Coweta County since the broker did not reside in Coweta County; as an individual resident of DeKalb County, the president was entitled under the constitutional venue provisions to be sued in DeKalb County, Ga. Const. 1983, Art. VI, Sec. II, Para. VI. *M&M Mortg. Co. v. Grantville Mill, LLC*, 302 Ga. App. 46, 690 S.E.2d 630 (2010).

Trial court did not err in granting a landowner summary judgment in a church's quiet title action because the doctrine of collateral estoppel applied when prior action adjudicated that the director of the church did not have the authority to act on behalf of or to represent the church, but the director did so by directing the filing of the quiet title action; the previous litigation was decided by a court of competent jurisdiction because the case was filed in the superior court in the county of the director's residence, and that court could adjudicate whether the director had the authority to act on behalf of or to represent the church corporation. *Body of Christ Overcoming Church of God, Inc. v. Brinson*, 287 Ga. 485, 696 S.E.2d 667 (2010).

Trial court erred in finding that venue was proper in Effingham County, Georgia because the defendant, who maintained residences in both Effingham County and Chatham County, Georgia, was domiciled in Chatham County. *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

Trial court did not err when the court denied the father's motion to move a child custody action from Gwinnett County to DeKalb County because the father had not proved domicile in DeKalb County; while the father testified that the father

moved to DeKalb County, the father's driver's license showed a Gwinnett County address eight months later and the father had not notified the father's homeowner's insurance company or the Internal Revenue Service of the move. *Goyal v. Fifadara*, 324 Ga. App. 567, 751 S.E.2d 190 (2013).

Provisions of Ga. L. 1949, p. 1168, §§ 4-6 (see now O.C.G.A. § 15-21-56) were not sufficient to overrule provisions of this paragraph, providing that civil actions generally shall be brought in the county of the defendant's residence. However, where there were joint defendants, such an action may be brought in the county of residence of either. *Banks County v. Stark*, 88 Ga. App. 368, 77 S.E.2d 33 (1953) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Except as the Constitution may otherwise authorize, all civil cases shall be tried in the county of the defendant's residence. — While jurisdiction of the person may be waived by appearance and pleading to the merits, parties cannot by consent give jurisdiction of the subject matter where the court has none. The superior court in one county has no jurisdiction in quo warranto of the office of "director" of electric corporation created and existing in another county. *Smith v. Upshaw*, 217 Ga. 703, 124 S.E.2d 751 (1962).

Residence of surety did not control. — Fact that plaintiff, as surety, guaranteed performance of contract by contracting company, as principal, would not give superior court of county of residence of contracting company jurisdiction on petition of the surety to hear and determine the controversy between the contracting company and the city for which the work was to be performed as to whether or not there had been a breach of the contract on the part of the contracting company, nor would the fact that the plaintiff and contracting company had entered into a separate contract by the application for the performance bond give the plaintiff any right to compel the city to join in a suit with reference to this separate contract, since the city was not a party to the application and had no interest therein. *Maryland Cas. Co. v. City of Adel*, 87 Ga.

App. 138, 73 S.E.2d 237 (1952).

Court maintains venue only if judgment is rendered against resident defendant. *Thoni Oil Co. v. Tinsley*, 140 Ga. App. 887, 232 S.E.2d 162 (1977).

If resident defendant is dismissed, the other defendant may still, prior to verdict, raise the question of lack of jurisdiction, if the defendant's nonresidence appears on the face of the plaintiff's pleading, or, if it does not so appear, may raise the question by plea; and this is true notwithstanding the defendant had previously filed a plea to the merits at a time when the defendant's defense of lack of jurisdiction would not have been well taken. Any other rule would open the door to easy evasion of the constitutional provision that, except in the enumerated cases, the venue of all suits is in the county of the defendant's residence. *Metcalf v. Hale*, 42 Ga. App. 402, 156 S.E. 301 (1930).

Petition dismissible for want of jurisdiction. — Where the interests of the plaintiff and the resident defendant are identical and the allegations of the petition fail to show any justiciable controversy between the plaintiff and the resident defendant in which the nonresident defendant has any substantial interest, on motion of the nonresident defendant, setting out that it is a resident of a named county in this state and subject to suit only in the superior court of that county, the petition will be dismissed as to such nonresident defendant for want of jurisdiction. *Maryland Cas. Co. v. City of Adel*, 87 Ga. App. 138, 73 S.E.2d 237 (1952) (case cites former §§ 2-4903, 2-4904, and 2-4906).

Resident defendant must be found liable. — Where suit is brought against two defendants, one of whom resides in the county, the court has no jurisdiction of nonresident defendant unless the resident codefendant is liable in the action. *Metcalf v. Hale*, 42 Ga. App. 402, 156 S.E. 301 (1930).

Service on nonresident motorist cannot affect jurisdiction for Georgia resident. — Action cannot be instituted against a resident of Georgia in a county other than that of the resident's residence where the nonresident motorist is found

Determining Venue (Cont'd)**2. Civil Actions (Cont'd)**

and served. Such a fictitious residence of the nonresident motorist is not sufficient to authorize the joining of a resident of Georgia outside the county of residence. *Horton v. Western Contracting Corp.*, 113 Ga. App. 613, 149 S.E.2d 542 (1966).

This paragraph simply prescribes that suits must be brought in the county of the defendant's residence, and the whole subject of domicile and residence of persons both natural and artificial is left to be determined by the General Assembly. *Drake v. Chesser*, 230 Ga. 148, 196 S.E.2d 137 (1973); *Davenport v. Petroleum Delivery Serv. of Ga., Inc.*, 134 Ga. App. 418, 214 S.E.2d 692, aff'd, 235 Ga. 116, 218 S.E.2d 848 (1975) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

O.C.G.A. § 43-34-38 does not violate this paragraph. *Smith v. State Bd. of Medical Exmrs.*, 172 Ga. 106, 157 S.E. 268 (1931) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

This paragraph is applicable to tort actions. *Orkin Exterminating Co. v. Gilland*, 130 Ga. App. 788, 204 S.E.2d 469 (1974) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Venue where accident occurred out of state. — The venue of an action for damages for injuries suffered by plaintiff when the plaintiff fell in a store in Tennessee was proper in the county in Georgia where the defendant resided. *Gray v. Armstrong*, 222 Ga. App. 392, 474 S.E.2d 280 (1996).

Auto negligence case, neither party Georgia resident, but defendant served in Georgia. — In an auto negligence suit, a trial court properly found that venue was proper in Muscogee County, Georgia, though the accident occurred in Alabama and both parties were Alabama residents, because the defendant was found and served in Muscogee County. *Gowdy v. Schley*, 317 Ga. App. 693, 732 S.E.2d 774 (2012).

One's legal residence for purpose of being sued in this state is generally the same county as his or her domicile. *Sorrells v. Sorrells*, 247 Ga. 9, 274 S.E.2d 314 (1981).

There must be either tacit or explicit intention to change one's domicile before there is a change of legal residence. *Sorrells v. Sorrells*, 247 Ga. 9, 274 S.E.2d 314 (1981).

Suits against guardians in representative capacity. — General requirement that defendant in civil case must be tried in county of the defendant's residence is applicable to suits against guardians in their representative capacities; and suit against a guardian must be brought in the county of the guardian's residence unless such representative is subject to suit in another county within one of the exceptions to the general rule which are embodied in Ga. Const. 1976, Art. VI, Sec. XIV, Paras. I through V and VII. *Kimsey v. Caudell*, 109 Ga. App. 271, 135 S.E.2d 903 (1964).

Venue in legitimacy action. — The rights afforded a mother in the scheme for legitimating the mother's child render the mother a defendant within the meaning of Ga. Const. 1983, Art. VI, Sec. II, Para. VI; thus, that portion of O.C.G.A. § 19-7-22(a) that provides for venue in the county of the putative father, when different from the county of the mother, offends the Georgia Constitution. Where one portion of a statute is unconstitutional, the Supreme Court of Georgia has the power to sever that portion of the statute and preserve the remainder if the remaining portion of the Act accomplishes the purpose the Georgia General Assembly intended; accordingly, severance of this venue provision does not affect the purpose of the remainder of the statute, and the remaining provisions of O.C.G.A. § 19-7-22(a) are to be given full effect. *Holmes v. Traweek*, 276 Ga. 296, 577 S.E.2d 777 (2003).

Termination of parental rights. — Termination of parental rights does not fall under any exceptions to general civil provision that all civil cases must be tried where defendant resides and, therefore, must be tried in the county of the parent's residence. *Quire v. Clayton County Dep't of Family & Children Servs.*, 242 Ga. 85, 249 S.E.2d 538 (1978).

Venue under Child Custody Intra-state Jurisdiction Act. — Boyfriend, who had been appointed temporary

guardian of child, was not the child's "legal custodian" as that term was used in the Georgia Child Custody Intrastate Jurisdiction Act, O.C.G.A. § 19-9-20 et seq., and, thus, the provisions of the Act, including its venue provisions, did not apply; accordingly, the trial court erred in dismissing the grandmother's petition for custody of the child on the ground that venue was not proper in the county where the mother was incarcerated but would have been proper where the temporary guardian, the boyfriend, resided, as application of the general venue rules governing venue in civil cases, contained in the Georgia Constitution, showed that since the mother was a necessary party to the grandmother's custody action, filing the action in the county where the mother was incarcerated was proper. *Gordon v. Gordon*, 269 Ga. App. 224, 603 S.E.2d 732 (2004).

Counterclaim for change in custody. — Under the plain language of the statute, the trial court erred in denying a motion to dismiss a parent's counterclaim seeking a change in physical custody and in finding that the evidence was sufficient to support the same. *Seeley v. Seeley*, 282 Ga. App. 394, 638 S.E.2d 837 (2006).

Application of guardianship must be heard in county of mentally incompetent's residence. — Where a person files an application for the appointment of a guardian of an allegedly mentally incompetent state resident, the allegedly mentally incompetent person is entitled to have the application for guardianship heard in the probate court of the county of his or her residence. *Sorrells v. Sorrells*, 247 Ga. 9, 274 S.E.2d 314 (1981).

Representative of alleged incompetent can contest jurisdiction. — Where representative of alleged incompetent files a plea to court's jurisdiction on ground that alleged incompetent is a resident of another county, the plea should be sustained if it is determined that the alleged incompetent is, in fact and in law, a resident of the other county. *Sorrells v. Sorrells*, 247 Ga. 9, 274 S.E.2d 314 (1981).

Resident defendant must be found liable. — Where suit is brought against two or more defendants jointly liable to plaintiff, one of whom resides in county

where suit is brought, court has jurisdiction of the other defendants, who are nonresidents of the county, where the resident defendant is liable in the action. *Moore v. Bryan*, 52 Ga. App. 272, 183 S.E. 117 (1935).

General venue provisions of the Georgia Constitution apply in a proceeding involving termination of parental rights. — The Constitution grants to a parent the right to defend a termination of parental rights suit in the county in which the parent resides. *Quire v. Clayton County Dep't of Family & Children Servs.*, 242 Ga. 85, 249 S.E.2d 538 (1978); *Williams v. Department of Human Resources*, 150 Ga. App. 610, 258 S.E.2d 288 (1979).

Adoption petitions. — This constitutional requirement that venue in civil cases be in county where defendant resides is not in conflict with former O.C.G.A. § 19-8-1, requiring that petitions for adoption be filed in the county where the adopting parents reside. *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23 (1981) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

The award of custody made by the divorce court is a final judgment on the facts then existing. — Where the record showed that a divorce action terminated with the entry of a final judgment and decree, that the wife subsequently changed her residence to another county, and that the husband filed his motion to modify outside the term of court, the trial court erred in ruling on the husband's motion to modify visitation. *Ward v. Ward*, 194 Ga. App. 669, 391 S.E.2d 480 (1990).

Action to modify decree awarding alimony is separate action and must be filed in county of defendant's residence under the mandate of the Constitution. *Hill v. Harper*, 230 Ga. 246, 196 S.E.2d 397 (1973).

Actions to modify alimony and divorce decrees must proceed in the county where the defendant currently resides. *Buckholts v. Buckholts*, 251 Ga. 58, 302 S.E.2d 676 (1983).

Father waived his defense to lack of venue in mother's counterclaim in an action for modification of child visitation by failing to file a motion to dismiss in a timely and expeditious manner. *Houston*

Determining Venue (Cont'd)**2. Civil Actions (Cont'd)**

v. Brown, 212 Ga. App. 834, 443 S.E.2d 3 (1994).

Bringing change of custody suit as submission to jurisdiction for counter-claim regarding child support. — Where plaintiff brings suit for change of custody in county other than county of residence, the plaintiff submits to jurisdiction of court in which suit is filed for purpose of allowing defendant to file counterclaim for revision of child support. *Ledford v. Bowers*, 248 Ga. 804, 286 S.E.2d 293 (1982).

Action to revise alimony is separate action. — Action for revision of award of permanent alimony and support after decree of divorce and award of alimony becomes final is not divorce case but is new and distinct action separate from the original divorce action in which the alimony was awarded. Being a separate and independent suit, it is subject to the constitutional provisions respecting venue just as any other civil case. *Bugden v. Bugden*, 224 Ga. 517, 162 S.E.2d 719 (1968).

Jurisdiction in habeas corpus action for child custody not sustained. — In habeas corpus action for child custody where the petition does not allege that the defendant is a resident of the county but alleges that the petitioner believes that the petitioner is a resident of such county, and the defendant could admit that the petitioner believes the defendant to be a resident of the county without conceding in any way that the defendant is a resident of that county, petition failed to allege that the defendant was a resident of the county and therefore subject to the jurisdiction of the court, and fails to show that the court had jurisdiction of the defendant and was subject to general demurrer (now motion to dismiss for failure to state claim) specifically pointing out this defect. *Dutton v. Freeman*, 213 Ga. 445, 99 S.E.2d 204 (1957).

Court of appropriate jurisdiction. — Where there is an attack upon a part of an original divorce decree and the court's jurisdiction is based upon the original decree having allegedly been obtained by fraud, the superior court granting the

decree attacked is the superior court of appropriate jurisdiction. *Hill v. Harper*, 230 Ga. 246, 196 S.E.2d 397 (1973).

Transfer provision not violative of Constitution. — The provision of former Code 1933, § 24A-1201 (see now O.C.G.A. § 15-11-30), providing that after adjudication of delinquency in a court of another county the proceeding shall be transferred to the county of the child's residence for disposition, is not violative of this paragraph. *M.E.B. v. State*, 230 Ga. 154, 195 S.E.2d 891 (1973) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Trial court erred in granting transfer motion. — In a wrongful death medical malpractice suit, the trial court erred in granting the plaintiff's motion to transfer venue of the case because the remaining defendant had waived the defendant's venue defenses and, therefore, the plaintiff had no standing to require the trial court to transfer the case to the county where the defendant resided when suit was filed. *Richardson v. Gilbert*, 319 Ga. App. 72, 733 S.E.2d 783 (2012).

Determining legal residence in delinquency proceeding. — A juvenile proceeding for delinquency or unruly conduct may be tried either in the county where the child resides or in the county where the unruly or delinquent conduct occurred. *In re A.M.C.*, 213 Ga. App. 897, 446 S.E.2d 760 (1994).

In determining where a juvenile resides for purposes of venue under O.C.G.A. § 15-11-15, it is generally the legal residence that controls. *In re A.M.C.*, 213 Ga. App. 897, 446 S.E.2d 760 (1994).

In a proceeding against a juvenile for the status offense of unruliness, the juvenile's legal residence for purposes of venue was in the county of the Department of Family & Children Services having custody over the juvenile, even though the place of the offense and the juvenile's family residence were in other counties. *In re A.M.C.*, 213 Ga. App. 897, 446 S.E.2d 760 (1994).

Minor who is resident of this state is subject to jurisdiction of juvenile court of county of the minor's residence, the proceedings in such court being civil rather than criminal in nature. Where the crime charged is a felony, such

minor is also subject to the criminal jurisdiction of the superior court of the county wherein the felony was committed. *Whitman v. State*, 96 Ga. App. 730, 101 S.E.2d 621 (1957).

Juvenile court action not bar to superior court action. — Juvenile court of residence of defendant may proceed to punish juvenile in civil action, and superior court of county where felony is committed may also proceed to try defendant in a criminal action, the one not being a bar to the other. *Whitman v. State*, 96 Ga. App. 730, 101 S.E.2d 621 (1957).

Instances of venue in civil cases. — Returns of administrators, under former Code 1882, § 2598 (see now O.C.G.A. § 53-7-163). *Young v. Brown*, 75 Ga. 1 (1885).

This paragraph was held to regulate venue in suits as to validation of municipal bonds. *Ray v. City of Lavonia*, 141 Ga. 626, 81 S.E. 884 (1914) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Affidavit contesting assessment by Superintendent of Banks. *Martin v. Bennett*, 291 F. 626 (N.D. Ga. 1923).

Attachment proceedings. — There was no constitutional provision which fixed the venue of attachment proceedings against nonresidents. Hence, former Civil Code 1910, § 5063 (see now O.C.G.A. § 18-3-17) must apply. *Carroll & Downs v. Groover*, 27 Ga. App. 747, 110 S.E. 30 (1921).

Where declaration in attachment does not show that the defendant was a nonresident or that the defendant was a resident of the county where the attachment was returned, nor was the ground of attachment one that would lie only against a nonresident, the trial court erred in overruling the defendant's demurrer (now motion to dismiss for failure to state claim) to petition for lack of jurisdiction over defendant. *Harris v. McDaniel*, 92 Ga. App. 299, 88 S.E.2d 442 (1955).

Superior Court of Murray County did not have jurisdiction to entertain case for declaratory judgment where all of the parties defendant except one defendant, against whom no substantial equitable relief was prayed, were nonresidents of Murray County; the equitable feature of the case is removed, leaving the

action solely one at law under Ga. L. 1945, p. 137 (see now O.C.G.A. Ch. 4, T. 9). The venue of such an action is in the county where the defendant resides. The nonresident defendants not being of the class of persons who may be sued in counties other than the counties of their residence as permitted in Ga. Const. 1976, Art. VI, Sec. XIV, Paras. IV and V (see Ga. Const. 1983, Art. VI, Sec. II, Paras. IV and V), the court was without jurisdiction to enter a declaratory judgment as to their rights. *Harper v. Gunby*, 215 Ga. 466, 111 S.E.2d 85 (1959).

Venue where tenant sold crops illegally in two counties. *Curry v. State*, 17 Ga. App. 272, 86 S.E. 533 (1915).

Venue where stolen goods taken to several counties. *Williams v. State*, 105 Ga. 743, 31 S.E. 749 (1898).

Where defendant's lottery operation covers several counties, each county would have jurisdiction over defendant for trial, regardless of the defendant's activities in other counties. *Lunsford v. State*, 60 Ga. App. 537, 4 S.E.2d 112 (1939).

Proceeding by a money rule is civil case within meaning of this paragraph. *Commings v. Ross*, 44 Ga. App. 182, 160 S.E. 679 (1931) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Confirmation required by Ga. L. 1935, p. 381, § 1 (see now O.C.G.A. § 44-14-161) is not a civil case within the meaning of this paragraph, requiring civil cases to be brought in the county where the defendant resides. *Wall v. Federal Land Bank*, 240 Ga. 236, 240 S.E.2d 76 (1977) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Plaintiff is required to bring an action for civil damages in county of residence of defendant trespassers and not in the county where the trespass allegedly occurred. *Jones v. Hudgins*, 218 Ga. 43, 126 S.E.2d 414 (1962).

If libel action is brought against noncorporate newspaper, venue would, by constitutional mandate, have to be brought in county of residence of libeler, which may not be the county where the newspaper is published. *Carroll City/County Hosp. Auth. v. Cox Enters.*, 243 Ga. 760, 256 S.E.2d 443 (1979).

Determining Venue (Cont'd)**2. Civil Actions (Cont'd)**

Convict does not acquire residence in county where the convict has been involuntarily placed to serve sentence of confinement. *Williams v. Department of Human Resources*, 150 Ga. App. 610, 258 S.E.2d 288 (1979).

Boundary-line dispute. — Where equitable relief is sought in conjunction with a boundary-line dispute (i.e., removal of a fence and ejectment from a disputed strip of land), the county of the defendant's residence is the proper venue forum. *Beauchamp v. Knight*, 261 Ga. 608, 409 S.E.2d 208 (1991).

Dispossessory warrant proceeding not civil case. — A dispossessory warrant proceeding being a summary statutory action to obtain possession of premises, in which proceeding the only judgment which can be obtained by the landlord is the statutory incidental penalty for double rent, now no longer double, imposed upon the tenant for unlawfully withholding possession, such a proceeding is not a civil case within the meaning of this paragraph, which declares that "all other civil cases shall be tried in the county where the defendant resides." *Wilson v. Healey Real Estate & Imp. Co.*, 203 Ga. 52, 45 S.E.2d 656 (1947) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Section 44-7-54 did not violate this paragraph. — Portions of O.C.G.A. § 44-7-54, which formerly provided that issue formed in dispossessory warrant shall be returned to "the county where the land lies," was not violative of this paragraph. *Wilson v. Healey Real Estate & Imp. Co.*, 203 Ga. 52, 45 S.E.2d 656 (1947) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Venue in action against motor carrier. — Under the constitutional and statutory venue provisions applicable to a tort action against a domestic motor carrier corporation, a motor carrier "may be" sued in the county where the cause of action or some part thereof originated or may be sued in the county where it maintains its principal office and place of business. *Thomas v. Bobby Stevens Hauling Contractors*, 165 Ga. App. 710, 302 S.E.2d 585 (1983).

Notwithstanding the 1937 legislation allowing permissive joinder under O.C.G.A. § 46-7-12, a suit in tort against a motor carrier is not ancillary to a suit in contract against the carrier's insurer, and such a tort action must be brought only where venue would be constitutionally permitted. *Thomas v. Bobby Stevens Hauling Contractors*, 165 Ga. App. 710, 302 S.E.2d 585 (1983).

Recovery of payment due on account. — Proper venue for action to recover payment due on an account was in the county where the debtor resided, not the county where the debtor's sole proprietorship was located. *Lee v. Xerox Corp.*, 193 Ga. App. 432, 387 S.E.2d 653 (1989).

Consent judgment against joint tortfeasors. — Where a single suit is brought against several joint tortfeasors in a county where one of them is a resident, and the others reside outside the county, a consent judgment and an agreement not to enforce it constitute a finding that the resident is liable and do not deprive the trial court of jurisdiction over the nonresident defendants in the county where suit was brought. *Motor Convoy, Inc. v. Brannen*, 194 Ga. App. 795, 391 S.E.2d 671, *aff'd*, 260 Ga. 340, 393 S.E.2d 262 (1990).

Tort Claims Act. — O.C.G.A. § 50-21-28, establishing the venue of tort actions against the state under the Georgia Tort Claims Act in the county wherein the loss occurred, does not violate Ga. Const. 1983, Art. VI, Sec. II, Para. VI. *Campbell v. Department of Cors.*, 268 Ga. 408, 490 S.E.2d 99 (1997).

Probate. — Where the decedent's grandniece filed a caveat to the probate of the will in solemn form on grounds of undue influence and contract to make a will and then filed an identical complaint in the superior court, the superior court was an improper venue for the contract to make a will action, as the co-executors did not live in the county where the action was filed as was required under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; as a result, the case had to be transferred to the appropriate superior court as provided under Ga. Const. 1983, Art. VI, Sec. I, Para. VIII. *SunTrust Bank v. Peterson*, 263 Ga. App. 378, 587 S.E.2d 849 (2003).

Counterclaim. — Regarding counterclaims, Georgia law has long held that a party that files suit in a Georgia court submits oneself to that court's jurisdiction and venue relating to all matters directly connected with the case that the party had originated; one who goes into the court of a county other than that of the party's residence, to assert a claim or set up an equity, must be content to allow that court to determine any counter-claim growing out of the original suit which the defendant sees fit to set up by a cross-action. *Kennestone Hosp., Inc. v. Hopson*, 264 Ga. App. 123, 589 S.E.2d 696 (2003).

3. Criminal Actions

Construction with statutory provisions. — O.C.G.A. § 17-2-2, governing venue in criminal cases, does not conflict with the state constitutional requirement that all criminal cases be tried in the county where the crime was committed. *Miller v. State*, 174 Ga. App. 42, 329 S.E.2d 252 (1985).

Allegations of venue. *Morakes v. State*, 158 Ga. 114, 123 S.E. 687 (1924).

The venue of criminal cases is determined at the time of trial, regardless of location of territory when crime was committed. *Bundrick v. State*, 125 Ga. 753, 54 S.E. 683 (1906); *Pope v. State*, 124 Ga. 801, 53 S.E. 384, 110 Am. St. R. 197, 4 Ann. Cas. 551 (1906); *Minter v. State*, 158 Ga. 127, 123 S.E. 23 (1924).

Venue of the crime must be established clearly and beyond a reasonable doubt. *Jackson v. State*, 177 Ga. App. 718, 341 S.E.2d 274 (1986).

Under Ga. Const. 1983, Art. VI, Sec. II, Para. VI, venue lies in the county where a crime is committed. *Goodrum v. State*, 259 Ga. App. 704, 578 S.E.2d 484 (2003).

Because the state failed to prove the element of venue beyond a reasonable doubt, and there was no indication in the record that the juvenile waived said requirement or that the court took judicial notice of venue as an element of the offenses charged, the juvenile's adjudications of delinquency had to be reversed. In the Interest of J.B., 289 Ga. App. 617, 658 S.E.2d 194 (2008).

Venue of city coextensive with county. — Venue for the Atlanta City Court did not need to be shown to be in Fulton County or DeKalb County as venue was coextensive with city territorial limits and need not be shown to lie in either county. *State v. Walker*, 276 Ga. 756, 585 S.E.2d 77 (2003).

Defendant's plea of not guilty contested every allegation against the defendant, including those pertaining to venue. *Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing *Graves v. State*, 227 Ga. App. 628, 490 S.E.2d 111 (1997).

Test to determine county crime committed in when in doubt not violative of paragraph. — Where it cannot be determined in what county a crime was committed, charge by trial court that the crime shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed and which correctly stated the law concerning venue in subsections (b), (e), and (h) of O.C.G.A. § 17-2-2, does not violate this paragraph. *Bundren v. State*, 247 Ga. 180, 274 S.E.2d 455 (1981) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

State not required to stipulate to venue. — Venue is not a fact to which the state is required to stipulate whenever the defendant wishes to do so, particularly when the state disbelieves the defendant's account of that fact, because stipulations and waivers of jurisdictional defenses streamline a proceeding in which both parties agree on a fact, making further proof unnecessary; stipulations and jurisdictional waivers are not a means of forcing an opposing party to agree to facts it believes are not true and would mislead the factfinder. If the facts are disputed, the parties' competing evidence and arguments can be presented to the factfinder to resolve. *State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010).

Proof of venue. — Testimony of police officers that the crimes charged in the indictment occurred in the county where defendant's trial was conducted was sufficient to authorize finding of venue. *Jones v. State*, 220 Ga. App. 161, 469 S.E.2d 300 (1996).

Determining Venue (Cont'd)**3. Criminal Actions (Cont'd)**

When a criminal defendant pleads not guilty, the defendant has challenged venue and the state will not be permitted to invoke the exception permitting it to establish venue with mere slight evidence. *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000).

Evidence that showed that the police in a particular county investigated the subject crimes and that the medical examiner in that same county performed the autopsy on the murdered man killed during the subject crimes was sufficient to prove venue was proper in defendant's trial on those same crimes. *Allison v. State*, 259 Ga. App. 775, 577 S.E.2d 845 (2003).

State proved venue in Cobb County beyond a reasonable doubt, with direct and circumstantial evidence, which showed that the defendant committed aggravated sexual battery upon the child victim while traveling from the victim's home in Cobb County to a bus stop. *Harris v. State*, 279 Ga. App. 570, 631 S.E.2d 772 (2006).

The incident on which a sodomy charge was based occurred about one mile from the home in Gordon County where the defendant and the victim lived, when the defendant and the victim were driving home; thus, under O.C.G.A. § 17-2-2(e), the crime was considered to have occurred in Gordon County, through which the car traveled, and the state proved venue. *Prudhomme v. State*, 285 Ga. App. 662, 647 S.E.2d 343 (2007).

In a juvenile delinquency case, the state had failed to prove venue where it offered no evidence that a church where an aggravated assault occurred was within the boundaries of the county in question; as to charges of obstruction of an officer, there was no evidence as to the location of the houses where the acts in question occurred. *In the Interest of D.D.*, 287 Ga. App. 512, 651 S.E.2d 817 (2007).

In a prosecution for aggravated child molestation and sodomy, a child's testimony that the defendant sodomized the child at the child's home on three occasions was sufficient to prove that venue was in the county where that home was located. *Terry v. State*, 293 Ga. App. 455, 667 S.E.2d 109 (2008).

While there was sufficient evidence that the defendant obstructed an officer in making an arrest, as there was no evidence that the city and street where the arrest and the obstruction occurred were in Floyd County, the state failed to prove venue, which was an essential element of the obstruction charge. *Frasier v. State*, 295 Ga. App. 596, 672 S.E.2d 668 (2009).

State's failure to prove beyond a reasonable doubt that the defendant and the codefendant possessed a pipe with traces of methamphetamine on it, which was discovered in a search of the defendant's impounded vehicle in the county, rendered the verdict contrary to law, without a sufficient evidentiary basis, because venue was an essential element of the crime, and there was no direct evidence of possession of the pipe in the county; because there was no evidence placing the pipe in the vehicle while the vehicle was in the county, and there was a possibility that the pipe was put in the vehicle after the shootings during one of several stops the defendant and the codefendant made while in Alabama, venue for possession of methamphetamine was not proven to be in the county. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

Venue with regard to convictions for possession of methamphetamine and of the less than an ounce of marijuana was established as being in the county where the drugs were discovered during a search of the defendant's impounded vehicle because although the state presented no evidence that the methamphetamine residue and the marijuana found in the vehicle were in the possession of the defendant and the codefendant while they were in the county. On cross-examination, the defendant admitted to having hand-rolled a marijuana cigarette found in the vehicle the morning of the shooting; that testimony, coupled with the undisputed fact that the defendant, the codefendant, and the vehicle were at a service station in the county at a time following the point at which the defendant admitted having made the cigarette, established beyond a reasonable doubt that the defendant and codefendant possessed the marijuana cigarette in the county. *Coleman v. State*, 286 Ga. 291, 687 S.E.2d 427 (2009).

State failed to prove venue beyond a reasonable doubt because evidence that the defendant's drugs sales to an informant occurred somewhere in Vidalia, Georgia, was insufficient to establish that the crimes occurred in Toombs County since the habeas court properly took judicial notice that Vidalia was located in two different counties, Toombs and Montgomery; there was no evidence that the drug task force agents were limited to acting within Toombs County, and even if the agents' authority was limited to Toombs County, the agents did not exercise any police power during the time in which the drug sales were made that was required to be limited to the agents' territorial jurisdiction, but instead, the agents were simply watching the informant and the defendant as the agents drove, and in doing so, the agents would have been authorized to follow the defendant across county lines. *Thompson v. Brown*, 288 Ga. 855, 708 S.E.2d 270 (2011).

Trial court did not err in denying the defendant's motion for new trial after the defendant was convicted of rape because venue was sufficiently established by a detective's testimony that the apartment complex where the crimes occurred was in DeKalb County, and even accepting the defendant's argument that the evidence only supported the conclusion that the victim could have been driven into another county before the rape occurred, that would not preclude a jury's conclusion that venue could be proper in DeKalb County; because the most definite testimony regarding the location of the crimes related to DeKalb County, the jury was authorized to find beyond a reasonable doubt that the rape could have occurred there. *Bizimana v. State*, 311 Ga. App. 447, 715 S.E.2d 754 (2011).

Evidence was sufficient to support codefendant's conviction on 12 counts of identity fraud, in violation of O.C.G.A. § 16-9-121(a)(1), based on the state introducing evidence that the victims' identifying information was found in the Henry County, Georgia, residence of defendant, and 12 of the victims testified at trial that they did not authorize any such use of their identifying information, and codefendant admitted in her statement that

she was a party to the crime in that she provided the victims' identifying information to an unauthorized third party, thus, the evidence was sufficient to allow the jury to find that at least part of the identity fraud took place in Henry County, regardless of whether codefendant was ever actually in that county. *Manhertz v. State*, 317 Ga. App. 856, 734 S.E.2d 406 (2012).

Since there was no clear evidence that the fatal injury was inflicted anywhere other than Harris County, where the victim was found, and where the victim died, the state sufficiently proved venue. *Walton v. State*, 293 Ga. 607, 748 S.E.2d 866 (2013).

Defendant's conviction for making a false statement in violation of O.C.G.A. § 16-10-20 was reversed on appeal because the state offered no proof that the jail where the alleged statement was made was in a particular county and since the defendant was transported, the false statement may have been made in another county. *Stockard v. State*, 327 Ga. App. 184, 755 S.E.2d 548 (2014).

Sufficient evidence supported defendant's conviction for theft by taking since it showed that defendant never used the funds borrowed for relocating the Florida plant, as promised, and the loan was secured with equipment that defendant did not own; however, the prosecution failed to prove venue was proper in Dodge County, Georgia, since although the contracts were executed in Dodge County, there was no evidence that defendant exercised any control over the \$ 350,000 in Dodge County. *Davis v. State*, 326 Ga. App. 279, 754 S.E.2d 815 (2014).

Uniform traffic citations are not evidence, and thus cannot provide the factual basis necessary to establish venue. *Graves v. State*, 269 Ga. 772, 504 S.E.2d 679 (1998), overruled on other grounds, *Jones v. State*, 272 Ga. 900, 537 S.E.2d 80 (2000), reversing *Graves v. State*, 227 Ga. App. 628, 490 S.E.2d 111 (1997).

Venue is a jurisdictional fact, and if not proved, a new trial is required. *Davis v. State*, 82 Ga. 205, 8 S.E. 184 (1888); *Alexander v. State*, 105 Ga. 834, 31 S.E. 754 (1898); *Mill v. State*, 1 Ga. App. 134, 57 S.E. 969, later appeal, 2 Ga. App.

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398, 58 S.E. 673 (1907), later appeal, 3 Ga. App. 414, 60 S.E. 4 (1908).

Trial in an improper venue will not prevent trial in proper venue. *Barrs v. State*, 22 Ga. App. 642, 97 S.E. 86, cert. denied, 227 Ga. App. 803 (1918), overruled on other grounds, *Deyton v. Wanzer*, 240 Ga. 509, 241 S.E.2d 228 (1978).

In Georgia, power to change venue in criminal cases is vested exclusively in superior courts. *Slaughter v. State*, 61 Ga. App. 619, 7 S.E.2d 215 (1940) (decision based in part on former Code 1933, § 27-1201).

Grant or denial of motions for change of venue lies largely within discretion of trial judge. — The requirement that a defendant be tried in the county where the crime is alleged to have occurred cannot be vacated by a legislative Act purporting to vest discretion in a trial judge relating to the comfort of the jury. *Hannah v. State*, 212 Ga. 313, 92 S.E.2d 89 (1956).

The exercise of judicial discretion will not be reversed on appeal unless it is made to appear that there has been an abuse of discretion. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

Burden of persuasion. — Jury charge based on O.C.G.A. § 17-2-2 did not improperly shift the burden of persuasion regarding venue to defendants; however, the Georgia Supreme Court noted that the subject legislation was poorly drafted and courts in the future should refrain from quoting such language, then the court suggested that the intent of the statute could be better effectuated by another instruction (which the court provided). *Napier v. State*, 276 Ga. 769, 583 S.E.2d 825 (2003).

An Act which disregards this paragraph is unconstitutional. *Dempsey v. State*, 94 Ga. 766, 22 S.E. 57 (1894) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Venue provisions of Ch. 11, T. 15 and this Constitution in accord. — Although some of the proceedings in juvenile court are of a criminal character, all are not. For those that are, delinquency, unruliness, and juvenile traffic offenses, the

venue provisions of Ga. L. 1971, p. 709, § 1 (see now O.C.G.A. Ch. 11, T. 15) and this Constitution, that venue lies in the county in which the act was committed, are in accord. *Quire v. Clayton County Dep't of Family & Children Servs.*, 242 Ga. 85, 249 S.E.2d 538 (1978) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Accessory before the fact is indictable and triable in county where principal crime was committed. *Welch v. State*, 49 Ga. App. 380, 175 S.E. 598 (1934).

Acts relating to trial of misdemeanors in Criminal Court of Fulton County did not contravene provisions of U.S. Const., amend. 14 for the reason that defendants therein in seeking a review by appellate courts must proceed by the slower and more expensive method of first petitioning to the superior court of the county for a certiorari, whereas, if tried in the superior court, they may sue out a bill of exceptions directly to the Court of Appeals, for the further reason that newly discovered evidence cannot be considered by superior courts in awarding a new trial on a petition for certiorari, or for the further reason that misdemeanor defendants in the court of the trial have no right to move for a change of venue as defendants were permitted to move in the superior courts, under Ga. Const., Art. VI, Sec. XIV, Para. VII (see Ga. Const. 1983, Art. VI, Sec. II, Para. VIII) and this paragraph, and former Code 1933, § 27-1201 (see now O.C.G.A. § 17-7-150). *McIntyre v. State*, 190 Ga. 872, 11 S.E.2d 5 (1940), cert. denied, 312 U.S. 695, 61 S. Ct. 732, 85 L. Ed. 1130 (1941) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Venue in cases of kidnapping is proper in the county where the victim was seized. *Harris v. State*, 165 Ga. App. 249, 299 S.E.2d 924 (1983).

Venue in violation of state ethics law. — When the defendants were indicted under O.C.G.A. § 21-5-9 for failing to file documents with the state ethics commission under O.C.G.A. § 21-5-34, venue was in the county where the commission was exclusively located; the place fixed for performance of the required act fixed the situs of the alleged crime. *McKinney v. State*, 282 Ga. 230, 647 S.E.2d 44 (2007).

Traffic cases. — Trial of defendant in the Atlanta Traffic Court, a city court which sits in the Fulton County portion of Atlanta, was improper where the state proved that the alleged offense took place in the City of Atlanta but did not offer any proof that it occurred in Fulton County; defendant is entitled to be tried in the county in which the offense was alleged to have occurred. *Waller v. State*, 231 Ga. App. 323, 498 S.E.2d 362 (1998).

Offense of armed robbery and possession of firearm during felony. — Where the victim testified that movant took a car from the victim at gunpoint in Chatham County, Georgia, a reasonable trier of fact was authorized to find beyond a reasonable doubt that movant committed the crimes of armed robbery and possession of a firearm during the commission of a felony in Chatham County, making that county the appropriate venue for movant's trial pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a); thus, the convictions and sentences were not void and the trial court properly dismissed, based on a lack of subject matter jurisdiction, movant's postconviction motion to vacate the convictions and sentences. *Green v. State*, 259 Ga. App. 195, 575 S.E.2d 921 (2002).

Medicaid fraud. — In a Medicaid fraud case committed by a fraudulent scheme or device under O.C.G.A. § 49-4-146.1(b)(1)(C) of the Georgia Medical Assistance Act, O.C.G.A. § 49-4-140 et seq., pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a), venue is proper in any county where an act was committed in furtherance of the fraudulent transaction and since defendants committed acts in furtherance of the fraud in counties in which they were tried and convicted then venue in those counties was proper and the appellate court improperly reversed defendants' convictions. *State v. Kell*, 276 Ga. 423, 577 S.E.2d 551 (2003).

Identity fraud. — O.C.G.A. § 16-9-125 complies with Ga. Const. 1983, Art. VI, Sec. II, Para. VI; since the crime of identity fraud, as defined by O.C.G.A. §§ 16-9-121 and 16-9-125 when read in para materia, takes place in the county

where the victim and the victim's personal information are located, there is no constitutional bar to trying the defendant in that county. *State v. Mayze*, 280 Ga. 5, 622 S.E.2d 836 (2005).

Trial court erred in sustaining defendant's demurrer to the identity fraud charges as O.C.G.A. § 16-9-125 did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. VI, since identity fraud was a continuing offense, which extended into the county where the victim resided or was located. *State v. Mayze*, 280 Ga. 5, 622 S.E.2d 836 (2005).

State established venue under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. §§ 16-9-125 and 17-2-2(a) because a reasonable trier of fact was authorized to find beyond a reasonable doubt that the victims resided or were found in Forsyth County at the time the offense of financial identity fraud was committed as alleged in the indictment; the victim testified that the victim had been a resident of Forsyth County for twelve years and that the victim's company had been located there for seventeen years. *Zachery v. State*, 312 Ga. App. 418, 718 S.E.2d 332 (2011).

Financial transaction fraud. — Venue was proper for a conviction of financial transaction card theft, O.C.G.A. § 16-9-31(a), as jurisdiction was proper in the county where the offense occurred, Ga. Const. 1983, Art. VI, Sec. II, Para. VI, and the trial was held in the county in which the defendant resided and the site where the stolen cards were found. *Middlebrooks v. State*, 277 Ga. App. 551, 627 S.E.2d 154 (2006).

DUI cases. — Defendant's DUI conviction had to be reversed as the prosecution failed to prove venue beyond a reasonable doubt even though the city where the offense occurred was only within one county; the Georgia Constitution, state statutory law, and judicial precedent required that the prosecution expressly prove venue and the appellate court could not presume the trial court took judicial notice of venue. *Robinson v. State*, 260 Ga. App. 186, 581 S.E.2d 285 (2003).

After a defendant was granted a directed verdict on the basis that the state failed to prove venue in a criminal prose-

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cution for driving under the influence *per se*, retrial was not barred under U.S. Const., amend. V and O.C.G.A. § 16-1-8 because, while venue had to be laid in the county in which the crime was allegedly committed under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2 and venue was a jurisdictional fact, failure to prove venue was a procedural error that implied nothing as to defendant's guilt or innocence. *Hudson v. State*, 296 Ga. App. 758, 675 S.E.2d 603, cert. denied, No. S09C1163, 2009 Ga. LEXIS 413 (Ga. 2009); cert. denied, 558 U.S. 1076, 130 S. Ct. 799, 175 L. Ed. 2d 559 (2009).

Inadequate showing of venue in murder conviction. — Defendant's murder conviction was reversed because although the evidence established that the cause of death, the shooting of the victim, was inflicted on a boat ramp in or near Lock and Dam Park and venue was proper where the boat ramp was situated under O.C.G.A. § 17-2-2(c), there was no evidence as to the county in which the park was located. *Twitty v. State*, 298 Ga. 204, 779 S.E.2d 298 (2015).

Adequate evidence of proper venue. — Although the prosecution did not introduce direct evidence which showed that the location of a robbery and murder was in the county where the defendant was tried, it did introduce evidence which showed that the crime occurred near a lounge that was in the county, and the jury was able to find proper venue by considering that evidence and the facts that the police officer who investigated the crime worked for the county and that the deceased's body was taken to the county's coroner for autopsy. *Chapman v. State*, 275 Ga. 314, 565 S.E.2d 442 (2002).

In a child molestation case, venue in McIntosh County was proper; the victim testified that the crime occurred in the home of the victim's aunt, where the victim currently lived, and the aunt testified that she currently lived in McIntosh County. *Flanders v. State*, 285 Ga. App. 805, 648 S.E.2d 97 (2007).

With regard to a defendant's conviction

for child molestation, the victim's testimony that the victim lived in a particular city, which was located in Spalding County, and that the incident occurred at another apartment, which the evidence revealed through the testimony was also located in that particular city, there was sufficient evidence to prove venue in Spalding County beyond a reasonable doubt. *Mahone v. State*, 293 Ga. App. 790, 668 S.E.2d 303 (2008).

Although defendant argued that the state failed to prove venue beyond a reasonable doubt, pursuant to Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a) generally, a criminal case had to be tried in the county in which the crime was committed. The state had the burden of proving venue, which the state could do using either direct or circumstantial evidence, and whether the evidence as to venue satisfied the reasonable-doubt standard was a question for the jury, and the court's decision will not be set aside if there is any evidence to support the decision; therefore, because in defendant's case, the victim testified that defendant molested the victim in their residence and that the residence was located in Grady County, Georgia, venue was established beyond a reasonable doubt. *Bynum v. State*, 300 Ga. App. 163, 684 S.E.2d 330 (2009), cert. denied, No. S10C0225, 2010 Ga. LEXIS 300 (Ga. 2010).

Evidence that a police officer found the victim lying on a sidewalk in Fulton County was sufficient to establish venue in that county under Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a). *Branford v. State*, 299 Ga. App. 890, 685 S.E.2d 731 (2009).

Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 on the ground that venue did not lie in Laurens County because there was some evidence that the place of payment was at the seller's location in Laurens County and that the defendant wrongfully failed or refused to pay the seller in Laurens County for the cattle; even if the defendant's fraudulent intent

arose in Kansas sometime after the cattle were shipped, the crime was not consummated until the defendant failed or refused to pay. *Babbitt v. State*, 314 Ga. App. 115, 723 S.E.2d 10 (2012).

Because any challenge on direct appeal to the sufficiency of proof of venue in a child molestation case would have failed due to evidence in the record from which the jury could have inferred venue was proper, appellate counsel was not unreasonable in failing to raise such a challenge. *Martin v. McLaughlin*, 298 Ga. 44, 779 S.E.2d 294 (2015).

Trial court did not err in denying the defendant's motion to dismiss an indictment charging the defendant with arranging to buy cattle and failing or refusing to pay the seller in violation of O.C.G.A. § 16-9-58 on the ground that venue did not lie in Laurens County because there was some evidence that the place of payment was at the seller's location in Laurens County and that the defendant wrongfully failed or refused to pay the seller in Laurens County for the cattle; even if the defendant's fraudulent intent arose in Kansas sometime after the cattle were shipped, the crime was not consummated until the defendant failed or refused to pay. *Jackson v. State*, 292 Ga. 685, 740 S.E.2d 609 (2013).

Venue properly set forth in indictment. — Contrary to defendant's contention, the indictment against him was not fatally flawed as it stated the venue of the crimes by indicating that it was returned in the Superior Court of Elbert County, Georgia, and that each count charged was committed by him in the county and state aforesaid. *Leverette v. State*, 291 Ga. 834, 732 S.E.2d 255 (2012).

Waiver of improper venue. — Although Ga. Const. 1983, Art. VI, Sec. II, Para. VI sets forth venue requirements, a challenge to the sufficiency of the evidence of venue is a "procedural matter" and may be waived in certain situations; where defendant failed to raise the issue of improper venue in the first direct appeal of defendant's conviction, defendant was not entitled to raise the venue issue in an appeal of a later denial of a motion to vacate the conviction due to the alleged improper venue. *Shields v. State*, 276 Ga.

669, 581 S.E.2d 536 (2003).

Trial court not required to instruct jury on lesser included offense over which court lacks venue. — Court of appeals erred in reversing the defendant's conviction for armed robbery because the trial court properly declined to instruct the jury on the lesser included offense of theft by taking since there was no evidence that the included crime was committed in the county in which the defendant was being tried; although the state was unwilling to allow the defendant to waive venue or stipulate that what occurred was a theft by taking that happened entirely in Clayton County, the defendant was free to present evidence and argue to the jury that while the defendant was guilty of committing theft by taking in Clayton County, the defendant was not guilty of armed robbery in DeKalb County. But the defendant could not require the state to agree that the defendant committed theft by taking in Clayton County or require the trial court to instruct the jury on a lesser included offense over which the court lacked venue. *State v. Dixon*, 286 Ga. 706, 691 S.E.2d 207 (2010).

Venue was question for jury. — Whether the state established venue was a question for a jury because the question of whether the defendant's efforts to abandon the illegal files was successful when the defendant placed the files in the trash before entering Clayton County could not be determined as a matter of law at the pretrial stage. *State v. Al-Khayyal*, 322 Ga. App. 718, 744 S.E.2d 885 (2013).

Standard for reviewing sufficiency of evidence of venue. — When reviewing the sufficiency of the evidence as to venue, an appellate court must view the evidence in the light most favorable to the verdict and inquire whether the evidence would authorize a rational trier of fact to find beyond a reasonable doubt that venue was properly laid. Decisions of the Court of Appeals to the contrary are disapproved. *Martin v. McLaughlin*, 298 Ga. 44, 779 S.E.2d 294 (2015).

4. Corporations Generally

Editor's notes. — Some of the cases noted under this subheading were decided prior to the addition of the provision re-

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garding prescribing of venue as to corporations by law.

General Assembly has power to declare residence of corporations. Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962).

The right of the General Assembly to create a corporation carries with it the power to designate its venue. Davenport v. Petroleum Delivery Serv. of Ga., Inc., 134 Ga. App. 418, 214 S.E.2d 692, aff'd, 235 Ga. 116, 218 S.E.2d 848 (1975).

Since the General Assembly may fix the residence of a corporation under this paragraph, there appears to be no reason it cannot also fix the residence of a corporation under Ga. Const. 1976, Art. VI, Sec. XIV, Para. IV (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV). White v. Fireman's Fund Ins. Co., 233 Ga. 919, 213 S.E.2d 879 (1975) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Venue of corporation provided by statute not exclusive of venue provided by Constitution. — The General Assembly may declare a corporation to be a resident of a county for venue purposes under this paragraph, the general venue-residence provision, but the venue of a corporation provided by statute is not the exclusive venue provided by the Constitution. Glover v. Donaldson, 243 Ga. 479, 254 S.E.2d 857 (1979) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Place of suit against corporation. — A corporation must generally be sued in the county of its principal office or place of business. Campbell v. Jim Walter Homes, Inc., 140 Ga. App. 435, 231 S.E.2d 450 (1976).

Although O.C.G.A. § 9-12-132 of the Uniform Enforcement of Foreign Judgments Law, O.C.G.A. § 9-12-130 et seq., did not contain a venue provision, Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 14-2-510(b)(1) provided that venue was in the county where the corporation maintained its registered office; therefore, the Superior Court of Cobb County erred in denying the corporation's motion to set aside a foreign judgment when the corporation's registered office

was in Henry County. Cherwood, Inc. v. Marlin Leasing Corp., 268 Ga. App. 64, 601 S.E.2d 356 (2004).

This paragraph applies to corporations as well as to natural persons and therefore a corporation must be sued in the county of its residence unless the case comes within one of the exceptions set out in the Constitution. Lloyd Adams, Inc. v. Liberty Mut. Ins. Co., 190 Ga. 633, 10 S.E.2d 46 (1940); Benton Rapid Express v. Johnson, 202 Ga. 597, 43 S.E.2d 667 (1947); Dependable Ins. Co. v. Gibbs, 218 Ga. 305, 127 S.E.2d 454 (1962); Orkin Exterminating Co. v. Gilland, 130 Ga. App. 788, 204 S.E.2d 469 (1974) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Residence of Metropolitan Atlanta Rapid Transit Authority. — Pursuant to this paragraph, General Assembly may fix residence of Metropolitan Atlanta Rapid Transit Authority for venue purposes when it is sued alone, but Ga. Const. 1976, Art. VI, Sec. XIV, Para. IV (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV) provides the venue when MARTA is sued as a joint tort-feasor. Glover v. Donaldson, 243 Ga. 479, 254 S.E.2d 857 (1979) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Situation rendering paragraph inapplicable. — Where the defendant carrier and the individual defendant were joint tort-feasors, venue of the suit as to both could be laid in the county of either of them pursuant to Ga. Const. 1976, Art. VI, Sec. XIV, Para. IV (see Ga. Const. 1983, Art. VI, Sec. II, Para. IV), and under such circumstances, the provision of this paragraph, to the effect that a defendant is entitled to be sued in the county of the defendant's residence, does not apply. Jones v. Chandler, 88 Ga. App. 103, 76 S.E.2d 237 (1953) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Amendment of 1912 (Ga. L. 1912, p. 66, §§ 1-4) fixing venue of electric companies was not violative of this paragraph. Central Ga. Power Co. v. Stubbs, 141 Ga. 172, 80 S.E. 636 (1913) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Venue against railroads fixed by O.C.G.A. § 46-1-2 is cumulative. Williams v. East Tenn., V. & Ga. Ry., 90 Ga. 519, 16 S.E. 303 (1892); Gilbert v. Georgia

R.R. & Banking Co., 104 Ga. 412, 30 S.E. 673 (1898).

Proper venue had to be determined pursuant to Georgia's long arm statute. — Trial court did not err in denying a motion filed by a corporate president and the president's spouse to dismiss a corporation's action against them or, in the alternative, to transfer the case because the trial court's application of the relation-back statute, O.C.G.A. § 9-11-15(c), did not violate the constitutional right of the president and the wife to be sued in the county where they resided under Ga. Const. 1983, Art. VI, Sec. II, Para. VI; because the president and the spouse were not residents of Georgia when the suit was filed, the proper venue had to be determined pursuant to Georgia's Long Arm Statute, O.C.G.A. §§ 9-10-91 and 9-10-93. *Cartwright v. Fuji Photo Film U.S.A., Inc.*, 312 Ga. App. 890, 720 S.E.2d 200 (2011), cert. denied, No. S12C0600, 2012 Ga. LEXIS 306 (Ga. 2012).

5. Foreign Corporations

Editor's notes. — Some of the cases noted under this subheading were decided prior to the addition of the provision regarding prescribing of venue as to corporations by law.

Office and place of business. — Foreign corporation has residence in any county in this state for the purpose of being sued where it has an office and a place of doing business. *Jones v. Chandler*, 88 Ga. App. 103, 76 S.E.2d 237 (1953).

Agent upon whom service can be perfected. — A foreign corporation doing business in this state, for purposes of suit, may be treated as a resident of this state and of any county in which it has an agent upon whom service can be perfected. *Jones v. Chandler*, 88 Ga. App. 103, 76 S.E.2d 237 (1953).

Foreign LLC's principal place of business was not LLC's registered office in Georgia. — Under O.C.G.A. §§ 14-2-510(b)(4) and 14-11-1108(b), venue for a Georgia corporation's suit against a foreign LLC lay in the county where the tort occurred, Thomas County; the provision allowing the LLC to transfer venue to the LLC's principal place of busi-

ness did not apply because the statute permitted transfer only to a county in Georgia and the LLC's principal place of business was in Maryland as shown in the LLC's application for a certificate of authority under O.C.G.A. § 14-11-702(a)(6). *Kingdom Retail Group, LLC v. Pandora Franchising, LLC*, 334 Ga. App. 812, 780 S.E.2d 459 (2015).

Foreign railway company can have residence in this state, which will subject it to suit in the courts; whenever it is present in any county of this state conducting a part of the business for which it was organized, it becomes a resident of such county. *Jones v. Chandler*, 88 Ga. App. 103, 76 S.E.2d 237 (1953).

Action against nonresident motor common carrier. — Even though a nonresident interstate motor common carrier was registered in Georgia and had a registered agent for service of process, venue of a personal injury action against the carrier and nonresident driver was proper only in the county in which the accident occurred. *Southern Drayage, Inc. v. Williams*, 216 Ga. App. 721, 455 S.E.2d 418 (1995).

Nonresident who voluntarily institutes suit in this state submits, for all purposes of that suit, to jurisdiction of the courts of the county in which suit is pending and is not deprived of constitutional venue requirements of this paragraph. *Howard Concrete Pipe Co. v. Cohen*, 139 Ga. App. 491, 229 S.E.2d 8 (1976) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Temporary presence of nonresident tortfeasor. — The temporary presence of a nonresident tortfeasor in this state is not such residence within the meaning of the Constitution as will authorize joining, in a suit against the tortfeasor in the county where the tortfeasor is found and served, other joint tortfeasors who reside in a different county or counties of this state. *Benton Rapid Express v. Johnson*, 202 Ga. 597, 43 S.E.2d 667 (1947).

Impartial Jury Requirement

Exception to trial in county of crime. — This paragraph requires that unless an impartial jury cannot be obtained "all criminal cases shall be tried in the county where the crime was commit-

Impartial Jury Requirement (Cont'd)

ted.” *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446, (5th Cir.), cert. denied, 454 U.S. 1035, 102 S. Ct. 575, 70 L. E. 2d 480 (1981), rev'd on other grounds, 462 U.S. 862, 103 S. Ct. 2733, 17 L. Ed. 2d 235 (1983) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI).

Best test of jury impartiality is examination of prospective jurors on voir dire. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

Judge need not put all jurors on voir dire before granting change of venue, as voir dire questions go to the impartiality of the juror; and, if the judge is satisfied that no qualified jury can be obtained in a certain county, the judge can in the judge's discretion grant a change of venue. *Alley v. Gormley*, 181 Ga. 650, 183 S.E. 787 (1935).

Test for pretrial publicity impact. — Test as to whether pretrial publicity has so prejudiced a case that accused cannot receive fair trial is whether jurors summoned to try the case have formed fixed opinions as to guilt or innocence of accused from pretrial publicity. *Wilkes v. State*, 238 Ga. 57, 230 S.E.2d 867 (1976).

Motions for change of venue within court's discretion. — Grant or denial of motions for change of venue lies within discretion of trial court and its discretion will not be disturbed on appeal absent an abuse of that discretion. *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

Test for determining whether trial court abused its discretion in overruling a motion for change of venue based on alleged juror prejudice is whether the jurors summoned to try the case are found at voir dire to have formed fixed opinions as to guilt or innocence. *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

The prospective jurors passed the test of impartiality and the trial court did not abuse its discretion in overruling defendant's motion for a change of venue. *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

Submission of conflicting evidence not sufficient to demonstrate abuse of discretion. — The fact that conflicting evidence is submitted in support of and in opposition to the motion for change of venue based on alleged juror prejudice is not sufficient to demonstrate an abuse of discretion. *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981).

Superior Court judge may not change venue on own motion over defendant's objection. — Under Georgia's constitutional and statutory law, a superior court judge lacks the authority to grant a change of venue in a criminal case, on the judge's own motion and over defense objection, on the ground that a fair and impartial jury cannot be obtained in the county where the crime was allegedly committed. *Patterson v. Faircloth*, 256 Ga. 489, 350 S.E.2d 243 (1986), disapproving dicta in *Wheeler v. State*, 42 Ga. 306 (1871).

OPINIONS OF THE ATTORNEY GENERAL

Venue of libel action against newspaper corporation in this state would be “where the defendant resides,” or in other words, in the county of the principal office or place of business of the

corporation. 1958-59 Op. Att'y Gen. p. 223. (Opinion rendered prior to addition of provision regarding prescribing of venue as to corporations by law.)

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Criminal Law, § 496 et seq. 77 Am. Jur. 2d, Venue, §§ 3, 29 et seq.

C.J.S. — 92A C.J.S., Venue, §§ 4 et seq., 79 et seq., 86.

ALR. — Constitutionality of statute for

prosecution of offense in county other than that in which it was committed, 76 ALR 1034.

National bank as subject to suit outside county of its residence, 86 ALR 47.

Venue of action for damage to growing

crops, 103 ALR 374.

Guardianship of incompetent or infant as affecting venue of action, 111 ALR 167.

Venue of civil action for false imprisonment, 133 ALR 1122.

What amounts to a personal injury within venue statute, 134 ALR 751.

Right to be tried in county or district in which offense was committed, as susceptible of waiver, 137 ALR 686.

Different or same venue or place of trial of proceeding or issue, and effect thereof, in respect of main action and ancillary garnishment or attachment, 139 ALR 1478.

Right of defendant, upon motion made or renewed after plaintiff has closed his case without proving liability on part of codefendant, to change of venue to the county or district which would have been proper venue but for the joinder of the codefendant, 140 ALR 1287.

Right of defendant in civil action to change of venue upon motion made after time specified by statute or rule in that regard, as affected by fact that codefendant had made such a motion within the prescribed period, 141 ALR 1177.

Venue of action against an unincorporated association, 145 ALR 700.

What is an action for damages to personal property within venue statute, 29 ALR2d 1270.

Venue of action against nonresident motorist served constructively under statute, 38 ALR2d 1198.

Venue of actions or proceedings against public officers, 48 ALR2d 423.

Venue of action for the cutting, destruction, or damage of standing timber or trees, 65 ALR2d 1268.

Proper forum and right to maintain

action for airplane accident causing death over or in high seas, 66 ALR2d 1002.

Venue of action for slander, 70 ALR2d 1340.

What is place of tort causing personal injury or resultant damage or death, for purpose of principle of conflict of laws that law of place of tort governs, 77 ALR2d 1266.

Appealability of order relating to transfer, on jurisdictional grounds, of cause from one state court to another, 78 ALR2d 1204.

Binding effect of order on motion for change of venue, where action is terminated otherwise than on merits and reinstated, 85 ALR2d 993.

Prohibition as appropriate remedy to restrain civil action for lack of venue, 93 ALR2d 882.

Place of personal representative's appointment as venue of action against him in his official capacity, 93 ALR2d 1199.

Independent venue requirements as to cross complaint or similar action by defendant seeking relief against a codefendant or third party, 100 ALR2d 693.

Venue of civil libel action against newspaper or periodical, 15 ALR3d 1249.

Pretrial publicity in criminal case as ground for change of venue, 33 ALR3d 17.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like, 34 ALR3d 804.

Change of venue by state in criminal case, 46 ALR3d 295.

Venue in action for malicious prosecution, 12 ALR4th 1278.

Validity of contractual provision limiting place or court in which action may be brought, 31 ALR4th 404.

Paragraph VII. Venue in third-party practice.

The General Assembly may provide by law that venue is proper in a county other than the county of residence of a person or entity impleaded into a pending civil case by a defending party who contends that such person or entity is or may be liable to said defending party for all or part of the claim against said defending party.

1976 Constitution. — There was no similar provision in the 1976 constitution.

Cross references. — Third-party prac-

tice generally, §§ 9-11-14, 9-11-19 et seq. Third-party venue provisions, § 9-10-34.

JUDICIAL DECISIONS

Cited in *Davis v. Betsill*, 178 Ga. App. 730, 344 S.E.2d 525 (1986).

Paragraph VIII. Power to change venue.

The power to change the venue in civil and criminal cases shall be vested in the superior courts to be exercised in such manner as has been, or shall be, provided by law.

1976 Constitution. — Art. VI, Sec. XIV, Para. VII.

Cross references. — Change of venue in civil cases generally, § 9-10-50 et seq. Change of venue in criminal cases generally, § 17-7-150 et seq.

Law reviews. — For article, "Criminal Venue and Related Problems," see 2 Ga. St. B.J. 331 (1966).

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Jurisdiction and venue distinguished. — Jurisdiction means the power of a court to render a binding judgment in the case, and venue means the place of trial. *Williams v. Fuller*, 244 Ga. 846, 262 S.E.2d 135 (1979).

In Georgia, the power to change the venue in criminal cases is vested exclusively in the superior courts. *Slaughter v. State*, 61 Ga. App. 619, 7 S.E.2d 215 (1940) (decided in part under former Code 1933, § 27-1201).

The acts relating to trial of misdemeanors in Criminal Court of Fulton County do not contravene provisions of U.S. Const., amend. 14 for the reason that defendants therein in seeking a review by appellate courts must proceed by the slower and more expensive method of first petitioning to the superior court of the county for a certiorari, whereas, if tried in the superior court, they may sue out a bill of exceptions directly to the Court of Appeals, for the further reason that newly discovered evidence cannot be considered by superior courts in awarding a new trial on a petition for certiorari, or for the further reason that misdemeanor defendants in the court of the trial have no right to move for a change of venue as

defendants were permitted to move in the superior courts, under Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see Ga. Const. 1983, Art. VI, Sec. II, Para. VI), and this paragraph, and former Code 1933, § 27-1201 (see now O.C.G.A. § 17-7-150). *McIntyre v. State*, 190 Ga. 872, 11 S.E.2d 5 (1940), cert. denied, 312 U.S. 695, 61 S. Ct. 732, 85 L. Ed. 1130 (1941) (see Ga. Const. 1983, Art. VI, Sec. II, Para. VIII).

Judge need not put all jurors on voir dire before granting a change of venue, as voir dire questions go to the impartiality of the jurors; and, if the judge is satisfied that no qualified jury can be obtained in a certain county, the judge can, in judicial discretion, grant a change of venue. *Alley v. Gormley*, 181 Ga. 650, 183 S.E. 787 (1935).

Superior court judge may not change venue on own motion over defendant's objection. — Under Georgia's constitutional and statutory law, the superior court judge lacks the authority to grant a change of venue in a criminal case, on the judge's own motion and over defense objection, on the ground that a fair and impartial jury cannot be obtained in the county where the crime was allegedly committed. *Patterson v. Faircloth*, 256 Ga.

489, 350 S.E.2d 243 (1986), disapproving dicta in *Wheeler v. State*, 42 Ga. 306 (1871).

Improper venue. — O.C.G.A. § 9-10-31(c) was not a proper exercise of the legislature’s authority to enact laws which allowed the superior and state courts to change venue; furthermore, because O.C.G.A. § 9-10-31.1(a) vested

power to change venue in the court, and not in a defendant, as did O.C.G.A. § 9-10-31(c). O.C.G.A. § 9-10-31.1(a) was proper under Ga. Const. 1983, Art. VI, Sec. II, Para. VIII, and did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. IV. *EHCA Cartersville, LLC v. Turner*, 280 Ga. 333, 626 S.E.2d 482 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 77 Am. Jur. 2d, Venue, § 48 et seq.

C.J.S. — 92A C.J.S., Venue, § 124 et seq.

ALR. — Power to withdraw or modify order granting change of venue, 59 ALR 362.

Right to lay venue of action against municipality in county other than that in which it is situated, 93 ALR 500.

Right to be tried in county or district in which offense was committed, as susceptible of waiver, 137 ALR 686.

Right of defendant in civil action to change of venue upon motion made after time specified by statute or rule in that regard, as affected by fact that codefendant had made such a motion within the prescribed period, 141 ALR 1177.

Construction and effect of statutory provision for change of venue for the promotion of the convenience of witnesses and the ends of justice, 74 ALR2d 16.

Appealability of order relating to transfer, on jurisdictional grounds, of cause from one state court to another, 78 ALR2d 1204.

Binding effect of order on motion for change of venue, where action is terminated otherwise than on merits and reinstituted, 85 ALR2d 993.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case, 93 ALR2d 802.

Right of accused in misdemeanor prosecution to change of venue on grounds of inability to secure fair trial and the like, 34 ALR3d 804.

Change of venue by state in criminal case, 46 ALR3d 295.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice, 50 ALR3d 760.

Forum non conveniens in products liability cases, 76 ALR4th 22.

SECTION III.

CLASSES OF COURTS OF LIMITED JURISDICTION

Paragraph

I. Jurisdiction of classes of courts of limited jurisdiction.

Paragraph I. Jurisdiction of classes of courts of limited jurisdiction.

The magistrate, juvenile, and state courts shall have uniform jurisdiction as provided by law. Probate courts shall have such jurisdiction as now or hereafter provided by law, without regard to uniformity.

1976 Constitution. — Art. VI, Sec. VI, Para. II; Art. VI, Sec. VII, Para. II.

Cross references. — State courts, § 15-7-1 et seq. Jurisdiction of probate courts generally, § 15-9-30 et seq. Magistrate courts, § 15-10-1 et seq. Juvenile

courts, Ch. 11, T. 15. Uniform Rules for the Probate Courts.

Law reviews. — For annual survey of

wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006).

JUDICIAL DECISIONS

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FORMER JUSTICE OF THE PEACE COURTS

General Consideration

Uniform jurisdiction of magistrate courts. — The requirement of Ga. Const. 1983, Art. VI, Sec. III, Para. I that “magistrate ... courts shall have uniform jurisdiction as provided by law” relates to jurisdiction rather than to the method of selection and terms of office of magistrates. *State v. Boatright*, 256 Ga. 23, 342 S.E.2d 674 (1986).

Jurisdiction over foreign plaintiff’s contract action. — When an out-of-state seller sued an in-state buyer in Georgia, despite a provision in the parties’ contract for the jurisdiction of the courts of Texas, and the seller did not respond, the courts of Georgia had subject matter jurisdiction under O.C.G.A. § 15-7-4(a)(2); Ga. Const. 1983, Art. VI, Sec. I, Para. I; Ga. Const. 1983, Art. VI, Sec. III, Para. I; and Ga. Const. 1983, Art. VI, Sec. IV, Para. I; the parties waived the forum selection clause by either filing suit in Georgia or not responding. *Euler-Siac S.P.A. (Creamar Spa) v. Drama Marble Co.*, 274 Ga. App. 252, 617 S.E.2d 203 (2005).

Termination of parental rights. — Pursuant to O.C.G.A. § 15-11-28(a)(2)(C), the superior court did not have subject matter jurisdiction to terminate the husband’s parental rights because the biological father’s petition to legitimate a child who was born in wedlock was a petition to terminate the parental rights of the legal father; after the superior court determined that the biological father had not abandoned his opportunity interest, the issue became whether the superior court could grant the petition to legitimate the child, and to grant the legitimation petition required the superior court to first terminate the parental rights of the husband, who was the legal father. *Brine v. Shipp*, 291 Ga. 376, 729 S.E.2d 393 (2012).

Cited in *Schroeder v. Hunter Douglas, Inc.*, 172 Ga. App. 897, 324 S.E.2d 746 (1984); *Freeman v. State*, 194 Ga. App. 905, 392 S.E.2d 330 (1990); *EHCA Cartersville, LLC v. Turner*, 280 Ga. 333, 626 S.E.2d 482 (2006); *Mauldin v. Mauldin*, 322 Ga. App. 507, 745 S.E.2d 754 (2013).

Probate Courts

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. VI, Para. II and antecedent provisions, relating to specific powers of the probate courts, are included in the annotations for this paragraph.

Purpose of Ga. Const. 1945, Art. 6, Sec. 6, Para. II(b) (see Ga. Const. 1983, Art. VI, Sec. III, Para. I and Art. IX, Sec. I, Para. III) is to provide for speedy trials for persons charged with misdemeanor violations upon highways. It was not the purpose of Ga. Const. 1945, Art. 6, Sec. 6, Para. II(b) to divest existing courts of jurisdiction in such cases, or to transfer jurisdiction from existing courts to another court not having such jurisdiction prior to the enactment of II(b). *Gibson v. Gober*, 204 Ga. 714, 51 S.E.2d 664 (1949).

Intent of Ga. Const. 1945, Art. 6, Sec. 6, Para. II(b) (see Ga. Const. 1983, Art. VI, Sec. III, Para. I and Art. IX, Sec. I, Para. III) is to confer jurisdiction as to subject matter upon police courts with the same restrictions as are imposed upon courts of ordinary (now probate courts). *Clarke v. Johnson*, 199 Ga. 163, 33 S.E.2d 425 (1945).

Limited authority as to county matters. — This paragraph must be construed in connection with the other provisions of the Constitution, and carries the

implication that the courts of ordinary (now probate courts) have no authority as to county matters except such “as may be conferred on them by law.” *Harrison v. Southern Ry.*, 44 Ga. App. 49, 160 S.E. 656 (1931) (see Ga. Const. 1983, Art. VI, Sec. III, Para. I).

Legislative authority. — Authority of General Assembly to prescribe powers of ordinary (now probate judge) over county affairs necessarily includes authority to increase or diminish such powers. *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969).

Where probate judge sits for county purposes. — The ordinary (now probate judge) sits for county purposes only in those counties where jurisdiction over county matters and county affairs has not been granted by legislative Act to a county commissioner or board of county commissioners. *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969).

Local Act creating board of county commissioners does not unconstitutionally infringe upon authority of ordinary (now probate judge). *Bleckley v. Vickers*, 225 Ga. 593, 170 S.E.2d 695 (1969).

Judgments subject to revision and vacation. — Courts of record retain full control over their orders and judgments during the term at which they are rendered, and in the exercise of sound discretion may revise or vacate them, as the ends of justice may require; the court of ordinary (now probate court) is a court of record, and its judgments are subject to this same rule and may be set aside during the term when entered, in the sound discretion of the ordinary (now probate judge). *Hall v. First Nat’l Bank*, 87 Ga. App. 142, 73 S.E.2d 252 (1952), cert. denied, 348 U.S. 896, 75 S. Ct. 215, 99 L. Ed. 704 (1954).

Probate court did not have jurisdiction to remove a trustee. *Moring v. Moring*, 228 Ga. App. 662, 492 S.E.2d 558 (1997).

Probate court has no authority to appoint another as guardian of the person of a child who has a living natural guardian unless the loss of that status has been ascertained and declared in some regular proceeding authorized by

law, after due notice is given. *Whitlock v. Barrett*, 158 Ga. App. 100, 279 S.E.2d 244 (1981).

Range of appointment limited where minor has natural guardian. — For a minor having no guardian, the judge of the probate court may appoint a guardian of the person and property, or of either, but if the minor has a natural guardian, it certainly cannot be said in a broad sense that he or she has no guardian; in such case the range of appointment is limited to guardianship of the property, for it is only as to property that there is no guardian. *Whitlock v. Barrett*, 158 Ga. App. 100, 279 S.E.2d 244 (1981).

Compromise of claim. — The probate court’s plenary jurisdiction does not cease upon the guardian’s compromise of a contested or doubtful claim. *Gnann v. Woodall*, 270 Ga. 516, 511 S.E.2d 188 (1999).

No jurisdiction to try title claims on application for year’s support. — The probate court has no jurisdiction to try conflicting claims of title to real property on an application for a year’s support. *Johnson v. Johnson*, 199 Ga. App. 549, 405 S.E.2d 544 (1991).

Probate court erred by allowing the objections of a bank and a decedent’s parents solely on the basis of adverse title and by denying a year’s support to the widow when the widow failed to meet the resulting burden of proof because the probate court lacked the jurisdiction under Ga. Const. 1983, Art. 6, Sec. 3, Para. I and O.C.G.A. § 15-9-30 to determine that the relevant money-market account and real property were not part of the estate; despite the jurisdictional limitation and the lack of an appropriate objection, the probate court proceeded to conduct a hearing as to the amount necessary for the widow’s support, thereby inappropriately placing upon the widow a burden of proof that was contrary to O.C.G.A. § 53-3-7(a) and otherwise lacking in the absence of the jurisdictionally defective objections to the petition. In *re Mahmoodzadeh*, 314 Ga. App. 383, 724 S.E.2d 797 (2012).

No jurisdiction to adjudicate claims of title to property. — Probate court does not have the jurisdiction to adjudicate conflicting claims of title to

Probate Courts (Cont'd)

property; thus, where decedent's widow asserted an ownership interest in property sought by the executor of the estate, and order of the probate court giving possession of such property to the executor was void, the widow could not be found in contempt for noncompliance with the order. *In re Estate of Adamson*, 215 Ga. App. 613, 451 S.E.2d 501 (1994).

Former Justice of the Peace Courts

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. VII, Para. II and antecedent provisions, relating to jurisdiction of the former justice of the peace courts (now magistrate courts), are included in the annotations for this paragraph.

This paragraph is not self-executing. *Tibbs v. Williamson*, 61 Ga. 74 (1878); *Humphrey v. Johnson*, 13 Ga. App. 557, 79 S.E. 530 (1913).

Right of appeals under Ch. 2, T. 5 is consistent with this paragraph. *Helmly v. Davis*, 100 Ga. 493, 28 S.E. 231 (1897).

Justice of the peace court has jurisdiction of action to recover debt less than \$200.00. — Where one is indebted to another on an open account in excess of \$200.00, and gives two checks for a part thereof, which are credited on the account, an action against that person by the creditor for less than \$200.00 to recover the full amount of the balance of the open account will lie, and is within the jurisdiction of the justice of the peace court even though another action has been filed to recover on the checks which had been dishonored. *Parker v. Timberlake Grocery Co.*, 71 Ga. App. 280, 30 S.E.2d 650 (1944).

Justice of the peace courts have jurisdiction of suits on distinct evidences of debt although they are given for one and the same debt or consideration. *Parker v. Timberlake Grocery Co.*, 71 Ga. App. 280, 30 S.E.2d 650 (1944).

Extent of criminal jurisdiction of justice court. — While justice courts have jurisdiction with respect to certain matters in the administration of criminal law, such courts did not have jurisdiction

in criminal actions as the word was defined in former Code 1933, §§ 3-101-3-103 (see now O.C.G.A. § 9-2-1). *Pate v. Taylor Chem. Co.*, 88 Ga. App. 127, 76 S.E.2d 131 (1953).

Effect of Act creating municipal court providing that criminal jurisdiction would not exceed that of justice court. — Where Act creating municipal court provides that the criminal jurisdiction of the court would not exceed the jurisdiction by law in the justice courts, but would extend over the entire county, such municipal court is not thereby given jurisdiction of criminal actions, though it might have jurisdiction with respect to certain matters in connection with the administration of criminal law. *Pate v. Taylor Chem. Co.*, 88 Ga. App. 127, 76 S.E.2d 131 (1953).

Section providing for abatement of nuisances unconstitutional. — Jurisdiction to abate a nuisance as provided in former Code 1933, § 72-201 (see § 41-2-1) was expressly denied the justices of the peace courts under this paragraph. Because that section was in irreconcilable conflict with the Constitution, it was void. *Sizemore v. Coker*, 220 Ga. 773, 141 S.E.2d 891 (1965).

Court lacked jurisdiction. — Under this paragraph, affidavits of illegality filed to levy of ordinary executions for amounts greater than \$200.00 are returnable to other courts having jurisdiction. *Scott v. Mayor of Mount Airy*, 186 Ga. 652, 198 S.E. 693 (1938).

Conversion of personal property does not constitute injury to property within the meaning of this paragraph. *Blocker v. Boswell*, 109 Ga. 230, 34 S.E. 289 (1899); *Covington v. Rosenbusch*, 148 Ga. 459, 97 S.E. 78 (1918).

For definition of damages under this paragraph, see *Seaboard Air-Line Ry. v. Smith*, 3 Ga. App. 644, 60 S.E. 353 (1908).

Insured in life insurance policy may not reduce amount of claim without consent so as to vest jurisdiction in justice of the peace court. — Where an insured in a life insurance policy, in an action against the insurer to recover for an alleged breach of the contract, alleges the insured's damage as being in the

amount of the premiums which had been paid on the policy, the amount of the damage was fixed and certain, and constituted a liquidated demand which, in a suit in a justice of the peace court, the insured cannot, without the consent of the insurer, reduce in order to bring the case within the monetary jurisdiction of the justice's

court. *Smith v. Atlanta Mut. Ins. Co.*, 42 Ga. App. 254, 155 S.E. 535 (1930).

Jurisdiction of court in action in trover is determinable by allegations in petition and not by averment in affidavit for bail. *Dorsey v. Cotton States Fertilizer Co.*, 46 Ga. App. 485, 167 S.E. 924 (1933).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION
PROBATE COURTS
FORMER JUSTICE OF THE PEACE COURTS

General Consideration

Magistrate court may issue writs and judgments in dispossessory and distress warrant proceedings where the amount in controversy exceeds \$3,000.00. 1988 Op. Att'y Gen. No. U88-18.

Probate Courts

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. VI, Sec. VI, Para. II and antecedent provisions, relating to specific powers of the probate courts, are included in the annotations for this paragraph.

This paragraph does not contemplate creation of a court, but rather enlargement of the jurisdiction of the probate court. 1969 Op. Att'y Gen. No. 69-10 (see Ga. Const. 1983, Art. VI, Sec. III, Para. I).

Probate judge calls special primary. — While T. 21 does not specify the exact method of calling a special primary, the judge of the probate court is the officer generally having jurisdiction of primaries, and the judge is the proper person to call a special primary. 1970 Op. Att'y Gen. No. U70-128.

Probate judges continue to exercise jurisdiction over traffic cases. 1983 Op. Att'y Gen. No. 83-53.

Probate judges may issue arrest warrants only in certain traffic cases and for peace officers accused of any offense in the performance of their duties. 1983 Op. Att'y Gen. No. U83-13.

Ga. L. 1955, p. 736, §§ 1 and 2 (see now O.C.G.A. §§ 40-6-371 and 40-6-376), giving local authorities right to pass traffic regulations, was not in conflict with this paragraph. 1972 Op. Att'y Gen. No. 72-79 (see Ga. Const. 1983, Art. VI, Sec. III, Para. I).

Jurisdiction to issue warrants and require bond. — Because a probate court may hold a court of inquiry pursuant to O.C.G.A. § 17-7-20, it may also issue warrants and require bond pursuant to either O.C.G.A. § 17-6-90 or O.C.G.A. § 17-6-110. 1995 Op. Att'y Gen. No. U95-1.

Jurisdiction to set bail. — Because a probate court may hold a court of inquiry pursuant to O.C.G.A. § 17-7-20, it may also set bail for any criminal offense not included in O.C.G.A. § 17-6-1(a). 1995 Op. Att'y Gen. No. U95-1.

Jurisdiction to hear case where offense occurs within city limits. — Probate court has jurisdiction to hear traffic case involving violation of state law even where offense occurs within city limits of municipality which has recorder's court. 1978 Op. Att'y Gen. No. U78-47.

Jurisdiction over violations of county ordinances. — A probate court has jurisdiction over violations of county ordinances in counties of 550,000, or more, pursuant to O.C.G.A. § 36-1-17. 1995 Op. Att'y Gen. No. U95-1.

A probate court, having jurisdiction over traffic offenses pursuant to O.C.G.A. §§ 15-9-30(b)(8) and 40-13-21, has jurisdiction over violations of county traffic ordinances. 1995 Op. Att'y Gen. No. U95-1.

Probate Courts (Cont'd)

No jurisdiction over violations of waste management or air pollution statutes. — The probate court does not have jurisdiction to try or sentence an individual accused of violating the criminal provisions concerning waste management or air pollution. 1995 Op. Att'y Gen. No. U95-1.

A probate court may exercise state judicial power over misdemeanor traffic offenses occurring within the corporate limits of a municipal corporation where the charter of the municipal corporation authorizes a municipal court but no such court is in existence. The arresting officer in a misdemeanor traffic case is responsible for returning those charges to the proper court with jurisdiction to hear the matter, but, if the citation is erroneously returned to the incorrect court, that court should promptly act to transfer the matter to a court with jurisdiction to consider the charges. 1989 Op. Att'y Gen. No. U89-30.

O.C.G.A. § 40-13-29 does not prohibit the probate court from exercising state judicial power in any county simply because of the existence of a municipal court within the corporate limits of a municipal corporation within that county. 1989 Op. Att'y Gen. No. U89-30.

Section 40-13-20 is broader than this paragraph, for under the former, any recorder's court is authorized to try traffic offenses, while under this paragraph, only those recorder's courts situated in counties having no city or county court are given such jurisdiction. 1954-56 Op. Att'y Gen. p. 899 (see Ga. Const. 1983, Art. VI, Sec. III, Para. I).

Probate court is not governed by Ga. L. 1971, p. 180, §§ 6 and 9 (see now O.C.G.A. § 36-15-9), since a probate court does not have comparable powers to those of the superior court. 1971 Op. Att'y Gen. No. U71-119.

Drunkenness of person in automobile other than driver is not traffic offense and the probate court is without jurisdiction to try that offense. 1957 Op. Att'y Gen. p. 59.

Probate court has affirmative burden to obtain written waiver of a jury

trial prior to proceeding to dispose of a pending traffic case on merits. However, the defendant has an affirmative burden to notify the court if the jury trial is desired. 1980 Op. Att'y Gen. No. 80-135.

Named probate court may issue warrant ordering apprehension of individual charged with violating traffic laws of this state who fails to appear in court on the date and at the time specified in the citation upon which he or she was arrested. 1980 Op. Att'y Gen. No. U80-58.

Probate court judges may not exercise jurisdiction over cases involving possession of one ounce or less of marijuana, either by virtue of Ga. Const. 1976, Art. VI, Sec. IV, Para. XI (see Ga. Const. 1983, Art. VI, Sec. X, Para. I) or by virtue of their undisputed authority over misdemeanor traffic cases. 1981 Op. Att'y Gen. No. 81-25.

Probate courts have jurisdiction to try violations of provisions regulating the size of loads and vehicles on public roads. 1979 Op. Att'y Gen. No. U79-14.

Probate court does not have jurisdiction to try violations of weight restrictions. 1979 Op. Att'y Gen. No. U79-14.

Probate court does not have jurisdiction over violations of motor vehicle licensing law. — The provisions regulating motor vehicle licensing are not within the purview of this paragraph and Ga. L. 1962, p. 3146, § 2 (see now O.C.G.A. § 40-13-21), and the provisions are not "traffic laws" contemplated by this paragraph and the Georgia law. 1965-66 Op. Att'y Gen. No. 65-18 (see Ga. Const. 1983, Art. VI, Sec. III, Para. I).

Former Justice of the Peace Courts

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. VI, Sec. VII, Para. II and antecedent provisions, relating to jurisdiction of the former justice of the peace courts (now magistrate courts), are included in the annotations for this paragraph.

Justice of the peace courts have jurisdiction in bail trover cases up to the amount of \$200.00. 1945-47 Op. Att'y Gen. p. 77.

Justice of the peace may only honor applications for writs of possession as provided by former Code 1933, § 67-701 et seq. (see now O.C.G.A. Part 4, Art. 7, Ch. 14, T. 44) when amount in controversy does not exceed \$200.00. 1974 Op. Att’y Gen. No. U74-104.

Justice of the peace may not issue bill of peace. — Since the superior court has exclusive jurisdiction over equity matters and a bill of peace is an equitable remedy, justices of the peace do not have jurisdiction to entertain a petition for such relief; it follows that any such bill of

peace issued by a justice of the peace would be void and of no effect. 1957 Op. Att’y Gen. p. 66.

Attendance at justice of the peace court commitment hearing does not entitle officer to fee. 1970 Op. Att’y Gen. No. U70-234.

Superior courts have exclusive jurisdiction to hear appeals from justice of the peace/magistrate courts; such jurisdiction having a constitutional basis until July 1, 1983, and a statutory one thereafter. 1983 Op. Att’y Gen. No. U83-27.

RESEARCH REFERENCES

C.J.S. — 21 C.J.S., Courts, §§ 15, 107, 109.

ALR. — Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 ALR4th 157.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile’s offense, 66 ALR4th 985.

Small claims: jurisdictional limits as binding on appellate court, 67 ALR4th 1117.

SECTION IV.

SUPERIOR COURTS

Paragraph

I. Jurisdiction of superior courts.

Paragraph I. Jurisdiction of superior courts.

The superior courts shall have jurisdiction in all cases, except as otherwise provided in this Constitution. They shall have exclusive jurisdiction over trials in felony cases, except in the case of juvenile offenders as provided by law; in cases respecting title to land; in divorce cases; and in equity cases. The superior courts shall have such appellate jurisdiction, either alone or by circuit or district, as may be provided by law.

1976 Constitution. — Art. VI, Sec. IV, Paras. I, III, IV.

Cross references. — Appeal de novo from magistrate and probate courts to superior court, § 5-3-29. Superior courts, Ch. 6, T. 15. Jurisdiction and powers of superior courts, § 15-6-8. Equity cases, Ga. Const. 1983, Art. VI, Sec. I, Para. IV, and § 23-1-1. Juvenile cases, § 15-11-5.

Divorce cases, § 19-5-1. Cases involving title to land, § 44-2-60.

Law reviews. — For article, “Injunction Procedure in Georgia,” see 13 Ga. B.J. 300 (1951). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006). For article surveying development of equity and the right to trial by jury in

equity suits, and advocating use of jury to try issues of fact in equitable actions, see 8 Mercer L. Rev. 225 (1957). For article discussing the uneasy sharing of powers and responsibilities between the superior and juvenile courts in their concurrent jurisdiction over juveniles aged 13 to 18 and suggesting reforms, see 23 Mercer L. Rev. 341 (1972). For article, “An Outline of Juvenile Court Jurisdiction with Focus on Child Custody,” see 10 Ga. St. B.J. 275

(1973). For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For article, “The Civil Jurisdiction of State and Magistrate Courts,” see 24 Ga. St. B.J. 29 (1987). For article, “A Study of the Unified Appeal Procedure in Georgia,” see 23 Ga. L. Rev. 185 (1988).
For comment on *J.W.A. v. State*, 233 Ga. 683, 212 S.E.2d 849 (1975), appearing below, see 27 Mercer L. Rev. 335 (1975).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- DIVORCE
- CRIMINAL CASES
- JUVENILE CASES
- TITLE TO LAND
- EQUITY
- JURISDICTION GENERALLY
- APPELLATE JURISDICTION
- CERTIORARI

General Consideration

Court may be presided over by more than one judge. — There is only one superior court in each county, but the court may be presided over by more than one judge, and the court may be divided into divisions, each presided over by a different judge. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).
Section 9-10-31.1(a) is constitutional. — O.C.G.A. § 9-10-31.1(a) does not automatically divest a superior court of its jurisdiction, but to the contrary a transfer of venue under the statute occurs only after the trial court exercises initial jurisdiction over the case to determine whether, in the interest of justice and for the convenience of the parties and witnesses, a claim or action would be more properly heard in a forum outside the state; accordingly, § 9-10-31.1(a) remains constitutional under Ga. Const. 1983, Art. VI, Sec. IV, Para. I. *Hawthorn Suites Golf Resorts, LLC v. Feneck*, 282 Ga. 554, 651 S.E.2d 664 (2007).
Legislature and judges may not alter jurisdiction of superior court. — The Constitution has vested all the judi-

cial power in the courts of the state, and neither the legislature nor a judge, nor the judges of a superior court have authority to limit or expand the jurisdiction and authority of a superior court. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).
Judges in multi-judge circuits have coequal jurisdiction and authority, yet are subject to reasonable rules designed to expedite the business of the court by adopting a manner or method for distribution of the business of the court among the judges. *Fulton County v. Woodside*, 222 Ga. 90, 149 S.E.2d 140 (1966).
Superior courts do not have exclusive jurisdiction of actions involving injuries to the person, nor does any other court within the same territorial jurisdiction as the Municipal Court of Savannah have such exclusive jurisdiction. *Goebel v. Hodges*, 83 Ga. App. 574, 64 S.E.2d 207 (1951).
All superior courts have jurisdiction over subject matter of habeas corpus cases or cases in nature of habeas corpus. *Hopkins v. Hopkins*, 237 Ga. 845, 229 S.E.2d 751 (1976).
For jurisdiction of superior courts

as to appeals from **Department of Industrial Relations (now State Board of Workers' Compensation)**, see *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

The superior courts have inherent authority to supervise the inferior courts in their respective jurisdictions. *McCray v. Cobb County*, 251 Ga. 24, 302 S.E.2d 563 (1983).

Designation of part-time and full-time judges. — Legislative Act may require the judges of the superior courts to designate which judges of courts of limited jurisdiction are full-time and which are part-time for purposes of compensation and to approve a schedule of availability for issuing warrants. *McCray v. Cobb County*, 251 Ga. 24, 302 S.E.2d 563 (1983).

Superior courts retain exclusive jurisdiction as to declaratory judgment actions. *EVI Equip., Inc. v. Northern Ins. Co.*, 178 Ga. App. 197, 342 S.E.2d 380 (1986), overruled on other grounds, 185 Ga. App. 870, 366 S.E.2d 179 (1988).

Subject-matter jurisdiction for judicial review of State Personnel Board decisions lies in the superior courts with venue in the county of the place of employment of the employee. *Duval v. Department of Human Resources*, 183 Ga. App. 726, 359 S.E.2d 756 (1987).

Subject matter jurisdiction over probate matter. — Trial court had subject matter jurisdiction to review the probate court's decision under Ga. Const. 1983, Art. VI, Sec. IV, Para. I and O.C.G.A. § 15-6-8(4)(E) to deny probate of the decedent's 1988 will and the parties' waiver of the statutory right to a jury trial did not deprive the trial court of subject matter jurisdiction to deny probate of the will. *Mosley v. Lancaster*, 296 Ga. 862, 770 S.E.2d 873 (2015).

Cited in *Gwinnett County Ass'n of Justices of Peace v. Gwinnett County Bd. of Comm'rs*, 251 Ga. 28, 302 S.E.2d 561 (1983); *Hall v. State*, 200 Ga. App. 585, 409 S.E.2d 221 (1991); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Bonner v. State*, 302 Ga. App. 57, 690 S.E.2d 216 (2010); *Long v. Long*, 303 Ga. App. 215,

692 S.E.2d 811 (2010); *Allifi v. Raider*, 323 Ga. App. 510, 746 S.E.2d 763 (2013).

Divorce

Exclusive jurisdiction of alimony cases is within superior courts. *Mathews v. Mathews*, 123 Ga. App. 81, 179 S.E.2d 547 (1970).

City courts without jurisdiction in divorce. — Since the exclusive jurisdiction of questions of divorce and/or alimony is vested in the superior courts, city courts are without jurisdiction to entertain a suit for alimony in a case in which a judgment has previously been rendered in the superior court. *Tyson v. Tyson*, 176 Ga. 137, 167 S.E. 172 (1932).

A city court is without jurisdiction to entertain a suit for alimony and/or child support ancillary to such action in a case in which a judgment setting the sum payable has previously been rendered in a superior court. *Mathews v. Mathews*, 123 Ga. App. 81, 179 S.E.2d 547 (1970).

Reference to "divorce cases" does not include determination of custody of minor children. *Wilbanks v. Wilbanks*, 220 Ga. 665, 141 S.E.2d 161 (1965).

Superior court has no jurisdiction in action on foreign alimony judgment. — An action on a foreign judgment for alimony, being an action on a debt of record rather than for an allowance from the husband for support of the wife, does not come within the exclusive jurisdiction of the superior courts. *Ryle v. Ryle*, 130 Ga. App. 680, 204 S.E.2d 339 (1974).

Award of custody does not fix exclusive jurisdiction. — It cannot be said that a judge of the superior court, by awarding the custody of minor children in a decree of divorce, acquires exclusive jurisdiction as to their future custody, under this paragraph and § 19-9-1. The interest and welfare of the minor children being the paramount issue, even in a contest between parents, or by other persons against the parents, the state is also *parens patriae*, and neither the child nor the state is finally concluded by the divorce proceedings. *Fortson v. Fortson*, 200 Ga. 116, 35 S.E.2d 896 (1945).

Jurisdiction over custody dispute involving nonparent. — Custody dis-

Divorce (Cont'd)

pute between a child's grandmothers and the child's parents fell within the superior court's broad original jurisdiction. *Barfield v. Butterworth*, 323 Ga. App. 156, 746 S.E.2d 819 (2013).

O.C.G.A. § 19-5-13 does not divest state courts of jurisdiction over trover or conversion actions in which the alleged trover or conversion results from the defendant's retention of property awarded to the plaintiff in a final divorce decree. *Dunlap v. Pope*, 177 Ga. App. 539, 339 S.E.2d 662 (1986).

Criminal Cases

Jurisdiction to try person accused of felony is vested exclusively by this paragraph in superior courts. *Andrews v. State*, 130 Ga. App. 2, 202 S.E.2d 246 (1973) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

Superior court has concurrent jurisdiction with other courts in misdemeanor cases. *Bell v. State*, 41 Ga. 589 (1871); *Clifton v. State*, 53 Ga. 241 (1874).

Subject matter jurisdiction. — Allegations of fraud in a presentence report and improper consideration by the trial court of another pending charge against defendant did not constitute "fraudulent subject matter" and thus did not deprive the court of jurisdiction nor did it render defendant's sentence void. *Broadwell v. State*, 224 Ga. App. 193, 480 S.E.2d 215 (1996).

Ga. Const. 1983, Art. VI, Sec. IV, Para. I vests superior courts with exclusive subject matter jurisdiction over all felony trials. *Goodrum v. State*, 259 Ga. App. 704, 578 S.E.2d 484 (2003).

Effect of proceedings in juvenile court on jurisdiction. — The superior court has constitutional jurisdiction to try a person accused of a felony if the person has reached the age of criminal responsibility. Nothing in Ga. L. 1971, p. 709, § 1 (see now O.C.G.A. Ch. 11, T. 15) or in the proceedings of a juvenile court can abrogate this jurisdiction. *Mathis v. State*, 231 Ga. 401, 202 S.E.2d 73 (1973).

Statutory bar to a criminal prosecution and a statutory limitation upon a criminal prosecution (see now

O.C.G.A. § 16-1-8(c)) are procedural prohibitions that do not affect jurisdiction in any way. *Dorsey v. State*, 237 Ga. 876, 230 S.E.2d 307 (1976).

Sheriff is not entitled to payment from county funds of sheriff's fees in misdemeanor cases disposed of in city court. *Hubbard v. Henderson*, 205 Ga. 438, 54 S.E.2d 271 (1949).

Sentence entered by a Superior Court in a felony case not void. — State did not have the right to appeal sentences imposed by the trial court contrary to a plea agreement under O.C.G.A. § 5-7-1(a)(6) because the sentences were not void; the sentences were within the 20-year range of punishments for robbery and aggravated assault, O.C.G.A. §§ 16-5-21(b) and 16-8-40(b), and the trial court had jurisdiction over the case, pursuant to Ga. Const. 1983, Art. VI, Sec. IV, Para. I and O.C.G.A. § 15-6-8(1). *State v. Harper*, 279 Ga. App. 620, 631 S.E.2d 820 (2006) was overruled. *State v. King*, 325 Ga. App. 445, 750 S.E.2d 756 (2013).

Juvenile Cases

Effect of adjudication of guilt in superior court. — A juvenile whose case is properly transferred to the superior court is subject to the criminal sanctions which may be imposed in that court. Thus, an adjudication of guilt of a juvenile in superior court is a criminal adjudication. *Carrindine v. Ricketts*, 236 Ga. 283, 223 S.E.2d 627 (1976).

Jurisdictional parameters of courts over juveniles. — This paragraph is authority and direction for the General Assembly to adopt implementing legislation defining the jurisdictional parameters of courts over juveniles. *J.W.A. v. State*, 233 Ga. 683, 212 S.E.2d 849 (1975), commented on in 27 Mercer L. Rev. 335 (1975). (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

The juvenile court jurisdiction statute does not violate the separation of powers doctrine of the state constitution, nor does it violate the due process and equal protection provisions of the federal and state constitutions. *Bishop v. State*, 265 Ga. 821, 462 S.E.2d 716 (1995); *Murphy v. State*, 267 Ga. 100, 475 S.E.2d 590 (1996).

Jurisdiction of superior court to try juvenile for felony. — Where a child has been indicted by a grand jury for murder, the superior court has constitutional jurisdiction to try the child, as any person accused of a felony, if the child has reached the age of criminal responsibility. Nothing in Ga. L. 1971, p. 709, § 1 (see now O.C.G.A. Ch. 11, T. 15) or in the proceedings of a juvenile court can abrogate this jurisdiction. *J.E. v. State*, 127 Ga. App. 589, 194 S.E.2d 288 (1972).

This paragraph preserves superior court jurisdiction over criminal cases but also authorizes concurrent original jurisdiction to be placed in juvenile courts. *J.W.A. v. State*, 233 Ga. 683, 212 S.E.2d 849 (1975), commented on in 27 Mercer L. Rev. 335 (1975) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

Superior court jurisdiction over juveniles not exclusive. — This paragraph only provides that the jurisdiction of the superior courts over juvenile felony offenders is not exclusive, in the case of juvenile offenders as provided by law. *J.W.A. v. State*, 133 Ga. App. 102, 210 S.E.2d 24 (1974), rev'd on other grounds, 233 Ga. 683, 212 S.E.2d 849 (1975).

Statutory scheme does not deprive juveniles of due process rights. — Statutory scheme which contemplates trials of juveniles in felony cases that are punished by death or life imprisonment in either superior or juvenile court does not deprive juveniles of any substantive or procedural due process rights. *Chapman v. State*, 259 Ga. 592, 385 S.E.2d 661 (1989).

This paragraph does not preclude joint indictment and trial of capital and noncapital felonies. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

Indictment of juvenile for noncapital felony in superior court does not oust juvenile court of its first obtained jurisdiction. *J.W.A. v. State*, 233 Ga. 683, 212 S.E.2d 849 (1975), commented on in 27 Mercer L. Rev. 335 (1975).

Title to Land

No jurisdiction in state court. — As the superior courts have exclusive juris-

diction in cases respecting title to land, this issue cannot be tried in state court. *Hyman v. Leathers*, 168 Ga. App. 112, 308 S.E.2d 388 (1983).

Action must involve title directly. — An action is not one respecting title to land where the title is not directly involved. *Adair v. Spellman Sem.*, 13 Ga. App. 600, 79 S.E. 589 (1913); *Kennedy v. Smith*, 23 Ga. App. 724, 99 S.E. 318 (1919).

The phrase "cases respecting title to land," as that phrase is used in determining subject-matter jurisdiction of superior courts under this paragraph, refers to cases in which the plaintiff asserts the plaintiff's title to the land in question, and depends for a recovery upon the plaintiff's maintenance of it. *Ingold, Inc. v. Adair*, 247 Ga. 155, 274 S.E.2d 560 (1981) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

Superior courts have jurisdiction in action to contest issue of delivery of deed and thereby try the title to the land described in the deed. *Dobbs v. First Nat'l Bank*, 65 Ga. App. 796, 16 S.E.2d 485 (1941).

Superior courts do have jurisdiction in action for recovery of value of land taken. — An action in which it is alleged that the city appropriated certain land of the plaintiff to the use of the public as a sidewalk, and asking recovery for the value of the land so taken, is not an action respecting title to land. *City of Atlanta v. West*, 60 Ga. App. 269, 3 S.E.2d 755 (1939).

Superior courts do not have jurisdiction in actions to recover damages for trespass to land. *Batson v. Higginbotham*, 7 Ga. App. 835, 68 S.E. 455 (1910).

Superior court does not have jurisdiction in landlord's complaint for ejectment. *Ingold, Inc. v. Adair*, 247 Ga. 155, 274 S.E.2d 560 (1981).

Jurisdiction held proper. — Upon finding that the trial court had exclusive subject matter jurisdiction, the court also properly ruled that a sibling had prescriptive title to certain property under O.C.G.A. § 44-5-164 by possessing the property under color of title for a period greater than seven years, satisfying the requirements of O.C.G.A. § 44-5-161; the

Title to Land (Cont'd)

fraud alleged by the other siblings did not defeat said title, as they were unaware of the fraud from 1989 to 2002. *Goodrum v. Goodrum*, 283 Ga. 163, 657 S.E.2d 192 (2008).

Equity

This paragraph confers exclusive jurisdiction in equity cases upon superior courts. *Miles v. Wilson*, 212 Ga. 60, 90 S.E.2d 568 (1955); *Kaplan v. City of Atlanta*, 158 Ga. App. 58, 279 S.E.2d 307 (1981) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

Legal remedies not exhausted. — Trial court lacked subject matter jurisdiction over a class action suit brought in equity by a class representative who had failed to exhaust the representative's available legal remedies in the juvenile court after the representative's request that counsel be appointed for the representative was denied. *Patterson v. Ellerbee*, 268 Ga. App. 826, 603 S.E.2d 308 (2004).

Whether action is equitable is determined by its allegations and prayers. *Wellcraft Mfg., Inc. v. Troutman*, 123 Ga. App. 321, 180 S.E.2d 588 (1971).

On appeal, whether complaint rests in equity and is beyond jurisdiction of court of origin is matter for determination by Court of Appeals. *Wellcraft Mfg., Inc. v. Troutman*, 123 Ga. App. 321, 180 S.E.2d 588 (1971).

Superior court has jurisdiction of an equitable complaint seeking decree ordering sale of interest of contingent remaindermen. *Kennedy v. Durham*, 219 Ga. 859, 136 S.E.2d 343 (1964).

Superior court has jurisdiction where judgment for fraud sought. — A judgment sought not merely against the corporation, but also against one of its officers who it is alleged obtained cash and other property for an inadequate consideration, which rendered defendant insolvent and by which plaintiff, a creditor, was defrauded, falls within the purview of this paragraph. *Wellcraft Mfg., Inc. v. Troutman*, 123 Ga. App. 321, 180 S.E.2d

588 (1971) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

In action to enjoin proceedings, the superior court has jurisdiction. — City courts have no jurisdiction to grant affirmative equitable relief where an action is filed in a city court ordinarily a court of equity will entertain an application by the defendant to enjoin a proceeding, where it is made to appear that the defendant has such rights in the subject matter of the litigation as require the application of equitable remedies for the grant of full relief. *Crummey v. Crummey*, 190 Ga. 774, 10 S.E.2d 859 (1940).

Where a surviving spouse had abandoned minor children and could not be found, the factual circumstances demanded the exercise of the court's equitable powers to preserve the rights of the minor children, the trial court should have allowed the minors, who had no remedy at law, to maintain an action for the wrongful death of their mother. *Brown v. Liberty Oil & Ref. Corp.*, 261 Ga. 214, 403 S.E.2d 806 (1991).

No equity jurisdiction for garnishment. — A trial court has no authority to modify the child support provisions of a final judgment and divorce decree in a garnishment action; such a modification must be accomplished by the filing of a petition in superior court pursuant to O.C.G.A. § 19-6-18 or O.C.G.A. § 19-6-19. In addition, the court lacks equity jurisdiction in garnishment cases, even under unusual and exceptional circumstances. *Davis v. Davis*, 220 Ga. App. 745, 470 S.E.2d 268 (1996).

Former Code 1933, § 37-1104, providing for special verdicts in equity cases, has been repealed by the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. *Cawthon v. Douglas County*, 248 Ga. 760, 286 S.E.2d 30 (1982).

Jurisdiction Generally

First sentence clearly relates to original jurisdiction. *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Word "jurisdiction," as used in the first sentence, refers to subject matter alone. *Starnes v. Mutual Loan &*

Banking Co., 102 Ga. 597, 29 S.E. 452 (1897).

Superior court has concurrent jurisdiction with justices' courts in all civil cases where the amount involved is less than \$100.00. Phillips v. Rawls, 46 Ga. App. 200, 167 S.E. 189 (1932).

Superior courts have concurrent jurisdiction over misdemeanors with inferior courts. Lee v. State, 222 Ga. App. 389, 474 S.E.2d 281 (1996).

Superior court has no jurisdiction of action brought to establish copy of lost will. Perkins v. Perkins, 21 Ga. 13 (1857); Ponce v. Underwood, 55 Ga. 601 (1876).

Trustee in bankruptcy has right to maintain action in superior court. — Where a bankrupt partnership, before becoming adjudicated a bankrupt, had a right to action against a third person to recover money of the partnership in the hands of the third person, the trustee in bankruptcy has the right to recover the money from the wrongdoer, in a court in which the bankrupt, before the adjudication in bankruptcy, could have maintained such suit; therefore the trustee had the right to maintain such action in the superior court. Brownlow v. Davis, 69 Ga. App. 111, 25 S.E.2d 150 (1943).

Breach of payment bond contract. — Subcontractor's action against surety for breach of payment bond contract, bad faith, and attorney fees was within the superior court's subject matter jurisdiction. Harry S. Peterson Co. v. National Union Fire Ins. Co., 209 Ga. App. 585, 434 S.E.2d 778 (1993).

Conversion actions. — The superior courts have subject matter jurisdiction to entertain conversion actions. Hughes v. Hughes, 193 Ga. App. 72, 387 S.E.2d 29 (1990).

Subject matter jurisdiction over employer case. — Superior courts have subject matter jurisdiction over timely Title VII claims under the Civil Rights Act of 1964 filed pursuant to Equal Employment Opportunity Commission notification to the claimant that, the federal prerequisites for suit having been fulfilled, suit may be filed. Collins v. DOT, 208 Ga. App. 53, 429 S.E.2d 707 (1993).

Subject matter jurisdiction of breach of contract and fraud action.

— The superior court had jurisdiction of an action for breach of contract and fraud involving an agreement between an employer and employee, even though the agreement provided that the parties "submit to the exclusive jurisdiction of the English Courts." Bradley v. British Fitting Group, Plc, 221 Ga. App. 621, 472 S.E.2d 146 (1996).

When an out-of-state seller sued an in-state buyer in Georgia, despite a provision in the parties' contract for the jurisdiction of the courts of Texas, and the seller did not respond, the courts of Georgia had subject matter jurisdiction under O.C.G.A. § 15-7-4(a)(2); Ga. Const. 1983, Art. VI, Sec. I, Para. I; Ga. Const. 1983, Art. VI, Sec. III, Para. I; and Ga. Const. 1983, Art. VI, Sec. IV, Para. I; the parties waived the forum selection clause by either filing suit in Georgia or not responding. Euler-Siac S.P.A. (Creamar Spa) v. Drama Marble Co., 274 Ga. App. 252, 617 S.E.2d 203 (2005).

Subject matter jurisdiction over business dispute. — In a direct action brought by a shareholder against another, the trial court did not err by vacating a consent order that incorporated a settlement agreement allegedly reached by the parties as the trial judge to whom the case had been reassigned had subject matter jurisdiction to vacate the previously entered order when the trial judge heard the contempt motions since the trial judge had subject matter jurisdiction over the action, which involved a business dispute. Further, since no final order had been entered in the matter and the case remained pending, the trial court had authority to reconsider the ruling made on the consent order, vacate the order, and order that the matter proceed to trial, irrespective of whether the case has been reassigned to a different trial judge. Internal Med. Alliance, LLC v. Budell, 290 Ga. App. 231, 659 S.E.2d 668 (2008).

Subject matter jurisdiction over action seeking injunction on dockage issues. — Trial court had subject matter jurisdiction over a landowner's action seeking an interlocutory injunction requiring neighbors to move the neighbors'

Jurisdiction Generally (Cont'd)

dock because the neighbors did not point to any federal law that would preempt the trial court as an appropriate forum for adjudicating the rights and remedies of the parties; there was no Congressional intent to preclude state action concurrently with the statutory and regulatory scheme establishing the authority of the Army Corps of Engineers over docks on the lake where the parties lived. *Dillon v. Reid*, 312 Ga. App. 34, 717 S.E.2d 542 (2011).

Termination of parental rights. — Pursuant to O.C.G.A. § 15-11-28(a)(2)(C), the superior court did not have subject matter jurisdiction to terminate the husband's parental rights because the biological father's petition to legitimate a child who was born in wedlock was a petition to terminate the parental rights of the legal father; after the superior court determined that the biological father had not abandoned his opportunity interest, the issue became whether the superior court could grant the petition to legitimate the child, and to grant the legitimation petition required the superior court to first terminate the parental rights of the husband, who was the legal father. *Brine v. Shipp*, 291 Ga. 376, 729 S.E.2d 393 (2012).

Custody dispute of orphaned children. — In a custody dispute involving children orphaned by the murder-suicide of their parents, a trial court did not err in denying an aunt's motion to dismiss for lack of jurisdiction because the trial court correctly held that, in the absence of an earlier-filed action in juvenile court or probate court, it was the first court to take jurisdiction and it properly retained it. *Stone-Crosby v. Mickens-Cook*, 318 Ga. App. 313, 733 S.E.2d 842 (2012).

Appellate Jurisdiction

Provision as to appellate jurisdiction not self-executing. *De Lamar v. Dollar*, 128 Ga. 57, 57 S.E. 85 (1907); *De Lamar v. Dollar*, 1 Ga. App. 687, 57 S.E. 1054 (1907).

Provision as to appellate jurisdiction is not self-executing, and such jurisdiction can be exercised only in accordance with enabling Acts; that is, only in such man-

ner and to such extent as may be provided by statute. *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Provision as to appellate jurisdiction must be made available by implementation of statute law prescribing the procedural processes to be employed in taking the appeal. *Rogers v. Anderson*, 95 Ga. App. 637, 98 S.E.2d 388 (1957).

This paragraph is not self-executing, and does not become operative until legislative action regulating the mode and manner of appeal. *Southern States Landfill, Inc. v. City of Atlanta Bd. of Zoning Adjustments*, 261 Ga. 759, 410 S.E.2d 721 (1991) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

Provision as to appellate jurisdiction gives General Assembly authority to enact laws placing conditions upon appeals. *Hancock v. Board of Tax Assessors*, 226 Ga. 570, 176 S.E.2d 102 (1970).

Appellate jurisdiction of superior court must be exercised, and can only be exercised, in such cases as are provided by law. *Georgia R.R. & Banking Co. v. Redwine*, 208 Ga. 261, 66 S.E.2d 234 (1951).

Powers limited to that of tribunal. — Superior court as appellate court has no greater or broader powers in reference to subject matter than court or tribunal from which appeal is taken. *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Jurisdiction in workers' compensation appeals. — The jurisdiction of the superior court in cases appealed from the Department of Industrial Relations (now State Board of Workers' Compensation) is not as provided in other laws relating to appeals, but is as defined in Ga. L. 1920, p. 167, § 59 (see now O.C.G.A. § 34-9-105). *Department of Indus. Relations v. Travelers' Ins. Co.*, 177 Ga. 669, 170 S.E. 883, answer conformed to, 47 Ga. App. 553, 171 S.E. 169 (1933).

Appellate Division of the State Board of Workers' Compensation had the authority to award a life estate to an employer

because no dispute as to the title of land was foreseeable in the future, and the Board did not exercise authority reserved to the superior court alone, but rather, it simply exercised its broad authority to craft a reasonable remedy; the Board's Rehabilitation Guidelines require that all issues of ownership and maintenance be resolved before any construction begins. *S. Concrete/Watkins Associated Indus. v. Spires*, No. A10A1981, 2011 Ga. App. LEXIS 243 (Mar. 22, 2011).

Authority of court in employment actions. — Trial court had such appellate jurisdiction as the law provided, and, thus, it could consider the county police sergeant's petition for writ of certiorari to review the county manager's affirmance of the police department's decision to demote the county police sergeant even though the county police sergeant could have appealed to the county board of commissioners as the county did not show any authority that the county police sergeant was required to do so or that the trial court did not have the authority to consider the petition. *Crumpler v. Henry County*, 257 Ga. App. 615, 571 S.E.2d 822 (2002).

Appeal to jury in justice's court not to take precedence of appeal to superior court. — To allow an appeal to a jury in a justice's court to take precedence over an appeal to the superior court would be to deprive the latter court of the jurisdiction expressly provided by this paragraph. *East Tenn., V. & Ga. R.R. v. Miles*, 72 Ga. 252 (1884) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

Proper and timely filing of notice of appeal is absolute requirement to confer jurisdiction upon appellate court. *Cooper v. Gwinnett County Bd. of Educ.*, 157 Ga. App. 289, 277 S.E.2d 285 (1981).

Superior court has no jurisdiction where proper appellate procedure not followed. — Where, in appeal from decision of board of education discharging a teacher, no notice of appeal was filed with the State Board of Education but, instead, appellant filed an appeal directly in the superior court, proper appellate procedure was not followed. Therefore, the superior court did not have jurisdiction to review the decision sought to be

appealed. *Cooper v. Gwinnett County Bd. of Educ.*, 157 Ga. App. 289, 277 S.E.2d 285 (1981).

Judicial review of local government's zoning appeal board. — Property owner properly filed a writ of mandamus challenging a county's denial of a business license because the county had no ordinance directing an alternative method of judicial review from a decision by the zoning appeal board, and Ga. Const. 1983, Art. VI, Sec. IV, Para. I did not provide a form of appeal. *Haralson County v. Taylor Junkyard of Bremen, Inc.*, 291 Ga. 321, 729 S.E.2d 357 (2012).

Judicial review of disability determination. — Superior court lacked jurisdiction for direct appellate review of the denial of a state employee's application for retirement disability benefits under O.C.G.A. § 47-2-123(b)(1). O.C.G.A. § 47-2-3 was inapplicable because the employee was not discharged from employment. *Employees' Ret. Sys. of Ga. v. Harris*, 303 Ga. App. 191, 692 S.E.2d 798 (2010).

Certiorari

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. IV, Para. V and antecedent provisions, relating to writs of certiorari to superior courts, are included in the annotations for this paragraph.

Right to correct errors by certiorari conferred by this paragraph and former Civil Code 1910, § 5180 (see now O.C.G.A. Ch. 4, T. 5) cannot be taken away by legislative Acts. *Moore v. City of Winder*, 10 Ga. App. 384, 73 S.E. 529 (1912); *Taylor v. Georgia Power Co.*, 44 Ga. App. 326, 161 S.E. 669 (1931); *City Inv. Co. v. Crawley*, 187 Ga. 48, 199 S.E. 747 (1938); *Bankers Life & Cas. Co. v. Cravey*, 209 Ga. 274, 71 S.E.2d 659 (1952); *Morman v. Pritchard*, 108 Ga. App. 247, 132 S.E.2d 561 (1963) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

General Assembly may provide that certiorari is available only after defendant has exhausted the defendant's remedies in municipal court. *Rose v. Mayor of Thunderbolt*, 86 Ga. App. 867, 72 S.E.2d 823 (1952).

Certiorari (Cont'd)

Right of certiorari is constitutional right which exists independently of any statute. *City Inv. Co. v. Crawley*, 187 Ga. 48, 199 S.E. 747 (1938).

Effect of constitutional amendment authorizing General Assembly to provide for procedure in justice of the peace courts. — The constitutional amendment of 1927 to Ga. Const. 1877, Art. VI, Sec. VII, Para. I (see Ga. Const. 1983, Art. VI, Sec. X, Para. I, Art. VI, Sec. I, Para. I), authorizing the General Assembly, as to certain courts established in lieu of justice courts, to make “such provisions as to rules and procedure in such courts (that is, in the courts substituted) and as to new trials and the correction of errors in and by said courts, and with such further provision for the correction of errors by the superior court or the Court of Appeals or the Supreme Court as the General Assembly may, from time to time, in its discretion, provide or authorize,” is not to be construed as conferring authority upon the General Assembly to prevent the granting of writs of certiorari as to such courts under this paragraph. *Aspironal Labs., Inc. v. Mallinckrodt Chem. Works*, 180 Ga. 544, 179 S.E. 709 (1935) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

City court judge cannot issue writ of certiorari. *Kieve v. Ford*, 111 Ga. 30, 36 S.E. 293 (1900).

Local Act an exception to this paragraph. — Georgia Laws 1929, p. 367, providing that cases decided in the Municipal Court of Atlanta without a jury must first be appealed to a jury before seeking certiorari to the superior court, is an exception to the general power of the superior court to grant certiorari and not unconstitutional. *Von Schmidt v. Noland Co.*, 176 Ga. 784, 169 S.E. 11 (1933).

Approval of certiorari bond by superior court judge not to come when bond not passed on by trial judge. — The judge of the superior court, at the time of sanctioning a petition for certiorari, has no authority to approve the certiorari bond where the bond has not been approved or disapproved by the judge who tried the case. *Clark v. Morris Plan Bank*,

194 Ga. 522, 22 S.E.2d 147, answer conformed to, 68 Ga. App. 174, 22 S.E.2d 415 (1942).

Writ of certiorari to superior court is constitutional as well as statutory remedy available where a party is dissatisfied with a decision or judgment of an inferior judicatory exercising judicial or quasi-judicial powers. *Flacker v. Berr-Nash Corp.*, 157 Ga. App. 638, 278 S.E.2d 180 (1981), overruled on other grounds, *Smith v. Elder*, 174 Ga. App. 316, 329 S.E.2d 511 (1985), overruled on other grounds as stated in, *Norris v. Henry County*, 255 Ga. App. 718, 566 S.E.2d 428 (2002).

Action in nature of judicial proceeding always subject to review by certiorari. *Heath v. City of Atlanta*, 67 Ga. App. 85, 19 S.E.2d 746 (1942).

Certiorari lies from city court having direct right to writ of error (see now O.C.G.A. §§ 5-6-49, 5-6-50) to appellate court. *Walker v. State*, 8 Ga. App. 214, 68 S.E. 873 (1910).

Certiorari will lie from conviction of policeman under city ordinance. — A trial and conviction of a policeman, pursuant to a city ordinance, on charges of conduct unbecoming an officer and with violation of police department rule, is a judicial proceeding from the final judgment in which the writ of certiorari will lie. *Heath v. City of Atlanta*, 67 Ga. App. 85, 19 S.E.2d 746 (1942).

Any decision rendered by city's recorder under former Code 1933, § 72-401 (see now O.C.G.A. § 41-2-5) may be reviewed by certiorari in superior court pursuant to this paragraph. *City of East Point v. Henry Chanin Corp.*, 210 Ga. 628, 81 S.E.2d 812 (1954) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

Certiorari available from revocation of certificate of qualification to practice as architect. *Beckanstin v. Dougherty County Council of Architects*, 215 Ga. 543, 111 S.E.2d 361 (1959).

No certiorari from order directing sheriff to take charge of room occupied by justice of the peace. — The action of county authorities in ordering a sheriff to take charge of the room in the courthouse occupied by a justice of the

peace is a mere exercise of administrative power, and possesses no such attribute of a judicial function as to permit certiorari therefrom under this paragraph. McDon-

ald v. Marshall, 185 Ga. 438, 195 S.E. 571 (1938) (see Ga. Const. 1983, Art. VI, Sec. IV, Para. I).

OPINIONS OF THE ATTORNEY GENERAL

Intent and effect of paragraph. — This paragraph was not intended to and does not have any effect other than to permit the General Assembly to create certain exceptions from the superior court's otherwise exclusive jurisdiction. 1972 Op. Att'y Gen. No. 72-179.

Except in case of capital crimes, juvenile courts generally have exclusive original jurisdiction of children and may not transfer them to other courts for criminal proceedings unless the child is 15 or older; a person will not come to the Department of Offender Rehabilitation (now Department of Corrections) under the exceptions of Ga. L. 1974, p. 1455, § 1 (see former O.C.G.A. § 49-5-7(a)(5)), unless the person is less than 17, and unless the person is at least 13 in the case of a capital crime or is at least 15 in the case of other crimes. 1974 Op. Att'y Gen. No. 74-88.

Ga. L. 1974, p. 1455, § 1 (see former paragraph (a)(5) of O.C.G.A. § 49-5-7) providing for the custody of convicted misdemeanants and felons under the age of 17 is not unconstitutional. 1972 Op. Att'y Gen. No. 72-3.

Effect of section on power of superior court to try juvenile offender. — Ga. L. 1974, p. 1455, § 1 (see former paragraph (a)(5) of O.C.G.A. § 49-5-7) sets apart a defined class of offenders and directs how they shall be punished for the offense; in doing this, the power of any superior court to try an individual under the age of 17 for any given crime is in no way affected. 1972 Op. Att'y Gen. No. 72-3.

Justice of the peace without jurisdiction to issue bill of peace. — Since the superior court has exclusive jurisdiction over equity matters and a bill of peace is an equitable remedy, justices of the peace do not have jurisdiction to entertain a petition for such relief; it follows that any such bill of peace issued by a justice of the peace would be void and of no effect. 1957 Op. Att'y Gen. p. 66.

Superior courts have exclusive jurisdiction to hear appeals from justice of the peace/magistrate courts; such jurisdiction having a constitutional basis until July 1, 1983, and a statutory one thereafter. 1983 Op. Att'y Gen. No. U83-27.

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Courts, §§ 16 et seq., 53 et seq. 24 Am. Jur. 2d, Divorce and Separation, § 170 et seq.

ALR. — Jurisdiction of state court over divorce suit by resident of United States reservation, 46 ALR 993.

Jurisdiction of state courts of actions in relation to interstate shipments, 64 ALR 333.

Jurisdiction of state court over actions involving patents, 167 ALR 1114.

Adjudication of property rights of spouses in action for separate maintenance, support, or alimony without divorce, 74 ALR2d 316.

Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 ALR3d 301.

Power of divorce court to deal with real property located in another state, 34 ALR3d 962.

Modern status of rule relating to jurisdiction of state court to try criminal defendant brought within jurisdiction illegally or as result of fraud or mistake, 25 ALR4th 157.

SECTION V.

COURT OF APPEALS

Paragraph	Paragraph
I. Composition of Court of Appeals; Chief Judge.	IV. Certification of question to Supreme Court.
II. Panels as prescribed.	V. Equal division of court.
III. Jurisdiction of Court of Appeals; decisions binding.	

Cross references. — Court of Appeals generally, Ch. 3, T. 15.

Law reviews. — For article, “The Supreme Court of Georgia: An Account of Its Delayed Birth,” see 6 Ga. B.J. 95 (1943). For article, “History of the Supreme Court of Georgia: The First Hundred Years,” see 6 Ga. B.J. 177 (1944); 6 Ga. B.J. 269 (1944); 7 Ga. B.J. 8 (1944); 7 Ga. B.J. 101

(1944); 7 Ga. B.J. 277 (1945); 7 Ga. B.J. 393 (1945); 8 Ga. B.J. 5 (1945); 8 Ga. B.J. 117 (1945). For article, “The Establishment of the Georgia Supreme Court,” see 9 Ga. St. B.J. 417 (1973). For article on cases in which the supreme court reversed the court of appeals on the subject of local government law, see 56 Mercer L. Rev. 1 (2004).

Paragraph I. Composition of Court of Appeals; Chief Judge.

The Court of Appeals shall consist of not less than nine Judges who shall elect from among themselves a Chief Judge.

1976 Constitution. — Art. VI, Sec. II, Para. VIII.

Cross references. — Court of Appeals generally, Ch. 3, T. 15.

JUDICIAL DECISIONS

Cited in Mahan v. Watkins, 256 Ga. App. 260, 568 S.E.2d 130 (2002).

RESEARCH REFERENCES

ALR. — Laws governing judicial recusal or disqualification in state pro-

ceeding as violating federal or state constitution, 91 ALR5th 437.

Paragraph II. Panels as prescribed.

The Court of Appeals may sit in panels of not less than three Judges as prescribed by law or, if none, by its rules.

1976 Constitution. — Art. VI, Sec. II, Para. VIII.

Paragraph III. Jurisdiction of Court of Appeals; decisions binding.

The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.

1976 Constitution. — Art. VI, Sec. II, Para. VIII.

Cross references. — Court of Appeals generally, Ch. 3, T. 15.

Law reviews. — For article, “Cities and Towns in Georgia: A Distinction With a Difference?,” see 14 Mercer L. Rev. 385 (1963). For article, “The Selection and Tenure of Judges,” see 2 Ga. St. B.J. 281 (1966). For article discussing the inefficiency of mandamus and impeachment as remedies for judicial inaction, see 5 Ga. St. B.J. 467 (1969). For article, “Researching Georgia Law,” see 34 Ga. St. U.L. Rev. 741 (2015).

For comment on *Bond v. Ray*, 207 Ga. 559, 63 S.E.2d 399 (1951), see 3 Mercer L.

Rev. 220 (1951). For comment on *Atlantic C.L.R.R. v. Godard, executrix*, 211 Ga. 373, 86 S.E.2d 311 (1955), holding that where the Court of Appeals rules on all questions presented by the record except the one question which results in a three to three split the case is one which is properly brought to the Supreme Court, see 17 Ga. B.J. 500 (1955). For comment on *Baggett Transp. Co. v. Barnes*, 108 Ga. App. 68, 132 S.E.2d 229 (1963), see 26 Ga. B.J. 214 (1963). For comment on *Tant v. State*, 123 Ga. App. 760, 182 S.E.2d 502 (1971), advocating additional reform of Georgia’s system of appellate review of criminal cases, see 9 Ga. St. B.J. 490 (1973).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CORRECTION OF ERRORS OF FACT

CONSTITUTIONAL QUESTIONS

1. IN GENERAL

2. CONSTITUTIONALITY OF MUNICIPAL ORDINANCES

DISPUTES CONCERNING LAND

EQUITY

1. IN GENERAL

2. SPECIFIC CASES

CRIMINAL CASES AND CONTEMPT OF COURT

OTHER CASES

PLEADING AND PRACTICE

1. IN GENERAL

2. NEED FOR RECORD

General Consideration

Court of Appeals was created as arm of Supreme Court, with no original jurisdiction, for the purpose of correcting errors of law in lower tribunals. *Harmon*

v. Southern Ry., 123 Ga. App. 309, 180 S.E.2d 604 (1971).

Court of Appeals is a court for correction of errors below; it is not a court of original jurisdiction. *Barnes v. State*, 157 Ga. App. 582, 277 S.E.2d 916

General Consideration (Cont'd)

(1981).

All appellate jurisdiction not specifically given to Supreme Court is conferred upon Court of Appeals. *City of Trenton v. Dade County*, 201 Ga. 189, 39 S.E.2d 473 (1946).

Case transferred when not within jurisdiction of Supreme Court. — Where allegations and prayers of the petition do not make a case which comes within the jurisdiction of Supreme Court, the Court of Appeals has jurisdiction of the writ of error and the case must be transferred. *Bond v. Ray*, 207 Ga. 559, 63 S.E.2d 399 (1951), commented on in 3 *Mercer L. Rev.* 220 (1951).

Erroneous decision of Court of Appeals within its exclusive jurisdiction is final and binding in that case. *Saffold v. Mangum*, 139 Ga. 119, 76 S.E. 858 (1912); *Buck v. Duval*, 139 Ga. 599, 77 S.E. 809 (1913).

Decisions of Supreme Court are precedents in other cases. *Southern Bell Tel. & Tel. Co. v. Glawson*, 140 Ga. 507, 79 S.E. 136 (1913); *Holmes v. Southern Ry.*, 145 Ga. 172, 88 S.E. 924 (1916).

The decisions of the Supreme Court shall bind the Court of Appeals as precedents, and the Court of Appeals is not authorized by this paragraph to request a review by the Supreme Court of a decision rendered by the Supreme Court. *Cargile v. State*, 194 Ga. 20, 20 S.E.2d 416, answer conformed to, 67 Ga. App. 610, 21 S.E.2d 326 (1942) (see Ga. Const. 1983, Art. VI, Sec. V, Para. III).

The appellate court was not at liberty to overrule the established line of authority for the hearsay rule to which the Supreme Court of the state adhered. *Day v. State*, 235 Ga. App. 771, 510 S.E.2d 579 (1998).

Decisions of the Georgia Court of Appeals that were inconsistent with Georgia Supreme Court precedent were not binding. — Following the defendant's conviction for attempted murder, there was no change in the law because *McNair v. State*, 293 Ga. 282 (2013) applying the rule of lenity when there was ambiguity between two felony punishments, was dictated by the Supreme Court's own precedents. Contrary cases by

the Georgia Court of Appeals were never binding precedents. *Rollf v. Carter*, 298 Ga. 557, No. S15A1505, 2016 Ga. LEXIS 195 (2016).

Supreme Court decisions need not be unanimous. — As to the Court of Appeals, a Supreme Court decision is a binding precedent even though not unanimous. *Life Ins. Co. v. Lawler*, 211 Ga. 246, 85 S.E.2d 1 (1954).

A decision rendered by a divided Supreme Court is authoritative as a precedent, and, although a decision of the Supreme Court may have been rendered by a divided court, the Court of Appeals is nevertheless bound thereby. *Western & Atl. R.R. v. Michael*, 43 Ga. App. 703, 160 S.E. 93 (1931).

Effect of Court of Appeals' opinions on trial court. — A trial court, regardless of its good intentions, cannot decide to disregard the opinions of the Court of Appeals. *Eastgate Assocs. v. Piggly Wiggly S., Inc.*, 200 Ga. App. 872, 410 S.E.2d 129, cert. denied, 200 Ga. App. 896, 410 S.E.2d 129 (1991).

Where the opinion of the Court of Appeals was not appealed by either party, the holdings therein were binding on the trial court. *Jackson v. Beech Aircraft Corp.*, 217 Ga. App. 498, 458 S.E.2d 377 (1995).

Argument of reliance on precedent without merit. — There was no merit in contention of insurer that a policy should be construed in accordance with named earlier decisions of the Court of Appeals relating to similar policies, upon the theory that, in the absence of any other pertinent decision at the time, the parties in issuing and accepting the instant policy presumably relied upon those decisions as to how it should be construed. *Mutual Life Ins. Co. v. Barron*, 198 Ga. 1, 30 S.E.2d 879 (1944).

Court of Appeals cannot render advisory opinion as such, although in many cases where the principal question decided leaves the case for further treatment in the lower court, instructions are often given for the guidance of the lower court and counsel for the parties. *Harmon v. Southern Ry.*, 123 Ga. App. 309, 180 S.E.2d 604 (1971).

Court of Appeals has the power to entertain a petition for mandamus or

prohibition in order to enforce its judgments. Raybestos-Manhattan, Inc. v. Moran, 248 Ga. 461, 284 S.E.2d 256 (1981).

Court of Appeals without power to require lower court judge to issue writ returnable before the judge for trial. — While the Supreme Court may aid a party by the writ of mandamus to bring to it the party's case from the lower court, as by issuing the writ to compel the judge to certify a bill of exceptions or to require the proper officers to perform their legal duties in reference to such proceeding, it is without any power or jurisdiction to require the judge of the lower court to issue a writ returnable before the judge for the purpose of trial. This rule is equally applicable to the Court of Appeals. McPhail v. Bagley, 96 Ga. App. 179, 99 S.E.2d 500 (1957).

Court of Appeals lacked jurisdiction to construe constitutional provision. — In reversing a trial court's denial of a motion for summary judgment, the Georgia Court of Appeals exceeded its jurisdiction by construing a constitutional provision that had not previously been construed by the Georgia Supreme Court and then applying the newly construed provision to the facts of the case. City of Decatur v. DeKalb County, 284 Ga. 434, 668 S.E.2d 247 (2008).

Court lacked jurisdiction to adjudicate a debtor's claim of state court judicial misconduct after the stay was lifted to permit a state court suit involving the debtor to proceed because nothing in 28 U.S.C. § 157 granted the court appellate power over, or disciplinary power, or oversight responsibility of the state court. Proper forum for the claim was the state appellate court pursuant to Ga. Const. 1983, Art. VI, Sec. V, Para. III. In re Osborne, No. 00-40453, 2001 Bankr. LEXIS 2314 (Bankr. S.D. Ga. Mar. 14, 2001).

Cited in Griffin v. Sisson, 146 Ga. 661, 92 S.E. 278 (1917); American Life & Accident Ins. Co. v. Quarterman, 19 Ga. App. 798, 92 S.E. 350 (1917); Fountain v. State, 149 Ga. 519, 101 S.E. 294 (1919); Taylor v. Stovall, 155 Ga. 894, 118 S.E. 715 (1923); City of Winder v. Winder Nat'l Bank, 161 Ga. 882, 132 S.E. 217 (1926); Georgia R.R. & Banking Co. v. Stanley, 38 Ga. App. 773,

145 S.E. 530 (1928); Atlantic Coast Line R.R. v. Georgia Sweet Potato Growers' Ass'n, 171 Ga. 30, 154 S.E. 698 (1930); Pearson v. Stamey, 172 Ga. 282, 157 S.E. 468 (1931); Radcliffe v. Jones, 174 Ga. 324, 162 S.E. 679 (1932); Stein & Co. v. State Tax Bd., 174 Ga. 611, 163 S.E. 187 (1932); Cowart v. State, 177 Ga. 377, 170 S.E. 253 (1933); Brooks v. Sturdivant, 177 Ga. 514, 170 S.E. 369 (1933); Patellis v. King, 52 Ga. App. 118, 182 S.E. 808 (1935); Dillon v. Sills, 181 Ga. 582, 183 S.E. 563 (1936); Johnston v. Travelers Ins. Co., 183 Ga. 229, 188 S.E. 27 (1936); Williford v. State, 184 Ga. 59, 190 S.E. 605 (1937); Hall v. Hall, 185 Ga. 502, 195 S.E. 731 (1938); Neely v. Sheppard, 185 Ga. 771, 196 S.E. 452 (1938); Kinney v. Crow, 186 Ga. 851, 199 S.E. 198 (1938); Lunsford v. State, 187 Ga. 162, 199 S.E. 808 (1938); Freeman v. Atlanta Police Relief Ass'n, 62 Ga. App. 523, 8 S.E.2d 711 (1940); Anderson v. State, 190 Ga. 455, 9 S.E.2d 642 (1940); Galloway v. Mitchell County Elec. Membership Corp., 190 Ga. 428, 9 S.E.2d 903 (1940); Aetna Ins. Co. v. Martin, 191 Ga. 458, 12 S.E.2d 633 (1940); Bell v. Bell, 193 Ga. 291, 18 S.E.2d 473 (1942); McDowell v. McDowell, 194 Ga. 88, 20 S.E.2d 602 (1942); Southern Ry. v. Parker, 194 Ga. 94, 21 S.E.2d 94 (1942); Huiet v. Dayan, 194 Ga. 250, 21 S.E.2d 423 (1942); Butler v. State, 194 Ga. 426, 21 S.E.2d 846 (1942); Gaston v. Keehn, 195 Ga. 559, 24 S.E.2d 675 (1943); Mutual Life Ins. v. Barron, 70 Ga. App. 454, 28 S.E.2d 334 (1943); Baker v. State, 198 Ga. 291, 31 S.E.2d 397 (1944); Saxon v. Aycock, 199 Ga. 232, 33 S.E.2d 697 (1945); Ward v. State, 199 Ga. 722, 35 S.E.2d 150 (1945); McRae v. Boykin, 73 Ga. App. 67, 35 S.E.2d 548 (1945); Collins v. Sam R. Greenberg & Co., 73 Ga. App. 377, 36 S.E.2d 484 (1945); Galloway v. McKinley, 73 Ga. App. 381, 36 S.E.2d 485 (1945); Brockett v. Maxwell, 200 Ga. 213, 36 S.E.2d 638 (1946); Comstock v. Tarbush, 200 Ga. 320, 37 S.E.2d 148 (1946); Associated Muts., Inc. v. Pope Lumber Co., 200 Ga. 487, 37 S.E.2d 393 (1946); Felton v. Chandler, 201 Ga. 347, 39 S.E.2d 654 (1946); Morris Plan Bank v. Hadsall, 202 Ga. 52, 41 S.E.2d 881 (1947); W.T. Rawleigh Co. v. Forbes, 202 Ga. 425, 43 S.E.2d 642 (1947); Edenfield v. Lanier, 203 Ga. 348, 46 S.E.2d 582 (1948);

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W.R. Rawleigh Co. v. Forbes, 77 Ga. App. 620, 48 S.E.2d 925 (1948); Manufacturers Trust Co. v. Wilby-Kincey Serv. Corp., 204 Ga. 273, 49 S.E.2d 514 (1948); Cheek v. White, 204 Ga. 321, 49 S.E. 819 (1948); Odom v. Atlanta & W. Point R.R., 204 Ga. 328, 49 S.E.2d 821 (1948); Dixon v. State, 78 Ga. App. 713, 51 S.E.2d 875 (1949); Galfas v. Ailor, 206 Ga. 76, 55 S.E.2d 582 (1949); McDowall Transp., Inc. v. Gault, 80 Ga. App. 445, 56 S.E.2d 161 (1949); Patterson v. Patterson, 208 Ga. 7, 64 S.E.2d 441 (1951); Stembidge v. Georgia, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952); Putnam v. Sewell, 209 Ga. 28, 70 S.E.2d 462 (1952); Burnett v. Burnett, 209 Ga. 353, 72 S.E.2d 459 (1952); McGill v. State, 209 Ga. 500, 74 S.E.2d 78 (1953); Complete Auto Transit, Inc. v. Thompson, 210 Ga. 182, 78 S.E.2d 520 (1953); Roberts v. Georgia S. Supply Co., 211 Ga. 402, 86 S.E.2d 241 (1955); Hubert v. Luden's, Inc., 211 Ga. 544, 87 S.E.2d 74 (1955); Davis v. State, 92 Ga. App. 627, 89 S.E.2d 548 (1955); Ledbetter v. Roberts, 213 Ga. 47, 96 S.E.2d 614 (1957); Robbins Home Imp. Co. v. Guthrie, 213 Ga. 138, 97 S.E.2d 153 (1957); Miller v. Miller, 213 Ga. 435, 99 S.E.2d 129 (1957); Brydie v. Pritchard, 213 Ga. 588, 100 S.E.2d 435 (1957); Gregory v. Ross, 214 Ga. 306, 104 S.E.2d 452 (1958); State v. Coca-Cola Bottling Co., 214 Ga. 316, 104 S.E.2d 574 (1958); Hamner v. Johnson, 215 Ga. 15, 108 S.E.2d 687 (1959); Petty v. Complete Auto Transit, Inc., 215 Ga. 66, 108 S.E.2d 697 (1959); C.V. Nalley, Inc. v. Schoen, 215 Ga. 513, 111 S.E.2d 40 (1959); Martin v. Bituminous Cas. Corp., 215 Ga. 476, 111 S.E.2d 53 (1959); Fidelity & Cas. Co. v. Scott, 215 Ga. 491, 111 S.E.2d 223 (1959); Southern Ry. v. Scott, 215 Ga. 739, 113 S.E.2d 459 (1960); United States v. Raines, 189 F. Supp. 121 (M.D. Ga. 1960); McMahon v. Folds, 216 Ga. 709, 119 S.E.2d 353 (1961); Kelley v. Tanksley, 217 Ga. 183, 121 S.E.2d 647 (1961); Mutual Fed. Sav. & Loan Ass'n v. Campbell Coal Co., 105 Ga. App. 185, 123 S.E.2d 925 (1962); Wright v. Lester, 218 Ga. 31, 126 S.E.2d 419 (1962); Garland v. Gray, 108 Ga. App. 303, 132 S.E.2d 834 (1963); Raif v. State, 109 Ga. App. 354, 136 S.E.2d 169 (1964); Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964); Richmond County Hosp. Auth. v. McClain, 221 Ga. 60, 143 S.E.2d 165 (1965); Horton v. Western Contracting Corp., 113 Ga. App. 613, 149 S.E.2d 542 (1966); Taylor v. ROA Motors, Inc., 114 Ga. App. 671, 152 S.E.2d 631 (1966); Bryant v. Fidelity & Cas. Co., 114 Ga. App. 853, 152 S.E.2d 759 (1966); Mundy v. Mundy, 114 Ga. App. 788, 152 S.E.2d 831 (1966); Brissette v. Munday, 115 Ga. App. 131, 153 S.E.2d 606 (1967); Travelers Ins. Co. v. Bagwell, 223 Ga. 145, 154 S.E.2d 200 (1967); Griffith v. Morgan, 115 Ga. App. 518, 154 S.E.2d 822 (1967); Johnson v. State, 116 Ga. App. 406, 157 S.E.2d 773 (1967); Colter v. Consolidated Credit Corp., 116 Ga. App. 520, 157 S.E.2d 812 (1967); Kohl v. Manning, 223 Ga. 755, 158 S.E.2d 375 (1967); Reid v. State, 116 Ga. App. 640, 158 S.E.2d 461 (1967); Woods v. State, 117 Ga. App. 546, 160 S.E.2d 922 (1968); Mack v. State, 224 Ga. 352, 161 S.E.2d 874 (1968); Maddox v. City of Newnan, 224 Ga. 361, 162 S.E.2d 419 (1968); Tiller v. State, 224 Ga. 645, 164 S.E.2d 137 (1968); Young v. State, 225 Ga. 221, 167 S.E.2d 591 (1969); Cohran v. Sosebee, 120 Ga. App. 115, 169 S.E.2d 624 (1969); Contractors Equip. Co. v. Essex Crane Rental Corp., 121 Ga. App. 184, 173 S.E.2d 270 (1970); Hess Oil & Chem. Corp. v. Nash, 226 Ga. 706, 177 S.E.2d 70 (1970); Miller v. State, 122 Ga. App. 869, 179 S.E.2d 265 (1970); Merneigh v. State, 123 Ga. App. 485, 181 S.E.2d 498 (1971); Leach v. Georgia Power Co., 123 Ga. App. 674, 182 S.E.2d 163 (1971); Travelers Ins. Co. v. Merritt, 124 Ga. App. 42, 183 S.E.2d 73 (1971); Southern Guar. Ins. Co. v. Johnson, 126 Ga. App. 134, 190 S.E.2d 136 (1972); Vaughn v. State, 126 Ga. App. 252, 190 S.E.2d 609 (1972); Firestone Tire & Rubber Co. v. Jackson Transp. Co., 126 Ga. App. 471, 191 S.E.2d 110 (1972); Shingler Motors, Inc. v. West, 127 Ga. App. 230, 193 S.E.2d 60 (1972); Harwell v. State, 127 Ga. App. 204, 193 S.E.2d 257 (1972); Columbia Drug Co. v. Cook, 127 Ga. App. 490, 194 S.E.2d 286 (1972); Sumbry v. Land, 127 Ga. App. 786, 195 S.E.2d 228 (1972); Walker v. Smith, 230 Ga. 626, 198 S.E.2d 320 (1973); Tingle v. Arnold, Cate & Allen, 129 Ga. App. 134, 199 S.E.2d 260 (1973); Holcomb v. State,

129 Ga. App. 202, 199 S.E.2d 408 (1973); State Hwy. Dep't v. Union Oil Co., 129 Ga. App. 596, 200 S.E.2d 301 (1973); Estep v. State, 129 Ga. App. 909, 201 S.E.2d 809 (1973); Ben O'Callaghan Co. v. Rose, Silverman & Hunt, 131 Ga. App. 29, 205 S.E.2d 45 (1974); Queen v. State, 131 Ga. App. 370, 205 S.E.2d 921 (1974); Akins v. Tucker, 132 Ga. App. 66, 207 S.E.2d 625 (1974); Southeastern Plumbing Supply Co. v. Lee, 232 Ga. 626, 208 S.E.2d 449 (1974); Mingo v. State, 133 Ga. App. 385, 210 S.E.2d 835 (1974); K.E.S. v. State, 134 Ga. App. 843, 216 S.E.2d 670 (1975); Barnes v. State, 135 Ga. App. 190, 217 S.E.2d 443 (1975); Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975); Clark v. State, 138 Ga. App. 266, 226 S.E.2d 89 (1976); Johnson v. State, 140 Ga. App. 343, 231 S.E.2d 75 (1976); McKenzey v. State, 140 Ga. App. 402, 231 S.E.2d 149 (1976); Bickford v. Nolen, 142 Ga. App. 256, 235 S.E.2d 743 (1977); Collins v. State, 239 Ga. 400, 236 S.E.2d 759 (1977); City of Atlanta v. Associated Bldrs. & Contractors, 143 Ga. App. 115, 237 S.E.2d 601 (1977); Thompson v. Hill, 143 Ga. App. 272, 283 S.E.2d 271 (1977); MPI Corp. v. Northside Realty Assocs., 151 Ga. App. 516, 260 S.E.2d 499 (1979); Grant v. State, 159 Ga. App. 2, 282 S.E.2d 668 (1981); Ferrell v. State, 160 Ga. App. 881, 289 S.E.2d 3 (1982); Byrd v. State, 171 Ga. App. 344, 319 S.E.2d 460 (1984); Sanders v. Georgia Farm Bureau Mut. Ins. Co., 182 Ga. App. 279, 355 S.E.2d 705 (1987); Cohran v. Haldi, 189 Ga. App. 529, 376 S.E.2d 416 (1988); DOT v. Franco's Pizza & Delicatessen, Inc., 194 Ga. App. 437, 390 S.E.2d 655 (1990); Allen v. Bergman, 201 Ga. App. 781, 412 S.E.2d 549 (1991); State v. Brown, 201 Ga. App. 771, 412 S.E.2d 583 (1991); Floyd v. First Union Nat'l Bank, 203 Ga. App. 788, 417 S.E.2d 725 (1992); DOT v. Metts, 208 Ga. App. 401, 430 S.E.2d 622 (1993); Cook v. Board of Registrars, 291 Ga. 67, 727 S.E.2d 478 (2012); Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657, 755 S.E.2d 683 (2014).

Correction of Errors of Fact

Court of Appeals is a court for correction of errors of law only and has no jurisdiction to hear evidence outside the

record, or to decide disputed issues of fact. Jones v. Smith, 83 Ga. App. 798, 65 S.E.2d 188 (1951); Allen v. Jentzen, 141 Ga. App. 548, 234 S.E.2d 136 (1977); Graham v. State, 152 Ga. App. 233, 262 S.E.2d 465 (1979); Johnson v. Lastinger, 152 Ga. App. 328, 262 S.E.2d 601 (1979).

The role of the Court of Appeals as an intermediate appellate court is limited to correcting lower court errors of law. Sturdy v. State, 192 Ga. App. 71, 383 S.E.2d 632 (1989).

Appellate court lacks jurisdiction to decide issues of fact. — Because the trial court, in a DUI case, determined that the arresting officer's testimony was not credible and suppressed the breath test results, the appellate court had to accept that determination because it lacked jurisdiction to decide disputed issues of fact pursuant to Ga. Const. 1983, Art. VI, Sec. V, Para. III. State v. Ellison, 271 Ga. App. 898, 611 S.E.2d 129 (2005).

Questions certified must be questions of law and not mixed questions of law and fact. Lynch v. Southern Express Co., 146 Ga. 68, 90 S.E. 527 (1916); Brown v. State, 149 Ga. 816, 102 S.E. 449 (1920); Louisville & N.R.R. v. Hood, 149 Ga. 829, 102 S.E. 521 (1920).

Error in granting new trial not law question. Randall v. Bell, 12 Ga. App. 614, 77 S.E. 1132 (1912); English v. Rosenkrantz, 150 Ga. 817, 105 S.E. 613 (1920).

Appellate court's review as to evidence is limited to its legal sufficiency, not its weight. Ballew v. State, 138 Ga. App. 530, 227 S.E.2d 65 (1976), rev'd on other grounds, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

Verdict supported by some evidence. — In the absence of legal error, the Court of Appeals has no jurisdiction to interfere with a verdict supported by some evidence, although the verdict was against the preponderance of the evidence. Black v. Duncan, 79 Ga. App. 342, 53 S.E.2d 726 (1949).

Where there is only an appeal from jury verdict and no description of appealable judgment or order there is nothing to review, and the Court of Appeals has no jurisdiction since it is a court for the corrections of errors of law

Correction of Errors of Fact (Cont'd)

alone. *Interstate Fire Ins. Co. v. Chattam*, 222 Ga. 436, 150 S.E.2d 618, answer conformed to, 114 Ga. App. 332, 151 S.E.2d 486 (1966).

When jury verdict may be set aside.

— In a court for the correction of errors, the verdict of a jury should not be set aside upon the assignment of error that it is without evidence to support it, unless it be further made to appear: (a) that some ruling of the court improperly withheld evidence from the jury; (b) or illegally permitted the jury to consider testimony which should not have been submitted to them; (c) or that the court's instructions, as applied to the evidence, were erroneous, inapplicable, or misleading. *Upchurch v. Upchurch*, 76 Ga. App. 215, 45 S.E.2d 855 (1947).

Jurisdiction over cross-appeal.

— Although under O.C.G.A. § 5-6-48(e), a cross-appeal may survive the dismissal of the main appeal, that is true only if the cross-appeal can stand on its own merit, and the Court of Appeals of Georgia has no jurisdiction to entertain a cross-appeal which must derive its life from the main appeal. An appellant's voluntary withdrawal of its direct appeal requires the dismissal of a cross-appeal that has no independent basis for jurisdiction and, to the extent it holds otherwise, *MARTA v. Harrington, George & Dunn, P.C.*, 208 Ga. App. 736 (1993) is overruled. *State, DOT v. Douglas Asphalt Co.*, 297 Ga. App. 511, 677 S.E.2d 728 (2009).

Constitutional Questions**1. In General**

Supreme Court has jurisdiction where constitutionality of law called in question. — Supreme Court, and not the Court of Appeals, has jurisdiction of writ of error excepting to judgment dismissing motion for new trial in a case involving the constitutionality of a state law. *Carmichael v. City of Jackson*, 193 Ga. 553, 19 S.E.2d 268, answer conformed to, 67 Ga. App. 278, 19 S.E.2d 922 (1942).

Supreme Court and not Court of Appeals has jurisdiction of action involving construction of United States

Constitution. *Price v. State*, 118 Ga. App. 207, 163 S.E.2d 243 (1968), rev'd on other grounds, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970).

Court of Appeals has jurisdiction over mere application of Constitution.

— The Court of Appeals can decide questions of law involving the application of a clear constitutional provision to a given set of facts. *Howell v. State*, 153 Ga. 201, 111 S.E. 675 (1922); *Wright v. Southern Ry.*, 28 Ga. App. 545, 112 S.E. 171 (1922); *Daniel v. City of Claxton*, 35 Ga. App. 107, 132 S.E. 411 (1926).

Under this paragraph, the Court of Appeals has jurisdiction to decide questions of law that involve application, in a general sense, of unquestioned and unambiguous provisions of the Constitution to a given state of facts, and that do not involve construction of some constitutional provision directly in question and doubtful either under its own terms or under the decisions of the Supreme Court of the state or of the United States, and that do not involve the constitutionality of any law of the state or of the United States or any treaty. *Meadows v. State*, 170 Ga. 802, 154 S.E. 188 (1930); *Norman v. State*, 171 Ga. 527, 156 S.E. 203 (1930); *Thompson v. State*, 174 Ga. 804, 164 S.E. 202 (1932); *Felker v. Still*, 176 Ga. 735, 169 S.E. 15 (1933); *Gormley v. Searcy*, 179 Ga. 389, 175 S.E. 913 (1934); *Payne v. State*, 180 Ga. 609, 180 S.E. 130 (1935); *Campbell v. Atlanta Coach Co.*, 186 Ga. 77, 196 S.E. 769 (1938); *Head v. Edgar Bros. Co.*, 187 Ga. 409, 200 S.E. 792 (1939); *Turner v. Board of Tax Assessors*, 197 Ga. 241, 28 S.E.2d 902 (1944); *Reliable Transf. Co. v. May*, 70 Ga. App. 613, 29 S.E.2d 187 (1944); *Ayers v. Franklin County*, 199 Ga. 835, 35 S.E.2d 455 (1945); *Macon Busses, Inc. v. Dashiell*, 73 Ga. App. 108, 35 S.E.2d 666 (1945); *Dade County v. State*, 201 Ga. 241, 39 S.E.2d 473 (1946); *Franklin v. Mobley*, 202 Ga. 212, 42 S.E.2d 755 (1947); *Loomis v. State*, 203 Ga. 394, 47 S.E.2d 58 (1948); *Boyett v. State*, 205 Ga. 370, 53 S.E.2d 919 (1949); *Carter v. Bishop*, 209 Ga. 146, 71 S.E.2d 216 (1952); *Hilliard v. State*, 209 Ga. 497, 74 S.E.2d 65 (1953); *Abbott v. State*, 211 Ga. 200, 84 S.E.2d 667 (1954); *Harrold v. State*, 217 Ga. 612, 124 S.E.2d 73 (1962); *City of Atlanta v. Don-*

ald, 220 Ga. 98, 137 S.E.2d 294 (1964); Woods v. State, 223 Ga. 754, 158 S.E.2d 395 (1967), transferred to 117 Ga. App. 546, 160 S.E.2d 922 (1968); Pollard v. State, 229 Ga. 698, 194 S.E.2d 107 (1972); Scott v. State, 157 Ga. App. 608, 278 S.E.2d 49 (1981) (see Ga. Const. 1983, Art. VI, Sec. V, Para. III).

The Court of Appeals has jurisdiction to decide constitutional questions that do not involve the construction of the Constitution of the United States or of this state, or the constitutionality of a law of the United States or of any law of this state. City of Columbus v. Atlanta Cigar Co., 220 Ga. 533, 140 S.E.2d 267 (1965).

Where exception taken to judgment as violative of Constitution, the Court of Appeals has jurisdiction. — Where, in a writ of error to dismissal of a petition for certiorari seeking review of a judgment holding one in contempt of court, exception is taken to such judgment as violative of certain named provisions of the Constitutions of the State of Georgia and of the United States, and such assignment of error does not contemplate construction of the Constitution where the meaning of some provision thereof is directly in question, or is doubtful by force of its own terms, or under the decisions of the Supreme Court of the United States or of the Supreme Court of Georgia, the Court of Appeals, and not the Supreme Court, has jurisdiction of the writ of error. White v. State, 196 Ga. 847, 27 S.E.2d 695 (1943).

Supreme Court is without jurisdiction of an action to recover damages for taking and injuring private property for public use, and the mere fact that Ga. Const. 1976, Art. I, Sec. III, Para. I (see Ga. Const. 1983, Art. I, Sec. III, Para. I) forbids such injury to or taking of private property without just and adequate compensation being first paid therefor in no wise makes a constitutional question for decision by such court. Mayor of Athens v. Gamma Delta Chapter House Corp., 208 Ga. 392, 67 S.E.2d 111 (1951).

Where constitutional question not necessary to determination of case. — Where a constitutional question is raised in the Court of Appeals, but its solution is not necessary to the determination of the case under consideration, the question

will not be certified to the Supreme Court. Brown v. State, 16 Ga. App. 268, 85 S.E. 262 (1915); Kendricks v. Millen, 16 Ga. App. 273, 85 S.E. 264 (1915).

Where question of constitutionality of an Act is improperly raised, the Court of Appeals has jurisdiction. Neal v. City of Dublin, 20 Ga. App. 263, 92 S.E. 1021 (1917); Lee v. Central of Ga. Ry., 147 Ga. 428, 94 S.E. 558 (1917).

Effect of transfer of action to Court of Appeals on constitutional question. — The Court of Appeals is authorized to conclude that no constitutional question is properly raised in a case where it is first sent to the Supreme Court for decision, and then is transferred by that court to the Court of Appeals. Wadley S. Ry. v. Faglee, 42 Ga. App. 80, 155 S.E. 65 (1930), rev'd on other grounds, 173 Ga. 814, 161 S.E. 847 (1931).

Where case being appealed was filed in the Supreme Court but was subsequently transferred to the Court of Appeals for decision, the Supreme Court is deemed to have determined that the constitutional issue was not properly raised or was otherwise not before that court on appellate review. Harris v. State, 157 Ga. App. 367, 278 S.E.2d 52 (1981).

Power of lower courts to rule on constitutionality of laws. — Any lower or inferior court of original jurisdiction in this state, when a proper attack is made upon an ordinance or statutory provision involved in a matter properly before the court, may rule upon its constitutionality, which becomes the law of the case, unless reversed on appeal; but only the appellate courts of this state can effectively declare an ordinance or a statute of this state unconstitutional and legally obliterate it from the books. Freeman v. City of Valdosta, 119 Ga. App. 345, 167 S.E.2d 170 (1969).

Exceptions to admission of evidence based on violation of Constitution vest jurisdiction in Court of Appeals. — Where there are certain exceptions based upon the contention that the admission of evidence violated the rights of the defendant as guaranteed to the defendant by the state and federal Constitutions but these assignments of error do not raise such questions as to the

Constitutional Questions (Cont'd)

1. In General (Cont'd)

construction of any part of the state or federal Constitutions as to give the Supreme Court jurisdiction, the questions involve merely the application of well-known constitutional principles and come under the jurisdiction of the Court of Appeals. *Turner v. State*, 176 Ga. 823, 169 S.E. 21 (1933).

Duty of court in obscenity case. — On appeal in an obscenity case, the appellate court cannot merely decide whether there is sufficient evidence to support a finding by the jury that the material is obscene, but must review independently the constitutional fact of obscenity and make a determination of such *vel non*. *Ballew v. State*, 138 Ga. App. 530, 227 S.E.2d 65 (1976), *rev'd on other grounds*, 435 U.S. 223, 98 S. Ct. 1029, 55 L. Ed. 2d 234 (1978).

2. Constitutionality of Municipal Ordinances

Court of Appeals has jurisdiction to determine constitutionality of municipal ordinance. *Maner v. Dykes*, 183 Ga. 118, 187 S.E. 699 (1936); *Cox v. DeJarnette*, 104 Ga. App. 664, 123 S.E.2d 16 (1961); *Rogers v. Mayor of Atlanta*, 219 Ga. 799, 136 S.E.2d 342 (1964).

Court of Appeals, and not Supreme Court, has jurisdiction of case wherein the only exception complains of judgment of the superior court overruling a certiorari sued out to set aside a conviction in the recorder's court, the specific assignment of error being that the city ordinance upon which the conviction rested was unconstitutional. *Jewel Tea Co. v. City Council*, 186 Ga. 145, 197 S.E. 235 (1938).

Municipal ordinance not law of state under this paragraph. — A municipal corporation is a public corporation, being a subordinate agent of the state, exercising governmental functions in a certain community; and while an ordinance enacted by such governmental agency may in that sense be a law of the state, it is not a law of the state as is contemplated in this paragraph. *Maner v. Dykes*, 183 Ga. 118, 187 S.E. 699 (1936)

(see Ga. Const. 1983, Art. VI, Sec. V, Para. III).

Disputes Concerning Land

Court of Appeals has jurisdiction in proceeding to partition land. *Anderson v. Anderson*, 27 Ga. App. 513, 108 S.E. 907, *cert. denied*, 27 Ga. App. 835 (1921).

In objection to setting aside homestead, the Court of Appeals has jurisdiction. — The title to the property in which a homestead is sought to be set aside is not directly involved, and therefore the question raised by the application and objections urged by a creditor of the applicant is not one respecting title to land, so as to confer jurisdiction on the Supreme Court. *Adams v. Bishop*, 174 Ga. 262, 162 S.E. 531 (1932).

In dispute over proper payment of condemnation award, the Court of Appeals has jurisdiction. — On appeal of an award by assessors in a condemnation proceeding in which the condemnor was dissatisfied the question of whether or not the condemnor properly tendered the amount of the award before entering the appeal did not make a question for decision within the jurisdiction of the Supreme Court, nor did the allegation of estoppel by reason of a judgment decreeing fee-simple title to be in the condemnor make a question involving title to land and within the jurisdiction thereof. *Wilson v. State Hwy. Dep't*, 208 Ga. 510, 67 S.E.2d 578 (1951).

In action to recover damages for breach of warranty of title, the Court of Appeals has jurisdiction. — The overruling of a demurrer, interposed by a defendant to a petition seeking to recover damages for a breach of warranty of title contained in a deed conveying land, does not present a case respecting title to land, so as to vest jurisdiction in the Supreme Court of a bill of exceptions (see now O.C.G.A. §§ 5-6-49, 5-6-50) assigning error on such ruling; accordingly, it must be transferred to the Court of Appeals. *Sanders v. Calloway*, 211 Ga. 580, 87 S.E.2d 397 (1955).

In proceeding to establish copy of lost deed, the Court of Appeals has jurisdiction. — Where a petition in a superior court to establish a copy of a deed

claimed to have been lost alleged only that the debtor resided in the county in which the suit was filed, that the debtor had executed to the plaintiff a certain deed, a true copy of which was attached to the petition, and that the deed had been lost, and in which petition the only prayer was that “the clerk of this court issue a rule nisi calling upon (the defendant) to show cause, if any he has, why the copy deed aforesaid should not be established in lieu of said lost original,” such petition was a mere statutory proceeding to establish a copy of the deed claimed to have been lost, and was not a suit in equity such as to grant appellate jurisdiction in the Supreme Court. *Loftin v. Carroll County Bd. of Educ.*, 195 Ga. 689, 25 S.E.2d 293 (1943).

In dispute over location of boundary line, the Court of Appeals has jurisdiction. — Where the parties by agreement have eliminated all issues in a case to enjoin a continuing trespass and an action in ejectment, except the issue as to the location of the dividing line, the Court of Appeals has jurisdiction of the writ of error. *Whaley v. Ellis*, 209 Ga. 147, 71 S.E.2d 209 (1952).

Neither an application for the processioning of an alleged disputed land line nor the protest thereto make a case “respecting title to land,” and, accordingly, such a case must be transferred to the Court of Appeals. *Jarrard v. Wildes*, 209 Ga. 282, 71 S.E.2d 549 (1952).

A writ of error will not lie to the Supreme Court to correct a judgment of the superior court where, on the trial of the case, it was stipulated and agreed by and between counsel for the parties that neither party required proof of title on the part of the other party, and that the issue in the case was the correct location of the dividing line between the property of the plaintiff and the property of the defendants. *Lively v. Thompson*, 209 Ga. 425, 73 S.E.2d 90 (1952).

Where the controlling issue, as limited by stipulation and as actually litigated in the lower court, is the correct location of a boundary line between adjacent tracts of land, and the verdict and judgment in effect do nothing more than establish the boundary line and award damages to the

successful litigants, an appeal from the judgment comes within the jurisdiction of the Court of Appeals. *Fendley v. Weaver*, 121 Ga. App. 526, 174 S.E.2d 369 (1970).

Where dispossessory warrant brought to evict tenant, the Court of Appeals has jurisdiction. *Arnold v. Water Power & Mining Co.*, 147 Ga. 91, 92 S.E. 889 (1917).

Court of Appeals, and not the Supreme Court, has jurisdiction of a case brought after the overruling of a motion for new trial after verdict upon an issue made by the filing of a counter-affidavit to a dispossessory warrant, which affidavit merely denied the tenancy alleged in the warrant. *Downs v. Weaver*, 184 Ga. 856, 193 S.E. 858 (1937).

Where a dispossessory warrant is sued out to evict a tenant who files a counter-affidavit alleging facts which are only defensive in character, and no equitable or affirmative relief is prayed, the action is a statutory one falling within the jurisdiction of the Court of Appeals. *Brumfield v. Home Owners Loan Corp.*, 196 Ga. 821, 27 S.E.2d 678 (1943).

Where defendants appealed to the Supreme Court from entry by the state court of an order granting a writ of possession in a dispossessory proceeding filed after foreclosure of defendants’ interest under a deed to secure debt, as right of possession, not title to land, was the issue before the state court, jurisdiction of the appeal was in the Court of Appeals. *Jordan v. Atlanta Neighborhood Hous. Servs., Inc.*, 251 Ga. 37, 302 S.E.2d 568 (1983).

Equity

1. In General

Transfer to Court of Appeals means no equity jurisdiction in case. — The transfer of a case from the Supreme Court to the Court of Appeals is an adjudication that the prayers for injunction in the intervention are mere surplusage and that there is no equity jurisdiction in the case. *Carter v. State*, 93 Ga. App. 12, 90 S.E.2d 672 (1955).

For purpose of testing equity jurisdiction a case is appraised in character it bore at time issues resulting in judgment complained of were submitted. *McCowen*

Equity (Cont'd)**1. In General (Cont'd)**

v. Aldred, 208 Ga. 483, 67 S.E.2d 478 (1951).

Petition containing allegations only appropriate to prayer for damages does not assume character of equitable action by virtue of prayer for injunctive relief. *Hollinshed v. Shadrick*, 212 Ga. 624, 94 S.E.2d 705 (1956).

Attempts to escape effect of constitution rejected. — Litigants should not be permitted to evade this paragraph and Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III) by the simple device of adding a spurious prayer for relief of an equitable nature. *Alderman v. Crenshaw*, 208 Ga. 71, 65 S.E.2d 178 (1951), overruled on other grounds, *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975) (see Ga. Const. 1983, Art. VI, Sec. V, Para. III).

Mere designation of action as equity not determinative. — Whether an action is one at law or in equity is determined by the allegations of the petition and the nature of the relief prayed, and not by designation given to the action by the pleader. *City of Summerville v. Georgia Power Co.*, 204 Ga. 276, 49 S.E.2d 661 (1948).

When plaintiff amends plaintiff's petition by eliminating prayer for equitable relief and seeks only legal relief then the Court of Appeals and not the Supreme Court has jurisdiction. *Boze v. Atlanta Veterans Transp., Inc.*, 218 Ga. 274, 127 S.E.2d 466 (1962).

Cases involving equity or constitutional questions. — Where a case involves equity or constitutional questions or other features that come within the jurisdiction of the Supreme Court, but all such features are abandoned or otherwise eliminated in the trial court before the judgment of that court, the Court of Appeals has exclusive jurisdiction. *Leggitt v. Allen*, 208 Ga. 298, 66 S.E.2d 709 (1951), disapproved sub nom. *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975).

Where the equity features which a case originally contained have been abandoned or eliminated before the judgment dismissing the petition was rendered, the

Court of Appeals and not the Supreme Court has jurisdiction. *Rumph v. Rister*, 211 Ga. 312, 85 S.E.2d 768 (1955).

Where by amendment all prayers for equitable relief have been stricken from petition, and court asked to vacate its temporary restraining order and to otherwise treat the case as an action at law for a money judgment against the defendants, the case is no longer one involving equity, and the Court of Appeals and not the Supreme Court has jurisdiction. *Citizens Bank v. Thompson*, 214 Ga. 674, 107 S.E.2d 175 (1959).

Dismissal of equitable action removes equity jurisdiction from counterclaim. — Where a defendant, in answer to an equitable petition for injunctive relief, sets up a money demand, and asks a judgment therefor against the petitioner, and after the grant of a temporary restraining order, the petitioner voluntarily dismisses the petitioner's action, such a dismissal removes all equitable questions involved in the case. *Rogers v. Miller Peanut Co.*, 199 Ga. 835, 35 S.E.2d 469 (1945).

Election of plaintiff to proceed in tort under former Code 1933, § 105-1207 (see now O.C.G.A. § 51-12-30) removed all equity from the case and left only an action at law for money damages of which the Court of Appeals and not the Supreme Court had jurisdiction. *Kenimer v. Ward Wight Realty Co.*, 219 Ga. 275, 133 S.E.2d 18 (1963).

2. Specific Cases

Addition of prayer that contract be set aside insufficient to give Supreme Court jurisdiction. — In petition seeking money damages because of alleged fraudulent misrepresentations inducing the plaintiff to sign a contract of sale for the purchase of an automobile, the addition of a prayer that the contract of sale "be set aside on the grounds of fraud" was not such a prayer for equitable relief as to give the Supreme Court rather than the Court of Appeals jurisdiction of the appeal. *Douglas v. Currie Ford Co.*, 103 Ga. App. 75, 118 S.E.2d 586 (1961).

Court of Appeals has jurisdiction where equitable challenges raised to

senior judgment. — Where a case involves the distribution of money arising from the sale of property under a senior judgment and execution, and the holder of a junior judgment and execution claims the fund upon the ground that the judgment in the older case is void, because at the time of its rendition the defendant therein was insane and confined in the state sanitarium, it is not an equity case. *Burkhalter v. Virginia-Carolina Chem. Co.*, 170 Ga. 237, 152 S.E. 98 (1930).

In action to recover shares in insolvent institution, Court of Appeals has jurisdiction. — Where the case under consideration is an action to recover the statutory liability of an alleged stockholder of an insolvent institution, in the hands of the Superintendent of Banks for liquidation, and to have the property seized under the writ of attachment in pursuance of law, and subjected to payment of the alleged liability, it is not a suit in equity but at law and is, therefore, under the jurisdiction of the Court of Appeals. *Pignatel v. Mobley*, 173 Ga. 410, 160 S.E. 411 (1931).

Where verdict of equity count not appealed, Court of Appeals has jurisdiction. — Where petition was in two counts, in which the prayer was for a money judgment in the first count and for reformation of a contract and for the stated amount in count two, and the jury returned a verdict for the plaintiff for the sum sued for and the prayer for reformation was not granted, the Court of Appeals and not the Supreme Court has jurisdiction of the writ of error (see now O.C.G.A. §§ 5-6-49, 5-6-50) the exception being to the failure to grant a motion for new trial in which the jury returned a verdict for a money judgment. *Ford v. Harden*, 212 Ga. 624, 94 S.E.2d 720 (1956).

In action under Declaratory Judgment Act, Court of Appeals has jurisdiction. — An action brought under the Declaratory Judgment Act, Ga. L. 1945, p. 137 (see now O.C.G.A. Ch. 4, T. 9), is not per se an equitable proceeding. *City of Summerville v. Georgia Power Co.*, 204 Ga. 276, 49 S.E.2d 661 (1948).

An action brought under the Declaratory Judgment Act (see now O.C.G.A. Ch. 4, T. 9), not being an equitable proceeding

per se, must involve some phase of those cases listed in Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III) in order to come within the jurisdiction of the Supreme Court on exceptions to the rulings of the lower court. *Bankers Life & Cas. Co. v. Cravey*, 210 Ga. 239, 78 S.E.2d 507 (1953).

A case falls within the jurisdiction of the Court of Appeals where it involves a declaratory judgment and temporary restraining order to maintain the status quo between the parties until an accounting may be had. *Stone v. First Nat'l Bank*, 223 Ga. 804, 158 S.E.2d 382 (1967).

Since an action to enforce an equitable foreclosure is in equity, the Court of Appeals is without jurisdiction to hear a case arising under O.C.G.A. § 44-14-49. *Arnold v. Hickey*, 169 Ga. App. 750, 315 S.E.2d 273 (1984).

Criminal Cases and Contempt of Court

Jurisdiction of appeals in all cases of conviction of a capital felony lies in the Supreme Court and jurisdiction as to other crimes is in the Court of Appeals. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

Supreme Court has no jurisdiction in cases involving misdemeanor offenses unmixed with equitable or constitutional questions. *Hilliard v. State*, 209 Ga. 497, 74 S.E.2d 65 (1953).

Jurisdiction of change of venue motion in Court of Appeals. — The Court of Appeals, and not the Supreme Court, has appellate jurisdiction of a murder case involving change of venue. *Wilburn v. State*, 140 Ga. 138, 78 S.E. 819 (1913); *Scoggins v. State*, 24 Ga. App. 677, 102 S.E. 39 (1920); *Ruffin v. State*, 151 Ga. 743, 108 S.E. 29 (1921).

The jurisdiction of all venue cases of this class (motion to change venue after an indictment for a capital felony) is vested in the Court of Appeals, and not the Supreme Court, provided no constitutional question is raised in the lower court. *Humphrey v. State*, 175 Ga. 666, 165 S.E. 587 (1932).

Court of Appeals without jurisdiction to review order of State Board of Pardons and Paroles denying the peti-

Criminal Cases and Contempt of Court (Cont'd)

tion of a defendant for reduction of the sentence imposed by the trial court. *Aikens v. State*, 111 Ga. App. 268, 141 S.E.2d 188 (1965).

Court of Appeals has jurisdiction in dispute over admissibility of illegally obtained evidence. *Howell v. State*, 153 Ga. 201, 111 S.E. 675 (1922).

Where, in a criminal trial, a part of the evidence was objected to upon the ground that it was obtained by an unlawful search of the defendant's house, the error complained of is not of such a character as to give the Supreme Court jurisdiction. *Thompson v. State*, 174 Ga. 804, 164 S.E. 202 (1932).

In appeal from contempt judgment, the Court of Appeals has jurisdiction. — The Court of Appeals has jurisdiction of an appeal from a judgment finding the appellant guilty of contempt in failing to obey a notice to produce certain papers into court, where the contempt feature arises out of the question of law as to the right to require such records produced. *Cranford v. Cranford*, 225 Ga. 60, 165 S.E.2d 847 (1969).

A life without parole sentence imposed on a juvenile who is not properly determined to be in the very small class of juveniles for whom such a sentence may be deemed constitutionally proportionate is not just erroneous but contrary to law and, as a result, void; it follows that state collateral review courts that are open to federal law claims must apply the holding of *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012), retroactively if a petitioner challenges such a sentence under the Eighth Amendment, and it follows, as a matter of Georgia procedural law, that a defendant's *Miller* claim, a substantive claim that, if meritorious, would render a sentence void, can be properly raised in an amended motion for new trial and in a direct appeal, despite the failure to raise the claim before the defendant was sentenced. *Veal v. State*, 298 Ga. 691 (2016).

Other Cases

Where Court of Appeals sitting as a body is equally divided as to judg-

ment that should be rendered, Supreme Court has jurisdiction. *Pacific Nat'l Fire Ins. Co. v. Cummins Diesel of Ga., Inc.*, 213 Ga. 4, 96 S.E.2d 881 (1957).

Court of Appeals is without jurisdiction to grant mandamus against judge of municipal court requiring the judge to show cause for the judge's failure to entertain a petition on the part of the movant seeking to have a judicial sale set aside for excessive levy and other grounds stated therein. The superior court of the county has original jurisdiction in mandamus and injunction cases, and movant's remedy, if any, would be by a proper proceeding in that court. *McPhail v. Bagley*, 96 Ga. App. 179, 99 S.E.2d 500 (1957).

In custody controversy in nature of habeas corpus, the Court of Appeals is without jurisdiction. *Moss v. Moss*, 233 Ga. 688, 212 S.E.2d 853 (1975).

Issues concerning the interpretation of a contract are properly brought on appeal before the Court of Appeals. *Cowen v. Snellgrove*, 169 Ga. App. 271, 312 S.E.2d 623 (1983).

Grant of motion for summary judgment in the Civil Court of Bibb County can be appealed directly to the Court of Appeals. *Middle Ga. Bank v. Continental Real Estate & Assocs.*, 168 Ga. App. 611, 309 S.E.2d 893 (1983).

Suit brought by one against former spouse seeking to domesticate out-of-state judgment in a divorce proceeding and to have spouse attached for contempt and ordered to pay arrearages was a suit on a foreign judgment, not a divorce or alimony case, within the meaning of the Georgia Constitution, and jurisdiction of appeal was in the Court of Appeals. *Lewis v. Robinson*, 254 Ga. 378, 329 S.E.2d 498 (1985).

Family violence actions. — Because family violence actions involve neither divorce nor alimony, they do not fall within the Supreme Court's exclusive jurisdiction and, therefore, jurisdiction lies in the Georgia Court of Appeals. *Schmidt v. Schmidt*, 270 Ga. 461, 510 S.E.2d 810 (1999).

Court of Appeals had jurisdiction in action for personal injuries. *Gulf Ref. Co. v. Miller*, 151 Ga. 727, 108 S.E. 28 (1921).

Court of Appeals had jurisdiction over

gift by testator recovered from executor. *Hodgson v. Hodgson*, 28 Ga. App. 250, 110 S.E. 754 (1922).

Court of Appeals had jurisdiction over claim case for ungathered crops. *Griffin v. Leggett*, 153 Ga. 663, 112 S.E. 899 (1922).

Court of Appeals had jurisdiction over petition in nature of rule is filed against clerk of superior court. *Wallace v. State*, 155 Ga. 414, 117 S.E. 243 (1923).

Court of Appeals had jurisdiction after garnishee's answer was denied. *Ford v. Southern Ry.*, 159 Ga. 111, 124 S.E. 887 (1924).

Court of Appeals had jurisdiction to review determination by judge of superior court as to whether particular case is within jurisdiction of justice court. *Smith v. Atlanta Mut. Ins. Co.*, 42 Ga. App. 254, 155 S.E. 535 (1930).

Court of Appeals had jurisdiction in adoption proceeding in adoption proceeding. *Criswell v. Jones*, 187 Ga. 55, 199 S.E. 804 (1938).

Court of Appeals had jurisdiction in action on contract providing support for wife in settlement of alimony. *Hayes v. Hayes*, 191 Ga. 237, 11 S.E.2d 764 (1940).

Court of Appeals had jurisdiction in proceeding to confirm and validate revenue anticipation certificates. *Dade County v. State*, 201 Ga. 241, 39 S.E.2d 473 (1946).

Court of Appeals had jurisdiction in custody controversy involving delinquent, unruly, or deprived child. *Moss v. Moss*, 233 Ga. 688, 212 S.E.2d 853 (1975).

Appeal of an order denying a motion for a default judgment was reviewable because the order denying the motion for default judgment made findings of fact which barred the relief requested by the movant. The order left no issues remaining to be resolved, and constituted the trial court's final ruling on the merits of the action; the trial court left the parties with no further recourse in that court, in such circumstances, the order was a final judgment and the appeal was within the jurisdiction of the Court of Appeals of Georgia. *Standridge v. Spillers*, 263 Ga. App. 401, 587 S.E.2d 862 (2003).

Cases involving revenues of the state. — The enactment of the 1983 Constitution superseded the Supreme Court's

order in *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977), which gave the Supreme Court jurisdiction over cases involving revenues of the state. Thus, all pending cases which involve revenues of the state and which have been docketed in the Supreme Court will be transferred to the Court of Appeals. *Collins v. AT & T Co.*, 265 Ga. 37, 456 S.E.2d 50 (1995).

Action for accounting against estate of deceased agent. — Action brought against administration of intestate on grounds that said intestate had been verbally appointed agent of plaintiff's intestate and had made no accounting or settlement was an action at law and not an equity case. *Goodwyn v. Roop*, 181 Ga. 327, 182 S.E. 4 (1935).

In action against surety on guardian's bond. — This paragraph and Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see Ga. Const. 1983, Art. VI, Sec. V, Para. III) confer exclusive jurisdiction upon the Court of Appeals to review a judgment dismissing, on defendant's oral motion, a petition seeking recovery against a surety on a guardian's bond. *Gunby v. Roberts*, 205 Ga. 346, 53 S.E.2d 370 (1949) (see Ga. Const. 1983, Art. VI, Sec. V, Para. III).

In exception to judgment discharging a rule nisi issued by superior court on address of two-thirds of the grand jury on charges of inefficiency of certain members of county board of education. *State v. Walker*, 209 Ga. 523, 74 S.E.2d 461 (1953).

Appellate jurisdiction to review grant of summary judgment. — Court of appeals had appellate jurisdiction to review the grant of summary judgment in favor of a bank on the bank's conversion claim against a real estate firm because the grant of summary judgment was directly appealable under O.C.G.A. § 9-11-56(h), and the firm's cross-appeal of that grant of summary judgment could stand on its own merits; because the court of appeals had jurisdiction to review the grant of summary judgment in favor of the bank on the bank's conversion claim, the court also had jurisdiction pursuant to O.C.G.A. § 5-6-34(d) to review the denial of the firm's motion for summary judgment on that same issue. *Trey Inman & Assocs., P.C. v. Bank of Am., N.A.*, 306 Ga.

Other Cases (Cont'd)

App. 451, 702 S.E.2d 711 (2010).

Pleading and Practice

Appeal from non-final judgment was dismissed. — Georgia Court of Appeals did not have jurisdiction over an appeal from a decision of a superior court remanding a case involving a challenge to a permit to build a community dock issued under the Coastal Marshlands Protection Act, O.C.G.A. § 12-5-286(a), to an administrative law judge for further consideration. The order was not final as required under O.C.G.A. § 50-13-20. *Coastal Marshlands Prot. Comm. v. Altamaha Riverkeeper, Inc.*, 304 Ga. App. 1, 695 S.E.2d 273, cert. denied, No. S10C1494, 2010 Ga. LEXIS 745 (Ga. 2010).

1. In General

Court of Appeals will take notice of its own lack of jurisdiction and, where such lack appears, will dismiss the writ of error even without a motion to that effect by the defendant in error. *Personal Credit Corp. v. Goldwire*, 88 Ga. App. 125, 76 S.E.2d 129 (1953).

Court of Appeals is not bound by statement of Supreme Court as to what rules court should adopt or how such rules should be enforced, provided such rules comply with the Constitution. *Justice v. Dunbar*, 152 Ga. App. 831, 264 S.E.2d 301 (1979).

Rule as to payment of costs. — The same rule (see Ga. Const. 1976, Art. I, Sec. I, Para. XXI (see Ga. Const. 1983, Art. I, Sec. I, Para. XXIV)) applies in the Court of Appeals as to payment of costs as obtains in the Supreme Court. *Swearngen v. State*, 146 Ga. 3, 90 S.E. 283 (1916).

Case returned without instruction where Supreme Court equally divided. — Where the Supreme Court is evenly divided in opinion upon the question certified by the Court of Appeals, the case must be returned without instruction in answer to the question. *Thornton v. Germania Fire Ins. Co.*, 151 Ga. 312, 106 S.E. 264 (1921).

Ex parte proceedings may be decided by Court of Appeals. *Whitehurst*

v. Singletary, 77 Ga. App. 811, 50 S.E.2d 80 (1948).

Trial courts cannot pass orders in such manner as to preclude appellate courts from exercising their jurisdiction when called upon to do so by a proper bill of exceptions and at the same time treat the order as valid and enforceable at the trial level, for such an order would violate this paragraph and Ga. Const., Art. VI, Sec. II, Para. IV (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III). *Garland v. State*, 99 Ga. App. 826, 110 S.E.2d 143 (1959), later appeal, 101 Ga. App. 395, 114 S.E.2d 176 (1960) (see Ga. Const. 1983, Art. VI, Sec. V, Para. III).

Effect of entry of new trial motion raising constitutional question after judgment of trial court upon jurisdiction of appellate court. *Western & Atl. R.R. v. Michael*, 172 Ga. 561, 158 S.E. 426 (1931), appeal dismissed, 291 U.S. 649, 54 S. Ct. 530, 78 L. Ed. 1044 (1934).

Court of Appeals may decide only such questions as are made by specific assignment of error certified to by the judge of the court appealed from. *Republic of Cuba v. Arcade Bldg. of Savannah, Inc.*, 104 Ga. App. 848, 123 S.E.2d 453 (1961).

Proper and timely filing of notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court. *Grant v. State*, 157 Ga. App. 390, 278 S.E.2d 53 (1981).

Failure to file brief and enumerations of error. — Georgia Department of Transportation's (DOT's) cross-appeal was dismissed with regard to a trial court's grant of an asphalt company's motions in limine and the denial of the DOT's partial motion for summary judgment since the asphalt company's direct appeal was dismissed for failure to file a brief and enumerations of error, therefore, the cross-appeal could not survive on its own under O.C.G.A. § 5-6-48. The DOT never applied for interlocutory review of the rulings of the trial court it was challenging, therefore, the appellate court had no independent basis for jurisdiction over the cross-appeal. *State, DOT v. Douglas Asphalt Co.*, 297 Ga. App. 511, 677 S.E.2d 728 (2009).

In a suit pursuant to O.C.G.A.

§ 36-91-90 et seq. seeking to recover against a payment bond for amounts due for labor and materials provided on a construction project on private property, the court dismissed the subcontractors' appeal because the subcontractors failed to set forth an enumeration of errors as required by O.C.G.A. § 5-6-40. *Complete Wiring Solutions, LLC v. Astra Group, Inc.*, 335 Ga. App. 723, 781 S.E.2d 597 (2016).

2. Need for Record

Grounds for error not enumerated cannot be considered by Court of Appeals. If no exception is taken at the trial, no point made, and the opinion of the court not invoked and not given, there has been no decision, sentence judgment, or decree of a superior court rendered upon the point; and, therefore, the Court of

Appeals has no right to review the proceeding. *May v. Lee*, 57 Ga. App. 893, 197 S.E. 50 (1938).

Court of Appeals has no original jurisdiction and no right to make a ruling on questions in the lower court which have not yet been ruled on there. *Harmon v. Southern Ry.*, 123 Ga. App. 309, 180 S.E.2d 604 (1971); *Craig v. State*, 130 Ga. App. 689, 204 S.E.2d 307 (1974).

Court of Appeals cannot consider and reverse on error enumerated unless it is supported in record and shown to have been ruled on by trial judge. *Craig v. State*, 130 Ga. App. 689, 204 S.E.2d 307 (1974).

Appellate courts have no original jurisdiction and will decide no question on appeal not clearly presented to and passed upon by the trial court. *Security Mgt. Co. v. King*, 132 Ga. App. 618, 208 S.E.2d 576 (1974).

RESEARCH REFERENCES

C.J.S. — 21 C.J.S., Courts, § 209 et seq.

ALR. — Power of court to prescribe

rules of pleadings, practice, or procedure, 110 ALR 22; 158 ALR 705.

Paragraph IV. Certification of question to Supreme Court.

The Court of Appeals may certify a question to the Supreme Court for instruction, to which it shall then be bound.

1976 Constitution. — Art. VI, Sec. II, Paras. IV and VIII.

JUDICIAL DECISIONS

Certification of question authorized. — The Court of Appeals was authorized to certify a question to the Supreme Court as to the constitutionality of retroactive application of the cap on damages recoverable against the state provided in O.C.G.A. § 50-21-26. *Department of Human Resources v. Phillips*, 223 Ga. App. 520, 478 S.E.2d 598 (1996).

When Supreme Court can decline to answer. — When the answer to a certified question would constitute the decision in the main case, the Supreme Court will decline to answer the question. *Lawrence v. State*, 268 Ga. 420, 489 S.E.2d 850 (1997).

Paragraph V. Equal division of court.

In the event of an equal division of the Judges when sitting as a body, the case shall be immediately transmitted to the Supreme Court.

1976 Constitution. — Art. VI, Sec. II, Paras. IV and VIII.

JUDICIAL DECISIONS

Supreme Court has jurisdiction when Court of Appeals, sitting as a body, is equally divided on the judgment that should be rendered. Pacific Nat’l Fire Ins. Co. v. Cummins Diesel of Ga., Inc., 213 Ga. 4, 96 S.E.2d 881 (1957).

When judges are divided on only one question in case. — This paragraph contemplates the transfer by the Court of Appeals to the Supreme Court of cases where the judges of the Court of Appeals are equally divided on all questions in the case which would require an affirmance or reversal of the judgment of the trial court, and does not provide for a transfer by that court to the Supreme Court of any case where there is an equal division between the judges of the Court of Appeals on an isolated question in the case. Atlantic Coast Line R.R. v. Godard, 211 Ga. 41, 83 S.E.2d 591 (1954) (see Ga. Const. 1983, Art. VI, Sec. V, Para. V).

When the judges of the Court of Appeals are not equally divided in the case at bar on all questions presented by the writ of error which would either require an affirmance or a reversal of the judgments

excepted to, but only as to one of the questions in the case, the Supreme Court is without jurisdiction of the case. Atlantic Coast Line R.R. v. Clinard, 211 Ga. 340, 86 S.E.2d 1 (1955).

If six judges would affirm and six would not. — In a review of a denial of a motion to suppress, six judges of the Georgia Court of Appeals would have affirmed, and six would not have affirmed; because there was an equal division, the Court of Appeals should have immediately transferred the case to the Supreme Court of Georgia, pursuant to Ga. Const. 1983, Art. VI, Sec. V, Para. V. The judges’ differences of opinion about whether the judgment of the trial court should be set aside as “reversed” or instead as “vacated” were not dispositive. Rodriguez v. State, 295 Ga. 362, 761 S.E.2d 19 (2014).

Cited in Rustin v. State Farm Mut. Auto. Ins. Co., 254 Ga. 494, 330 S.E.2d 356 (1985); Garland v. State, 263 Ga. 495, 435 S.E.2d 431 (1993); Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821 (2013); Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014).

SECTION VI.

SUPREME COURT

Paragraph

- I. Composition of Supreme Court; Chief Justice; Presiding Justice; quorum; substitute judges.
- II. Exclusive appellate jurisdiction of Supreme Court.
- III. General appellate jurisdiction of Supreme Court.

Paragraph

- IV. Jurisdiction over questions of law from state appellate or federal district or appellate courts.
- V. Review of cases in Court of Appeals.
- VI. Decisions of Supreme Court binding.

Cross references. — Supreme Court generally, Ch. 2, T. 15.

Law reviews. — For essay, “Lightening the Load: In the Georgia Supreme

Court,” see 37 Ga. L. Rev. 697 (2003). For article on cases in which the supreme court reversed the court of appeals on the subject of local government law, see 56

Mercer L. Rev. 1 (2004). For article, “When Wrong Is Right: Stare Decisis in the Supreme Court of Georgia,” see 21 Ga. St. Bar. J. 11 (Dec. 2015).

JUDICIAL DECISIONS

Petition seeking to require superior court judge to enter order. — Although there may occasionally appear to be a need to file an original petition in the Supreme Court to issue process in the nature of mandamus, and perhaps quo warranto or prohibition where a superior court judge is named as the respondent, such as where the petitioner seeks to require the judge to enter an order in a matter allegedly pending more than 30 days in violation of O.C.G.A. § 15-6-21(a),

such a petition may in fact be filed in the appropriate superior court. Being the respondent, the superior court judge will disqualify, another superior court judge will be appointed to hear and determine the matter, and the final decision may be appealed to the Supreme Court for review. *Brown v. Johnson*, 251 Ga. 436, 306 S.E.2d 655 (1983).

Cited in *First Am. Title Ins. Co. v. Broadstreet*, 260 Ga. App. 705, 580 S.E.2d 676 (2003).

Paragraph I. Composition of Supreme Court; Chief Justice; Presiding Justice; quorum; substitute judges.

The Supreme Court shall consist of not more than nine Justices who shall elect from among themselves a Chief Justice as the chief presiding and administrative officer of the court and a Presiding Justice to serve if the Chief Justice is absent or is disqualified. A majority shall be necessary to hear and determine cases. If a Justice is disqualified in any case, a substitute judge may be designated by the remaining Justices to serve.

1976 Constitution. — Art. VI, Sec. II, Paras. I, II, VII.

Cross references. — Discipline and removal of justices, Ga. Const. 1983, Art. VI, Sec. VII, Para. VII. Supreme Court generally, Ch. 2, T. 15. Replacement of justices incapacitated for providential cause, § 15-2-2.

Law reviews. — For article, “The Majority That Wasn’t: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements,” see 58 Emory L.J. 831 (2009). For article, “Researching Georgia Law,” see 34 Ga. St. U.L. Rev. 741 (2015).

JUDICIAL DECISIONS

Editor’s notes. — For cases decided under Ga. Const. 1976, Art. VI, Sec. II, Para. VII and antecedent provisions, relating to power of Supreme Court to promulgate regulations as to hearing and determining cases, see judicial decisions under Ga. Const. 1983, Art. VI, Sec. I, Para. V.

Majority of the court, or four associate justices, have authority to render judgment and such a judgment would not be invalid or void because the places of the disqualified justices were not

filled and the case was not decided by a full bench of seven. *Life Ins. Co. v. Burke*, 217 Ga. 742, 125 S.E.2d 48 (1962).

Manner of election of justices. — The Chief Justice and Associate Justices of the Supreme Court are elected by the people at the same time and in the same manner as the Governor and the state-house officers are elected. *Stephens v. Reid*, 189 Ga. 372, 6 S.E.2d 728 (1939).

Court must decide case where all justices disqualified. — Although the justices of the Supreme Court may be

disqualified on account of pecuniary interest in the subject matter of the litigation, nevertheless they must decide such a case where there is no other tribunal to do so, and none can be legally constituted. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Cited in *Boykin v. Hopkins*, 174 Ga. 511, 162 S.E. 796 (1932); *Ward v. Big Apple Super Mkts. of Bolton Rd., Inc.*, 223 Ga. 756, 158 S.E.2d 396 (1967); *David v. State*, 261 Ga. App. 468, 583 S.E.2d 135 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d, Judges, § 86 et seq.

C.J.S. — 48A C.J.S., Judges, § 342et seq.

Paragraph II. Exclusive appellate jurisdiction of Supreme Court.

The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:

(1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question; and

(2) All cases of election contest.

1976 Constitution. — Art. VI, Sec. II, Para. IV.

Law reviews. — For comment, “Judicial Review of Zoning Ordinances in Georgia: The Court’s Role in Land Use Planning,” see 41 Mercer L. Rev. 1469 (1990).

For article, “Georgia’s Constitutional Scheme for State Appellate Jurisdiction,” see 6 Ga. St. B.J. 24 (2001).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION DIVORCE AND ALIMONY

General Consideration

Exclusive jurisdiction where constitutionality of law or ordinance in question. — Georgia Supreme Court has exclusive appellate jurisdiction of cases in which the constitutionality of a law or ordinance is in question without regard to the court from which the appeal is taken. *Kariuki v. DeKalb County*, 253 Ga. 713, 324 S.E.2d 450 (1985).

The Court of Appeals has no authority to determine the constitutionality of a state statute. *Burson v. State*, 183 Ga.

App. 647, 359 S.E.2d 731, cert. denied, 183 Ga. App. 905, 359 S.E.2d 731 (1987).

The state appellate court has no jurisdiction to determine the constitutionality of a state law, other than where the law has been held to be constitutional against the same attack being made, and only to decide the application of established constitutional law to the facts. *Braden v. Bell*, 222 Ga. App. 144, 473 S.E.2d 523 (1996).

In reversing a trial court’s denial of a motion for summary judgment, the Georgia Court of Appeals exceeded its jurisdiction by construing a constitutional provi-

sion that had not previously been construed by the Georgia Supreme Court and then applying the newly construed provision to the facts of the case. *City of Decatur v. DeKalb County*, 284 Ga. 434, 668 S.E.2d 247 (2008).

A distinct, oral ruling, reflected in a transcript is sufficient and need not be reduced to writing in order to invoke the Supreme Court of Georgia's exclusive appellate jurisdiction in cases in which the constitutionality of a law has been drawn into question. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

Georgia trial court erred by denying injunctive relief to a county and the county's chosen waste disposal company which sought to prohibit an unauthorized waste company from providing services in the county against an ordinance because the ordinance served a legitimate public purpose by establishing means reasonably necessary for providing a comprehensive solid waste management plan as the county was required to do under O.C.G.A. § 12-8-31.1. *Advanced Disposal Servs. Middle Ga., LLC v. Deep S. Sanitation, LLC*, 296 Ga. 103, 765 S.E.2d 364 (Sept. 22, 2014).

Under Ga. Const. 1983, Art. VI, Sec. VI, Para. II (1), the Supreme Court of Georgia had exclusive appellate jurisdiction in a case involving the construction of the Constitution of the State of Georgia or of the United States; therefore, the Supreme Court had jurisdiction in a stalking case in which the defendant contended that publication of commentary about the victim and the victim's copyright enforcement practices was speech protected by the First Amendment, although the court did not reach that question. *Chan v. Ellis*, 296 Ga. 838, 770 S.E.2d 851 (2015).

Constitutional issue required. — The Supreme Court did not have jurisdiction over a discretionary appeal of a superior court order, based on a question as to the constitutionality of a statute, where the trial court had not specifically passed upon the issue of constitutionality. *Marr v. Georgia Dep't of Educ.*, 264 Ga. 841, 452 S.E.2d 112 (1995).

Constitutional challenges considered. — Trial court erred in determining that a defendant's challenges to the con-

stitutionality of O.C.G.A. § 17-10-10 were waived; however, the Supreme Court of Georgia had jurisdiction to consider the constitutional challenges under Ga. Const. 1983, Art. VI, § VI, Para. II, because the trial court also made a distinct ruling in the alternative rejecting the challenges on the merits. *Rooney v. State*, 287 Ga. 1, 690 S.E.2d 804, cert. denied, 131 S. Ct. 117, 178 L. Ed. 2d 72 (2010).

A life without parole sentence imposed on a juvenile who is not properly determined to be in the very small class of juveniles for whom such a sentence may be deemed constitutionally proportionate is not just erroneous but contrary to law and, as a result, void; it follows that state collateral review courts that are open to federal law claims must apply the holding of *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455 (2012), retroactively if a petitioner challenges such a sentence under the Eighth Amendment, and it follows, as a matter of Georgia procedural law, that a defendant's *Miller* claim, a substantive claim that, if meritorious, would render a sentence void, can be properly raised in an amended motion for new trial and in a direct appeal, despite the failure to raise the claim before the defendant was sentenced. *Veal v. State*, 298 Ga. 691 (2016).

Waiver of constitutional challenge. — While a defendant challenged the constitutionality of the non-merger provision of the hijacking a motor vehicle statute, O.C.G.A. § 16-5-44.1(d), the state supreme court, where the initial appeal had been filed under Ga. Const. 1983, Art. VI, Sec. VI, Para. II, had determined that the challenge was untimely and thus had been waived; thus, the defendant could not pursue the challenge at the appellate court level after the case had been transferred. *Rutland v. State*, 296 Ga. App. 471, 675 S.E.2d 506 (2009).

Direct appeal of administrative agency decision. — Ga. Const. 1983, Art. VI, Sec. VI, Para. II does not permit the direct appeal of an administrative agency decision just because the constitutionality of an ordinance is drawn into question. O.C.G.A. § 5-6-35(a)(1) requires the filing of an application for an appeal. *City of Atlanta Bd. of Zoning Adjustment v. Midtown N., Ltd.*, 257 Ga. 496, 360 S.E.2d 569 (1987).

General Consideration (Cont'd)

Questions of constitutionality of administrative regulations are not subject to the exclusive jurisdiction of the Supreme Court. *Georgia Bd. of Dentistry v. Pence*, 223 Ga. App. 603, 478 S.E.2d 437 (1996).

Appellate court had subject matter jurisdiction over two associations' claims that included a challenge to the constitutionality of administrative regulation, as the state supreme court's exclusive appellate jurisdiction extended to all cases in which the constitutionality of a law, ordinance, or constitutional provision was in question, but a regulation was not in any of those categories under the state constitution, and, thus, jurisdiction in the appellate court was proper. *Ga. Oilmen's Ass'n v. Ga. Dep't of Revenue*, 261 Ga. App. 393, 582 S.E.2d 549 (2003).

Exclusive appellate jurisdiction of the Supreme Court of Georgia under Ga. Const. 1983, Art. VI, Sec. VI, Para. II does not extend to questions concerning the constitutionality of an administrative regulation; thus, the Georgia Court of Appeals had jurisdiction to resolve whether Interim Ethics Rule 505-2-.03(1)(o), Ga. Comp. R. & Regs. r. 505-2-.03(1)(o), which permitted suspension or revocation of an educator's certificate, was constitutional. *Prof'l Stds. Comm'n v. Alberson*, 273 Ga. App. 1, 614 S.E.2d 132 (2005).

Direct appeal not available from recorder's court. — A direct appeal from the recorder's court to the Supreme Court was not available in a case challenging the constitutionality of an ordinance. Instead, the proper method of review was by certiorari to the superior court. *Russell v. City of E. Point*, 261 Ga. 213, 403 S.E.2d 50 (1991), cert. denied, 502 U.S. 971, 112 S. Ct. 448, 116 L. Ed. 2d 466 (1991).

Cases involving revenues of the state. — The enactment of the 1983 Constitution superseded the Supreme Court's order in *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977), assuming jurisdiction over cases involving revenues of the state, thus, all pending cases which involve revenues of the state and which have been docketed in the Supreme Court will be transferred to the Court of Appeals. *Col-*

lins v. AT & T Co., 265 Ga. 37, 456 S.E.2d 50 (1995).

Election contest must tie to specific election. — Without a clear connection to a specific election, a challenge to a voter's qualifications brought under O.C.G.A. § 21-2-228 or O.C.G.A. § 21-2-229 does not come within the jurisdiction of the Supreme Court of Georgia over "cases of election contest," Ga. Const. 1983, Art. VI, Sec. VI, Para. II(2). To the extent that *Jarrard v. Clayton County Bd. of Registrars*, 425 S.E.2d 874 (1992), was decided as an election contest, it was overruled. *Cook v. Board of Registrars*, 291 Ga. 67, 727 S.E.2d 478 (2012).

Transfer to Court of Appeals. — Transfer of a case to the Court of Appeals does not represent the Supreme Court's determination that no constitutional issue in the case has merit since there are a number of reasons why a case can fail to come with the court's exclusive jurisdiction. *Atlanta Indep. Sch. Sys v. Lane*, 266 Ga. 657, 469 S.E.2d 22 (1996).

Cited in *Andrews v. State*, 175 Ga. App. 22, 332 S.E.2d 299 (1985); *Liles v. Still*, 176 Ga. App. 65, 335 S.E.2d 168 (1985); *In re W.M.F.*, 180 Ga. App. 397, 349 S.E.2d 265 (1986); *In re C.D.B.*, 182 Ga. App. 263, 355 S.E.2d 759 (1987); *Rybert & Co. v. City of Atlanta*, 258 Ga. 347, 368 S.E.2d 739 (1988); *Kolker v. State*, 260 Ga. 240, 391 S.E.2d 391 (1990); *Noland v. State*, 202 Ga. App. 125, 413 S.E.2d 509 (1991); *Forsyth County v. Greer*, 211 Ga. App. 444, 439 S.E.2d 679 (1993); *Board of Tax Assessors v. Tom's Foods, Inc.*, 264 Ga. 309, 444 S.E.2d 771 (1994); *Smith v. State*, 214 Ga. App. 631, 448 S.E.2d 906 (1994); *Ryals v. State*, 215 Ga. App. 51, 449 S.E.2d 865 (1994); *Kelly v. City of Atlanta*, 217 Ga. App. 365, 457 S.E.2d 675 (1995); *Doe v. Department of Cors.*, 224 Ga. App. 494, 481 S.E.2d 837 (1997); *Jenkins v. State*, 235 Ga. App. 53, 508 S.E.2d 710 (1998); *Metheny v. Hammonds*, 216 F.3d 1307 (11th Cir. 2000); *Palmaka v. State*, 280 Ga. App. 761, 634 S.E.2d 883 (2006); *In the Interest of J.R.R.*, 281 Ga. 662, 641 S.E.2d 526 (2007); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008); *Wheatley v. Moe's Southwest Grill, LLC*, 580 F. Supp. 2d 1324 (N.D. Ga. 2008); *Austin v. Bank of Am., N.A.*, 293 Ga. 42, 743 S.E.2d 399

(2013); *Deal v. Coleman*, 294 Ga. 170, 751 S.E.2d 337 (2013); *Wilbros, LLC v. State*, 294 Ga. 514, 755 S.E.2d 145 (2014); *In the Interest of M. F.*, 298 Ga. 138, 780 S.E.2d 291 (2015); *Ames v. JP Morgan Chase Bank, N.A.*, No. S15G1007, 2016 Ga. LEXIS 210 (Mar. 7, 2016).

Divorce and Alimony

Jurisdiction of appeal from denial of equitable defense to alimony enforcement. — Where an appeal arises from the trial court's judgment against a husband on his affidavit of illegality filed

in response to his wife's *feri facias* issued on the alimony provisions of their divorce decree where the appellant is seeking to have the superior court set aside the *feri facias* on equitable grounds because of his former wife's apparent abandonment of their children over which she was charged with custody pursuant to the decree, this appeal is from a judgment rendered pursuant to a request for equitable relief, which places the appeal within the Supreme Court's jurisdiction. *Iannicelli v. Iannicelli*, 169 Ga. App. 155, 311 S.E.2d 850 (1983).

Paragraph III. General appellate jurisdiction of Supreme Court.

Unless otherwise provided by law, the Supreme Court shall have appellate jurisdiction of the following classes of cases:

- (1) Cases involving title to land;
- (2) All equity cases;
- (3) All cases involving wills;
- (4) All habeas corpus cases;
- (5) All cases involving extraordinary remedies;
- (6) All divorce and alimony cases;
- (7) All cases certified to it by the Court of Appeals; and
- (8) All cases in which a sentence of death was imposed or could be imposed.

Review of all cases shall be as provided by law.

1976 Constitution. — Art. VI, Sec. II, Para. IV.

Cross references. — Jurisdiction and powers of Supreme Court generally, §§ 15-2-8, 15-2-9, and 15-3-3. Party's right to appeal, see §§ 5-6-34 and 5-6-35.

Law reviews. — For article, "Cities and Towns in Georgia: A Distinction With a Difference?," see 14 Mercer L. Rev. 385 (1963). For article, "The Appellate Procedure Act of 1965," (Art. 2, Ch. 6, T. 5), see 1 Ga. St. B.J. 451 (1965). For article discussing the inefficiency of mandamus and impeachment as remedies for judicial inaction, see 5 Ga. St. B.J. 467 (1969). For

article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B.J. 29 (1987). For article, "Georgia's Constitutional Scheme for State Appellate Jurisdiction," see 6 Ga. St. B.J. 24 (2001). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of appellate practice and procedure, see 57 Mercer L. Rev. 35 (2005).

For comment on *Bond v. Ray*, 207 Ga. 559, 63 S.E.2d 399 (1951), see 3 Mercer L. Rev. 220 (1951). For comment on *State v. Vaughn*, 207 Ga. 583, 63 S.E.2d 357 (1951), see 14 Ga. B.J. 72 (1951). For

comment on *Tant v. State*, 123 Ga. App. 760, 182 S.E.2d 502 (1971), advocating additional reform of Georgia's system of

appellate review of criminal cases, see 9 Ga. St. B.J. 490 (1973).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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TITLE TO LAND

1. IN GENERAL
2. PROCEEDINGS TO ESTABLISH COPY OF LOST DEED
3. CONDEMNATION
4. PARTITIONING PROCEEDINGS
5. PROCESSIONING AND BOUNDARY DISPUTES

EQUITY

1. IN GENERAL
2. TESTS FOR EQUITY JURISDICTION
3. WHERE EQUITABLE FEATURES ELIMINATED
4. DECLARATORY JUDGMENTS
5. INJUNCTIONS
6. EQUITABLE DEFENSES
7. RECEIVERSHIP
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WILLS

CRIMINAL CASES

CONTEMPT OF COURT

HABEAS CORPUS

EXTRAORDINARY REMEDIES

DIVORCE AND ALIMONY

OTHER CASES

PLEADING AND PRACTICE

1. IN GENERAL
2. NEED FOR DEFINITENESS

General Consideration

Court of Appeals has jurisdiction in all cases in which jurisdiction has not been conferred upon the Supreme Court. *White v. State*, 196 Ga. 847, 27 S.E.2d 695 (1943).

Where a bill of exceptions presents no question over which the Supreme Court has jurisdiction, no equity is involved, nor is title to land, constitutional question, or any other question over which the Supreme Court has jurisdiction, the Court of Appeals has jurisdiction of the bill of exceptions. *May v. Braddock*, 211 Ga. 285, 85 S.E.2d 421 (1955).

Effect of reversal by Supreme Court is to place the case where it stood prior thereto; and thereafter the

trial court should enter an order sustaining the exceptions of law, and a finding sustaining the exceptions of fact. *Holton v. Lankford*, 189 Ga. 506, 6 S.E.2d 304 (1939).

It is the duty of the Supreme Court to inquire upon its own motion into question of its jurisdiction. *Abel v. State*, 190 Ga. 651, 10 S.E.2d 198 (1940); *City of Summerville v. Georgia Power Co.*, 204 Ga. 276, 49 S.E.2d 661 (1948); *Findley v. City of Vidalia*, 204 Ga. 279, 49 S.E.2d 661 (1948); *Carter v. Walker*, 209 Ga. 807, 76 S.E.2d 401 (1953); *Alderman v. Crenshaw*, 208 Ga. 71, 65 S.E.2d 178 (1951), overruled on other grounds, *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975); *United States Cas. Co. v. Georgia*

S. & Fla. Ry., 212 Ga. 569, 94 S.E.2d 422 (1956).

Supreme Court has jurisdiction to determine jurisdiction of particular case and to order its transfer to the court having jurisdiction of the case. *Water Power & Mining Co. v. Arnold*, 149 Ga. 107, 99 S.E. 382 (1919).

Decision rendered by divided Supreme Court is authoritative as precedent, and the Court of Appeals is bound thereby. *Western & Atl. R.R. v. Michael*, 43 Ga. App. 703, 160 S.E. 93 (1931).

When Supreme Court can decline to answer. — When the answer to a certified question would constitute the decision in the main case, the Supreme Court will decline to answer the question. *Lawrence v. State*, 268 Ga. 420, 489 S.E.2d 850 (1997).

Court of Appeals was created as an arm of the Supreme Court with no original jurisdiction for the purpose of correcting errors of law in lower tribunals. *Harmon v. Southern Ry.*, 123 Ga. App. 309, 180 S.E.2d 604 (1971).

The issue of venue is within the jurisdiction of the Court of Appeals. *Beauchamp v. Knight*, 261 Ga. 608, 409 S.E.2d 208 (1991).

Limited jurisdiction of Court of Appeals. — Court of Appeals only has jurisdiction in all cases in which such jurisdiction has not been conferred by the Constitution upon the Supreme Court. *Evans v. Pennington*, 50 Ga. App. 146, 177 S.E. 357 (1934); *Findley v. City of Vidalia*, 204 Ga. 279, 49 S.E.2d 658 (1948); *United States Cas. Co. v. Georgia S. & Fla. Ry.*, 212 Ga. 569, 94 S.E.2d 422 (1956).

Ga. L. 1963, p. 70, § 1 (see now O.C.G.A. § 15-19-30), establishing the State Bar, does not violate this paragraph. *Wallace v. Wallace*, 225 Ga. 102, 166 S.E.2d 718, cert. denied, 396 U.S. 939, 90 S. Ct. 369, 24 L. Ed. 2d 240 (1969) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Interpretation of legal document. — Appeals filed by a trustee and a beneficiary were transferred from the supreme court to the court of appeals because the cases did not come within the supreme court's appellate jurisdiction over "equity cases" under Ga. Const. 1983, Art. VI, Sec.

VI, Para. III; the issue presented on appeal, how to interpret a specific provision of a legal document, was a straightforward legal question. *Durham v. Durham*, 291 Ga. 231, 728 S.E.2d 627 (2012).

Allowing videotaping of criminal calendar proceedings. — Trial court erred in excluding a camera and denying a purported student's request to make video recordings of the criminal calendar proceedings because the trial court erred in the court's application of O.C.G.A. § 15-1-10.1 and did not properly consider the factors set forth therein. *McLaurin v. Ott*, 327 Ga. App. 488, 759 S.E.2d 567 (2014).

Cited in *Henderson v. Easters*, 178 Ga. App. 867, 345 S.E.2d 42 (1986); *Jost v. Jost*, 179 Ga. App. 1, 345 S.E.2d 115 (1986); *Lemke v. Southern Farm Bureau Life Ins. Co.*, 182 Ga. App. 700, 356 S.E.2d 739 (1987); *Rybert & Co. v. City of Atlanta*, 258 Ga. 347, 368 S.E.2d 739 (1988); *Cohran v. Haldi*, 189 Ga. App. 529, 376 S.E.2d 416 (1988); *Piedmont Properties, Inc. v. Sims*, 195 Ga. App. 353, 393 S.E.2d 496 (1990); *Bryant v. Employees Retirement Sys.*, 264 Ga. 125, 441 S.E.2d 757 (1994); *Firearms Training Sys. v. Sharp*, 213 Ga. App. 566, 445 S.E.2d 538 (1994); *United States Fid. and Guar. Co. v. Park 'N Go of Ga., Inc.*, 66 F.3d 273 (11th. Cir. 1995); *Redfearn v. Huntcliff Homes Ass'n*, 243 Ga. App. 222, 531 S.E.2d 376 (2000); *Henson v. Tucker*, 278 Ga. App. 859, 630 S.E.2d 64 (2006); *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011); *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 755 S.E.2d 683 (2014); *DOCO Credit Union v. Chambers*, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Right of Review

Right of appeal is not absolute, but is based upon the conditions imposed by the General Assembly for bringing cases to the appellate courts. *Fife v. Johnston*, 225 Ga. 447, 169 S.E.2d 167 (1969); *State v. Hollomon*, 132 Ga. App. 304, 208 S.E.2d 167 (1974).

When jurisdiction alterable by General Assembly. — Jurisdiction of Supreme Court over cases not involving construction of Constitution or constitutionality of statutes is alterable

Right of Review (Cont'd)

by legislative enactment. *Taylor v. Stovall*, 155 Ga. 894, 118 S.E. 715 (1923).

Power of General Assembly to set conditions on right of review. — This paragraph vests in the General Assembly the power to prescribe conditions as to the right of review of a case in the Supreme Court. *Gordy v. Dunwody*, 210 Ga. 810, 83 S.E.2d 7 (1954) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Constitution gives General Assembly authority to enact laws placing conditions upon appeals. *Fife v. Johnston*, 225 Ga. 447, 169 S.E.2d 167 (1969); *State v. Hollomon*, 132 Ga. App. 304, 208 S.E.2d 167 (1974); *Reed v. Hopper*, 235 Ga. 298, 219 S.E.2d 409 (1975).

General Assembly has no authority to prescribe cases to Supreme Court. *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977).

Supreme Court not a court for hearing appeals from Court of Appeals generally. — As to most cases, that court is and should be considered as a court of last resort, though technically it is not such. *Adair v. Traco Div.*, 192 Ga. 59, 14 S.E.2d 466, answer conformed to, 65 Ga. App. 110, 15 S.E.2d 306 (1941).

When Supreme Court will not review Court of Appeals decisions. — Supreme Court will not ordinarily review judgment of Court of Appeals because of assignment of error complaining that Court of Appeals has erroneously construed pleadings, nor will it ordinarily review a decision of the Court of Appeals merely because of an assignment of error complaining that the judgment of such court is incorrect. *Frazier v. Southern Ry.*, 200 Ga. 590, 37 S.E.2d 774 (1946).

Correction of Errors of Fact

Where trial judge has discharged the judge's duty to review evidence, the Supreme Court has no power to pass judgment on issues of fact. *Merritt v. State*, 190 Ga. 81, 8 S.E.2d 386 (1940).

Supreme Court is a court for the correction of errors of law only, and cannot undertake to correct errors of fact.

Mills v. State, 188 Ga. 616, 4 S.E.2d 453 (1939).

Where eight trial jurors petition trial judge to grant a new trial, and trial judge declines to do so, no question of law is presented to the Supreme Court to authorize a judgment of reversal. *Myrick v. State*, 199 Ga. 244, 34 S.E.2d 36 (1945), overruled on other grounds, *Dunagan v. State*, 269 Ga. 590, 502 S.E.2d 726 (1998).

Title to Land**1. In General**

Meaning of term "cases involving title to land." — "Cases involving title to land," as that term is used in this paragraph, refers to and means actions at law, such as ejectment and statutory substitutes, in which the plaintiff asserts a presently enforceable legal title against the possession of the defendant for the purpose of recovering the land. *Bond v. Ray*, 207 Ga. 559, 63 S.E.2d 399 (1951), commented on in 3 Mercer L. Rev. 220 (1951); *Reid v. Standard Oil Co.*, 218 Ga. 289, 127 S.E.2d 678 (1962); *Barton v. Gammell*, 238 Ga. 643, 235 S.E.2d 18, aff'd, 143 Ga. App. 291, 238 S.E.2d 445 (1977) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Supreme Court has no jurisdiction when title to land is not directly, but only incidentally, involved. *Colley v. Atlanta & W. Point R.R.*, 156 Ga. 43, 118 S.E. 712 (1923); *Radcliffe v. Jones*, 174 Ga. 324, 162 S.E. 679 (1932); *Reece v. McCrary*, 179 Ga. 812, 177 S.E. 741 (1934); *Lewis v. Fry*, 194 Ga. 842, 22 S.E.2d 817 (1942); *Miller v. Ray*, 208 Ga. 27, 64 S.E.2d 449 (1951).

Since the children sought a determination that their deceased parent had a one-half interest in a home occupied by the parent and the second spouse and the second spouse sought a determination that the parent had no interest in the property, the parties were not seeking recovery of the land and the case was not within the jurisdiction of the Supreme Court. *Cole v. Cole*, 205 Ga. App. 332, 422 S.E.2d 230 (1992).

Plaintiff must depend for recovery on maintenance of title. — The Supreme Court has jurisdiction of cases in

which the plaintiff asserts the plaintiff's title to the land in question, and depends for a recovery upon the plaintiff's maintenance of it; or to supply a link in the chain, wanting by reason of accident or other cause. *Colley v. Atlanta & W. Point R.R.*, 156 Ga. 43, 118 S.E. 712 (1923).

Plaintiff must not be in actual possession of land. — Where petition shows that the plaintiff is in actual possession of the land described in the deed involved in the action, the action is not one at law for the recovery of land. *Bond v. Ray*, 207 Ga. 559, 63 S.E.2d 399 (1951), commented on in 3 Mercer L. Rev. 220 (1951).

Action seeking legal and equitable title to estate. — The Supreme Court's exclusive jurisdiction of cases "involving title to land" was not applied to an action by alleged illegitimate children of a decedent seeking legal and equitable title to the decedent's estate. *Tolbert v. Whatley*, 223 Ga. App. 508, 478 S.E.2d 587 (1996).

Supreme Court has no jurisdiction in contest over title growing out of proceeding for homestead exemption. *Adams v. Bishop*, 174 Ga. 262, 162 S.E. 531 (1932).

In action seeking rule nisi to require defendants to show cause why nonjudicial foreclosure proceeding should not be allowed to proceed, the Supreme Court did not have jurisdiction. *Graham v. Tallent*, 235 Ga. 47, 218 S.E.2d 799 (1975).

In action for abatement in contract price for purchase of described realty, the Supreme Court did not have jurisdiction. *Halliburton v. Collier*, 201 Ga. 340, 39 S.E.2d 698 (1946).

In appeal from judgment in favor of widow's application for dower, the Supreme Court did not have jurisdiction. *Rowe v. Rowe*, 221 Ga. 820, 147 S.E.2d 447 (1966).

In overruling of demurrer (now motion to dismiss) to petition seeking to recover damages for breach of warranty of title, the Supreme Court did not have jurisdiction. *Sanders v. Calloway*, 211 Ga. 580, 87 S.E.2d 397 (1955).

In action to confirm sale of land under power of sale, pursuant to former Code 1933, § 37-608 (see now O.C.G.A. § 44-14-161), the Supreme Court did not

have jurisdiction. *Tingle v. Atlanta Fed. Sav. & Loan Ass'n*, 211 Ga. 636, 87 S.E.2d 841 (1955).

Determining if defective security deed exists. — Where purchaser of property at a tax sale sought determination that assignee of security deed had no interest in the property by virtue of a defective security deed in the chain of title, the Supreme Court did not have jurisdiction. *Hooten v. Goldome Credit Corp.*, 224 Ga. App. 581, 481 S.E.2d 550 (1997).

Where dispossessory warrant is sued out to evict tenant who files a counter-affidavit alleging defensive facts only, and no equitable or affirmative relief is prayed, the Supreme Court lacks jurisdiction. *Brumfield v. Home Owners Loan Corp.*, 196 Ga. 821, 27 S.E.2d 678 (1943).

Appeal of judgment determining local church held property in trust for national church within Supreme Court's jurisdiction. — Appeal by the trustees of a local church of a judgment determining that the possessory interest in property held by the local church was held in trust for the benefit of a national church and ordering that property delivered to the national church was within the supreme court's appellate jurisdiction over all equity cases under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2); because resolution of the equitable issue would not be a matter of routine once the underlying legal issues were resolved, a substantive issue on appeal involved the legality or propriety of equitable relief. *Kemp v. Neal*, 288 Ga. 324, 704 S.E.2d 175 (2010).

Ownership as defense. — Where the statutory affidavit provided for in former Civil Code 1910, § 5385 (see now O.C.G.A. § 44-7-50), seeking to evict one alleged to be tenant holding over beyond the tenant's term, was resisted by the filing of a counter-affidavit denying tenancy and asserting ownership as a defense, the issue presented was not a case respecting title to land. *Anderson v. Watkins*, 170 Ga. 483, 153 S.E. 8 (1930).

Denial of tenancy. — Court of Appeals has jurisdiction of a case brought after the overruling of a motion for new trial after verdict upon an issue made by the filing of

Title to Land (Cont'd)**1. In General** (Cont'd)

a counter-affidavit to a dispossessory warrant, which affidavit merely denied the tenancy alleged in the warrant. *Downs v. Weaver*, 184 Ga. 856, 193 S.E. 858 (1937).

Rights of possession, not title was issue. — Where defendants appealed to the Supreme Court from entry by the state court of an order granting a writ of possession in a dispossessory proceeding filed after foreclosure of defendants' interest under a deed to secure debt, as right of possession, not title to land, was the issue before the state court, jurisdiction of the appeal was in the Court of Appeals. *Jordan v. Atlanta Neighborhood Hous. Servs., Inc.*, 251 Ga. 37, 302 S.E.2d 568 (1983).

Easements. — The Supreme Court lacked jurisdiction to hear an appeal on grounds that the case "involved title to land" where the party against whom default judgment had been entered admitted that there was no slope-and-fill easement on the party's property and the title-insurance policy covering such easements did not affect title to property. *Krystal Co. v. Carter*, 256 Ga. 43, 343 S.E.2d 490 (1986).

2. Proceedings to Establish Copy of Lost Deed

Form of judgment affected nature of case. — Where in an action to establish a copy of a lost deed the jury found in favor of the plaintiff's contention as to the character of the deed, and upon such verdict the judge entered a decree that the plaintiff recover the land described, that fee-simple title be vested in it, and that the deed attached to the petition be established as prayed, the only effect of the decree was to establish the deed as prayed by the plaintiff; the provisions therein as to recovery of land and decree of title being surplusage. Accordingly, the form of the judgment did not make the case one in equity or one respecting title to land. *Loftin v. Carroll County Bd. of Educ.*, 195 Ga. 689, 25 S.E.2d 293 (1943).

Proceeding not converted into equity case by defendant's answer. — A proceeding to establish a copy of a lost deed was not converted into an equity case

by the answer of the defendant, asserting only that the deed executed by the defendant contained a provision whereby title would revert to the defendant on a certain condition stated, and not invoking any equitable relief; nor did it constitute a suit respecting title to land, hence appellate jurisdiction was not in the Supreme Court. *Loftin v. Carroll County Bd. of Educ.*, 195 Ga. 689, 25 S.E.2d 293 (1943).

3. Condemnation

Supreme Court has no jurisdiction where sole issue is value of property condemned. *Housing Auth. v. Spink*, 210 Ga. 718, 82 S.E.2d 502 (1954).

Where only issue is value of property sought to be acquired by city, the Supreme Court does not have jurisdiction. *Burress v. Montgomery*, 148 Ga. 548, 97 S.E. 538 (1918); *Brandt v. Buckley*, 151 Ga. 582, 107 S.E. 773 (1921); *City of Reynolds v. Carter*, 159 Ga. 229, 125 S.E. 380 (1924).

Where sole subject of appeal is amount awarded intervenor claiming an easement, the Supreme Court does not have jurisdiction. *State Hwy. Dep't v. Holleman*, 220 Ga. 72, 137 S.E.2d 39 (1964).

In controversy over proceeds of condemnation award, the Supreme Court does not have jurisdiction. *Boswell v. Underwood*, 217 Ga. 675, 124 S.E.2d 394 (1962).

Where title to land has been decreed in the condemnor, incidental questions determining the rights of parties to receive the award of condemnation money, not directly involving the title to land, do not give the Supreme Court jurisdiction of a condemnation case. *DeKalb County v. Jackson-Atlantic Co.*, 226 Ga. 664, 177 S.E.2d 90 (1970).

Question of whether condemnor properly tendered award outside jurisdiction. — On appeal of an award by assessors in a condemnation proceeding in which the condemnor was dissatisfied, the question of whether or not the condemnor properly tendered the amount of the award before entering the appeal did not make a question for decision within the jurisdiction of the Supreme Court, nor did the allegation of estoppel by reason of a

judgment decreeing fee-simple title to be in the condemnor make a question involving title to land and within the jurisdiction thereof. *Wilson v. State Hwy. Dep't*, 208 Ga. 510, 67 S.E.2d 578 (1951).

4. Partitioning Proceedings

Supreme Court has jurisdiction over partition proceeding involving title to land. *Harlowe v. Harlowe*, 160 Ga. 822, 129 S.E. 98 (1925).

Jurisdiction of an appeal from a judgment in an action involving statutory partitioning proceedings is in the Supreme Court. *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975).

Appellate jurisdiction of partitioning rested in the Supreme Court as involving title to land where a divorced husband, who filed a complaint seeking a partitioning under O.C.G.A. § 44-6-160, appealed the grant of a summary judgment to the wife, denying partitioning. *Wallace v. Wallace*, 260 Ga. 400, 396 S.E.2d 208 (1990).

5. Processioning and Boundary Disputes

Supreme Court had no jurisdiction over proceedings to procession land under former Civil Code 1910, § 3817 (see now O.C.G.A. Art. I, Ch. 4, T. 44). *Elkins v. Merritt*, 146 Ga. 647, 92 S.E. 51 (1917); *Frey v. Thompson*, 147 Ga. 559, 94 S.E. 999 (1918).

Neither an application for the processioning of an alleged disputed land line nor the protest thereto make a case respecting title to land. *Jarrard v. Wildes*, 209 Ga. 282, 71 S.E.2d 549 (1952).

An application for processioning to determine a disputed land line and a protest thereto is not a case respecting title to land so as to give the Supreme Court jurisdiction. *Fulford v. Johnson*, 221 Ga. 338, 144 S.E.2d 526 (1965).

Boundary-line cases are within the province of the Court of Appeals. Rarely does a boundary-line dispute exist in which equitable relief is not sought, but such relief is incidental to and secondary to the principal issue—the location of the line. *Beauchamp v. Knight*, 261 Ga. 608, 409 S.E.2d 208 (1991).

Action not one respecting title to land which only involves the proper

location of a boundary between coterminous landowners. *Taylor v. Murray*, 215 Ga. 628, 112 S.E.2d 583 (1960).

Location of dividing line appropriate issue for Court of Appeals. — Where the parties by agreement have eliminated all issues in a case to enjoin a continuing trespass and an action in ejectment, except the issue as to the location of the dividing line, the Court of Appeals has jurisdiction of the writ of error. *Whaley v. Ellis*, 209 Ga. 147, 71 S.E.2d 209 (1952).

Title to land not involved. — Where the controlling question in an encroachment action between owners of adjoining lots is the location of the dividing line separating the lots, title to land is not directly involved. *Grobli v. Foreman*, 171 Ga. 712, 156 S.E. 622 (1931).

Equity

1. In General

Supreme Court has exclusive appellate jurisdiction of equity cases. *Wyche v. Bank of Campbell County*, 160 Ga. 258, 127 S.E. 741 (1925).

Jurisdiction of the Supreme Court embraces both good and bad equity cases. — Consequently, even though a petition, may not state a valid and subsisting cause of action for equitable relief, it is within that court's jurisdiction. *Sutker v. Pennsylvania Ins. Co.*, 114 Ga. App. 627, 152 S.E.2d 578 (1966), transferred to 223 Ga. 58, 153 S.E.2d 540 (1967).

Where action is not one in equity, Supreme Court is without jurisdiction, and the action should be transferred to the Court of Appeals. *Regal Textile Co. v. Feil*, 189 Ga. 581, 6 S.E.2d 908 (1940); *Gay v. Lewis*, 215 Ga. 317, 109 S.E.2d 646 (1959).

Case the Court of Appeals transferred to the Supreme Court was returned to the Court of Appeals because the matter was not an equity case that triggered the Supreme Court's jurisdiction; the issues raised in the case, which placed an implied trust on disputed property, were legal in nature, and the issues did not relate to the propriety of an implied trust itself. *Reeves v. Newman*, 287 Ga. 317, 695 S.E.2d 626 (2010).

Equity (Cont'd)**1. In General (Cont'd)**

Constitution of will. — Where none of the findings or exceptions thereto are of such a character as to make a case in equity, and the case does not involve the validity or construction of a will, the Supreme Court has no jurisdiction of the subject matter, the jurisdiction being in the Court of Appeals. *Adams v. Bishop*, 170 Ga. 238, 152 S.E. 108 (1930).

Supreme Court has jurisdiction over affirmative equitable relief. — If there are pleadings and facts to warrant affirmative equitable relief, only the Supreme Court could entertain jurisdiction for purposes of review, but where the pleadings and evidence do not authorize affirmative equitable relief, the Supreme Court would have no jurisdiction for purposes of review. *Alsabrook v. Prudential Ins. Co.*, 174 Ga. 637, 163 S.E. 706 (1932).

Transfer of case by Supreme Court equivalent to holding that action is not in equity. *Stone v. Edwards*, 32 Ga. App. 479, 124 S.E. 54 (1924); *Taylor Lumber Co. v. Clark Lumber Co.*, 53 Ga. App. 815, 127 S.E. 905 (1924); *Carter v. State*, 93 Ga. App. 12, 90 S.E.2d 672 (1955).

Where an action for specific performance of a contract for the sale of land is transferred by the Supreme Court to the Court of Appeals, transfer of the appeal is tantamount to a ruling eliminating and resolving the equitable issues which lie only within the jurisdiction of the Supreme Court to determine. *Brooks v. Boykin*, 194 Ga. App. 854, 392 S.E.2d 46 (1990).

Equitable complaint rejected by Supreme Court states no cause of action at law. — Where the plaintiff has instituted an action and has prosecuted an appeal upon the theory that the plaintiff has some right that is cognizable in a court of equity, and the Supreme Court, which has exclusive jurisdiction of writs of error in equity cases, has decided that no jurisdiction of the cause exists in that court, it does not appear that the plaintiff has stated a cause of action at law. *Citizens' & S. Nat'l Bank v. Georgia R.R. Bank*, 43 Ga. App. 387, 159 S.E. 287 (1931).

Judgment sustaining demurrer to equitable petition reviewable. — In a suit brought in a superior court seeking equitable relief, the Supreme Court has exclusive jurisdiction to review a judgment sustaining a demurrer to the petition, regardless of whether a valid and subsisting cause of action was stated. *O'Callaghan v. Bank of Eastman*, 180 Ga. 812, 180 S.E. 847 (1935).

2. Tests for Equity Jurisdiction

Fact that case may be "equitable proceeding" does not make it "equity case" within meaning of this paragraph. *Robinson v. Lindsey*, 184 Ga. 684, 192 S.E. 910 (1937) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

In order for action to be treated as one in equity, pleader must allege or seek to allege such cause of action as is cognizable only in court of equity, according to the historical jurisdiction of such courts as modified by statute, as distinguished from those causes of action which are cognizable at law; and the prayers or some of them must be such as are appropriate to equitable relief in the particular situation. *Regal Textile Co. v. Feil*, 189 Ga. 581, 6 S.E.2d 908 (1940); *Reynolds v. Hyers*, 190 Ga. 200, 9 S.E.2d 78 (1940).

Test is what remains in case for review. — The test of a case as to whether it is one in equity, and hence reviewable by the Supreme Court, is not what it might have been at any given time during its pendency in the trial court but what remained in it for review. Matters eliminated either by the parties or by order of the trial court constitute no part of the case in the Supreme Court. *Douglas-Guardian Whse. Corp. v. Todd*, 212 Ga. 791, 96 S.E.2d 275 (1957); *Benton v. State Hwy. Dep't*, 220 Ga. 674, 141 S.E.2d 396 (1965); *Sanders v. Carney*, 224 Ga. 429, 162 S.E.2d 351 (1968); *Gainesville Carpet Mart v. First Fed. Sav. & Loan Ass'n*, 225 Ga. 315, 168 S.E.2d 159 (1969); *Matuszczak v. Kelly*, 233 Ga. 914, 213 S.E.2d 875 (1975).

Nature of relief sought. — Whether a complaint sets forth an equitable or a legal cause of action depends upon the relief prayed for. *Burgess v. Ohio Nat'l*

Life Ins. Co., 177 Ga. 48, 169 S.E. 364 (1933).

Whether an action is one at law or in equity is determined by the nature of the relief sought, rather than the form of the allegations of the complaint. *Firemen's Fund Ins. Co. v. Thomas*, 177 Ga. 427, 170 S.E. 222 (1933); *Griffin v. Securities Inv. Co.*, 181 Ga. 455, 182 S.E. 594 (1935); *Dobbs v. FDIC*, 187 Ga. 569, 1 S.E.2d 672 (1939); *Regal Textile Co. v. Feil*, 189 Ga. 581, 6 S.E.2d 908 (1940); *Comstock v. Tarbush*, 200 Ga. 320, 37 S.E.2d 148 (1946); *City of Summerville v. Georgia Power Co.*, 204 Ga. 276, 49 S.E.2d 661 (1948); *United States Cas. Co. v. Georgia S. & Fla. Ry.*, 212 Ga. 569, 94 S.E.2d 422 (1956); *State Hwy. Dep't v. Hewitt Contracting Co.*, 221 Ga. 621, 146 S.E.2d 632 (1966); *Gifford v. Jackson*, 223 Ga. 155, 154 S.E.2d 224 (1967).

To make a case one for equity jurisdiction in the Supreme Court, it must contain allegations and prayers for equitable relief. *Jones v. Van Vleck*, 224 Ga. 796, 164 S.E.2d 724 (1968).

Litigants will not be permitted to evade this paragraph by adding spurious prayer for equitable relief. *Alderman v. Crenshaw*, 208 Ga. 71, 65 S.E.2d 178 (1951), overruled on other grounds, *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Prayer for equitable relief does not make equity action. — Complaint containing allegations appropriate only to action for damages does not assume character of equity action merely by virtue of prayer for equitable relief. *Atlanta Fin. Co. v. Fitzgerald*, 189 Ga. 121, 5 S.E.2d 242 (1939); *Hollinshed v. Shadrick*, 212 Ga. 624, 94 S.E.2d 705 (1956).

Complaint will not be construed as suit in equity merely because it is filed in the superior court and is styled "complaint in equity." *Burgess v. Ohio Nat'l Life Ins. Co.*, 177 Ga. 48, 169 S.E. 364 (1933).

A complaint is not to be treated as a case in equity merely because of general language so terming it where the allegations of fact and the specific prayers do not support the general language used. *Dobbs v. FDIC*, 187 Ga. 569, 1 S.E.2d 672 (1939).

Allegations of a complaint must be applicable to equitable relief prayed, and there must be a prayer either for the specific relief prayed or for general relief. *Aetna Life Ins. Co. v. Dorman*, 179 Ga. 890, 177 S.E. 703 (1934); *Hollinshed v. Shadrick*, 212 Ga. 624, 94 S.E.2d 705 (1956).

Allegation to effect that equitable relief is necessary to avoid multiplicity of suits is merely conclusion of pleader; without allegations to support it, the action is not one in equity within the jurisdiction of the Supreme Court. *Woolsey v. Mimms*, 209 Ga. 360, 72 S.E.2d 706 (1952).

Equitable defense does not make equity case. — The posing of an equitable defense in response to a motion for summary judgment in a case in the jurisdiction of the Court of Appeals clearly does not make it a case in equity. *Capitol Fish Co. v. Tanner*, 192 Ga. App. 251, 384 S.E.2d 394 (1989).

3. Where Equitable Features Eliminated

Jurisdiction of Supreme Court lost where equitable prayers in complaint are stricken by amendment. *Cochran v. Stephens*, 147 Ga. 401, 94 S.E. 303 (1917); *Cochran v. Stephens*, 155 Ga. 134, 116 S.E. 303 (1923); *Henley v. Colonial Stages S., Inc.*, 184 Ga. 445, 191 S.E. 445 (1937); *Leggitt v. Allen*, 208 Ga. 298, 66 S.E.2d 709 (1951); *Fulford v. Johnson*, 221 Ga. 338, 144 S.E.2d 526 (1965).

A case may begin as an action in equity; but, in its progress the equitable features may become eliminated, so that the Supreme Court would have no jurisdiction. *Regal Textile Co. v. Feil*, 189 Ga. 581, 6 S.E.2d 908 (1940).

Where the equity features which a case originally contained have been abandoned, or eliminated before the judgment dismissing a complaint was rendered, the Court of Appeals and not the Supreme Court has jurisdiction. *Rumph v. Rister*, 211 Ga. 312, 85 S.E.2d 768 (1955).

Where the complaint, after being amended, seeks only legal relief, the Court of Appeals and not the Supreme Court has jurisdiction to decide the case.

Equity (Cont'd)**3. Where Equitable Features****Eliminated (Cont'd)**

Motels, Inc. v. Shadrick, 213 Ga. 434, 99 S.E.2d 107 (1957).

Where by amendment all prayers for equitable relief have been stricken from petition, and court asked to vacate its temporary restraining order and to otherwise treat the case as an action at law for a money judgment against the defendants, the case is no longer one involving equity. *Citizens Bank v. Thompson*, 214 Ga. 674, 107 S.E.2d 175 (1959).

When a plaintiff amends the plaintiff's petition by eliminating a prayer for equitable relief, and the petition as finally amended seeks and prays only for legal relief, the Court of Appeals and not the Supreme Court has jurisdiction. *Boze v. Atlanta Veterans Transp., Inc.*, 218 Ga. 274, 127 S.E.2d 466 (1962).

Election of plaintiff to proceed in tort under former Code 1933, § 105-1207 (see now O.C.G.A. § 51-12-30) removed all equity from the case and left only an action at law for money damages of which the Court of Appeals and not the Supreme Court had jurisdiction. *Kenimer v. Ward Wight Realty Co.*, 219 Ga. 275, 133 S.E.2d 18 (1963).

Failure to appeal judgment denying reformation eliminates jurisdiction. — Where plaintiff cobroker has not appealed the grant of summary judgment as to the plaintiff's pleadings seeking to reform the contract based upon a mutual mistake of fact of the parties, the reformation sought therein is not now before the court on appeal which would have rendered jurisdiction of this case in the Supreme Court. *MPI Corp. v. Northside Realty Assocs.*, 151 Ga. App. 516, 260 S.E.2d 499 (1979), rev'd, 245 Ga. 321, 265 S.E.2d 11 (1980).

Dismissal of equity action removes equity jurisdiction from counterclaim. — Where a defendant, in answer to an equitable complaint for injunctive relief, sets up a money demand, and asks a judgment therefor against the complainant and, after the grant of a temporary restraining order, the complainant volun-

tarily dismisses the action, such a dismissal removes all equitable questions involved in the case. *Rogers v. Miller Peanut Co.*, 199 Ga. 835, 35 S.E.2d 469 (1945).

4. Declaratory Judgments

Jurisdiction in Supreme Court is not afforded merely because declaratory judgment is sought. *Jones v. Van Vleck*, 224 Ga. 796, 164 S.E.2d 724 (1968).

Prayer for restraining order as provided for under the Declaratory Judgment Act (see now O.C.G.A. Ch. 4, T. 9) is not one for equitable relief within meaning of this paragraph. *Milwaukee Mechanics Ins. Co. v. Davis*, 204 Ga. 67, 48 S.E.2d 876 (1948); *City of Summerville v. Georgia Power Co.*, 204 Ga. 276, 49 S.E.2d 661 (1948); *Bond v. Ray*, 207 Ga. 559, 63 S.E.2d 399 (1951), commented on in 3 *Mercer L. Rev.* 220 (1951); *Adler v. Adler*, 209 Ga. 363, 72 S.E.2d 714 (1952); *Boggs v. Broome*, 209 Ga. 836, 76 S.E.2d 497 (1953); *Peoples v. Bass*, 211 Ga. 802, 89 S.E.2d 171 (1955); *United States Cas. Co. v. Georgia S. & Fla. Ry.*, 212 Ga. 569, 94 S.E.2d 422 (1956); *McMahon v. Folds*, 216 Ga. 709, 119 S.E.2d 353 (1961) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Where all of the substantial relief sought by the plaintiff in an action for declaratory judgment may be obtained in a court of law, jurisdiction of the cause on appeal is not vested in the Supreme Court merely because the trial court granted a temporary restraining order "to maintain the status pending the adjudication of the questions." *Findley v. City of Vidalia*, 204 Ga. 279, 49 S.E.2d 658 (1948).

An action brought under the Declaratory Judgment Act, not being an equitable proceeding per se, must involve some phase of those cases listed in this paragraph in order to come within the jurisdiction of the Supreme Court on exceptions to rulings of the lower court. *Bankers Life & Cas. Co. v. Cravey*, 210 Ga. 239, 78 S.E.2d 507 (1953) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

5. Injunctions

Nature of order. — The nature of the order containing the underlying contested

issues of law will govern the appellate path in the Court of Appeals under O.C.G.A. § 5-6-34(b). *Saxton v. Coastal Dialysis & Medical Clinic, Inc.*, 220 Ga. App. 805, 470 S.E.2d 252 (1996), *aff'd*, 267 Ga. 177, 476 S.E.2d 587 (1996).

Supreme Court has jurisdiction in appeal from grant of permanent injunction. — Where the general judgment and decree includes the grant of a permanent injunction, the Supreme Court has jurisdiction of the writ of error (see now O.C.G.A. §§ 5-6-49, 5-6-50) excepting to such general judgment and decree granting equitable relief. *Pinkard v. Mendel*, 216 Ga. 487, 117 S.E.2d 336 (1960), later appeal, 217 Ga. 562, 123 S.E.2d 770 (1962).

Where a complaint is brought by the corporate operator of a business alleging that a license ordinance of a municipality sought to be enforced is unconstitutional and praying for process, a temporary restraining order, and for a permanent injunction, such a case is an equity case within the meaning of this paragraph. *City of Atlanta v. Royal Peacock Social Club, Inc.*, 119 Ga. App. 648, 168 S.E.2d 335 (1969) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Supreme Court has jurisdiction over injunctive relief. — The Supreme Court had jurisdiction where the primary issue on appeal was whether the trial court erred in denying injunctive relief given the jury's finding of misappropriation of trade secrets and use of those trade secrets by defendants. *Electronic Data Sys. Corp. v. Heinemann*, 268 Ga. 755, 493 S.E.2d 132 (1997).

Where prayer for injunction is mere surplusage, the Supreme Court lacks jurisdiction. *Gulf Am. Fire & Cas. Co. v. McNeal*, 222 Ga. 454, 150 S.E.2d 685 (1966); *Tierce v. Davis*, 225 Ga. 574, 170 S.E.2d 228 (1969).

A prayer for permanent injunction without alleging facts which would support the prayer for such relief is insufficient to place jurisdiction in the Supreme Court. *Stone v. First Nat'l Bank*, 223 Ga. 804, 158 S.E.2d 382 (1967).

In complaint seeking injunction against criminal prosecution pending adjudication of questions raised

in complaint, the Supreme Court has jurisdiction. *Tierce v. Davis*, 225 Ga. 574, 170 S.E.2d 228 (1969).

Requirement that injunctive relief be substantive issue. — Jurisdiction of the Supreme Court does not attach simply because pleadings contain a prayer for an injunction or any other form of equitable relief; instead, an equity case for purposes of Supreme Court jurisdiction is a case in which a substantive issue raised on appeal involves the legality or propriety of equitable relief. *Saxton v. Coastal Dialysis & Medical Clinic, Inc.*, 267 Ga. 177, 476 S.E.2d 587 (1996); *Powell v. Norman Elec. Galaxy, Inc.*, 229 Ga. App. 99, 493 S.E.2d 205 (1997).

No jurisdiction where denial of injunction was not appealed. — Where the only request for equitable relief made by appellants in their complaint was for an injunction to halt construction of road improvements, and the denial of that request was not appealed, there was not currently any claim for equitable relief pending in the case and jurisdiction over the appeal was in the Court of Appeals rather than the Supreme Court. *Clay v. Department of Transp.*, 198 Ga. App. 155, 400 S.E.2d 684 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 684 (1991).

6. Equitable Defenses

Equitable defense does not make action equity case. — Where an action is one at law and the defendant's answer, if at all equitable in nature, is purely defensive, the sustaining of which would result simply in a general verdict in favor of the defendant, the case is not an "equity case" within the meaning of this paragraph. *Equitable Life Assurance Soc'y v. Bischoff*, 179 Ga. 255, 175 S.E. 560 (1934); *Alderman v. Crenshaw*, 208 Ga. 71, 65 S.E.2d 178 (1951), overruled on other grounds, *Wiley v. Wiley*, 233 Ga. 824, 213 S.E.2d 682 (1975) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Petition to set aside judgment on equitable grounds not equity case. — A petition filed in the court where a judgment was rendered to set aside the judgment on the ground of mental incapacity to enter into contract and of insanity existing at the time the judgment was ren-

Equity (Cont'd)**6. Equitable Defenses (Cont'd)**

dered is not "an equity case" as is contemplated by this paragraph. *Perry v. Fletcher*, 174 Ga. 180, 162 S.E. 285 (1932) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Response to motion to dismiss petition denominated "plea of equitable estoppel" and not seeking any affirmative equitable relief does not confer jurisdiction on Supreme Court and not seeking any affirmative equitable relief does not confer jurisdiction on Supreme Court under this paragraph because it does not change the character of the cross action from a money demand to a suit in equity. *Rogers v. Miller Peanut Co.*, 199 Ga. 835, 35 S.E.2d 469 (1945) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Where petition subject to demurrer (now motion to dismiss) on ground of misjoinder of parties or causes of action is brought, the fact that no demurrer is filed will not convert it into equity case. *Dobbs v. FDIC*, 187 Ga. 569, 1 S.E.2d 672 (1939).

7. Receivership

Supreme Court has jurisdiction in appointment of receiver of partnership property. *Greeson v. Taylor*, 160 Ga. 392, 128 S.E. 177 (1925).

Where there is no objection to appointment, the Supreme Court lacks jurisdiction. — Where suit, as originally brought, was one in equity seeking the appointment of a receiver, to which there is no objection, nor is there any complaint as to anything done, the case before the Supreme Court on writ of error (see §§ 5-6-49, 5-6-50) does not involve any equitable relief, or the application of any rule of equitable procedure; the question in issue is one of law, and is not such as to confer jurisdiction upon the Supreme Court but that it be transferred to the Court of Appeals. *Refrigeration Appliances, Inc. v. Atlanta Provision Co.*, 210 Ga. 475, 80 S.E.2d 683 (1954).

Fact that verdict and judgment were obtained by receiver as substituted plaintiff does not make case one in equity. *Henley v. Colonial Stages S.,*

Inc., 184 Ga. 445, 191 S.E. 445 (1937).

8. Specific Cases

Claim case can, by pleadings and prayer, be converted into equitable proceeding. *Columbus Plumbing, Heating & Mill Supply Co. v. Home Fed. Sav. & Loan Ass'n*, 216 Ga. 706, 119 S.E.2d 118 (1961).

Supreme Court has jurisdiction in action involving equitable setoff. — Where petitioner, a nonresident railroad, brought an action ex contractu against a resident of this state for the collection of freight charges owing the petitioner, and by cross action the defendant set off an action ex delicto for negligence, a court of equity would take jurisdiction thereof, under former Code 1933, § 37-308 (see now O.C.G.A. § 23-2-76), and the Supreme Court had jurisdiction. *Atlanta Paper Co. v. New York, N.H. & H.R.R.*, 211 Ga. 185, 84 S.E.2d 359 (1954).

In controversy arising out of complaint for interpleader, the Supreme Court has jurisdiction. *Freeman v. Atlanta Police Relief Ass'n*, 62 Ga. App. 523, 8 S.E.2d 711 (1940); *Finney v. Green*, 90 Ga. App. 321, 83 S.E.2d 65 (1954).

In judgment against corporate director for fraud, the Supreme Court has jurisdiction. — Where a judgment is not merely against a corporation to which an overpayment was made, but also against one of the directors who was liable, not because the director received the overpayment, but because the director wrongfully took that much and more money out of the capital assets of the corporation, rendering it insolvent, in fraud of the plaintiff's rights, the case presented is one in equity. *Regal Textile Co. v. Feil*, 189 Ga. 581, 6 S.E.2d 908 (1940).

In action involving conventional subrogation, the Supreme Court has jurisdiction. *Lee v. Holman*, 52 Ga. App. 543, 183 S.E. 837, aff'd, 182 Ga. 559, 186 S.E. 189 (1936).

Where claimant of personalty seeks equitable relief, the Supreme Court has jurisdiction. — Where one files a claim to personalty levied upon under an attachment or other process, and in aid of that claim files an amendment in which

the person seeks affirmative equitable relief, the original proceeding at law is converted into a proceeding both at law and in equity. In such a case, when a writ of error is sued out to review the final judgment, the Supreme Court has jurisdiction to determine the assignments of error set out in the bill of exceptions. *Benton v. Benton*, 164 Ga. 541, 139 S.E. 68 (1927).

Contract law issues. — Georgia Court of Appeals, rather than the Georgia Supreme Court, had jurisdiction over the appeal because the propriety of equitable relief was ancillary to the underlying substantive issues of contract law that were the focus of the appeal including whether the parties made a mutual mistake in their agreement over the purchase of the acquisition loan. *First Chatham Bank v. Liberty Capital, LLC*, 325 Ga. App. 821, 755 S.E.2d 219 (2014).

Contract claim against county barred by sovereign immunity. — Builder's contractual and quasi-contractual claims against a county and the county's officials for an interest in a sewer pumping station were properly dismissed by the trial court because those claims were barred by sovereign immunity as there was no written contract to enforce. *Layer v. Barrow County*, 297 Ga. 871, 778 S.E.2d 156 (2015).

Action for specific performance. — An appeal from an order granting summary judgment against the plaintiff seeking specific performance of an alleged agreement for the sale of land was within the Supreme Court's jurisdiction, not within the jurisdiction of the Court of Appeals, even though the plaintiff had included an alternative prayer for damages in the complaint. *Stephens v. Trotter*, 205 Ga. App. 497, 422 S.E.2d 568 (1992).

In an action for the violation of restrictive covenants, because the "primary issue" to be resolved on appeal was whether the trial court properly construed the contracts and the viability of any equitable claim was ancillary thereto, the appeal was outside the realm of the Supreme Court's jurisdiction. *Redfern v. Huntcliff Homes Ass'n*, 271 Ga. 745, 524 S.E.2d 464 (1999).

Affidavit of illegality did not give Supreme Court jurisdiction. — Where

simple law case made by foreclosure on personal property was halted by affidavit of illegality, denying that defendant owes the debt, the Supreme Court did not have jurisdiction. *Universal C.I.T. Credit Corp. v. Pritchett*, 217 Ga. 52, 121 S.E.2d 17 (1961).

In action at law to recover judgment upon note secured by deed to land, the Supreme Court lacked jurisdiction. *Burgess v. Ohio Nat'l Life Ins. Co.*, 177 Ga. 48, 169 S.E. 364 (1933).

In proceeding to establish copy of lost deed, the Supreme Court lacked jurisdiction. — Where a petition in a superior court to establish a copy of a deed claimed to have been lost alleged only that the debtor resided in the county in which the suit was filed, that the debtor had executed to the plaintiff a certain deed, a true copy of which was attached to the petition, and that the deed had been lost, and in which petition the only prayer was that "the clerk of this court issue a rule nisi calling upon (the defendant) to show cause, if any he has, why the copy deed aforesaid should not be established in lieu of said lost original," such petition was a mere statutory proceeding to establish a copy of the deed claimed to have been lost, and was not a suit in equity such as to grant appellate jurisdiction in the Supreme Court. *Loftin v. Carroll County Bd. of Educ.*, 195 Ga. 689, 25 S.E.2d 293 (1943).

In proceeding to subject trust estate to payment of debt, the Supreme Court lacked jurisdiction. The suit did not seek or pray for any relief not allowable in a court of law under the statutory procedure under Art. 4, Ch. 12, T. 53. *Robinson v. Lindsey*, 184 Ga. 684, 192 S.E. 910 (1937).

Prayer added to set aside contract did not give Supreme Court jurisdiction. — In petition seeking money damages because of alleged fraudulent misrepresentations inducing the plaintiff to sign a contract of sale for the purchase of an automobile, the addition of a prayer that the contract of sale "be set aside on the grounds of fraud" was not such a prayer for equitable relief as to give the Supreme Court jurisdiction of the appeal. *Douglas v. Currie Ford Co.*, 103 Ga. App.

Equity (Cont'd)

8. Specific Cases (Cont'd)

75, 118 S.E.2d 586 (1961).

Where order requires executor to secure additional bond, the Supreme Court lacks jurisdiction. — Order of the superior court on appeal from the court of ordinary (now probate court) requiring executor to secure an additional surety bond within 15 days and, upon the executor's failure to comply, revocation of the executor's letters of executorship and order to make an accounting are reviewable solely by the Court of Appeals. *Goodman v. Little*, 213 Ga. 178, 97 S.E.2d 567 (1957).

Where plaintiff asks for special lien against fund in garnishment, the Supreme Court lacks jurisdiction. *Henley v. Colonial Stages S., Inc.*, 184 Ga. 445, 191 S.E. 445 (1937).

In motion to revoke order of incorporation on grounds that movant had acquired prior use to name used by the corporation, the Supreme Court lacked jurisdiction. *Methodist Episcopal Church S., Inc. v. Decell*, 60 Ga. App. 843, 5 S.E.2d 66 (1939).

Where holder of junior judgment claims older judgment void on grounds of insanity, the Supreme Court lacks jurisdiction. — Where a case involves the distribution of money arising from the sale of property under a senior judgment and execution, and the holder of a junior judgment and execution claims the fund upon the ground that the judgment in the older case is void, because at the time of its rendition the defendant therein was insane and confined in the state sanitarium, it is not an equity case within the meaning of the Constitution declaring the jurisdiction of the Supreme Court, and will be transferred to the Court of Appeals, which has jurisdiction. *Burkhalter v. Virginia-Carolina Chem. Co.*, 170 Ga. 237, 152 S.E. 98 (1930).

In money rule against sheriff under former Civil Code 1910, § 5348 (see now O.C.G.A. § 15-13-13), the Supreme Court lacked jurisdiction. *Alsabrook v. Prudential Ins. Co.*, 174 Ga. 637, 163 S.E. 706 (1932).

In action for accounting against deceased agent, the Supreme Court

lacked jurisdiction. — Suit brought against administration of intestate on grounds that the administrator had been verbally appointed agent of plaintiff's intestate and had made no accounting or settlement was an action at law and not an equity case. *Goodwyn v. Roop*, 181 Ga. 327, 182 S.E. 4 (1935).

In discovery ancillary to recovery of funds from guardian, the Supreme Court lacked jurisdiction. *Williams v. Farmers State Bank*, 147 Ga. 569, 94 S.E. 998 (1918).

In action to recover assets of stockholder of insolvent corporation, the Supreme Court lacks jurisdiction. — A suit to recover the statutory liability of an alleged stockholder of an insolvent institution, in the hands of the Superintendent of Banks for liquidation, and to have the property seized under the writ of attachment in pursuance of law and subjected to payment of the alleged liability, is not a suit in equity. *Pignatel v. Mobley*, 173 Ga. 410, 160 S.E. 411 (1931).

In action for recovery of money had and received, the Supreme Court lacks jurisdiction. *Orient Ins. Co. v. Dunlap*, 193 Ga. 241, 17 S.E.2d 703 (1941).

Action for money had and received. — Though a petition filed in the superior court may contain allegations authorizing the rendition of a money judgment against the defendant therein, as upon an action in equity upon the doctrine of subrogation, or as upon an action at law for money had and received, if the prayer of the petition seeks the recovery of the money judgment as for money had and received, in the absence of any other prayer, the case presented is not an equity case within the meaning of the constitutional provision giving the Supreme Court exclusive jurisdiction of equity cases. *Jasper School Dist. v. Gormley*, 184 Ga. 756, 193 S.E. 248 (1937).

Equitable adoption. — Appeal in which the substantive issue involves the legality or propriety of a trial court's declaration that a certain individual is or is not the virtually adopted child of a decedent is an action in equity that invokes the jurisdiction of the Supreme Court of Georgia under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2); to the extent Walden

v. Burke, 282 Ga. App. 154, 637 S.E.2d 859 (Ga. Ct. App. 2006) may have been read as indicating the contrary, it was disapproved. *Morgan v. Howard*, 285 Ga. 512, 678 S.E.2d 882 (2009).

Action involving riparian rights to water. — Because equitable principles were at the core of a trial court's determination as to whether an appellee had made a reasonable use of the water the appellee shared with the appellants, jurisdiction over the appeal was properly in the Supreme Court of Georgia under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2). *Tunison v. Harper*, 286 Ga. 687, 690 S.E.2d 819 (2010).

Interpretation of trust not within supreme court's jurisdiction over equity cases. — Appeals that involve the proper interpretation of a trust provision do not come within the supreme court's general appellate jurisdiction over "equity cases," Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2), because the resolution of that legal issue will affect the administration of the trust. *Durham v. Durham*, No. S12A0607, 2012 Ga. LEXIS 577 (June 18, 2012).

Appeals challenging orders granting and denying motions for summary judgment were transferred to the court of appeals because the cases did not come within the supreme court's appellate jurisdiction over "equity cases" under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2); the sole issue presented on appeal was how to interpret a specific provision of a legal document, the in terrorem clause of the trust, which was a straightforward legal question and one that did not require any analysis that could be termed an evaluation of equitable considerations. *Durham v. Durham*, No. S12A0607, 2012 Ga. LEXIS 577 (June 18, 2012).

Wills

Language "all cases involving wills" means those cases in which the will's validity or meaning is in question. Where the only issue in a case is the jurisdiction of the probate court to set aside a probate based on discovery of new evidence, jurisdiction lies in the Court of Appeals. *In re Estate of Lott*, 251 Ga. 461, 306 S.E.2d 920 (1983).

Supreme Court has no jurisdiction where construction of a will is involved only as incident to some other proceeding. *Reece v. McCrary*, 179 Ga. 812, 177 S.E. 741 (1934); *Trust Co. v. Smith*, 182 Ga. 360, 185 S.E. 525 (1936); *Hicks v. Wadsworth*, 184 Ga. 681, 192 S.E. 729 (1937); *Furrow v. Sanders*, 189 Ga. 614, 7 S.E.2d 181 (1940); *Roberts v. Wilson*, 198 Ga. 428, 31 S.E.2d 707 (1944); *Darnell v. Tate*, 208 Ga. 23, 64 S.E.2d 582 (1951); *Grant v. Bell*, 150 Ga. App. 141, 257 S.E.2d 12, rev'd on other grounds, 244 Ga. 665, 261 S.E.2d 616 (1979).

In proceeding to establish copy of lost will, the Supreme Court lacks jurisdiction. — Where the proceeding was not one to probate a copy of a lost or destroyed will under former Civil Code 1910, § 3863 (see now O.C.G.A. § 53-3-6), but was one to establish a copy of a lost record of a will therefore duly probated and admitted to record, the Supreme Court had no jurisdiction under this paragraph. *Bond v. Reid*, 152 Ga. 481, 110 S.E. 281 (1922) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

In dispute over identity of beneficiary, the Supreme Court lacks jurisdiction. — The issue of which of two persons of the same name is the beneficiary named in a testator's will does not involve either the validity of a will or the construction of a will. *Scheridan v. Scheridan*, 231 Ga. 729, 204 S.E.2d 293 (1974).

In a proceeding to determine heirship, the Supreme Court lacks jurisdiction. — In an action to determine heirship where the parties did not raise, nor did the trial court consider or resolve, any issue relating to the validity or meaning of decedent's will, the Court of Appeals had jurisdiction of the appeal. *Goodman v. Hammonds*, 224 Ga. App. 387, 480 S.E.2d 397 (1997).

Will dispute within Court of Appeals' jurisdiction upon transfer. — Court of Appeals had jurisdiction upon the transfer by the Supreme Court of Georgia of an appeal of a will dispute as the Supreme Court's determination that the issue did not involve the validity or meaning of the will, such that it was ancillary, was binding; the Court of Appeals none-

Wills (Cont'd)

theless had jurisdiction to resolve the dispute. *Simmons v. England*, 323 Ga. App. 251, 746 S.E.2d 862 (2013).

Where provisions of will incidentally relied upon to show title to stock, the Supreme Court lacks jurisdiction. — Where certain provisions of a will are incidentally relied on to show title to corporate stock as the basis of stockholder's liability and no question is made as to construction or validity of the will, but both sides treat it as valid and meaning the same thing as bequeathing the capital stock in question to the defendant, the case does not involve the validity or construction of a will. *Pignatel v. Mobley*, 173 Ga. 410, 160 S.E. 411 (1931).

In proceeding to select replacement for executor, the Supreme Court lacked jurisdiction. — Where the purpose of an action is the selection of an executor to succeed one who is resigning because of ill health, the construction of the testator's will is only incidentally involved, if at all, and the nature of the alleged cause will be determined by the controlling object for which the proceeding is instituted and the character of the relief sought. Measured by this rule, the proceeding does not make a case involving the construction of a will within the constitutional provision relating to the jurisdiction of the Supreme Court. *Darnell v. Tate*, 208 Ga. 23, 64 S.E.2d 582 (1951).

Denial of motion for new trial, subject of which is qualification of nominated executors of probated will, does not involve validity or construction of a will. *Thomasson v. Barber*, 191 Ga. 262, 11 S.E.2d 887 (1940).

Criminal Cases

Jurisdiction in Supreme Court turns not on what punishment is actually imposed, but on whether conviction is for a capital felony. *Mika v. State*, 196 Ga. 473, 26 S.E.2d 616 (1943); *Birdell v. State*, 200 Ga. 785, 38 S.E.2d 589 (1946); *Climer v. State*, 78 Ga. App. 125, 50 S.E.2d 633 (1948); *Osborne v. State*, 209 Ga. 345, 72 S.E.2d 317 (1952); *Coleman v. State*, 211 Ga. 704, 88 S.E.2d 381 (1955).

Sentence to life imprisonment does not change nature of conviction. —

When a person on trial for murder is found guilty of that offense, but with a recommendation by the jury that the person be imprisoned for life in the penitentiary, the person is convicted of a capital felony. *Caesar v. State*, 127 Ga. 710, 57 S.E. 66 (1907).

If under a murder indictment one is convicted, not of murder but of a lower grade of homicide such as manslaughter, the Supreme Court is without jurisdiction since the defendant has not been convicted of the capital felony as charged. *Mika v. State*, 196 Ga. 473, 26 S.E.2d 616 (1943).

Plea of guilty, accepted and entered by the court, is a "conviction." *McCrary v. State*, 215 Ga. 887, 114 S.E.2d 133 (1960).

Supreme Court has jurisdiction of all counts of indictment once conviction shown. — Although "conviction of a capital felony" is critical to the Supreme Court's jurisdiction, once the conviction is shown, then the court has jurisdiction of that "case," including all counts of the indictment on which the accused was found guilty and all enumerations of error arising therefrom regardless of their subject matter. *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975).

Convictions of rape, kidnapping, and armed robbery are no longer convictions of capital felonies for appellate jurisdictional purposes and jurisdiction of these appeals lies in the Court of Appeals. *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977).

Mere indictment of capital felony does not give Supreme Court jurisdiction. — Where there has been indictment, but no trial and no conviction of a capital felony, the Supreme Court is without jurisdiction. *Robinson v. State*, 209 Ga. 48, 70 S.E.2d 514 (1952).

The mere fact that a capital offense is charged in an indictment does not give the Supreme Court jurisdiction of a criminal case, but there must be a conviction of a capital felony. *McCrary v. State*, 215 Ga. 887, 114 S.E.2d 133 (1960).

Jurisdiction of change of venue motion in Court of Appeals. — The Court

of Appeals, and not the Supreme Court, has appellate jurisdiction of a murder case involving change of venue. *Wilburn v. State*, 140 Ga. 138, 78 S.E. 819 (1913); *Scoggins v. State*, 24 Ga. App. 677, 102 S.E. 39 (1920); *Ruffin v. State*, 151 Ga. 743, 108 S.E. 29 (1921).

The jurisdiction of all venue cases of this class (motion to change venue after an indictment for a capital felony is vested in the Court of Appeals, and not the Supreme Court, provided no constitutional question is raised in the lower court. *Humphrey v. State*, 175 Ga. 666, 165 S.E. 587 (1932).

Denial of pretrial motion no basis for appeal. — Denial of a motion for new trial on a plea of insanity at the time of trial on an indictment for murder, when, in fact, there had been no trial upon the murder charge, cannot afford a basis for jurisdiction of the Supreme Court. *Spell v. State*, 225 Ga. 237, 167 S.E.2d 642 (1969).

Objection to illegally seized evidence does not give jurisdiction. — Where, in a criminal trial, a part of the evidence was objected to upon the ground that it was obtained by an unlawful search of the defendant's house, the error complained of is not of such a character as to give the Supreme Court jurisdiction. *Thompson v. State*, 174 Ga. 804, 164 S.E. 202 (1932).

Supreme Court lacks jurisdiction in cases involving misdemeanor offenses unmixed with equitable or constitutional questions. *Hilliard v. State*, 209 Ga. 497, 74 S.E.2d 65 (1953).

Contempt of Court

Supreme Court has jurisdiction over attachment for contempt in violating injunction. — An attachment for contempt in violating an injunctive order, though having some of the characteristics of a criminal proceeding, is so connected with the injunction that a writ of error to review a judgment imposing a fine or a term of imprisonment for such contempt should be treated as an equity case within this paragraph. *Tomlin v. Rome Stove & Range Co.*, 183 Ga. 183, 187 S.E. 879 (1936); *Wagner v. Commercial Printers, Inc.*, 203 Ga. 1, 45 S.E.2d 205 (1947) (see

Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Where a citation seeking a judgment for criminal contempt is filed as a branch of an equity case in which the judgment enjoined the defendant from committing the acts which form the basis for the contempt citation, the contempt case comes within the jurisdiction of the court having jurisdiction of the equity case. *Holcomb v. Johnston*, 103 Ga. App. 116, 118 S.E.2d 387 (1961).

In appeal of trial court's finding of contempt of witness in divorce proceeding, the Supreme Court lacks jurisdiction. *Crocker v. Crocker*, 232 Ga. 97, 205 S.E.2d 308 (1974).

In appeal of judgment finding appellant guilty of contempt in failing to obey notice to produce certain papers into court where the contempt feature arises out of the question of law as to the right to require such records produced, the Supreme Court is without jurisdiction. *Cranford v. Cranford*, 225 Ga. 60, 165 S.E.2d 847 (1969).

Habeas Corpus

Motions to vacate judgments in all criminal cases are not normally to be treated as petitions for habeas corpus. *Martin v. State*, 240 Ga. 488, 241 S.E.2d 246 (1978).

Child custody. — Custody controversies involving delinquent children, unruly children, or deprived children are not cases "in the nature of habeas corpus" and are not within the appellate jurisdiction of the Supreme Court. *Moss v. Moss*, 233 Ga. 688, 212 S.E.2d 853 (1975).

In a custody controversy in the nature of habeas corpus, the juvenile court has concurrent jurisdiction to decide the issue only if the case is transferred to the juvenile court by proper order of the superior court; and, in such a transferred case, appellate jurisdiction is lodged in the Supreme Court of Georgia. *Moss v. Moss*, 233 Ga. 688, 212 S.E.2d 853 (1975).

Where the natural parent of a child contended that there had never been a transfer of custody to defendant, the parent properly brought the complaint as habeas corpus, and the appeal of the case should have remained with the Supreme

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Court. *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983).

Extraordinary Remedies

Phrase “extraordinary remedies” refers only to such extraordinary legal remedies as mandamus, prohibition, quo warranto, and the like. *Spence v. Miller*, 176 Ga. 96, 167 S.E. 188 (1932); *Felton v. Chandler*, 201 Ga. 347, 39 S.E.2d 654 (1946).

“Extraordinary remedies” encompass mandamus proceedings. *James v. State*, 120 Ga. App. 317, 170 S.E.2d 303 (1969).

Declaratory judgments are not included in “extraordinary remedies.” *Felton v. Chandler*, 201 Ga. 347, 39 S.E.2d 654 (1946).

Proceeding for contempt for violation of mandamus involves extraordinary remedy. — A proceeding for contempt in violation of a mandamus absolute is so connected with the mandamus that a writ of error to review a judgment therein should be treated as a case involving an extraordinary remedy within this paragraph. *Settle v. McWhorter*, 203 Ga. 93, 45 S.E.2d 210 (1947) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Divorce and Alimony

Appellate jurisdiction of custody dispute in Supreme Court. — In case of dispute over custody between parents, original jurisdiction exists exclusively in courts having jurisdiction of habeas corpus or divorce and alimony actions, in both of which the Supreme Court has exclusive jurisdiction on appeal. *Bartlett v. Bartlett*, 99 Ga. App. 770, 109 S.E.2d 821 (1959).

Supreme Court has jurisdiction in proceeding for modification of alimony judgment. *Perry v. Perry*, 213 Ga. 847, 102 S.E.2d 534 (1958).

Sheriff failed to secure bond in divorce action. — The Supreme Court has no jurisdiction of a suit against a sheriff and the sheriff's sureties, to enforce a liability against them for failure of the sheriff to obtain from the defendant in a

suit for divorce and alimony an appearance bond as ordered by the trial court. *Swain v. Jaudon*, 147 Ga. 773, 95 S.E. 696 (1918).

In citation for contempt based upon failure to comply with judgment rendered by court of another state, the Supreme Court lacked jurisdiction. *Henderson v. Henderson*, 209 Ga. 148, 71 S.E.2d 210 (1952).

In action in which defense alleges divorce in plaintiff's action for damages for death of spouse, the Supreme Court lacks jurisdiction. *Thompson v. Central of Ga. Ry.*, 214 Ga. 130, 103 S.E.2d 555 (1958).

Where exceptions are taken to an order sustaining a demurrer (now motion to dismiss) on an oral motion to strike defendant's answer and to judgment in action upon contract for payment of alimony, the Supreme Court lacks jurisdiction. *Arnold v. Arnold*, 217 Ga. 430, 122 S.E.2d 734 (1961).

In action based solely upon contract for support in settlement of alimony and praying for recovery of sums agreed upon, the Supreme Court lacked jurisdiction. *Hayes v. Hayes*, 191 Ga. 237, 11 S.E.2d 764 (1940).

Petition for support under uniform act. — The petition of a divorced wife for support of two minor children by her former husband, brought under the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. Art. 2, Ch. 11, T. 19) is not a divorce or alimony case within the meaning of this paragraph. *O'Quinn v. O'Quinn*, 217 Ga. 431, 122 S.E.2d 925 (1961) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Action on foreign judgment for alimony is simply an action on debt of record and is not an alimony case. *McLendon v. McLendon*, 192 Ga. 70, 14 S.E.2d 477 (1941); *Johnson v. Johnson*, 223 Ga. 147, 154 S.E.2d 13 (1967).

Suit brought by one against former spouse seeking to domesticate out-of-state judgment in a divorce proceeding and to have spouse attached for contempt and ordered to pay arrearages was a suit on a foreign judgment, not a divorce or alimony case within the meaning of the Georgia Constitution, and juris-

diction of the appeal was in the Court of Appeals. *Lewis v. Robinson*, 254 Ga. 378, 329 S.E.2d 498 (1985).

Family violence actions. — Because family violence actions involve neither divorce nor alimony, they do not fall within the Supreme Court's exclusive jurisdiction and, therefore, jurisdiction lies in the Georgia Court of Appeals. *Schmidt v. Schmidt*, 270 Ga. 461, 510 S.E.2d 810 (1999).

A case involving a "domestic relations" issue wherein appellant sought domestication and "correction" of a foreign divorce decree, normally within the jurisdiction of the Court of Appeals, also involved claims based upon an unincorporated settlement agreement which raised no "domestic relations" issue and, therefore, the Supreme Court had jurisdiction over the direct appeal from the grant of summary judgment in favor of the former husband as to the former wife's claims for specific performance of the settlement agreement and jurisdiction over the rulings on all the former wife's claims, including the "domestic relations" claim. *Eickhoff v. Eickhoff*, 263 Ga. 498, 435 S.E.2d 914 (1993).

Non-custodial parent receiving child support. — Trial court erred by incorrectly starting with the father's presumptive amount of child support and incorrectly applying a parenting time deviation available only to the noncustodial parent to him under O.C.G.A. § 19-6-15(b)(1)-(7) when the court ordered him to pay the non-custodial mother child support per month. *Williamson v. Williamson*, 293 Ga. 721, 748 S.E.2d 679 (2013).

Court of Appeals has jurisdiction of appeals of contempt actions involving child custody. — Having eschewed jurisdiction over appeals which involve child custody but not a judgment for divorce and alimony and having held in *Munday v. Munday*, 243 Ga. 863, 257 S.E.2d 282 (1979), that the Court of Appeals has jurisdiction of appeals involving child custody, the Supreme Court retains jurisdiction of contempt actions involving child custody. *Ashburn v. Baker*, 256 Ga. 507, 350 S.E.2d 437 (1986).

Contempt order entered in divorce case. — Where the jury specifically desig-

nates a property transfer as alimony in a divorce case, the Court of Appeals does not have jurisdiction of an appeal of a contempt order entered therein, which by law is subject to application for discretionary appeal to the Supreme Court. *Cale v. Byrdwell*, 166 Ga. App. 901, 305 S.E.2d 468 (1983).

Georgia Supreme Court, as opposed to the Georgia Court of Appeals, had jurisdiction over a discretionary appeal by a former spouse of a contempt ruling relating to a property distribution portion of a divorce decree pursuant to Ga. Const. 1983, Art. VI, Sec. VI, Para. III(6) as the application for contempt was ancillary to the divorce action and not a new civil action; thus, it fell within the Georgia Supreme Court's jurisdiction over divorce and alimony cases. *Morris v. Morris*, 284 Ga. 748, 670 S.E.2d 84 (2008).

Tort action. — Wife's claim for damages for a motorcycle accident against her husband involved only a tort claim, and was not a divorce case within the meaning of Ga. Const. 1983, Art. VI, Sec. VI, Para. III(6), even though the wife sought a divorce in another count of the complaint, and the Supreme Court of Georgia did not have jurisdiction over the interlocutory appeal of the denial of the husband's motion to dismiss, which had been treated as a motion for summary judgment; the wife's argument that the appeal fell within the Supreme Court of Georgia's appellate jurisdiction over constitutional issues was rejected as she did not specify any allegedly unconstitutional statutes, and argued only that the interspousal tort immunity doctrine, as codified in O.C.G.A. § 19-3-8, was unconstitutional as applied. *Gates v. Gates*, 277 Ga. 175, 587 S.E.2d 32 (2003).

Writ of mandamus. — Superior court's order that the county issue building permits to the developer amounted to a writ of mandamus and, thus, the Georgia Supreme Court properly had appellate jurisdiction over the county's appeal. *Union County v. CGP, Inc.*, 277 Ga. 349, 589 S.E.2d 240 (2003).

Action for damages. — Because an ex-wife and children sought damages for a decedent's alleged failure to comply with an insurance provision in a divorce decree,

Divorce and Alimony (Cont'd)

and not a recovery of alimony or child support, the Georgia Supreme Court lacked jurisdiction to hear a discretionary appeal under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(6) and the orders appealed from were subject to the discretionary appeal requirements of O.C.G.A. § 5-6-35(a)(2); therefore, the Court of Appeals correctly dismissed their direct appeal. *Walker v. Estate of Mays*, 279 Ga. 652, 619 S.E.2d 679 (2005).

Other Cases

Supreme Court has no jurisdiction to review judgment rendered on action for breach of contract. *Lexington Presbyterian Church v. Reid*, 147 Ga. 225, 93 S.E. 208 (1917).

In contract action for cutting timber where the issue was payment of the amount due, the Supreme Court lacked jurisdiction. *King v. Rodgers*, 147 Ga. 464, 94 S.E. 580 (1917).

In action at law for deceit. — A suit seeking to recover damages for misrepresentations inducing the petitioner to purchase described real property where the sole prayer of the petition is for a money judgment as compensation for injury done, the suit must be transferred to the Court of Appeals. *Elliott v. Dolvin*, 160 Ga. 320, 127 S.E. 651 (1925).

In action on account, the Supreme Court lacks jurisdiction. *Fuller v. Cox*, 206 Ga. 332, 57 S.E.2d 173 (1950).

In action to remove obstructions from private way under former Code 1933, § 83-119 (see now O.C.G.A. § 44-9-59), the Supreme Court lacked jurisdiction. *Carter v. Kinman*, 231 Ga. 759, 204 S.E.2d 299 (1974).

The Court of Appeals, not the Supreme Court, had jurisdiction of an action begun in the probate court as a petition for removal of an obstruction of a private way, which was appealed as such to the superior court, and which also concerned whether plaintiffs had an easement across defendant's property. *Stutts v. Moore*, 218 Ga. App. 624, 463 S.E.2d 30 (1995).

In judgment discharging rule nisi issued by superior court judge on charges of inefficiency of certain members

of county board of education, the Supreme Court lacked jurisdiction. *State v. Walker*, 209 Ga. 523, 74 S.E.2d 461 (1953).

In petition seeking recovery against surety on guardian's bond, the Supreme Court lacked jurisdiction. *Gunby v. Roberts*, 205 Ga. 346, 53 S.E.2d 370 (1949).

To review determination by judge of superior court as to whether particular case is within jurisdiction of justice court, the Supreme Court lacked jurisdiction. *Smith v. Atlanta Mut. Ins. Co.*, 42 Ga. App. 254, 155 S.E. 535 (1930).

Where only question is plaintiff's right to recover attorney's fees, the Supreme Court is without jurisdiction. *Pickett v. Georgia F. & A.R.R.*, 214 Ga. 263, 104 S.E.2d 450 (1948).

In action against State Revenue Commissioner to recover money paid as corporation license tax, the Supreme Court is without jurisdiction. *Atlanta Labor Temple Ass'n v. Williams*, 214 Ga. 263, 104 S.E.2d 449 (1958).

In cases involving revenues of the state, the Supreme Court is without jurisdiction. — The enactment of the 1983 Constitution superseded the Supreme Court's order in *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977), giving the Supreme Court jurisdiction over cases involving revenues of the state; thus, all pending cases which involve revenues of the state and which have been docketed in the Supreme Court will be transferred to the Court of Appeals. *Collins v. AT & T Co.*, 265 Ga. 37, 456 S.E.2d 50 (1995).

Supreme Court lacked jurisdiction in proceeding to confirm and validate revenue anticipation certificates. *Dade County v. State*, 201 Ga. 241, 39 S.E.2d 473 (1946).

Supreme Court lacked jurisdiction in adoption proceeding. *Criswell v. Jones*, 187 Ga. 55, 199 S.E. 804 (1938).

An appraisal proceeding pursuant to former § 14-2-251 (see now O.C.G.A. § 14-2-1330) is legal, not equitable, in character; and thus no right of direct appeal to the Supreme Court lies from such a proceeding. *Atlantic States Constr., Inc. v. Beavers*, 250 Ga. 828, 301 S.E.2d 635 (1983).

Non-capital murder trial. — In non-capital murder trial, the Court of Ap-

peals retained jurisdiction under the Georgia Constitution to evaluate the merits of defendant's direct appeal from a denied double jeopardy plea, despite the Court of Appeals' failure to transfer the appeal to the Supreme Court. *Rhyne v. State*, 264 Ga. 176, 442 S.E.2d 742 (1994).

Class action challenging cheating on exam. — In an appeal pursuant to Ga. Const. 1983, Art. VI, Sec. VI, Para. III(2), arising from a class action suit challenging cheating on a city's firefighter exam, a trial court abused the court's discretion in fashioning injunctive relief specific to appealing non-party firefighters because the firefighters were not bound by the judgment since the firefighters were never joined in the action. *Barham v. City of Atlanta*, 292 Ga. 375, 738 S.E.2d 52 (2013).

Pleading and Practice

1. In General

Proper and timely filing of notice of appeal is absolute requirement to confer jurisdiction upon the appellate court. *Mingo v. State*, 133 Ga. App. 385, 210 S.E.2d 835 (1974).

Court not precluded from disposing of issues not reached by Court of Appeals. — While ordinarily the Supreme Court, in granting certiorari, does not undertake to dispose of issues not reached by the Court of Appeals in its decision, it is not precluded from doing so under this paragraph. *State v. Royal*, 247 Ga. 309, 275 S.E.2d 646 (1981) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. III).

Certification of question authorized. — The Court of Appeals was authorized to certify a question to the Supreme Court as to the constitutionality of retroactive application of the cap on damages recoverable against the state provided in O.C.G.A. § 50-21-26. *Department of Human Resources v. Phillips*, 223 Ga. App. 520, 478 S.E.2d 598 (1996).

The Supreme Court has no jurisdiction to consider merits of any question which is omitted in the trial court, and it is upon errors alleged by the complaining party to have been committed in the court below that the court must confine itself. *Yarbrough v. Georgia R.R. &*

Banking Co., 176 Ga. 780, 168 S.E. 873 (1933); *Herndon v. State*, 179 Ga. 597, 176 S.E. 620 (1934), appeal dismissed, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935); *Calhoun v. State*, 211 Ga. 112, 84 S.E.2d 198 (1954); *Willingham v. Lee*, 227 Ga. 425, 181 S.E.2d 49 (1971).

Enumeration of errors complaining of rulings not appearing of record cannot be considered by Supreme Court. *Cowart v. Cowart*, 223 Ga. 487, 156 S.E.2d 94 (1967).

Supreme Court has no original jurisdiction and it cannot decide questions raised for first time on appeal. *Kitchens v. State*, 228 Ga. 624, 187 S.E.2d 268 (1972).

Appellate courts have no original jurisdiction and will decide no question on appeal not clearly presented to and passed upon by the trial court. *Security Mgt. Co. v. King*, 132 Ga. App. 618, 208 S.E.2d 576 (1974).

Supreme Court has no original jurisdiction. — It is the province of the appellate court to consider only such questions as were presented to the trial court. Accordingly, an assignment of error is limited by the objections made at the time the evidence was offered. The objections cannot be enlarged by the addition of new matter as argument or grounds of error in a motion for new trial. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597 (1934), appeal dismissed with opinions, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935).

The Supreme Court is a court for the correction of errors, and has no original jurisdiction; it will not pass upon questions on which no ruling has ever been made by the trial judge. *South View Cem. Ass'n v. Hailey*, 199 Ga. 478, 34 S.E.2d 863 (1945).

The Supreme Court is limited in its consideration of a case to the rulings actually made by the trial court to which there is exception. *Walker v. State*, 220 Ga. 415, 139 S.E.2d 278 (1964), rev'd on other grounds, 381 U.S. 355, 85 S. Ct. 1557, 14 L. Ed. 2d 681 (1965).

Any error not enumerated shall be disregarded. *Windsor v. Southeastern Adjusters, Inc.*, 221 Ga. 329, 144 S.E.2d 739 (1965).

Party alleging error has burden of showing it in the record. *Tukes v.*

Pleading and Practice (Cont'd)**1. In General (Cont'd)**

State, 238 Ga. 114, 230 S.E.2d 841 (1976).

All interested persons are necessary parties. — All persons who are interested in sustaining or reversing the judgment of the court below are necessary parties in the Supreme Court, and must be made parties to the bill of exceptions. *Greeson v. Taylor*, 160 Ga. 392, 128 S.E. 177 (1925).

Appeal to United States Supreme Court tolls term for case. — Where on appeal from Georgia Supreme Court to the United States Supreme Court the judgment has been reversed and the case remanded for further proceedings, the appeal tolls the term for the case, and the Georgia Supreme Court still has jurisdiction to give such direction and make such disposition of the case as it may deem proper, not inconsistent with the opinion and judgment of the United States Supreme Court. *Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32 (1935), *aff'd sub nom. Georgia Ry. & Elec. Co. v. City of Decatur*, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).

Case transferred when outside jurisdiction. — Where an action was held by the Supreme Court to be a tort action, and not for equitable accounting, it will be transferred to the Court of Appeals. *Callaway v. Pearson*, 146 Ga. 632, 92 S.E. 43 (1917).

When case transferred to Court of Appeals entered on docket. — When a case is transferred by the Supreme Court to the Court of Appeals during a term of the latter court and before the docket of the term is by order of the court closed, such case shall be entered upon the docket of the court when received, which shall be the first term; but when such transferred case is received by the clerk of the court after the docket for the term has been by order of the court closed, it shall be entered upon the docket of the next term,

which shall be the first term of the case in the court to which it is transferred. *Atlantic C.L.R. Co. v. Georgia Sweet Potato Growers' Ass'n*, 171 Ga. 30, 154 S.E. 698, answer conformed to, 42 Ga. App. 82, 154 S.E. 915 (1930).

2. Need for Definiteness

Each question certified must be distinct question or proposition of law clearly stated, so that it can be definitely answered without regard to other issues of law or of fact in the case. A question must not contain inferences drawn either from the pleadings or from the evidence. *Gormley v. Slicer*, 177 Ga. 430, 170 S.E. 224 (1933); *Willis v. Georgia Power Co.*, 178 Ga. 878, 174 S.E. 625 (1934).

Supreme Court will not answer question of objectionable generality, or such as contains a number of contingencies dependent upon evidence. A question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances, and a different answer under another. *Willis v. Georgia Power Co.*, 178 Ga. 878, 174 S.E. 625 (1934).

Where certified question does not present distinct issue of law, Supreme Court is not required or authorized to answer it. *Butler v. State*, 194 Ga. 426, 21 S.E.2d 846 (1942).

There can be no order or judgment by inference or implication that can be subject of review by an appellate court. *Calhoun v. State*, 211 Ga. 112, 84 S.E.2d 198 (1954).

Referring to prior case as "essentially similar" insufficient. — It is not sufficient to refer to a former case decided by the Supreme Court and to certify that the prayers and the allegations of the petition are "essentially similar" to the case mentioned. Such certification necessarily includes an inference or opinion on the question as to whether the allegations and prayers are "essentially similar." *Gormley v. Slicer*, 177 Ga. 430, 170 S.E. 224 (1933).

OPINIONS OF THE ATTORNEY GENERAL

Public Service Commission as defendant in superior court action for injunction has right to appeal to Su-

preme Court. 1967 Op. Att’y Gen. No. 67-40.

RESEARCH REFERENCES

ALR. — Jurisdiction of state court over divorce suit by resident of United States reservation, 46 ALR 993.

Validity of contract as affected by public policy as an independent question for the federal courts, or one as to which they are bound to follow the decisions of the state court, 57 ALR 435.

Jurisdiction of state courts of actions in relation to interstate shipments, 64 ALR 333.

Jurisdiction to order performance of positive acts in another state, 71 ALR 1351.

Right of federal courts in passing upon the validity or construction of state statute or constitutional provision, or rights and obligations accruing thereunder, to exercise their own judgment independent

of latest state court decisions thereon rendered subsequent to the accrual of the right in question, 97 ALR 515.

Propriety of certiorari to review decisions of public officer or board granting, denying, or revoking permit, certificate, or license required as condition of exercise of particular right or privilege, 102 ALR 534.

Power of court to prescribe rules of pleadings, practice, or procedure, 110 ALR 22; 158 ALR 705.

Superintending control over inferior tribunals, 112 ALR 1351.

Jurisdiction of state court over actions involving patents, 167 ALR 1114.

Adjudication of property rights of spouses in action for separate maintenance, support, or alimony without divorce, 74 ALR2d 316.

Paragraph IV. Jurisdiction over questions of law from state appellate or federal district or appellate courts.

The Supreme Court shall have jurisdiction to answer any question of law from any state appellate or federal district or appellate court. (Ga. Const. 1983, Art. 6, § 6, Para. 4; Ga. L. 2003, p. 404, § 1/HR 68.)

1976 Constitution. — Art. VI, Sec. II, Para. VII.

Cross references. — Certification of questions from federal courts as to Georgia law, Rules of the Supreme Court of the State of Georgia, Rule 46.

Editor’s notes. — The constitutional amendment (Ga. L. 2003, p. 404, § 1)

which revised Paragraph IV was approved by a majority of the qualified voters voting at the general election held on November 2, 2004.

Law reviews. — For article, “Georgia’s Constitutional Scheme for State Appellate Jurisdiction,” see 6 Ga. St. B.J. 24 (2001).

JUDICIAL DECISIONS

Particular phrasing of the certified question does not restrict the supreme court’s consideration of the problems involved and issues raised as perceived by it in its analysis of the record certified in the case. *Union Camp Corp. v. Helmy*, 258 Ga. 263, 367 S.E.2d 796 (1988).

Court declined to answer certified questions seeking advisory or anticipatory answers. — Because a federal district court certified questions regarding potential issues in a litigation and the certified questions addressed matters that either were previously decided in a prior

certified opinion, were advisory or anticipatory in nature, or appeared to involve determinations properly made under federal practice and procedure, the court declined to answer the certified questions. *CSX Transp., Inc. v. City of Garden City*, 279 Ga. 655, 619 S.E.2d 597 (2005).

Habeas corpus. — Defendant's "Motion to Set Aside Sentences" was not an appropriate remedy and should have been considered as a petition for habeas corpus. *State v. McCrary*, 193 Ga. App. 11, 387 S.E.2d 10 (1989), *aff'd*, 259 Ga. 830, 388 S.E.2d 682 (1990).

No certification for moot questions. — While federal district courts could certify open questions of law under the Georgia state constitution and relevant state statutes to the Supreme Court of Georgia under Ga. Const. 1983, Art. VI, Sec. VI, Para. IV, O.C.G.A. § 15-2-9, and Ga. Sup. Ct. R. 46-48, because the direct actions by plaintiff insureds against defendant insurer were barred by O.C.G.A. § 33-7-11 for failure to have first obtained a judgment against their uninsured motorists, the insureds' request for certification of a

question of law to the Supreme Court of Georgia, to determine whether Georgia precedent prohibited the insurer from asserting set-offs in the payment of uninsured motorist personal injury claims was not warranted. *Harden v. State Farm Mut. Auto. Ins. Co.*, No. 08-15008, 2009 U.S. App. LEXIS 16095 (11th Cir. July 22, 2009).

Cited in *Varner v. Century Fin. Co.*, 720 F.2d 1228 (11th Cir. 1983); *Smith v. Universal Underwriters Ins. Co.*, 732 F.2d 129 (11th Cir. 1984); *Wood v. New York Life Ins. Co.*, 758 F.2d 1459 (11th Cir. 1985); *Abney v. Cox Enters.*, 777 F.2d 1521 (11th Cir. 1985); *St. Joseph Hosp. v. Celotex Corp.*, 854 F.2d 426 (11th Cir. 1988); *Kitchen v. CSX Transp., Inc.*, 19 F.3d 601 (11th Cir. 1994); *Hardin v. NBC Universal, Inc.*, 283 Ga. 477, 660 S.E.2d 374 (2008); *Trinity Outdoor, LLC v. Cent. Mut. Ins. Co.*, 285 Ga. 583, 679 S.E.2d 10 (2009); *Harden v. State Farm Mut. Auto. Ins. Co.*, No. 08-15008, 2009 U.S. App. LEXIS 16095 (11th Cir. July 22, 2009) (Unpublished).

Paragraph V. Review of cases in Court of Appeals.

The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance.

1976 Constitution. — Art. VI, Sec. 2, Para. IV.

Cross references. — Writ of certiorari to Court of Appeals, § 5-6-15.

Law reviews. — For article, "Getting Certiorari Granted," 28 Ga. St. B.J. 90 (1991).

JUDICIAL DECISIONS

Under this paragraph, Supreme Court has authority to review any case by certiorari from Court of Appeals. *Frazier v. Southern Ry.*, 200 Ga. 590, 37 S.E.2d 774 (1946) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. V).

General Assembly does not have power to limit time period for Supreme Court to grant certiorari. *Holliman v. State*, 175 Ga. 232, 165 S.E. 11 (1932).

Writ issued only for questions of gravity and importance. — The power of the Supreme Court to require the Court

of Appeals to certify a case by certiorari is exercised with great caution and the writ is issued only in cases involving questions of great public concern in matters of gravity and importance. *Central of Ga. Ry. v. Yesbik*, 146 Ga. 620, 91 S.E. 873 (1917); *King v. State*, 155 Ga. 707, 118 S.E. 368 (1923); *Louisville & N.R.R. v. Tomlin*, 161 Ga. 749, 132 S.E. 90 (1926); *Adair v. Traco Div.*, 192 Ga. 59, 14 S.E.2d 466, answer conformed to, 65 Ga. App. 110, 15 S.E.2d 306 (1941); *Frazier v. Southern Ry.*, 200 Ga. 590, 37 S.E.2d 774 (1946).

Ga. Const. 1983, Art. VI, Sec. 6, Para. V

gives the state's highest court the power to review by certiorari cases in the Georgia Court of Appeals that are of gravity or great public importance. *Mathis v. Cannon*, 276 Ga. 16, 573 S.E.2d 376 (2002).

Denial of writ of certiorari shall not be taken as adjudication that decision or judgment of Court of Appeals is correct. — The writ may have been denied for want of sufficient assignment of error in the petition, or for other failure to comply with the rules, or because the case was not considered as one falling within the class which may be reviewed on certiorari. *Adair v. Traco Div.*, 192 Ga. 59, 14 S.E.2d 466, answer conformed to, 65 Ga. App. 110, 15 S.E.2d 306 (1941).

Supreme Court determines whether to grant certiorari. — When conflict in decisions is involved, whether or not writ of certiorari will be granted is a question for determination by the Supreme Court, under the facts and circumstances of each particular case. *Frazier v. Southern Ry.*, 200 Ga. 590, 37 S.E.2d 774 (1946).

Court of Appeals decision in favor of defendant in criminal case. — The Supreme Court has jurisdiction to review by certiorari any decision by the Court of Appeals in the defendant's favor in a criminal case, and a defendant's constitutional right against double jeopardy is not implicated when the state seeks discretionary review of an adverse decision by the Court of Appeals in a criminal case. *State v. Tyson*, 273 Ga. 690, 544 S.E.2d 444 (2001).

Court not precluded from disposing of issues not reached by Court of Appeals. — While ordinarily the Supreme Court, in granting certiorari, does not undertake to dispose of issues not reached by the Court of Appeals in its decision, it is not precluded from doing so under this paragraph. *State v. Royal*, 247 Ga. 309, 275 S.E.2d 646 (1981) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. V).

Certiorari properly granted where question involved is effect of Carmack Amendment to Hepburn Act (49 U.S.C. §§ 11, 18). *Central of Ga. Ry. v. Yesbik*, 146 Ga. 620, 91 S.E. 873 (1917).

Federal habeas petitioner. — A federal habeas petitioner was not required to petition the Georgia Supreme Court to review the Georgia appellate court's decision in the petitioner's appeal of convictions for armed robbery and aggravated battery, the convictions being appealed because of the alleged unconstitutionality of the grand and traverse jury pools, as the state Supreme Court's certiorari jurisdiction is extremely limited and offered no practical remedy to be exhausted. *Buck v. Green*, 743 F.2d 1567 (11th Cir. 1984).

Because certiorari was only granted in cases of gravity or great public importance under Ga. Const. 1983, Art. VI, Sec. VI, Para. V, and the Georgia Supreme Court's denial of certiorari was not a ruling on the merits, petitioner state inmate had not fairly presented the petitioner's claims to the state and dismissal of the petitioner's federal habeas petition was proper for failure to exhaust. *Mauk v. Lanier*, 484 F.3d 1352 (11th Cir. 2007).

Appeals by state prisoners. — Because a state prisoner did not appeal a conviction to the Georgia Supreme Court, the conviction became final 10 days after the appellate court affirmed the conviction, and the prisoner was not entitled to seek certiorari review to the U.S. Supreme Court under 28 U.S.C. § 1257(a). Thus, the habeas petition was untimely under 28 U.S.C. § 2244(d)(1)(A); although the Georgia Constitution circumscribed review by the Georgia Supreme Court, the Georgia Supreme Court placed no limit on its certiorari jurisdiction under Ga. Const. 1983, Art. VI, O.C.G.A. § 5-6-15, and Ga. Sup. Ct. R. 40. *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006).

Paragraph VI. Decisions of Supreme Court binding.

The decisions of the Supreme Court shall bind all other courts as precedents.

1976 Constitution. — Art. VI, Sec. II, Para. VIII.

JUDICIAL DECISIONS

In general. — See *Southern Bell Tel. & Tel. Co. v. Glawson*, 140 Ga. 507, 79 S.E. 136 (1913); *Holmes v. Southern Ry.*, 145 Ga. 172, 88 S.E. 924 (1916).

The decisions of the Supreme Court shall bind the Court of Appeals as precedents, and the Court of Appeals is not authorized by this paragraph to request a review by the Supreme Court of a decision rendered by the Supreme Court. *Cargile v. State*, 194 Ga. 20, 20 S.E.2d 416, answer conformed to, 67 Ga. App. 610, 21 S.E.2d 326 (1942) (see Ga. Const. 1983, Art. VI, Sec. VI, Para. VI).

Unanimity not required. — A decision rendered by a divided Supreme Court is authoritative as a precedent, and, although a decision of the Supreme Court may have been rendered by a divided court, the Court of Appeals is nevertheless bound thereby. *Western & A.R.R. v. Michael*, 43 Ga. App. 703, 160 S.E. 93 (1931).

As to the Court of Appeals, a Supreme Court decision is a binding precedent even though not unanimous. *Life Ins. Co. v. Lawler*, 211 Ga. 246, 85 S.E.2d 1 (1954).

Court of Appeals has no authority to overrule or modify decision of the Supreme Court of Georgia. *Adams v. State*, 174 Ga. App. 558, 331 S.E.2d 29 (1985); *Etkind v. Suarez*, 234 Ga. App. 108, 505 S.E.2d 831 (1998), *aff'd*, 271 Ga. 352, 519 S.E.2d 210 (1999).

The Appellate Court of Georgia was without authority to abolish or modify the Supreme Court's determination that constitutional challenges must be raised before the jury returns a verdict. *Nahid v. State*, 276 Ga. App. 687, 624 S.E.2d 264 (2005).

Decisions of the Georgia Court of Appeals that were inconsistent with Georgia Supreme Court precedent were not binding. — Following the defendant's conviction for attempted murder, there was no change in the law because *McNair v. State*, 293 Ga. 282 (2013), applying the rule of lenity when there was ambiguity between two felony punish-

ments, was dictated by the Supreme Court's own precedents. Contrary cases by the Georgia Court of Appeals were never binding precedents. *Rollf v. Carter*, 298 Ga. 557, No. S15A1505, 2016 Ga. LEXIS 195 (2016).

Declaratory ruling. — Litigants who argued that a prior decision of the court was not a genuine case or controversy between adversaries and that the prior litigation was "arranged" solely to elicit a declaratory ruling on the constitutionality of a statute were not availed because the court had previously ruled that the statute, O.C.G.A. § 36-60-13, was constitutional under Ga. Const. 1983, Art. IX, § V, Para. I(a), and that prior decision was binding on any lower court faced with an argument that the statute was not constitutional. *Bauerband v. Jackson County*, 278 Ga. 222, 598 S.E.2d 444 (2004).

Cited in *State v. Benton*, 168 Ga. App. 665, 310 S.E.2d 243 (1983); *Lane Co. v. Taylor*, 174 Ga. App. 356, 330 S.E.2d 112 (1985); *Thompson v. Crownover*, 186 Ga. App. 633, 368 S.E.2d 170 (1988); *W.R. Grace & Co. v. Mouyal*, 959 F.2d 219 (11th Cir. 1992); *Conner v. State*, 205 Ga. App. 564, 422 S.E.2d 872 (1992); *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n*, 212 Ga. App. 575, 442 S.E.2d 860 (1994); *National Health Network, Inc. v. Fulton County*, 228 Ga. App. 584, 492 S.E.2d 333 (1997); *Zachery v. State*, 233 Ga. App. 519, 504 S.E.2d 466 (1998); *Flores v. State*, 298 Ga. App. 574, 680 S.E.2d 609 (2009); *State v. Smith*, 308 Ga. App. 345, 707 S.E.2d 560 (2011); *Jenkins v. Smith*, 308 Ga. App. 762, 709 S.E.2d 23 (2011); *Bunn v. State*, 291 Ga. 183, 728 S.E.2d 569 (2012); *Tender Loving Health Care Servs. of Ga., LLC v. Ehrlich*, 318 Ga. App. 560, 734 S.E.2d 276 (2012); *Sherman v. Atlanta Indep. Sch. Sys.*, 293 Ga. 268, 744 S.E.2d 26 (2013); *Southern LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 755 S.E.2d 683 (2014); *Financial Education Services, Inc. v. State*, No. A15A2311, 2016 Ga. App. LEXIS 104 (Mar. 1, 2016).

SECTION VII.

SELECTION, TERM, COMPENSATION, AND DISCIPLINE
OF JUDGES

Paragraph	Paragraph
I. Election; term of office.	VI. Judicial Qualifications Commission; power; composition.
II. Qualifications.	VII. Discipline, removal, and involuntary retirement of judges.
III. Vacancies.	VIII. Due process; review by Supreme Court.
IV. Period of service of appointees.	
V. Compensation and allowances of judges.	

Paragraph I. Election; term of office.

All superior court and state court judges shall be elected on a nonpartisan basis for a term of four years. All Justices of the Supreme Court and the Judges of the Court of Appeals shall be elected on a nonpartisan basis for a term of six years. The terms of all judges thus elected shall begin the next January 1 after their election. All other judges shall continue to be selected in the manner and for the term they were selected on June 30, 1983, until otherwise provided by local law.

1976 Constitution. — Art. VI, Sec. II, Paras. III, VIII; Art. VI, Sec. III, Paras. I, II, and III; Art. VI, Sec. VI, Para. III; Art. VI, Sec. VII, Paras. I and III.	of superior court judges, § 21-2-9. Qualification of candidates for election in nonpartisan primary, § 21-2-130 et seq. Form of nonpartisan primary ballot, §§ 21-2-284.1, 21-2-285.1.
Cross references. — Time of election	

JUDICIAL DECISIONS

Election held under paragraph not affected by paragraph providing for filling vacancy in unexpired term. — An election held at the time prescribed by this paragraph to fill the office for the next ensuing four-year term is not affected by the provisions of Ga. Const. 1976, Art. VI, Sec. III, Para. III (see Ga. Const. 1983, Art. VI, Sec. VII, Para. IV), which provide not for the election of a judge for the next ensuing four-year term, but for the filling of a vacancy for the portion of the unexpired term occasioned by the death or resignation of the incumbent. *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. I).

“Six month provision” in Ga. Const. 1983, Art. VI, Sec. VII, Para. IV is not in conflict with the mandate in Ga. Const. 1983, Art. VI, Sec. VII, Para. I that superior court and state court judges are to be

elected on a nonpartisan basis for a four-year term because the drafters envisioned that the six month provision would give the voters the right to select the holders of elective office, yet would afford the appointee a sufficient opportunity to demonstrate the merit, or lack thereof, of the appointee’s service. *Perdue v. Palmour*, 278 Ga. 217, 600 S.E.2d 370 (2004).

Agreement to change to retention election system unconstitutional. — In an action challenging Georgia’s judicial election system under the Voting Rights Act and the federal Constitution a proposed consent decree that would establish retention elections instead of direct elections was rejected because it would impermissibly decrease the power of the electorate in violation of constitutional and statutory law of the state. *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548 (S.D.

Ga. 1994), appeal dismissed, 59 F.3d 1114 (11th Cir. 1995).

One elected Chief Justice not entitled to office where previous term unexpired. — One who claims to have been elected Chief Justice of the Supreme Court of Georgia in a state-wide general election is not entitled to a commission from the Governor, and could not qualify as Chief Justice where before such election there existed a vacancy in the office, the unexpired term whereof extended beyond the time when a regular election would be held for judicial officers of that class, and the vacancy had been filled by executive appointment. *Stephens v. Reid*, 189 Ga. 372, 6 S.E.2d 728 (1939).

Quo warranto denied challenging appointment of judges. — Trial court's denial of the challenger's petition for a writ of quo warranto was affirmed because the newly created positions on the Georgia Court of Appeals qualified as vacancies under Ga. Const. 1983, Art. VI, Sec. VII, Para. III; thus, the governor had the authority to appoint judges to the vacancies created by amended O.C.G.A. § 15-3-1(a). *Clark v. Deal*, No. S16X0560, 2016 Ga. LEXIS 314 (Apr. 26, 2016).

Intra-county judicial assistance. — Requesting and receiving intra-county judicial assistance did not unconstitutionally create a judgeship as the juvenile court judges who assisted the superior court did not become superior court judges; thus, no judicial position constitutionally required to be filled by election under Ga. Const. 1983, Art. VI, Sec. VII, Para. I, or by gubernatorial appointment until election under Ga. Const. 1983, Art. V, Sec. II, Para. VIII, was created by the exercise of O.C.G.A. § 15-1-9.1(b)(2)(C). *Earl v. Mills*, 278 Ga. 128, 598 S.E.2d 480 (2004).

Remaining in office after term of office ends. — Previous state constitutions explicitly provided that the term of office for superior court judges “shall be for four years, and until his successor is qualified.” Omission of the phrase “until his successor is qualified” in the 1983 Constitution does not prevent judges from remaining in office after their four-year term of office ends. *Garcia v. Miller*, 261 Ga. 531, 408 S.E.2d 97 (1991).

Serving on state court after taking oath of superior court judge. — There are no constitutional or statutory bars to a judge's continuing to serve as judge of the state court until the effective date of the judge's resignation from that office, notwithstanding the judge having taken the oath of office of judge of the superior court a few days before the judge's term of office was to begin. *Carey Can., Inc. v. Hinely*, 181 Ga. App. 364, 352 S.E.2d 398 (1986), rev'd on other grounds, 257 Ga. 150, 356 S.E.2d 202, cert. denied, 484 U.S. 898, 108 S. Ct. 233, 98 L. Ed. 2d 192 (1987).

Magistrate judges and variance by local law. — As the constitution permits selection and terms of offices of magistrate judges to be varied by local law, the provisions of O.C.G.A. §§ 15-10-20, 15-10-23, 15-10-100, 15-10-105 and Ga. L. 1983, p. 4027, are not unconstitutional. *In re Magistrate Court*, 262 Ga. 334, 418 S.E.2d 42 (1992).

Judicial appointment to a vacant seat. — Since any appointment for the judicial position would have been made less than six months prior to the election, pursuant to Ga. Const. 1983, Art. VI, Sec. VII, the judge candidate could not show that the candidate was deprived of the candidate's right to vote or participate in the electoral process where the candidate's candidacy was “revoked” by the Secretary of State after the Governor decided to appoint a judge to the vacant seat; thus, the judge candidate failed to state a claim pursuant to 42 U.S.C. § 1983 or U.S. Const., amend. 14 against the Governor or the Secretary of State. *Hornsby v. Barnes*, No. 1:02-cv-1812-GET, 2002 U.S. Dist. LEXIS 27508 (N.D. Ga. July 22, 2002).

Appointment not improper. — Because defendant's claim that defendant's trial judge was not properly appointed under O.C.G.A. § 15-1-9.1(b)(2) was first raised on a motion for new trial, the complaint was untimely; in any event, the judge's previous appointments by separate orders to preside over other superior court matters for specified periods of time did not render the judge a de facto superior court judge in violation of the constitutional requirement that all superior court judges be elected, Ga. Const. 1983,

Art. VI, Sec. VII, Para. I, and thus defendant failed to establish that counsel's failure to object to the allegedly improper appointment of the judge was ineffective assistance. *Moreland v. State*, 279 Ga. 641, 619 S.E.2d 626 (2005).

Cited in *Madden v. Cleland*, 105 F.R.D. 520 (N.D. Ga. 1985); *Brooks v. State Bd. of Elections*, 838 F. Supp. 601 (S.D. Ga. 1993).

OPINIONS OF THE ATTORNEY GENERAL

Candidates not restricted to judicial district involved. — Names appearing upon nomination petition for candidate seeking office of judge of superior court or solicitor general (now district attorney) are not restricted to electors residing in judicial circuit directly involved. 1965-66 Op. Att'y Gen. No. 66-126.

Election of clerks of state court on partisan basis. — In enacting Ga. Const. 1983, Art. VI, Sec. VII, Para. I and O.C.G.A. §§ 21-2-138 and 21-2-139, the General Assembly did not intend to place the election of clerks of state courts on a

nonpartisan basis unless the General Assembly so provided by special legislation. 1985 Op. Att'y Gen. No. U85-6.

Terms of appointees to vacancies. — An appointee to fill a vacancy occurring in a superior or state court judgeship will serve until January 1 following the next general election which is more than six months after the date of the person's appointment at which time the appointee will be required to run for a new four year term of office regardless of the time remaining in the original term of office. 1986 Op. Att'y Gen. No. 86-31.

Paragraph II. Qualifications.

(a) Appellate and superior court judges shall have been admitted to practice law for seven years.

(b) State court judges shall have been admitted to practice law for seven years, provided that this requirement shall be five years in the case of state court judges elected or appointed in the year 2000 or earlier. Juvenile court judges shall have been admitted to practice law for five years.

(c) Probate and magistrate judges shall have such qualifications as provided by law.

(d) All judges shall reside in the geographical area in which they are selected to serve.

(e) The General Assembly may provide by law for additional qualifications, including, but not limited to, minimum residency requirements. (Ga. Const. 1983, Art. 6, § 7, Para. 2; Ga. L. 2000, p. 2002, § 1/HR 268.)

1976 Constitution. — Art. VI, Sec. II, Para. VIII; Art. VI, Sec. VII, Para. I; Art. VI, Sec. XIII, Para. I.

Editor's notes. — The constitutional amendment (Ga. L. 2000, p. 2002, § 1), which changed the experience requirement for eligibility for the office of state

court judge from five years to seven years, was approved by a majority of the qualified voters voting at the general election held on November 7, 2000.

Law reviews. — For article, "The Selection and Tenure of Judges," see 2 Ga. St. B.J. 281 (1966).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

LAW-PRACTICE REQUIREMENT

General Consideration

Qualifications for office constitutionally fixed cannot be changed by statute. — Certain offices are created by the Constitution itself, and in certain cases the Constitution prescribes the qualifications which will prevent one from holding or being eligible to hold such office; and where the Constitution does fix the grounds of qualification and disqualification, the legislature cannot by statute take from or add to those grounds. *Ray v. Hand*, 225 Ga. 589, 170 S.E.2d 692 (1969).

This paragraph does not bar a person with the constitutional qualifications from seeking and assuming office. *Ray v. Hand*, 225 Ga. 589, 170 S.E.2d 692 (1969) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. II).

Age at time of election. — The word “election” as it appears in this provision means the day votes are cast, not the day when they are finally tabulated and certified by the Secretary of State. *Poythress v. Moses*, 250 Ga. 452, 298 S.E.2d 480 (1983) (decided under Ga. Const. 1976, Art. VI, Sec. XIII, Para. I, relating to qualifications of appellate and superior court judges and other officials.).

Cited in *Anderson v. Flake*, 270 Ga. 141, 508 S.E.2d 650 (1998).

Law-Practice Requirement

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. XIII, Para. I and antecedent provisions, which stated that a person must “have practice law” for specified periods before becoming eligible for service as a Justice of the Supreme Court, Judge of the Court of Appeals, or judge of the superior court, are included in the annotations for this paragraph. The present provision requires one to have been “admitted to practice law” for a specified period.

The language “shall have practiced” means actual practice and, of course, contemplates lawful practice. *Wallace v. Wallace*, 225 Ga. 102, 166 S.E.2d 718, cert. denied, 396 U.S. 939, 90 S. Ct. 369, 24 L. Ed. 2d 240 (1969).

If an attorney never registers with nor pays any license fee to the State Bar, any practice of law which the attorney may have engaged in is unlawful and the attorney is ineligible for the office of district attorney. *Wallace v. Wallace*, 225 Ga. 102, 166 S.E.2d 718, cert. denied, 396 U.S. 939, 90 S. Ct. 369, 24 L. Ed. 2d 240 (1969).

Qualification of § 15-18-3 must be read in light of this paragraph. — The denial of eligibility to one “who has not been duly admitted and licensed to practice law in the superior courts for at least three years” under former Code 1933, § 24-2901 (see now O.C.G.A. § 15-18-3), must be read in light of the higher requirement of this paragraph. *Wallace v. Wallace*, 225 Ga. 102, 166 S.E.2d 718, cert. denied, 396 U.S. 939, 90 S. Ct. 369, 24 L. Ed. 2d 240 (1969) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. II).

Disbarment and cancellation of license to practice law separate proceedings. — Where a lawyer is also a judge of the superior court and hence a constitutional officer and must have practiced law seven years at time of the lawyer’s election and is prohibited from practicing law while serving as judge, the lawyer cannot at the same time be disbarred and the lawyer’s license to practice law canceled as provided in the Rules and Regulations of the State Bar of Georgia. The two proceedings are provided for the accomplishment of entirely different results. Each must be pursued to accomplish the result which it is intended to accomplish. *Gordon v. Clinkscales*, 215 Ga. 843, 114 S.E.2d 15 (1960).

Supreme Court Justice candidate. — An individual must be a member of the State Bar of Georgia in order to be quali-

fied to run for office as a Justice of the Supreme Court of Georgia. Littlejohn v. Cleland, 251 Ga. 597, 308 S.E.2d 186 (1983).

OPINIONS OF THE ATTORNEY GENERAL

Residency requirement. — A state court judge must continue to maintain residency in the county from which the judge is elected in order to retain office and, if the judge fails to do so, then the office becomes vacant as a matter of law. 1995 Op. Att’y Gen. No. U95-6.

Seven-year practice of law requirement must be met by date of election. — One running for office of judge of superior court must meet seven-year practice of law requirement by date of one’s election to that office, rather than at time of oath of office. 1981 Op. Att’y Gen. No. 81-64.

Magistrates should be classified as county officials for purposes of social security reporting and contributions. 1986 Op. Att’y Gen. No. 86-9.

RESEARCH REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d, Judges, § 5 et seq.

C.J.S. — 48A C.J.S., Judges, § 46 et seq.

ALR. — Nonregistration as affecting one’s qualification to hold public office, 128 ALR 1117.

Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.

Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 ALR3d 1048.

Validity and construction of constitutional or statutory provisions making legal knowledge or experience a condition of eligibility for judicial office, 71 ALR3d 498.

Constitutional restrictions on nonattorney acting as judge in criminal proceeding, 71 ALR3d 562.

Validity of age requirement for state public office, 90 ALR3d 900.

Paragraph III. Vacancies.

Vacancies shall be filled by appointment of the Governor except as otherwise provided by law in the magistrate, probate, and juvenile courts.

1976 Constitution. — Art. VI, Sec. II, Paras. III, VIII; Art. VI, Sec. III, Para. III.

Cross references. — Filling of vacancies in public office generally, Ch. 5, T. 45, and § 45-12-50 et seq.

JUDICIAL DECISIONS

Judge appointed upon request for assistance. — Judgment entered by a judge who was appointed by the chief county magistrate judge upon a request for “assistance” made by the superior court chief judge pursuant to O.C.G.A. § 15-1-9.1, was not void, even though the judge was appointed to fill a vacancy created by the resignation of a superior court judge, which vacancy should have been filled by the Governor. Dominguez v. Enterprise Leasing Co., 197 Ga. App. 664, 399 S.E.2d 269 (1990).

Quo warranto denied challenging appointment of judges. — Trial court’s denial of the challenger’s petition for a writ of quo warranto was affirmed because the newly created positions on the Georgia Court of Appeals qualified as vacancies under Ga. Const. 1983, Art. VI, Sec. VII,

Para. III; thus, the governor had the authority to appoint judges to the vacancies created by amended O.C.G.A. § 15-3-1(a). *Clark v. Deal*, No. S16X0560, 2016 Ga. LEXIS 314 (Apr. 26, 2016).

Six-month provision. — Trial court erred in directing a county election super-

intendent to proceed with the primary and general elections for a judge and solicitor-general because the Governor's appointees would not have had six months to demonstrate their merit. *Perdue v. Palmour*, 278 Ga. 217, 600 S.E.2d 370 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Reelection of Supreme Court Justice appointed to fill vacancy. — When the Governor appoints to fill a vacancy on the Supreme Court, the appointee must stand for reelection in the nonpartisan judicial primary and also during the next general election in November, which is more than six months after their appointment. 1992 Op. Att'y Gen. No. U92-7.

Special election occurs when superior court judge has died and a successor is to be selected according to this paragraph and no call is necessary. 1970 Op.

Att'y Gen. No. U70-144. (see Ga. Const. 1983, Art. VI, Sec. VII, Para. III).

State court solicitor. — A person appointed to fill a vacancy created by the resignation of a state court solicitor may serve until January 1 of the year following the next general election which is more than six months after such person's appointment and, if elected in the general election next preceding that January 1 date, such person would begin to serve a new four-year term of office. 1990 Op. Att'y Gen. No. U90-17.

Paragraph IV. Period of service of appointees.

An appointee to an elective office shall serve until a successor is duly selected and qualified and until January 1 of the year following the next general election which is more than six months after such person's appointment.

1976 Constitution. — Art. VI, Sec. II, Paras. III, VIII; Art. VI, Sec. III, Para. III.

Cross references. — Filling of vacan-

cies in public office generally, Ch. 5, T. 45, and § 45-12-50 et seq.

JUDICIAL DECISIONS

Paragraph does not affect regular elections. — An election held at the time prescribed by Ga. Const. 1976, Art. VI, Sec. III, Para. II (see Ga. Const. 1983, Art. VI, Sec. VII, Para. I) to fill the office for the next ensuing four-year term is not affected by the provisions of this paragraph, which provide not for the election of a judge for the next ensuing four-year term, but for the filling of a vacancy for the portion of the unexpired term occasioned by the death or resignation of the incumbent. *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. IV).

Trial court erred in directing a county

election superintendent to proceed with the primary and general elections for a judge and solicitor-general because the Governor's appointees would not have had six months to demonstrate their merit. *Perdue v. Palmour*, 278 Ga. 217, 600 S.E.2d 370 (2004).

Paragraph does affect regular elections. — "Six month provision" in Ga. Const. 1983, Art. VI, Sec. VII, Para. IV is not in conflict with the mandate in Ga. Const. 1983, Art. VI, Sec. VII, Para. I that superior court and state court judges are to be elected on a nonpartisan basis for a four-year term because the drafters envisioned that the six month provision would

give the voters the right to select the holders of elective office, yet afforded the appointee a sufficient opportunity to demonstrate the merit, or lack thereof, of the appointee's service. *Perdue v. Palmour*, 278 Ga. 217, 600 S.E.2d 370 (2004).

Meaning of term “general election.”

— The term “the general election” refers to a general election held for members of the General Assembly. *Brackett v. Etheridge*, 190 Ga. 216, 9 S.E.2d 275 (1940).

Application of term “vacancy.”

— “Vacancy,” as applied to an office, applies not to the incumbent, but to the term or to the office, or both, depending generally upon the context of a statute or a constitutional provision in which the term is used. *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943).

How vacant seat filled. — When a vacancy occurs during a justice's term of office, the seat is filled by executive appointment, but when the vacancy occurs after a general election and prior to the commencement of the term, the seat is filled by a special election called for that purpose. *Duncan v. Poythress*, 515 F. Supp. 327 (N.D. Ga.), *aff'd*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 941, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Limitation on exercise of power of executive appointment. — The exercise of the authority of appointment under the constitutional provision now contained in this paragraph must necessarily be given a restricted meaning, and is limited to those instances where an election is to be had for the unexpired term. *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. IV).

Power of executive appointment contemplates only vacancies occurring in term. — The right and duty of the Governor under this paragraph to appoint is shown by the context not to contemplate vacancies other than those that occur in the term. *Hooper v. Almand*, 196 Ga. 52,

25 S.E.2d 778 (1943) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. IV).

Executive appointment power not to be exercised while incumbent in office. — The power of executive appointment in this paragraph is for an emergency and can be exercised only in case of a vacancy. It cannot be exercised to be effective while a duly commissioned incumbent is in office. *Pittman v. Ingram*, 184 Ga. 255, 190 S.E. 794 (1937) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. IV).

When vacancy must occur.

— Thirty-day (now six-month) provision in this paragraph is operative only when vacancy occurs during that period or longer before the election. *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. IV).

When tenure of office of appointee expires. — Under this paragraph, when a vacancy in the office of judge of the superior court is filled by appointment of the Governor, the tenure of office of the appointee expires on the first day of January after the general election held next after the expiration of 30 days (now six months) from the time such vacancy occurs, at which election a successor for the unexpired term shall be elected. *Stephens v. Reid*, 189 Ga. 372, 6 S.E.2d 728 (1939) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. IV).

Term of office not affected by holding over of incumbent. — The term of an office, as fixed in the Constitution or statute creating the office, is not to be confused with the tenure of an officer, and is not affected by the holding over of an incumbent beyond the expiration of the term for which the incumbent was appointed. *Hooper v. Almand*, 196 Ga. 52, 25 S.E.2d 778 (1943).

Incumbent holds office until successor qualified. — Where the legislature creates an office and provides for the election of an officer to fill it for a given term of years, the incumbent will hold over and beyond the fixed term until the incumbent's successor is elected, qualified, and commissioned. *Pittman v. Ingram*, 184 Ga. 255, 190 S.E. 794 (1937).

OPINIONS OF THE ATTORNEY GENERAL

Reelection of Supreme Court Justice appointed to fill vacancy. — When the Governor appoints to fill a vacancy on the Supreme Court, the appointee must stand for reelection in the nonpartisan judicial primary and also during the next general election in November, which is more than six months after their appointment. 1992 Op. Att’y Gen. No. U92-7.

Special election occurs when superior court judge has died and the judge’s successor is to be selected according to this paragraph and no call is necessary. 1970 Op. Att’y Gen. No. U70-144. (see Ga. Const. 1983, Art. VI, Sec. VII, Para. IV).

Terms of appointees to vacancies. — An appointee to fill a vacancy occurring in a superior or state court judgeship will serve until January 1 following the next

general election which is more than six months after the date of the person’s appointment at which time the appointee will be required to run for a new four year term of office regardless of the time remaining in the original term of office. 1986 Op. Att’y Gen. No. 86-31.

State court solicitor. — A person appointed to fill a vacancy created by the resignation of a state court solicitor may serve until January 1 of the year following the next general election which is more than six months after such person’s appointment and, if elected in the general election next preceding that January 1 date, such person would begin to serve a new four-year term of office. 1990 Op. Att’y Gen. No. U90-17.

Paragraph V. Compensation and allowances of judges.

All judges shall receive compensation and allowances as provided by law; county supplements are hereby continued and may be granted or changed by the General Assembly. County governing authorities which had the authority on June 30, 1983, to make county supplements shall continue to have such authority under this Constitution. An incumbent’s salary, allowance, or supplement shall not be decreased during the incumbent’s term of office.

1976 Constitution. — Art. VI, Sec. II, Para. VIII; Art. VI, Sec. VII, Para. I; Art. VI, Sec. XII, Para. I.

Editor’s notes. — The constitutional amendment (Ga. L. 1997, p. 1713) creating the Georgia Citizens Commission on Compensation of Public Officials was defeated at the 1998 November general election.

Cross references. — Salaries and fees for public officers and employees generally, see Ch. 7, T. 45.

Law reviews. — For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. XII, Para. I and antecedent provisions, which empowered the General Assembly to authorize counties to supplement, out of county funds, the compensation and allowances of superior court judges and district attorneys, are included in the anno-

tations for this paragraph. See Ga. Const. 1983, Art. VI, Sec. VIII, Para. I(c) for authorization for supplemental compensation for district attorneys.

Intent and purpose of this paragraph after fixing salaries of state officers, including district attorneys, in declaring: “with the right of the General Assembly to authorize any county to sup-

plement the salary of a judge of the superior court and district attorney of the judicial circuit in which such county lies, out of county funds,” is to require the concurrence of both the General Assembly and the county fiscal authorities in any salary supplement. *Houlihan v. Ryan*, 205 Ga. 734, 55 S.E.2d 243 (1949) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. V).

Salary supplement authorized, not required. — It clearly appears from the language that the General Assembly undertook only to authorize, and not to require, county commissioners to supplement the salary, to the extent provided for in the Act (Ga. L. 1949, p. 406), and further provided that, “if so fixed,” it should be paid to the incumbent judge. *Houlihan v. Atkinson*, 205 Ga. 720, 55 S.E.2d 233 (1949).

Construing this paragraph as a whole and in connection with the constitutional amendment of 1927 (Ga. L. 1927, p. 111), the salary of the judge of the superior court of the Eastern Circuit was \$6000.00, paid from the state treasury; \$5000.00 paid under the constitutional amendment of 1927 from funds of the county, and the General Assembly has the right to authorize the county to further supplement the salary from county funds, just as was done by Ga. L. 1949, p. 406, and the county ordinance. That meaning of the Constitution is apparent from the latter part of this paragraph where it is provided that the board of commissioners or other authority having charge of the fiscal affairs of the county shall without further legislative action continue to supplement from the county’s treasury the salary of the judge of the superior court of the circuit of which the county is a part, by the sum of \$2000.00 per annum, which was in addition to the amount received by the judge from the state treasury, which payment was made to the judge then in office during the judge’s term or subsequent term as well as to the judge’s successor, with the authority in the General Assembly to increase such salary from the county treasury as provided. *Houlihan v. Atkinson*, 205 Ga. 720, 55 S.E.2d 233 (1949).

General Assembly may by legislation authorize counties to supple-

ment salaries of judges without a constitutional amendment. — While the valid local amendment of 1927 (Ga. L. 1927, p. 111) to the Constitution of 1877, brought forward as a part of the Constitution of 1945, could not be altered or repealed by a legislative Act, there is a specific right granted to the General Assembly by this paragraph to authorize, by legislative Act, counties which are already supplementing the salaries of judges under previous constitutional amendments to further supplement salaries of judges as provided, and there is also specifically granted to the General Assembly the right by legislative Act to authorize counties which have not heretofore supplemented salaries of such officers from county funds to do so without necessity of having to secure a constitutional amendment each time this is desired. This right and power the General Assembly did not possess prior to the authority conferred upon it by the Constitution of 1945. *Houlihan v. Atkinson*, 205 Ga. 720, 55 S.E.2d 233 (1949) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. V).

Reduction of erroneously calculated salary proper. — County was not barred from reducing a judge’s salary when the salary had been inflated erroneously; the fact that the inflated salary was calculated by the same method as used previously did not estop the county from paying the reduced salary that the judge was actually due. *Maddox v. Hayes*, 278 Ga. 141, 598 S.E.2d 505 (2004).

Reduction of compensation during term authorized. — Chief magistrate working less than full-time is not entitled to full-time salary. *Poppell v. Gault*, 278 Ga. 437 (2004).

Reduction of compensation during term not authorized. — County commissioners violated the mandates of this paragraph and O.C.G.A. § 15-10-23 by reducing a magistrate’s compensation during the elected term. *Dudley v. Rowland*, 271 Ga. 176, 517 S.E.2d 326 (1999) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. V).

Validity of Act conferring authority on county commissioners to adopt ordinance supplementing district attorney’s salary. — Where the Act (Ga. L.

1949, p. 648) is mandatory, it unquestionably authorizes, and while the county commissioners are not under the terms of this paragraph compelled to obey, they may nevertheless choose to act voluntarily in accordance with the authority conferred by the legislative Act. Accordingly, the Act is valid, and has conferred authority upon the county commissioners to adopt the ordinance supplementing the salary of the district attorney. *Houlihan v. Ryan*, 205 Ga. 734, 55 S.E.2d 243 (1949).

Trial court did not err in holding Act constitutional. — The trial court did not err in holding the Act of 1949 (Ga. L. 1949, p. 648) and the ordinance passed by the commissioners of the county under the authority granted, providing that the salary of the judge of the superior court of the Eastern Judicial Circuit be supplemented by \$1000.00 per year from county funds as a court expense in addition to the salary provided for by the Constitution, were in all respects valid and constitutional; nor did it err in directing the county commissioners to make payment of such supplemental salary to the duly elected and qualified judge then in commission from and after the effective date of the ordinance. *Houlihan v. Atkinson*, 205 Ga. 720, 55 S.E.2d 233 (1949).

The right of the judge of the superior court to supplementary salary provided for in this paragraph is not contractual, but arises under the Constitution of this state; and therefore the statute of limitations as to matters of contract is not applicable thereto. *Best v. Maddox*, 185 Ga. 78, 194 S.E. 578 (1937)

(see Ga. Const. 1983, Art. VI, Sec. VII, Para. V).

Remedy available to former judge to recover salary due. — Mandamus is available at the instance of a former judge of the superior court to recover of the county treasurer salary alleged to be due the judge pursuant to this paragraph. *Best v. Maddox*, 185 Ga. 78, 194 S.E. 578 (1937) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. V).

Retirement. — The Georgia Constitution does not prohibit the award to elected judicial officers of creditable service for retirement purposes based upon accrued but unused annual leave and sick leave. *Arneson v. Board of Trustees*, 257 Ga. 579, 361 S.E.2d 805 (1987).

Reduction upon appointment to fill unexpired term. — County board of commissioners violated this paragraph and O.C.G.A. § 15-10-23 in reducing the salary of a chief magistrate following the magistrate's appointment to fill the unexpired term of the predecessor. *Lee v. Peach County Bd. of Comm'rs*, 269 Ga. 380, 497 S.E.2d 562 (1998) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. V).

Reduction of incumbent's compensation illegal. — Chief magistrate was entitled to recover salary because the magistrate was an incumbent, having performed the duties of chief magistrate before the salary reduction, and defendants reduced the magistrate's salary in violation of Ga. Const. 1983, Art. VI, Sec. VII, Para. V, and O.C.G.A. § 15-10-23(d). *Pike County v. Callaway-Ingram*, 292 Ga. 828, 742 S.E.2d 471 (2013).

OPINIONS OF THE ATTORNEY GENERAL

State Commission on Compensation may make recommendations to General Assembly concerning elimination, increase or decrease of county supplements of salaries of judges of the superior courts. 1971 Op. Att'y Gen. No. 71-173.1.

Commission on Compensation may

recommend to General Assembly limit on total salaries and supplements to be paid to superior court judges and district attorneys subject to the constitutional limitation set forth in Ga. Const. 1976, Art. III, Sec. VIII, Para. IV (see Ga. Const. 1983, Art. III, Sec. VI, Para. V). 1971 Op. Att'y Gen. No. 71-173.

RESEARCH REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d, Judges, §§ 50 et seq., 57 et seq.

C.J.S. — 48A C.J.S., Judges, § 189 et seq.

Paragraph VI. Judicial Qualifications Commission; power; composition.

The power to discipline, remove, and cause involuntary retirement of judges shall be vested in the Judicial Qualifications Commission. It shall consist of seven members, as follows:

- (1) Two judges of any court of record, selected by the Supreme Court;
- (2) Three members of the State Bar of Georgia who shall have been active status members of the state bar for at least ten years and who shall be elected by the board of governors of the state bar; and
- (3) Two citizens, neither of whom shall be a member of the state bar, who shall be appointed by the Governor.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2016, p. 896, § 1/HR 1113, if ratified, would amend this paragraph to read as follows: “Paragraph VI. Judicial Qualifications Commission; power; composition. (a) The General Assembly shall by general law create and provide for the composition, manner of appointment, and governance of a Judicial Qualifications Commission, with such commission having the power to discipline, remove, and cause involuntary retirement of judges as provided by this Article. Appointments to the Judicial Qualifications Commission

shall be subject to confirmation by the Senate as provided for by general law.
“(b) The procedures of the Judicial Qualifications Commission shall comport with due process. Such procedures and advisory opinions issued by the Judicial Qualifications Commission shall be subject to review by the Supreme Court.
“(c) The Judicial Qualifications Commission which existed on June 30, 2017, is hereby abolished.”
1976 Constitution. — Art. VI, Sec. XIII, Para. III.
Cross references. — Rules of the Judicial Qualifications Commission.

JUDICIAL DECISIONS

Coroners are not “judges” within the meaning of that term as it is used in Ga. Const. 1983, Art. VI, Sec. VII, Para. VI. In re Smith, 259 Ga. 831, 388 S.E.2d 683 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Authorized expenditure. — The Judicial Qualifications Commission may expend funds to become a subscriber to the services of the Center for Judicial Conduct Organizations of the American Judicature Society. 1979 Op. Att’y Gen. No. 79-8.

Paragraph VII. Discipline, removal, and involuntary retirement of judges.

(a) Any judge may be removed, suspended, or otherwise disciplined for willful misconduct in office, or for willful and persistent failure to perform the duties of office, or for habitual intemperance, or for conviction of a crime involving moral turpitude, or for conduct prejudi-

cial to the administration of justice which brings the judicial office into disrepute. Any judge may be retired for disability which constitutes a serious and likely permanent interference with the performance of the duties of office. The Supreme Court shall adopt rules of implementation.

(b)(1) Upon indictment for a felony by a grand jury of this state or by a grand jury of the United States of any judge, the Attorney General or district attorney shall transmit a certified copy of the indictment to the Judicial Qualifications Commission. The commission shall, subject to subparagraph (b)(2) of this Paragraph, review the indictment, and, if it determines that the indictment relates to and adversely affects the administration of the office of the indicted judge and that the rights and interests of the public are adversely affected thereby, the commission shall suspend the judge immediately and without further action pending the final disposition of the case or until the expiration of the judge's term of office, whichever occurs first. During the term of office to which such judge was elected and in which the indictment occurred, if a nolle prosequi is entered, if the public official is acquitted, or if after conviction the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the judge shall be immediately reinstated to the office from which he was suspended. While a judge is suspended under this subparagraph and until initial conviction by the trial court, the judge shall continue to receive the compensation from his office. After initial conviction by the trial court, the judge shall not be entitled to receive the compensation from his office. If the judge is reinstated to office, he shall be entitled to receive any compensation withheld under the provisions of this subparagraph. For the duration of any suspension under this subparagraph, the Governor shall appoint a replacement judge. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof.

(2) The commission shall not review the indictment for a period of 14 days from the day the indictment is received. This period of time may be extended by the commission. During this period of time, the indicted judge may, in writing, authorize the commission to suspend him from office. Any such voluntary suspension shall be subject to the same conditions for review, reinstatement, or declaration of vacancy as are provided in this subparagraph for a nonvoluntary suspension.

(3) After any suspension is imposed under this subparagraph, the suspended judge may petition the commission for a review. If the commission determines that the judge should no longer be suspended, he shall immediately be reinstated to office.

(4) The findings and records of the commission and the fact that the public official has or has not been suspended shall not be admissible in evidence in any court for any purpose. The findings and records of the commission shall not be open to the public.

(5) The provisions of this subparagraph shall not apply to any indictment handed down prior to January 1, 1985.

(6) If a judge who is suspended from office under the provisions of this subparagraph is not first tried at the next regular or special term following the indictment, the suspension shall be terminated and the judge shall be reinstated to office. The judge shall not be reinstated under this provision if he is not so tried based on a continuance granted upon a motion made only by the defendant.

(c) Upon initial conviction of any judge for any felony in a trial court of this state or the United States, regardless of whether the judge has been suspended previously under subparagraph (b) of this Paragraph, such judge shall be immediately and without further action suspended from office. While a judge is suspended from office under this subparagraph, he shall not be entitled to receive the compensation from his office. If the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the judge shall be immediately reinstated to the office from which he was suspended and shall be entitled to receive any compensation withheld under the provisions of this subparagraph. For the duration of any suspension under this subparagraph, the Governor shall appoint a replacement judge. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof. The provisions of this subparagraph shall not apply to any conviction rendered prior to January 1, 1987. (Ga. Const. 1983, Art. 6, § 7, Para. 7; Ga. L. 1984, p. 1722, § 1/SR 267; Ga. L. 1986, p. 1619, §§ 1, 2/HR 506.)

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2016, p. 896, § 2/HR 1113, if ratified, would amend subparagraph (b)(4) to read as follows: “(4)(A) The findings and records of the commission and the fact that the public official has or has not been suspended shall not be admissible in evidence in any court for any purpose.

“(B) The findings and records of the commission shall not be open to the public except as provided by the General Assembly by general law.”

1976 Constitution. — Art. VI, Sec. VII, Para. III; Art. VI, Sec. XIII, Para. III.

Cross references. — Code of ethics for government service, § 45-10-1. Rules of the Judicial Qualifications Commission.

Editor’s notes. — The constitutional amendment (Ga. L. 1984, p. 1722, § 1) which designated the previously undesignated language of this Paragraph as subparagraph (a) and added subparagraph (b) was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

The constitutional amendment (Ga. L.

1986, p. 1619, §§ 1, 2) which revised division (1) of subparagraph (b) by substituting “mistrial conviction by the trial court” for “final conviction” in the fourth sentence and adding the present fifth and

sixth sentences, and which added subparagraph (c), was approved by a majority of the qualified voters voting at the general election held on November 4, 1986.

JUDICIAL DECISIONS

Language regarding conduct bringing office into disrepute not unconstitutionally vague and overbroad.

— Language “conduct prejudicial to the administration of justice which brings the judicial office into disrepute” in this section is not so vague and overbroad as to deny respondent equal protection and due process. *In re Judge No. 491*, 249 Ga. 30, 287 S.E.2d 2 (1982) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. VII).

Commission cannot be restricted by legislature in consideration of conduct bringing judicial office into disrepute. — Under this paragraph, the Judicial Qualifications Commission cannot be restricted by legislative Act from considering any conduct of judicial officer which reflects on question they are called upon to decide, i.e., does such conduct bring judicial office into disrepute. *In re Judge No. 491*, 249 Ga. 30, 287 S.E.2d 2 (1982) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. VII).

Plea of nolo contendere to crime involving moral turpitude brings judicial office into disrepute. — Judge who enters plea of nolo contendere to crime involving moral turpitude is guilty of conduct which brings judicial office into disrepute. This is so even though question of guilt is not formally adjudicated by such plea. *In re Judge No. 491*, 249 Ga. 30, 287 S.E.2d 2 (1982).

Commission’s consideration of nolo contendere plea not violative of due process or equal protection. — Consideration by Judicial Qualifications Commission of judge’s nolo contendere plea to a felony involving moral turpitude, pursuant to this paragraph, is not a denial of equal protection and due process to defendant under either state or federal constitutions. *In re Judge No. 491*, 249 Ga. 30, 287 S.E.2d 2 (1982) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. VII).

Coroners are not “judges” within the meaning of that term as it is used in this

Paragraph. *In re Smith*, 259 Ga. 831, 388 S.E.2d 683 (1990) (see Ga. Const. 1983, Art. VI, Sec. VII, Para. VII).

Seeking nonjudicial office brings judicial office into disrepute. — By the adoption of the Code of Judicial Conduct, Canon 7.A.(3), the Supreme Court has resolved that a judge seeking a nonjudicial office without resigning judicial office thereby is guilty of conduct prejudicial to the administration of justice which brings the judicial office into disrepute. Such a determination is an exercise of the express power relative to removal as contained in Ga. Const. 1976, Art. VI, Sec. XIII, Para. III (see Ga. Const. 1983, Art. VI, Sec. VII, Paras. VI-VIII), as well as within the inherent power of the Supreme Court by virtue of its creation by the Constitution, and, the delegation to it of constitutional responsibilities. *In re Inquiry Concerning Judge No. 591*, 250 Ga. 796, 300 S.E.2d 807 (1983).

Justices of the peace may seek election to General Assembly. — The 1976 Constitution which assigned duties and vested powers, express and inherent, in the Supreme Court, provided (in former Ga. Const. 1976, Art. III, Sec. V, Para. VII, now Ga. Const. 1983, Art. III, Sec. II, Para. IV) that justices of the peace, unlike other public officers, are not prohibited from serving in the General Assembly. Thus, a justice of the peace who was a candidate for the office of state senator, being constitutionally empowered to seek election to the General Assembly while serving as a justice of the peace, could not be disciplined for the exercise of that power, despite the Code of Judicial Conduct, Canon 7.A.(3). *In re Inquiry Concerning Judge No. 591*, 250 Ga. 796, 300 S.E.2d 807 (1983).

Supreme Court may regulate judicial elections. — The Supreme Court possesses the authority to regulate the conduct of judges — including conduct

during judicial elections. Accordingly, the court had the authority to promulgate and enforce former Canon 7 B(2), Code of Jud. Cond. (1974), which provided: "A candidate's committees may solicit funds for his campaign no earlier than six (6) months before a primary election and no later than the date of the last election in which he participates during the election year." *Judicial Qualifications Comm'n v. Lowenstein*, 252 Ga. 432, 314 S.E.2d 107 (1984).

Probate judge who allowed defendants to "buy out" their community service sentences was removed from office. — Probate judge who told criminal defendants they had the burden of proving their innocence, who allowed defendants to "buy out" their community service sentences and kept the proceeds in a bank account that the judge controlled, participated in ex parte communications, insulted and abused parties in the judge's court, and disposed of cases outside the jurisdiction of the probate court, was

found in violation of Ga. Code Jud. Conduct Canons 1, 2, and 3, Ga. Const. 1983, Art. VI, Sec. VII, Para. VII(a), and O.C.G.A. §§ 16-10-32 and 40-13-26, was removed from office and barred from seeking judicial office again. *Inquiry Concerning Fowler*, 287 Ga. 467, 696 S.E.2d 644 (2010).

Judge properly removed from office. — Magistrate court judge was permanently removed from office, pursuant to Ga. Const. 1983, Art. VI, Sec. VII, Para. VII(a), for violating Ga. Code Jud. Conduct Canons 1-3 by using illegal drugs, forcibly kicking in doors at a man's home at the request of a relative, pulling out a gun in front of at least one colleague, and refusing to work assigned hours. *Inquiry Concerning Judge (Peters)*, 289 Ga. 633, 715 S.E.2d 56 (2011).

Cited in *In re Inquiry Concerning a Judge*, 265 Ga. 843, 462 S.E.2d 728 (1995); *DeKalb County Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 751 S.E.2d 827 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d, Judges, § 16 et seq.

C.J.S. — 48A C.J.S., Judges, § 228 et seq.

ALR. — Power of court to remove or suspend judge, 53 ALR3d 882.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case, 43 ALR4th 410.

Abuse or misuse of contempt power as

ground for removal or discipline of judge, 76 ALR4th 982.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 ALR4th 567.

Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, or parties to or witnesses in actions, and the like, 89 ALR4th 278.

Paragraph VIII. Due process; review by Supreme Court.

No action shall be taken against a judge except after hearing and in accordance with due process of law. No removal or involuntary retirement shall occur except upon order of the Supreme Court after review.

1976 Constitution. — Art. VI, Sec. VII, Para. III; Art. VI, Sec. XIII, Para. III.

Cross references. — Rules of the Judicial Qualifications Commission.

JUDICIAL DECISIONS

Coroners are not “judges” within the meaning of that term as it is used in Ga. Const. 1983, Art. VI, Sec. VII, Para. VIII. *In re Smith*, 259 Ga. 831, 388 S.E.2d 683 (1990).

Cited in *In re Inquiry Concerning a Judge*, 265 Ga. 843, 462 S.E.2d 728 (1995).

SECTION VIII.

DISTRICT ATTORNEYS

Paragraph

I. District attorneys; vacancies; qualifications; compensation; duties; immunity.

Paragraph

II. Discipline, removal, and involuntary retirement of district attorneys.

Cross references. — District attorneys, Ch. 18, T. 15.

Law reviews. — For article, “The Pros-

ecuting Attorney in Georgia’s Juvenile Courts,” see 13 Ga. St. B.J. 27 (2008).

Paragraph I. District attorneys; vacancies; qualifications; compensation; duties; immunity.

(a) There shall be a district attorney for each judicial circuit, who shall be elected circuit-wide for a term of four years. The successors of present and subsequent incumbents shall be elected by the electors of their respective circuits at the general election held immediately preceding the expiration of their respective terms. District attorneys shall serve until their successors are duly elected and qualified. Vacancies shall be filled by appointment of the Governor.

(b) No person shall be a district attorney unless such person shall have been an active-status member of the State Bar of Georgia for three years immediately preceding such person’s election.

(c) The district attorneys shall receive such compensation and allowances as provided by law and shall be entitled to receive such local supplements to their compensation and allowances as may be provided by law.

(d) It shall be the duty of the district attorney to represent the state in all criminal cases in the superior court of such district attorney’s circuit and in all cases appealed from the superior court and the juvenile courts of that circuit to the Supreme Court and the Court of Appeals and to perform such other duties as shall be required by law.

(e) District attorneys shall enjoy immunity from private suit for actions arising from the performance of their duties.

1976 Constitution. — Art. VI, Sec. XI, Paras. I, II; Art. VI, Sec. XII, Paras. I, II; Art. VI, Sec. XIII, Para. I.

Editor’s notes. — The constitutional amendment (Ga. L. 1997, p. 1713) creating the Georgia Citizens Commission on

Compensation of Public Officials and amending (c) was defeated at the 1998 November general election.

Cross references. — Duties generally, §§ 15-18-6 and 15-18-7.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- ELECTION
- QUALIFICATIONS
- DUTIES
- NOTICE OF APPEAL
- COMPENSATION
- IMMUNITY

General Consideration

Cited in *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987); *Luangkhot v. State*, 292 Ga. 423, 736 S.E.2d 397 (2013).

Election

Office of district attorney is an elective office; an appointment made by the Governor shall be for such period of time only as is necessary to fill the office until the people can legally elect a district attorney. *Copland v. Wohlwender*, 197 Ga. 782, 30 S.E.2d 462 (1944).

Construction of language. — The language, “next preceding the expiration of their respective terms,” was intended to designate the election at which the district attorneys should be elected for the full term of four years, and was not intended to designate the “general election” at which a successor should be elected in case of a vacancy. *Copland v. Wohlwender*, 197 Ga. 782, 30 S.E.2d 462 (1944).

Age at time of election. — The word “election” as it appears in this provision means the day votes are cast, not the day when they are finally tabulated and certified by the Secretary of State. *Poythress v. Moses*, 250 Ga. 452, 298 S.E.2d 480 (1983) (decided under Ga. Const. 1976, Art. VI, Sec. XIII, Para. I, relating to qualifications of district attorneys and other officials).

Qualifications

The intent of the legislature when it imposed the three-year practice as a requirement for the district attorney post was to ensure that the individuals elected to the office of district attorney would be experienced in the practice of law before the courts in which they would be required to perform their functions as district attorneys. It would be contrary to this intent to allow individuals who have not been licensed to practice before the superior courts of this state to include their practice time in other states as partial satisfaction of this paragraph and former Code 1933, § 24-2901 (see now O.C.G.A. § 15-18-3). *Whitmer v. Thurman*, 241 Ga. 569, 247 S.E.2d 104 (1978) (see Ga. Const. 1983, Art. VI, Sec. VIII, Para. I).

“Lawful practice” defined. — The three-year practice requirement, one of the qualifications for district attorney, of this paragraph and former Code 1933, § 24-2901 (see now O.C.G.A. § 15-18-3) contemplated lawful practice and lawful practice was defined as the practice of law as an active member of the State Bar of Georgia in good standing. *Whitmer v. Thurman*, 241 Ga. 569, 247 S.E.2d 104 (1978) (see Ga. Const. 1983, Art. VI, Sec. VIII, Para. I).

Three-year practice requirement does not include legal practice in other states. *Whitmer v. Thurman*, 241

Qualifications (Cont'd)

Ga. 569, 247 S.E.2d 104 (1978).

Qualifications at time of appointment. — This paragraph does not either expressly, or by inference, by any of its terms, purport to deal with the qualifications of a district attorney at the time of the district attorney's election or appointment. *Ray v. Hand*, 225 Ga. 589, 170 S.E.2d 692 (1969) (see Ga. Const. 1983, Art. VI, Sec. VIII, Para. I).

Time of effectiveness of active-status membership. — Where an attorney was sworn in to practice law on Nov. 5, 1981, and the attorney's membership application and dues were received by the State Bar within 60 days as contemplated by the bar's rules, the attorney's active-status membership was effective upon the date of the attorney's admission in the superior court, and thus the attorney was qualified for election as district attorney on Nov. 6, 1984. *Weaver v. Cleland*, 253 Ga. 482, 322 S.E.2d 56 (1984).

Duties

District attorneys performing duties are immune in civil cases. — District attorneys who send a letter to the parole board describing aspects of crimes, giving their opinion, and including an autobiographical manuscript detailing a murder are protected by the same immunity in civil cases which is applicable to judges, provided their acts are within the scope of their jurisdiction and intimately associated with the judicial phase of the criminal process. *Mosier v. State Bd. of Pardons & Paroles*, 213 Ga. App. 545, 445 S.E.2d 535 (1994), cert. denied, 5 U.S. 1040, 115 S. Ct. 1409, 131 L. Ed. 2d 295 (1995).

District attorney's function as calendar clerk not unconstitutional. — Internal Operating Procedure 2000-3 of the Appalachian Judicial Circuit, under which a district attorney set the time for a defendant's arraignment for aggravated assault and related charges in a road rage incident, was not an unconstitutional delegation of judicial powers and did not require dismissal of the charges against the defendant; the functions of the district

attorney were not exclusively executive, as shown by Ga. Const. 1983, Art. VI, Sec. VIII, Para. I(d), O.C.G.A. § 15-18-6(3), and Ga. Unif. Super. Ct. R. 30.1. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Internal Operating Procedure 2000-3 of the Appalachian Judicial Circuit, which appoints the district attorney to act as calendar clerk for criminal matters, including setting the time for arraignments, merely aids the judges in the Appalachian Judicial Circuit in organizing their courts and is not an unconstitutional delegation of judicial powers; the functions of the district attorney are not exclusively executive, as shown by the requirement in Ga. Const. 1983, Art. VI, Sec. VIII, Para. I(d) that the district attorney must perform such other services as shall be required by law, the requirement of O.C.G.A. § 15-18-6(3) that the district attorney shall aid the presiding judge in organizing the courts as the presiding judge may require, and Ga. Unif. Super. Ct. R. 30.1, providing that the judge or the judge's designee shall set the time of an arraignment. *Adams v. State*, 282 Ga. App. 819, 640 S.E.2d 329 (2006).

Department of Transportation condemnation cases prosecuted by Department of Law and not district attorney. — In condemnation cases which are brought by the Department of Transportation, it is "otherwise specially provided for" that the Department of Law and not the solicitor general (now district attorney) shall prosecute such actions. *State Hwy. Dep't v. Smith*, 120 Ga. App. 529, 171 S.E.2d 575 (1969).

Proceeding for removal from office of county board of education members properly brought by district attorney. — A county board of education was a political subdivision of the state, an agency through which the county acted in school matters, and the state had an interest in whether or not members of a county school board were competent and qualified to act; hence, a proceeding for removal from office of members of a county board of education under former Code 1933, § 32-905 (see now O.C.G.A. § 20-2-53) was properly brought by the district attorney of the county in the

state's name. *State v. Walker*, 88 Ga. App. 413, 76 S.E.2d 852 (1953).

Paragraph not applicable to divorce cases where state not named nor appears as a party. — According to the usual and ordinary signification of the language employed, this clause applies only to cases in which the state is a formal party, and would not include a divorce case in which the state has not been named and has not appeared as a party, although the state has an interest in all divorce cases. *Boykin v. Martocello*, 194 Ga. 867, 22 S.E.2d 790 (1942) (see Ga. Const. 1983, Art. VI, Sec. VIII, Para. I).

Private citizen cannot procure private practitioner to file appeals in state's name when district attorney decides against appeal. — Where the state, through its authorized legal arm, does not wish to appeal and takes no action in a matter, there is no provision of law allowing a private citizen to procure the services of a private practitioner to file appeals in the name of the state, that being the constitutional and statutory duty of the office of the district attorney. *State v. Trice*, 150 Ga. App. 588, 258 S.E.2d 270 (1979).

Special prosecutor may take part in prosecution of a case on behalf of the state, and by inference of an appeal therefrom, if the special prosecutor is subject to the direction and control of the district attorney. *State v. Trice*, 150 Ga. App. 588, 258 S.E.2d 270 (1979).

Performance of duties in another circuit. — A district attorney may be authorized to perform duties in a county constituting another circuit, but which formerly was embraced in the district attorney's own circuit. *Godbee v. State*, 141 Ga. 515, 81 S.E. 876 (1914).

A district attorney in a judicial circuit of this state was not disqualified by this paragraph, and former Code 1933, §§ 24-2913, 24-2914 and 24-2908 (see now O.C.G.A. §§ 15-18-5 and 15-18-6), or by any other law, to appear before courts of a different judicial circuit at the request of the prosecution on a trial for murder, and assist the district attorney of the latter circuit in the prosecution, notwithstanding the last mentioned officer was not indisposed, or disqualified from inter-

est or relationship, or absent from the circuit, and such assistance was not requisitioned by the presiding judge. *Floyd v. State*, 182 Ga. 549, 186 S.E. 556 (1936) (see Ga. Const. 1983, Art. VI, Sec. VIII, Para. I).

Notice of Appeal

Effect of failure to give sufficient notice of sanction of writ of certiorari to district attorney. — A failure to give the district attorney at least ten days written notice of sanction of a writ of certiorari to which the state is a party and of the time and place of hearing, unless prevented by unavoidable cause, or to obtain a waiver of such notice, is fatal to the proceedings; and service upon and notice to the district attorney of the criminal court is insufficient to cure the defect. *Washburn v. Thompson*, 78 Ga. App. 133, 50 S.E.2d 761 (1948).

Effect of failure to serve notice of appeal upon district attorney. — Where a misdemeanor was tried in county criminal court and from judgment therein a certiorari was taken to the superior court and, upon judgment entered after hearing, overruling and denying petition for certiorari, a bill of exceptions was sued out to the Court of Appeals, such bill of exceptions should have been served upon the district attorney of the circuit, and since the district attorney was not so served, and did not acknowledge or waive service, the motion to dismiss the bill of exceptions would be granted. *Welch v. State*, 91 Ga. App. 86, 84 S.E.2d 838 (1954).

Compensation

Fixing of district attorney's salary by grand jury or probate judge. — Statute that delegates to grand jury and judge of probate court authority to fix salary to be paid district attorney for years subsequent to 1932 is violative of this paragraph which vests in the General Assembly power to prescribe such salaries, and is violative of Ga. Const. 1976, Art. III, Sec. I, Para. I (see Ga. Const. 1983, Art. III, Sec. I, Para. I) of the Constitution which vests the legislative power of the state in the General Assembly.

Compensation (Cont'd)

Mosley v. Garrett, 182 Ga. 810, 187 S.E. 20 (1936) (see Ga. Const. 1983, Art. VI, Sec. VIII, Para. I).

Immunity

Scope of immunity. — A district attorney is protected by the same immunity in civil cases that is applicable to judges, provided that the district attorney's acts

are within the scope of his jurisdiction. *Robbins v. Lanier*, 198 Ga. App. 592, 402 S.E.2d 342 (1991).

Decision to file charges is protected. — A prosecutor's decision to file formal criminal charges against an individual is an act intimately associated with the judicial phase of the criminal process, for which act the prosecutor would be protected by the doctrine of prosecutorial immunity. *Robbins v. Lanier*, 198 Ga. App. 592, 402 S.E.2d 342 (1991).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

ELECTION

QUALIFICATIONS

DUTIES AND POWERS

COMPENSATION

General Consideration

Counties within circuits legislating individually regarding district attorneys prohibited. — As to whether it is possible, in a judicial circuit including several counties, to allow each county to legislate separately in regard to the district attorney, such separate treatment would contravene the intent of the state's Constitution; the intent was to treat the judicial circuit as the appropriate legal unit and not subdivide it further when providing for compensation of the district attorney and whether the district attorney may engage in the private practice of law; therefore, the judicial circuit should be dealt with as a unit rather than as individual counties. 1967 Op. Att'y Gen. No. 67-453.

Election

Procedure to fill office after withdrawal of person elected in general election. — A special election called by the Secretary of State is the proper procedure to fill the office of district attorney for the full four-year term beginning January 1, in the event the person elected to such office in the November general election has withdrawn. 1976 Op. Att'y Gen. No. 76-120.

A person elected to fill a vacancy in

the office of district attorney holds only for the unexpired term. 1945-47 Op. Att'y Gen. p. 281.

A district attorney cannot run in the same election for one-half of an unexpired term and for an additional full term. 1970 Op. Att'y Gen. No. U70-77.

Qualifications

The three-year practice of law requirement of this paragraph related solely to the date of election rather than the date of qualification; therefore, a candidate for the office of district attorney must meet the three-year practice of law requirement at the time of such candidate's election rather than at the time of such candidate's qualification for the office governed by former Code 1933, § 24-2901 (see now O.C.G.A. § 15-18-3). 1978 Op. Att'y Gen. No. 78-20 (see Ga. Const. 1983, Art. VI, Sec. VIII, Para. I).

Service by third-year law student as legal assistant to district attorney not lawful practice of law. — A third-year law student who served as a legal assistant to a district attorney pursuant to former Code 1933, § 9-401.2 (see now O.C.G.A. § 15-18-22) did not thereby become "duly admitted and licensed to practice law in the superior courts" for the

purposes of determining eligibility to the office of district attorney under former Code 1933, § 24-2901 (see now O.C.G.A. § 15-18-3). 1976 Op. Att’y Gen. No. 76-28.

Duties and Powers

District attorneys do not possess arrest powers greater than those of ordinary citizens. 1980 Op. Att’y Gen. No. U80-33.

District attorneys do not exercise direct power or control over law enforcement agencies within their circuits. 1980 Op. Att’y Gen. No. U80-33.

Representing sheriff indicted for federal violation in performance of duties. — Where sheriff or other enforcement officer is charged or indicted for

federal violation in performance of duties, the Attorney General may order a district attorney to represent the sheriff in defense of the charge. 1962 Op. Att’y Gen. p. 67.

Compensation

Role of State Commission on Compensation. — State Commission on Compensation may make recommendations to General Assembly concerning elimination, increase or decrease of county supplements of salaries of district attorneys. 1971 Op. Att’y Gen. No. 71-173.1.

One county of a judicial circuit cannot legally place a district attorney who is on the fee system on salary. 1963-65 Op. Att’y Gen. p. 317.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Prosecuting Attorneys, § 1 et seq.

C.J.S. — 27 C.J.S., District and Prosecuting Attorneys, § 1 et seq.

ALR. — Power of assistant or deputy prosecuting or district attorney to file information, or to sign or prosecute it in his own name, 80 ALR2d 1067.

Validity, under state law, of appoint-

ment of independent special prosecutor to handle political or controversial prosecutions or investigations of persons other than regular prosecutor, 84 ALR3d 29.

Prosecutor’s appeal in criminal case to self-interest or prejudice of jurors as taxpayers as ground for reversal, new trial, or mistrial, 60 ALR4th 1063.

Paragraph II. Discipline, removal, and involuntary retirement of district attorneys.

Any district attorney may be disciplined, removed or involuntarily retired as provided by general law.

1976 Constitution. — There was no similar provision in the 1976 Constitution.

Law reviews. — For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005).

SECTION IX.

GENERAL PROVISIONS

Paragraph	Paragraph
I. Administration of the judicial system; uniform court rules;	advice and consent of councils.
	II. Disposition of cases.

Paragraph I. Administration of the judicial system; uniform court rules; advice and consent of councils.

The judicial system shall be administered as provided in this Paragraph. Not more than 24 months after the effective date hereof, and from time to time thereafter by amendment, the Supreme Court shall, with the advice and consent of the council of the affected class or classes of trial courts, by order adopt and publish uniform court rules and record-keeping rules which shall provide for the speedy, efficient, and inexpensive resolution of disputes and prosecutions. Each council shall be comprised of all of the judges of the courts of that class.

1976 Constitution. — Art. VI, Sec. I, Para. II; Art. VI, Sec. VII, Para. I.

Law reviews. — For article, “Planning

for the Future of our Courts,” see 9 Ga. St. U.L. Rev. 395 (1993).

JUDICIAL DECISIONS

Supreme Court powers enumerated. — The Supreme Court has the inherent power to protect the judiciary as an independent branch of state government and to maintain a court system capable of providing for the administration of justice in an orderly and efficient manner. *Garcia v. Miller*, 261 Ga. 531, 408 S.E.2d 97 (1991).

Judicial power of holdover superior court judges. — Because a complete and continuous judicial system is required to ensure that governmental functions continue without interruption, the judicial power of holdover superior court judges remains vested in them until their successors are qualified. *Garcia v. Miller*, 261 Ga. 531, 408 S.E.2d 97 (1991).

Speedy resolution is a constitutional requirement under Ga. Const. 1983, Art. VI, Sec. IX, Para. I, just as speedy trial is a defendant’s right under Ga. Const. 1983, Art. I, Sec. I, Para. XI. *Williams v. State*, 187 Ga. App. 355, 370 S.E.2d 210 (1988).

Refusal to restore budget cuts for district attorney. — Trial court exercised proper caution in denying a requested writ of mandamus to require county commissioners to restore budget cuts for the district attorney’s office. *Wilson v. Southerland*, 258 Ga. 479, 371 S.E.2d 382 (1988).

Supreme Court’s approval of a local court rule providing that civil actions

seeking primarily money damages up to \$25,000 or in an unspecified amount would be referred to compulsory but non-binding arbitration did not abridge the rights of any litigants or conflict with any federal or state constitutional provision or Georgia statute. *Davis v. Gaona*, 260 Ga. 450, 396 S.E.2d 218 (1990).

“Two-term” rule not applicable to bar candidates. — Bar examinee’s motion to admit the examinee to the practice of law by default, because the Georgia Supreme Court did not dispose of the examinee’s appeal during the term of court in which it was filed or the term next following, was denied; the “two-term” rule did not apply to those cases filed in the Supreme Court in furtherance of the Court’s exercise of its inherent authority to supervise and regulate the practice of law in Georgia. *In re Singh*, 276 Ga. 288, 576 S.E.2d 899 (2003).

Challenges to criminal indictment. — Because O.C.G.A. § 17-10-36 did not grant the Supreme Court of Georgia the power to abrogate or interfere with an otherwise-valid statutory enactment, such as the statutory procedure by which prosecutors procured indictments and conducted criminal prosecutions through them, the trial court did not err in refusing to quash the indictment filed against the defendant, despite the fact that a 6.04 percentage point under-representation of white persons on the grand jury list from

which the defendant’s grand jury was selected violated the standard outlined in Ga. Unif. R. Super. Ct. 34, Unif. App. P. II(E). *Edwards v. State*, 281 Ga. 108, 636 S.E.2d 508 (2006).

Cited in *Dugger v. Danello*, 175 Ga. App. 618, 334 S.E.2d 3 (1985); *Dallas Blue*

Haven Pools, Inc. v. Taslimi, 180 Ga. App. 734, 350 S.E.2d 265 (1986); *Atlanta Journal & Atlanta Constitution v. Long*, 258 Ga. 410, 369 S.E.2d 755 (1988); *Wheeler’s, Inc. v. Wilson*, 196 Ga. App. 622, 396 S.E.2d 790 (1990); *O’Kelley v. State*, 284 Ga. 758, 670 S.E.2d 388 (2008).

Paragraph II. Disposition of cases.

The Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court’s docket for hearing or at the next term.

1976 Constitution. — Art. VI, Sec. II, Para. V.

Cross references. — Hearing of cases at first term, and cases not disposed of during term, § 5-6-3. Schedule of terms of Court of Appeals and Supreme Court, §§ 15-2-4 and 15-3-2.

Law reviews. — For article, “Setting the Record Straight: A Proposal to Save Time and Trees,” see 14 Ga. St. B.J. 14 (2008). For article, “‘May It Please the Court:’ Tips on Effective Appellate Advo-

cacy from Start to Finish,” see 16 (No. 1) Ga. St. B.J. 28 (2010). For article, “Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Special Contribution: Open Chambers: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals,” see 65 Emory L. J. 831 (2014).

For comment on *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966), see 4 Ga. St. B.J. 259 (1967).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PLAINTIFF’S OR CLERK’S ERROR

General Consideration

Paragraph imperative. — This paragraph imperatively requires that all cases brought to the Supreme Court or the Court of Appeals shall be heard at the first term, unless continued for providential cause and that all cases shall be decided not later than the end of the term following that at which they are heard. *Atlantic Coast Line R.R. v. Georgia Sweet Potato Growers’ Ass’n*, 171 Ga. 30, 154 S.E. 698, answer conformed to, 42 Ga. App. 82, 154 S.E. 915 (1930) (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II).

Where case does not reach Supreme Court in time to be heard at first term, the Supreme Court is without jurisdiction to hear and determine the cause. *Dixie Realty Fin. Co. v. Morgan*, 171 Ga. 348, 155 S.E. 468 (1930).

When cases deemed entered on

docket following Supreme Court transfer or remand to Court of Appeals. — For the purpose of compliance by the appellate courts with the two-term rule, cases transferred or remanded by the Supreme Court to the Court of Appeals will be considered as entered on the court’s docket for hearing on the day the remittitur from the Supreme Court is received in the Court of Appeals. *CC Fin., Inc. v. Ross*, 250 Ga. 832, 301 S.E.2d 262 (1983).

Disposal must be in current term. — Appellate court lacked the authority to stay the case because the appellate court had to dispose of the action during the term in which the case was entered on the court’s docket. *Boardman v. Brenninkmeijer*, 328 Ga. App. 882, 763 S.E.2d 267 (2014).

Appeal disposed of within two

General Consideration (Cont'd)

terms. — Where, although an appeal was filed in the September 1986 term of court, it was docketed for hearing during the January 1987 term, the disposition of the appeal during the April 1987 term complied with the “two-term rule” of this Paragraph. *Superb Carpet Mills, Inc. v. Thomason*, 183 Ga. App. 554, 359 S.E.2d 370, cert. denied, 183 Ga. App. 907, 359 S.E.2d 370 (1987) (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II).

Cited in *Palmer v. State*, 173 Ga. 535, 160 S.E. 637 (1931); *Vann v. Wardlaw*, 180 Ga. 573, 179 S.E. 726 (1935); *Fuqua v. Hadden*, 190 Ga. 361, 9 S.E.2d 243 (1940); *Bethlehem Steel Co. v. Spivey*, 62 Ga. App. 693, 9 S.E.2d 702 (1940); *Byrd v. Goodman*, 192 Ga. 466, 15 S.E.2d 619 (1941); *Livingston v. Barnett*, 193 Ga. 640, 19 S.E.2d 385 (1942); *Fort Oglethorpe v. Catoosa County*, 80 Ga. App. 188, 55 S.E.2d 753 (1949); *Rutherford v. Tidwell*, 103 Ga. App. 557, 120 S.E.2d 38 (1961); *Smith v. Barnett*, 107 Ga. App. 849, 132 S.E.2d 139 (1963); *Wallace v. Willis*, 111 Ga. App. 576, 142 S.E.2d 383 (1965); *Davis v. Davis*, 222 Ga. 579, 151 S.E.2d 123 (1966); *Hornsby v. Rodriguez*, 116 Ga. App. 234, 156 S.E.2d 830 (1967); *O’Quinn v. State*, 121 Ga. App. 231, 173 S.E.2d 409 (1970); *Baxter v. Long*, 122 Ga. App. 500, 177 S.E.2d 712 (1970); *Massey v. State*, 227 Ga. 257, 181 S.E.2d 71 (1971); *Southeastern Plumbing Supply Co. v. Lee*, 232 Ga. 626, 208 S.E.2d 449 (1974); *Tamplin v. State*, 235 Ga. 774, 221 S.E.2d 455 (1975); *Brown v. State*, 236 Ga. 333, 223 S.E.2d 642 (1976); *Smith v. Branch*, 226 Ga. App. 626, 487 S.E.2d 35 (1997).

Plaintiff’s or Clerk’s Error

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VI, Sec. II, Para. V and antecedent provisions, relating to the effect of delay or lack of preparation by plaintiff in error and the effect of the clerk’s failure to transfer the bill of exceptions or record, are included in the annotations for this paragraph. See also Ga. Const. 1983, Art. VI, Sec. V, Para. III for decisions relating to taking of appeals.

This paragraph forbids dismissal of action where delay is attributable to clerk of court rather than to counsel. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev’d on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968) (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II).

Court of Appeals is controlled by this paragraph and dismisses appeals when delays in transmission are due to the fault of appellant. *Brookshire v. J.P. Stevens Co.*, 133 Ga. App. 97, 210 S.E.2d 46 (1974) (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II).

Supreme Court will not consider appeal which represents stale one caused by laches of appellant, and it is dismissed under the authority of this section. *George v. American Credit Control, Inc.*, 222 Ga. 512, 150 S.E.2d 683 (1966); *Elliott v. Leathers*, 223 Ga. 497, 156 S.E.2d 440 (1967); *Fahrig v. Garrett*, 224 Ga. 817, 165 S.E.2d 126 (1968) (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II).

Section allowing extension of time for filing appeal not to be construed as requiring dismissal. — To construe Ga. L. 1965, p. 18, § 6 (see now O.C.G.A. § 5-6-39) as requiring dismissal where an appellant did not cause the delay and the trial judge declined to grant a requested extension would shut off the right of appeal, and would thus violate the mandate of this paragraph. Such a construction would also be contrary to the legislative intent expressed in Ga. L. 1965, p. 18, §§ 13 and 23 (see now O.C.G.A. §§ 5-6-48 (b), (c), and (d) and 5-6-30) as to a decision upon the merits. *Elliott v. Leathers*, 223 Ga. 497, 156 S.E.2d 440 (1967) (see Ga. Const. 1983, Art. VI, Sec. IX, Para. II).

Section stating that cause not to be dismissed where extension granted is in accordance with this paragraph. — Ga. L. 1965, p. 18, § 12 (see now O.C.G.A. § 5-6-43) follows this paragraph by stating that a cause shall not be dismissed if the clerk is unable to transmit the record within the time specified (15 days) or when the judge grants an extension of time, and the judge shall attach a certificate attesting to the cause of the delay. *George v. American Credit Control, Inc.*, 222 Ga. 512, 150 S.E.2d 683 (1966) (see

Ga. Const. 1983, Art. VI, Sec. IX, Para. II).

Cause for late filing of transcript is fact issue for determination in the trial court. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols, 138 Ga. App. 593, 226 S.E.2d 742 (1976).

Issue of late filing of a transcript waived if not raised and determined in trial court. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols, 138 Ga. App. 593, 226 S.E.2d 742 (1976).

Illness of trial court clerk does not excuse failure to transmit record. — Where plaintiff in error failed to certify and transmit the record within the time required by law because of illness of the clerk of the trial court and the lack of clerical help, this did not prevent the dismissal of the case for want of jurisdiction of the Supreme Court to hear the case after the first term. Dixie Realty Fin. Co. v. Morgan, 171 Ga. 348, 155 S.E. 468 (1930).

Failure to pay bond results in dismissal. — Where a pauper’s affidavit is held not to be good, and appellant is ordered to make a supersedeas bond within three days but fails to do so and

causes a delay of 70 days, the appeal is dismissed. George v. American Credit Control, Inc., 222 Ga. 512, 150 S.E.2d 683 (1966).

Costs must be paid before record transmitted. — All costs shall be paid in the court below or the appellant shall make an affidavit that the appellant is unable to pay such costs before the clerk transmits the record to the appellate court. Pickett v. Paine, 139 Ga. App. 508, 229 S.E.2d 90 (1976).

Supreme Court and Court of Appeals cannot require lower court judge to issue writ returnable for purpose of trial. — While the Supreme Court may aid a party by the writ of mandamus to bring to it the party’s case from the lower court, as by issuing the writ to compel the judge to certify a bill of exceptions or to require the proper officers to perform their legal duties in reference to such proceeding, it is without any power or jurisdiction to require the judge of the lower court to issue a writ returnable before the judge for the purpose of trial. This rule is equally applicable to the Court of Appeals. McPhail v. Bagley, 96 Ga. App. 179, 99 S.E.2d 500 (1957).

RESEARCH REFERENCES

ALR. — Award of damages for dilatory tactics in prosecuting appeal in state court, 91 ALR3d 661.

SECTION X.

TRANSITION

Paragraph	Paragraph
I. Effect of ratification.	II. Continuation of judges.

Paragraph I. Effect of ratification.

- On the effective date of this article:
- (1) Superior courts shall continue as superior courts.
 - (2) State courts shall continue as state courts.
 - (3) Probate courts shall continue as probate courts.
 - (4) Juvenile courts shall continue as juvenile courts.
 - (5) Municipal courts not otherwise named herein, of whatever name, shall continue as and be denominated municipal courts, except

that the City Court of Atlanta shall retain its name. Such municipal courts, county recorder's courts, the Civil Courts of Richmond and Bibb counties, and administrative agencies having quasi-judicial powers shall continue with the same jurisdiction as such courts and agencies have on the effective date of this article until otherwise provided by law.

(6) Justice of the peace courts, small claims courts, and magistrate courts operating on the effective date of this Constitution and the County Court of Echols County shall become and be classified as magistrate courts. The County Court of Baldwin County and the County Court of Putnam County shall become and be classified as state courts, with the same jurisdiction and powers as other state courts.

1976 Constitution. — Art. VI, Sec. IV, Para. XI; Art. VI, Sec. VII, Para. I.

Cross references. — Effective date of Constitution, Ga. Const. 1983, Art. XI, Sec. I, Para. VI. State courts, § 15-7-1 et seq. Magistrate courts, § 15-10-1 et seq. Establishment of municipal courts and change of name of existing courts with municipal jurisdiction, § 36-32-1.

Law reviews. — For annual survey article, “‘Garbage In, Garbage Out’: The Litigation Implosion Over the Unconstitutional Organization and Jurisdiction of the City Court of Atlanta,” see 52 Mercer L. Rev. 49 (2000).

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This paragraph effectively extinguishes small claims courts throughout the state, vesting their jurisdiction instead in magistrate courts. *Porter v. Calhoun County Bd. of Comm’rs*, 252 Ga. 446, 314 S.E.2d 649 (1984) (see Ga. Const. 1983, Art. VI, Sec. X, Para. I).

Recorder’s court jurisdiction over state misdemeanor traffic offenses. — Under the 1983 Georgia Constitution, the recorder’s courts continue to possess limited jurisdiction over state misdemeanor traffic offenses until otherwise provided by law. *Wojcik v. State*, 260 Ga. 260, 392 S.E.2d 525 (1990).

City traffic courts. — Trial of defendant in the Atlanta Traffic Court, a City court which sits in the Fulton County portion of Atlanta, was improper where the state proved that the alleged offense took place in the city of Atlanta but did not offer any proof that it occurred in Fulton County; defendant is entitled to be tried in the county in which the offense was alleged to have occurred. *Waller v. State*, 231 Ga. App. 323, 498 S.E.2d 362 (1998).

Cited in *Smith v. Greene*, 274 Ga. 815, 559 S.E.2d 726 (2002).

OPINIONS OF THE ATTORNEY GENERAL

Ga. Const. 1983, Art. VI, Sec. X, Para. I does not expand the jurisdiction of recorder’s courts, but rather continues their previous jurisdiction. 1983 Op. Att’y Gen. No. U83-41.

Recorder’s courts do not have the authority to try offenses under former § 33-34-10(f) or 33-34-12(a) (see now O.C.G.A. § 40-5-70). 1983 Op. Att’y Gen. No. U83-41.

Paragraph II. Continuation of judges.

Each judge holding office on the effective date of this article shall continue in office until the expiration of the term of office, as a judge of the court having the same or similar jurisdiction. Each court not named herein shall cease to exist on such date or at the expiration of the term of the incumbent judge, whichever is later; and its jurisdiction shall automatically pass to the new court of the same or similar jurisdiction, in the absence of which court it shall pass to the superior court.

1976 Constitution. — There were no similar provisions in the 1976 Constitution.

Cross references. — Effective date of Constitution, Ga. Const. 1983, Art. XI, Sec. I, Para. VI.

JUDICIAL DECISIONS

Cited in *Porter v. Calhoun County Bd. of Comm’rs*, 252 Ga. 446, 314 S.E.2d 649 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Term “judge” includes a justice of the peace who becomes a magistrate because magistrate courts replace justice courts and magistrate courts are included within the courts described in Ga. Const. 1983, Art. VI, Sec. X, Para. II. 1983 Op. Att’y Gen. No. 83-53.

Unless justice uncertified. — A justice of the peace in office on June 30, 1983, who was not certified under the former Georgia Justice Courts Training Council

Act as of that date, did not become a magistrate of the successor court on July 1, 1983. 1983 Op. Att’y Gen. No. 83-53.

Magistrate assuming office serves original term. — A magistrate assuming office on July 1, 1983, by virtue of the magistrate’s previous position serves a term as magistrate identical to the original term of the magistrate’s former judicial office. 1983 Op. Att’y Gen. No. 83-59.

ARTICLE VII.

TAXATION AND FINANCE

- Section
- I. Power of Taxation.
 - II. Exemptions From Ad Valorem Taxation.
 - IIA. Homeowner's Incentive Adjustment.
 - III. Purposes and Method of State Taxation.
 - IV. State Debt.

Law reviews. — For article, "An Overview of the New Georgia Constitution," see 35 Mercer L. Rev. 1 (1983).

SECTION I.

POWER OF TAXATION

- | | |
|---|--|
| Paragraph | Paragraph |
| I. Taxation; limitations on grants of tax powers. | III. Uniformity; classification of property; assessment of agricultural land; utilities. |
| II. Taxing power limited. | |

Paragraph I. Taxation; limitations on grants of tax powers.

The state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void. Except as otherwise provided in this Constitution, the right of taxation shall always be under the complete control of the state.

<p>1976 Constitution. — Art. VII, Sec. I, Para. I.</p> <p>Cross references. — Laws impairing contract obligations or granting irrevocable privileges or immunities, Ga. Const. 1983, Art. I, Sec. I, Para. X. Laws affecting prior corporate charters, Ga. Const. 1983, Art. III, Sec. VI, Para. V. Tax powers of counties and municipalities, Ga. Const. 1983, Art. VIII, Sec. VI, Para. I and Ga. Const. 1983, Art. IX, Sec. IV, Para. I. Power of Governor to suspend collection of</p>	<p>taxes, § 45-12-22. Taxation, T. 48. Taxing of corporations, §§ 48-7-21 and 48-13-72.</p> <p>Law reviews. — For article discussing taxation of foreign businesses in Georgia, see 27 Mercer L. Rev. 629 (1976).</p> <p>For note discussing taxation of shares of stock, see 1 Ga. L. Rev. 41 (1927).</p> <p>For comment on <i>Sams v. Olah</i>, 225 Ga. 497, 169 S.E.2d 790 (1969), as to the constitutionality of Art. 2, Ch. 19, T. 15, see 21 Mercer L. Rev. 355 (1969).</p>
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JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- SOVEREIGN RIGHT OF TAXATION
- INCOME TAXATION

PAYMENT OF GRATUITY BY STATE

TAXATION OF CORPORATIONS AND CORPORATE PROPERTY

General Consideration

Inherent power of taxation. — The power of the legislature to impose taxes is inherent and is only circumscribed by the organic law. *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930).

General Assembly does not need constitutional authorization to levy a tax or to authorize the levy of a tax by a county. *Board of Comm'rs v. Cooper*, 245 Ga. 251, 264 S.E.2d 193 (1980).

This paragraph changed the prior law. *Augusta Factory v. City Council*, 83 Ga. 734, 10 S.E. 359 (1889) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

Taxation of all properties not subject to exemption is required under Ga. Const. 1976, Art. VII, Sec. I, Para. III (see Ga. Const. 1983, Art. VII, Sec. I, Para. III), and Ga. Const. 1976, Art. VII, Sec. I, Para. IV (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV). *Atlanta Nat'l Bldg. & Loan Ass'n v. Stewart*, 109 Ga. 80, 35 S.E. 73 (1900).

De facto government has inherent power to tax. *O'Byrne v. Mayor of Savannah*, 41 Ga. 331, 5 Am. R. 532 (1870).

State may not grant irrevocable tax exemptions, whether statutory or constitutional. Because the Constitution prohibits irrevocable restraints on the state's taxing powers, the state may amend the Constitution to repeal any tax exemption. *Collins v. City of Dalton ex rel. Bd. of Water, Light & Sinking Fund Comm'rs*, 261 Ga. 584, 408 S.E.2d 106 (1991).

This paragraph says nothing of the time when a tax execution must be issued or enforced. *Georgia R.R. & Banking v. Wright*, 124 Ga. 596, 53 S.E. 251 (1906) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

This paragraph has no relation to the right of the legislature to give legislative sanction to bar orders, and make them applicable to the state. *Suttles v. J.B. Withers Cigar Co.*, 194 Ga. 617, 22 S.E.2d 129 (1942), overruled on other grounds, *Johnson v. Mayor of City of Carrollton*, 249 Ga. 173, 288 S.E.2d 565 (1982) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

Municipality's power to tax must be conferred directly by Constitution or statute. — Basic power to tax belongs to state; for a municipality to possess this power it must be conferred upon it either directly in the Constitution or by statute and it must be conferred in plain and unmistakable terms. *Camden Tel. & Tel. Co. v. City of St. Marys*, 247 Ga. 687, 279 S.E.2d 200 (1981).

Authority of municipality to collect occupation tax. — First city lacked authority to collect an occupation tax on professional or business activities within a second city's limits because the first city did not identify any constitutional provision or general law that authorized the first city to levy, assess, and collect an occupation tax on businesses and practitioners that were not located in that city's limits, and to the extent an agreement between the cities purported to vest in the first city the authority to collect an occupation tax on businesses located within the second city's limits, the contract was unenforceable; a contract between municipalities, however, is not a general law. *City of Atlanta v. City of College Park*, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

Sanitation assessments. — Sanitation assessments were not taxes within the meaning of the Georgia Constitution but rather charges for services rendered by a county, which was authorized to enforce by ordinance the collection of fees for solid waste collection services in the same manner as authorized by law for the enforcement of the collection and payment of state taxes, fees, or assessments; thus, the county's solid waste collection fee did not violate Ga. Const. 1983, Art. VII, Sec. I, Para. I. *Strykr v. Long County Bd. of Comm'rs*, 277 Ga. 624, 593 S.E.2d 348 (2004).

Cited in *Harrison v. Southern Ry.*, 44 Ga. App. 49, 160 S.E. 656 (1931); *Jones v. Darby*, 174 Ga. 71, 161 S.E. 835 (1931); *City of Moultrie v. Moultrie Banking Co.*, 175 Ga. 738, 165 S.E. 814 (1932); *Barwick v. Roberts*, 192 Ga. 783, 16 S.E.2d 867 (1941); *State v. State Toll Bridge Auth.*, 210 Ga. 690, 82 S.E.2d 626 (1954); *Sams v.*

General Consideration (Cont'd)

Olah, 225 Ga. 497, 169 S.E.2d 790 (1969); Blackmon v. Ewing, 231 Ga. 239, 201 S.E.2d 138 (1973).

Sovereign Right of Taxation

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VII, Sec. I, Para. I and antecedent provisions, providing for "The right of taxation is a sovereign right...of the State," are included in the annotations for this paragraph.

Right of taxation in the legislature is without limit, except as provided in the Georgia Constitution. — The right of taxation is not a power specially granted; it is assumed to exist, and is limited by special clauses. Featherstone v. Norman, 170 Ga. 370, 153 S.E. 58 (1930).

Georgia Constitution denies to the legislature power to surrender the sovereign right of the state to tax. IBM Corp. v. Evans, 213 Ga. 333, 99 S.E.2d 220 (1957).

Provisions of former Code 1933, § 92-5712 (see now O.C.G.A. § 48-5-25) were not violative of this paragraph of the Georgia Constitution pertaining to the sovereign right of the state to tax. Aldridge v. Federal Land Bank, 203 Ga. 285, 46 S.E.2d 578 (1948) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

The main purpose of this paragraph is to prohibit exemptions from taxation, and to void all limitations of every kind and character upon the taxing power of the state. It is not the purpose of this paragraph to prohibit the legislature from prescribing the priority by which debts of an insolvent bank should be paid as in Ga. L. 1931, p. 7, § 91 (see now O.C.G.A. § 7-1-202). Felton v. McArthur, 173 Ga. 465, 160 S.E. 419 (1931) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

O.C.G.A. § 7-1-202 not violative of this paragraph and other constitutional provisions. — The order of distribution of assets upon the insolvency of a bank which grant payments of debts due to depositors prior to payment of state taxes (see now O.C.G.A. § 7-1-202) is not an unconstitutional violation of this paragraph and Ga. Const. 1976, Art. VII, Sec.

I, Paras. III and IV (see Ga. Const. 1983, Art. VII, Sec. I, Para. III and Art. VII, Sec. II, Para. I). Felton v. McArthur, 173 Ga. 465, 160 S.E. 419 (1931) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

Restraint on state's taxing power. — In the field of direct taxation, the power of the sovereign state is supreme, except when exercise of that supreme right brings it into collision with the operation of a government instrumentality necessary to the existence of the federal government and the exercise of its powers upon a subject as to which exclusive jurisdiction was delegated to Congress. City of Atlanta v. Stokes, 175 Ga. 201, 165 S.E. 270 (1932).

Interference with federal government war power by state taxation prohibited. — Even though power of a state to tax is supreme, that power may not be used to hamper, hinder, annoy, harass, and impede the federal government in the exercise of its unlimited power to carry on war. City of Atlanta v. Stokes, 175 Ga. 201, 165 S.E. 270 (1932).

State taxation of veterans benefits. — Where Congress enacts legislation declaring that certain compensation for war veterans shall be exempt from taxation, Congress is acting within its war powers and the exemption applies to state taxation, including taxation of property purchased by veterans with funds declared tax exempt by Congress. City of Atlanta v. Stokes, 175 Ga. 201, 165 S.E. 270 (1932).

Exercise of taxing power for local improvements. — Though assessments for local improvements are not taxes, within the meaning of the requirement of the Constitution that taxes must be ad valorem and uniform, nevertheless assessments for local improvements, such as street paving and sewerage, are an exercise of the taxing power. Steele v. City of Waycross, 190 Ga. 816, 10 S.E.2d 867 (1940).

Income Taxation

Right to impose an income tax is an inherent right of the people. — The grant of this power is not necessary to enable the legislature to exercise it. There is nothing in the Constitution of Georgia which denies to the legislature the power

to impose an income tax, if it is levied without infringing some provision of that instrument. *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930).

Exemption. — Allowing a tax exemption for retirement benefits paid to teachers and state employees bestowed an irrevocable tax exemption upon the retirees in violation of Ga. Const. 1983, Art. VII, Sec. I, Para. I. *Parrish v. Employees' Retirement Sys.*, 260 Ga. 613, 398 S.E.2d 353 (1990), cert. denied, 500 U.S. 353, 111 S. Ct. 2016, 114 L. Ed. 2d 103 (1991).

Payment of Gratuity by State

Payment of claim was forbidden gratuity. — A payment of plaintiff's claim, with or without a judgment against a school board, in settlement of a supposed tort liability of the board is a gratuity which is forbidden. *Sheley v. Board of Pub. Educ.*, 132 Ga. App. 314, 208 S.E.2d 126 (1974), cert. dismissed, 233 Ga. 487, 212 S.E.2d 627 (1975).

Taxation of Corporations and Corporate Property

Corporation doing business in a city is taxable, although its principal office is elsewhere. *Georgia Ins. Co. v. City of Cedartown*, 134 Ga. 87, 67 S.E. 410, 19 Ann. Cas. 954 (1910).

Contract limiting the taxes on certain property is void. *Tarver v. Mayor of Dalton*, 134 Ga. 462, 67 S.E. 929, 29 L.R.A. (n.s.) 183, 20 Ann. Cas. 281 (1910).

For case purporting to exempt from "all state, county, and municipal taxation" lands ceded to United States government, see *IBM Corp. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957).

For case purportedly holding former Code 1933, §§ 15-301, 15-302, and 15-303 (see now O.C.G.A. §§ 50-2-22, 50-2-23 and 50-2-24) was void as being offensive to this paragraph, see *IBM Corp. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

The state has not waived and cannot waive its right to tax private property on federal land and indeed

the Constitution demands that it be taxed. *IBM Corp. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957).

Taxing private property not interfering with government business. — Former Code 1933, §§ 15-301, 15-302, and 15-303 (see now O.C.G.A. §§ 50-2-22, 50-2-23 and 50-2-24) must be construed in pari materia with this paragraph of the Georgia Constitution. When thus construed, they mean that taxation cannot be prevented so long as such taxation in no wise interferes with the business of the United States. Taxing private property could not conceivably interfere with the government's business. *IBM Corp. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

Legislature cannot violate this paragraph. — Nothing legislature does, no matter how unambiguously it is expressed, can have validity if it offends this paragraph of the Georgia Constitution. *IBM Corp. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957) (see Ga. Const. 1983, Art. VII, Sec. I, Para. I).

Classification of business. — The General Assembly may classify different businesses for purpose of taxation and may make subclassifications within one type of business. These classifications have been held constitutional where there was a business tax involved as opposed to a property tax. A tax on gross insurance premiums is a business tax. *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966).

Does not apply to O.C.G.A. § 33-8-8. — Neither Ga. Const. 1976, Art. I, Sec. I, Para. VII (see Ga. Const. 1983, Art. I, Sec. I, Para. X), nor this paragraph is applicable to Ga. L. 1964, p. 122, § 2 (see now O.C.G.A. § 33-8-8) because the constitutional provisions contain the words "irrevocable" and "irrevocably." Webster's Third New International Dictionary defines the word "irrevocable" as "incapable of being recalled or revoked." Statutes passed by the General Assembly such as Ga. L. 1964, p. 122, § 2 are clearly revocable at the will of the legislature. *Nash v. National Preferred Life Ins. Co.*, 222 Ga. 14, 148 S.E.2d 402 (1966).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, State and Local Taxation, § 57 et seq.

C.J.S. — 84 C.J.S., Taxation, §§ 7 et seq., 122.

ALR. — Validity of statutes imposing license tax on automobiles as affected by constitutional provisions in relation to taxation, 5 ALR 759; 126 ALR 1419.

Constitutional enumeration of subjects of tax exemption as affecting power of Legislature to free government securities or property from taxation, 9 ALR 436.

Appropriation or raising of public funds for distribution by chamber of commerce, 31 ALR 495.

Constitutionality of taxing statute which refuses to corporation deduction of credits allowed to individual taxpayer, 42 ALR 1049.

Constitutionality of statute impairing or postponing lien for taxes, 53 ALR 1134; 136 ALR 328.

Constitutionality of statute which extinguishes or impairs lien of special assessments on sale of property for taxes, 53 ALR 1140.

State income tax on resident in respect of income earned outside the state, 87 ALR 380.

Constitutionality of statute permitting payment of taxes in installments, 101 ALR 1335.

Constitutionality of chain store tax, 112 ALR 305.

Tax on corporations as affected by fact that corporation is not actually engaged in or carrying on business for which it was incorporated, 124 ALR 1109.

Constitutional guaranty of freedom of religion as applied to license taxes or regulations, 141 ALR 538; 146 ALR 109; 152 ALR 322.

Sales or use tax: deduction or exemption of discount or premium in computing amount of sales, 90 ALR2d 338.

Validity, construction, and application of state statutes forbidding possession, transportation, or sale of unstamped or unlicensed cigarettes or other tobacco products, 46 ALR3d 1342.

Paragraph II. Taxing power limited.

(a) The annual levy of state ad valorem taxes on tangible property for all purposes, except for defending the state in an emergency, shall not exceed one-fourth mill on each dollar of the assessed value of the property.

(b) So long as the method of taxation in effect on December 31, 1980, for the taxation of shares of stock of banking corporations and other monied capital coming into competition with such banking corporations continues in effect, such shares and other monied capital may be taxed at an annual rate not exceeding five mills on each dollar of the assessed value of the property.

1976 Constitution. — Art. VII, Sec. I, Para. II.

Cross references. — Prohibition

against certain taxes, U.S. Const., Art. I, Sec. X, Cl. 2, and § 48-13-2 et seq.

JUDICIAL DECISIONS

The constitutional restriction to five mills is applicable only to taxes upon property ad valorem, and does not apply to occupation privilege sales tax.

Standard Oil Co. v. State Revenue Comm'n, 179 Ga. 371, 176 S.E. 1 (1934).

The tax imposed by the revenue tax act is an excise tax, and is not tax on

“property” in the sense in which that word is used in this paragraph, limiting the levy of taxes on property by the General Assembly to five mills on each dollar of the value of the property. *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939), overruled on other grounds, *Blackston v. State Dep’t of Natural Resources*, 255 Ga. 15, 334 S.E.2d 679 (1985) (see Ga. Const. 1983, Art. VII, Sec. I, Para. II).

Uniformity of taxation and equal protection not violated. — A decree enjoining the assessment of a railroad’s property for local ad valorem tax purposes at a greater percentage of fair market value than that employed in counties and municipalities and ordering a new assessment does not violate uniformity and equal protection by discriminating against taxpayers in counties and municipalities where assessments are higher as to the quarter-mill tax authorized by this

paragraph. *Undercoffer v. Seaboard Air Line R.R.*, 222 Ga. 822, 152 S.E.2d 878 (1966) (see Ga. Const. 1983, Art. VII, Sec. I, Para. II).

Levy exceeding tax cap authorized for quality education. — The exception contained in the 1982 tax-cap amendment to former Ga. Const. 1976, Art. VII, Sec. I, Para. II (see Ga. Const. 1983, Art. VII, Sec. I, Para. II), presented a clear and unambiguous explanation of those circumstances under which the levy could exceed the tax cap. The Quality Basic Education Act, O.C.G.A. § 20-2-130 et seq., which imposes additional funding obligations upon local boards of education for which no state or federal funds are provided, mandated such a levy. *Hicks v. Arnall*, 258 Ga. 296, 368 S.E.2d 733 (1988).

Cited in *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939).

OPINIONS OF THE ATTORNEY GENERAL

The phrase “for all purposes” means all state purposes. 1952-53 Op. Att’y Gen. p. 189.

The purpose of this paragraph was to take the state out of ad valorem taxes and leave this field of taxation to counties and municipalities; it was necessary for the state to retain in the Constitution the right to levy some amount in order that the state might continue its present functions in assessment and collection of taxes on public utilities; another purpose of this paragraph was to eliminate so far as practicable the inequalities existing in various counties in assessing real estate for the purpose of taxation. 1952-53 Op. Att’y Gen. p. 189. (see Ga. Const. 1983, Art. VII, Sec. I, Para. II).

Former Code 1933, § 92-3701 (see now O.C.G.A. § 48-5-220) did not provide any limitation upon the rate of taxation for welfare purposes other than that stated in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I). 1948-49 Op. Att’y Gen. p. 357.

The State Board of Education can enforce in court notes and agreements, properly executed on standard forms, given in consideration of scholarship payments made pursuant to this paragraph in order to enable Georgia students to become teachers. 1968 Op. Att’y Gen. No. 68-373. (see Ga. Const. 1983, Art. VII, Sec. I, Para. II).

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, State and Local Taxation, § 104 et seq.

C.J.S. — 84 C.J.S., Taxation, § 12.

ALR. — Constitutionality, construction, and application of provisions of state tax law for conformity with federal income tax law or administrative and judicial interpretation, 42 ALR 797; 166 ALR 516; 42 ALR2d 797.

Income as “property” within constitutional limitation on taxation, 70 ALR 468; 97 ALR 1488.

Conclusiveness of official determination of existence of emergency within the contemplation of constitutional or statutory provisions permitting excess of maximum limit of tax or indebtedness in an “emergency”, 90 ALR 328.

Meaning of term “assessment” or “assessed valuation” when used as basis of tax or debt limit, 156 ALR 594.

Validity, construction, and effect of state

statutes affording preferential property tax treatment to land used for agricultural purposes, 98 ALR3d 916.

Paragraph III. Uniformity; classification of property; assessment of agricultural land; utilities.

(a) All taxes shall be levied and collected under general laws and for public purposes only. Except as otherwise provided in subparagraphs (b), (c), (d), (e), and (f) of this Paragraph, all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

(b)(1) Except as otherwise provided in this subparagraph (b), classes of subjects for taxation of property shall consist of tangible property and one or more classes of intangible personal property including money; provided, however, that any taxation of intangible personal property may be repealed by general law without approval in a referendum effective for all taxable years beginning on or after January 1, 1996.

(2) Subject to the conditions and limitations specified by law, each of the following types of property may be classified as a separate class of property for ad valorem property tax purposes and different rates, methods, and assessment dates may be provided for such properties:

(A) Trailers.

(B) Mobile homes other than those mobile homes which qualify the owner of the home for a homestead exemption from ad valorem taxation.

(C) Heavy-duty equipment motor vehicles owned by nonresidents and operated in this state.

(3) Motor vehicles may be classified as a separate class of property for ad valorem property tax purposes, and such class may be divided into separate subclasses for ad valorem purposes. The General Assembly may provide by general law for the ad valorem taxation of motor vehicles including, but not limited to, providing for different rates, methods, assessment dates, and taxpayer liability for such class and for each of its subclasses and need not provide for uniformity of taxation with other classes of property or between or within its subclasses. The General Assembly may also determine what portion of any ad valorem tax on motor vehicles shall be retained by the state. As used in this subparagraph, the term “motor vehicles” means all vehicles which are self-propelled.

(c) Tangible real property, but no more than 2,000 acres of any single property owner, which is devoted to bona fide agricultural purposes

shall be assessed for ad valorem taxation purposes at 75 percent of the value which other tangible real property is assessed. No property shall be entitled to receive the preferential assessment provided for in this subparagraph if the property which would otherwise receive such assessment would result in any person who has a beneficial interest in such property, including any interest in the nature of stock ownership, receiving the benefit of such preferential assessment as to more than 2,000 acres. No property shall be entitled to receive the preferential assessment provided for in this subparagraph unless the conditions set out below are met:

(1) The property must be owned by:

(A)(i) One or more natural or naturalized citizens;

(ii) An estate of which the devisee or heirs are one or more natural or naturalized citizens; or

(iii) A trust of which the beneficiaries are one or more natural or naturalized citizens; or

(B) A family-owned farm corporation, the controlling interest of which is owned by individuals related to each other within the fourth degree of civil reckoning, or which is owned by an estate of which the devisee or heirs are one or more natural or naturalized citizens, or which is owned by a trust of which the beneficiaries are one or more natural or naturalized citizens, and such corporation derived 80 percent or more of its gross income from bona fide agricultural pursuits within this state within the year immediately preceding the year in which eligibility is sought.

(2) The General Assembly shall provide by law:

(A) For a definition of the term “bona fide agricultural purposes,” but such term shall include timber production;

(B) For additional minimum conditions of eligibility which such properties must meet in order to qualify for the preferential assessment provided for herein, including, but not limited to, the requirement that the owner be required to enter into a covenant with the appropriate taxing authorities to maintain the use of the properties in bona fide agricultural purposes for a period of not less than ten years and for appropriate penalties for the breach of any such covenant.

(3) In addition to the specific conditions set forth in this subparagraph (c), the General Assembly may place further restrictions upon, but may not relax, the conditions of eligibility for the preferential assessment provided for herein.

(d)(1) The General Assembly shall be authorized by general law to establish as a separate class of property for ad valorem tax purposes

any tangible real property which is listed in the National Register of Historic Places or in a state historic register authorized by general law. For such purposes, the General Assembly is authorized by general law to establish a program by which certain properties within such class may be assessed for taxes at different rates or valuations in order to encourage the preservation of such historic properties and to assist in the revitalization of historic areas.

(2) The General Assembly shall be authorized by general law to establish as a separate class of property for ad valorem tax purposes any tangible real property on which there have been releases of hazardous waste, constituents, or substances into the environment. For such purposes, the General Assembly is authorized by general law to establish a program by which certain properties within such class may be assessed for taxes at different rates or valuations in order to encourage the cleanup, reuse, and redevelopment of such properties and to assist the revitalization thereof by encouraging remedial action.

(e) The General Assembly shall provide by general law:

(1) For the definition and methods of assessment and taxation, such methods to include a formula based on current use, annual productivity, and real property sales data, of: “bona fide conservation use property” to include bona fide agricultural and timber land not to exceed 2,000 acres of a single owner; and “bona fide residential transitional property,” to include private single-family residential owner occupied property located in transitional developing areas not to exceed five acres of any single owner. Such methods of assessment and taxation shall be subject to the following conditions:

(A) A property owner desiring the benefit of such methods of assessment and taxation shall be required to enter into a covenant to continue the property in bona fide conservation use or bona fide residential transitional use; and

(B) A breach of such covenant within ten years shall result in a recapture of the tax savings resulting from such methods of assessment and taxation and may result in other appropriate penalties;

(2) That standing timber shall be assessed only once, and such assessment shall be made following its harvest or sale and on the basis of its fair market value at the time of harvest or sale. Said assessment shall be two and one-half times the assessed percentage of value fixed by law for other real property taxed under the uniformity provisions of subparagraph (a) of this Paragraph but in no event greater than its fair market value; and for a method of temporary supplementation of the property tax digest of any county

if the implementation of this method of taxing timber reduces the tax digest by more than 20 percent, such supplemental assessed value to be assigned to the properties otherwise benefiting from such method of taxing timber.

(f)(1) The General Assembly shall provide by general law for the definition and methods of assessment and taxation, such methods to include a formula based on current use, annual productivity, and real property sales data, of “forest land conservation use property” to include only forest land each tract of which exceeds 200 acres of a qualified owner. Such methods of assessment and taxation shall be subject to the following conditions:

(A) A qualified owner shall consist of any individual or individuals or any entity registered to do business in this state;

(B) A qualified owner desiring the benefit of such methods of assessment and taxation shall be required to enter into a covenant to continue the property in forest land use;

(C) All contiguous forest land conservation use property of an owner within a county for which forest land conservation use assessment is sought under this subparagraph shall be in a single covenant;

(D) A breach of such covenant within 15 years shall result in a recapture of the tax savings resulting from such methods of assessment and taxation and may result in other appropriate penalties; and

(E) The General Assembly may provide by general law for a limited exception to the 200 acre requirement in the case of a transfer of ownership of all or a part of the forest land conservation use property during a covenant period to another owner qualified to enter into an original forest land conservation use covenant if the original covenant is continued by both such acquiring owner and the transferor for the remainder of the term, in which event no breach of the covenant shall be deemed to have occurred even if the total size of a tract from which the transfer was made is reduced below 200 acres.

(2) No portion of an otherwise eligible tract of forest land conservation use property shall be entitled to receive simultaneously special assessment and taxation under this subparagraph and either subparagraph (c) or (e) of this Paragraph.

(3)(A) The General Assembly shall appropriate an amount for assistance grants to counties, municipalities, and county and independent school districts to offset revenue loss attributable to the implementation of this subparagraph. Such grants shall be

made in such manner and shall be subject to such procedures as may be specified by general law.

(B) If the forest land conservation use property is located in a county, municipality, or county or independent school district where forest land conservation use value causes an ad valorem tax revenue reduction of 3 percent or less due to the implementation of this subparagraph, in each taxable year in which such reduction occurs, the assistance grants to the county, each municipality located therein, and the county or independent school districts located therein shall be in an amount equal to 50 percent of the amount of such reduction.

(C) If the forest land conservation use property is located in a county, municipality, or county or independent school district where forest land conservation use value causes an ad valorem tax revenue reduction of more than 3 percent due to the implementation of this subparagraph, in each taxable year in which such reduction occurs, the assistance grants to the county, each municipality located therein, and the county or independent school districts located therein shall be as follows:

(i) For the first 3 percent of such reduction amount, in an amount equal to 50 percent of the amount of such reduction; and

(ii) For the remainder of such reduction amount, in an amount equal to 100 percent of the amount of such remaining reduction amount.

(4) Such revenue reduction shall be calculated by utilizing forest land fair market value. For purposes of this subparagraph, forest land fair market value means the 2008 fair market value of the forest land. Such 2008 valuation may increase from one taxable year to the next by a rate equal to the percentage change in the price index for gross output of state and local government from the prior year to the current year as defined by the National Income and Product Accounts and determined by the United States Bureau of Economic Analysis and indicated by the Price Index for Government Consumption Expenditures and General Government Gross Output (Table 3.10.4). Such revenue reduction shall be determined by subtracting the aggregate forest land conservation use value of qualified properties from the aggregate forest land fair market value of qualified properties for the applicable tax year and the resulting amount shall be multiplied by the millage rate of the county, municipality, or county or independent school district.

(5) For purposes of this subparagraph, the forest land conservation use value shall not include the value of the standing timber located on forest land conservation use property.

(g) The General Assembly may provide for a different method and time of returns, assessments, payment, and collection of ad valorem taxes of public utilities, but not on a greater assessed percentage of value or at a higher rate of taxation than other properties, except that property provided for in subparagraph (c), (d), (e), or (f) of this Paragraph. (Ga. Const. 1983, Art. 7, § 1, Para. 3; Ga. L. 1984, p. 1711, § 1/HR 589; Ga. L. 1988, p. 2119, §§ 1, 2/SR 265; Ga. L. 1990, p. 2437, §§ 1, 2/HR 836; Ga. L. 1992, p. 3336, § 1/HR 715; Ga. L. 1996, p. 1665, § 1/HR 734; Ga. L. 2002, p. 1504, § 1/HR 1111; Ga. L. 2008, p. 1209, §§ 1, 2/HR 1276.)

1976 Constitution. — Art. VII, Sec. I, Para. III.

Cross references. — Assessment of tangible property, §§ 48-5-7 and 48-5-7.1. Uniformity of taxation, § 48-5-260 et seq. Separate tax classification for motor vehicles and for mobile homes, § 48-5-441. Taxation of public utility property, § 48-5-510 et seq. Taxation of intangibles, Ch. 6, T. 48.

Editor's notes. — The constitutional amendment (Ga. L. 1984, p. 1711, § 1) which in (c)(1) redesignated (A) as (1) of (A), added (ii) and (iii) of (A), and inserted "or which is owned by ... naturalized citizens" in subparagraph (B) was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

The constitutional amendment (Ga. L. 1988, p. 2119, §§ 1, 2) which revised this Paragraph to authorize the General Assembly to establish as a separate class of property for ad valorem tax purposes any tangible real property which is listed in the National Register of Historic Places or in a state historic register, and to establish a program whereby certain properties may be assessed for taxes at different rates in order to encourage preservation of historic properties was approved by a majority of the qualified voters voting at the general election held on November 8, 1988.

The constitutional amendment (Ga. L. 1990, p. 2437, §§ 1, 2) which rewrote subparagraph (a) and added subparagraphs (e) and (f) was approved by a majority of the qualified voters voting at the general election held on November 6, 1990.

The constitutional amendment (Ga. L.

1992, p. 3336, § 1) which revised subparagraphs (a) and (b) to provide that heavy-duty equipment motor vehicles owned by nonresidents may be classified as a separate rate class of property for ad valorem property tax purposes was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

The constitutional amendment (Ga. L. 1996, p. 1665, § 1), which added the proviso at the end of paragraph (b)(1), was approved by a majority of the qualified voters voting at the general election held on November 5, 1996.

The constitutional amendment (Ga. L. 2000, p. 2003, § 1), which would have revised subparagraph (b) to provide that marine vessels may be classified as a separate class of property for ad valorem property tax purposes, and such class may be divided into separate subclasses for ad valorem purposes, was defeated at the general election held on November 7, 2000.

The constitutional amendment (Ga. L. 2002, p. 1499, § 1), which would have revised this Paragraph to provide that qualified low-income building projects may be classified as a separate class of property for ad valorem property tax purposes and different rates, methods, and assessment dates may be provided for such building projects, was defeated at the general election held on November 5, 2002.

The constitutional amendment (Ga. L. 2002, p. 1502, § 1), which would have revised this Paragraph to provide that commercial dockside facilities may be classified as a separate class of property for ad valorem property tax purposes and

different rates, methods, and assessment dates may be provided for such dockside facilities, was defeated at the general election held on November 5, 2002.

The constitutional amendment (Ga. L. 2002, p. 1504, § 1), which revised this Paragraph to provide that the General Assembly shall be authorized to provide by general law for the separate classification and taxation of properties on which there have been releases of hazardous waste, constituents, or substances into the environment so as to encourage cleanup, reuse, and redevelopment of such properties was approved by a majority of the qualified voters voting at the general election held November 5, 2002.

The constitutional amendment (Ga. L. 2008, p. 1209, §§ 1 and 2), which in subparagraph (a), substituted “subparagraphs (b), (c), (d), (e), and (f) of this Paragraph,” for “subparagraphs (b), (c), (d), and (e)”; added present subparagraph (f); redesignated former subparagraph (f) as subparagraph (g); and, in subparagraph (g), substituted “subparagraph (c), (d), (e), or (f) of this Paragraph” for “subparagraph (c), (d), or (e)” at the end was ratified at the general election held on November 4, 2008.

Law reviews. — For article suggesting

potential problems of discrimination in municipal annexation statutes, see 2 Ga. L. Rev. 35 (1967). For article, “Selected Oddities in Georgia Municipal Law,” see 9 Ga. L. Rev. 783 (1975). For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979). For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981). For survey article on local government law, see 34 Mercer L. Rev. 225 (1982). For article, “Freeport Exemption from Property Taxes for Inventory Stored in Georgia But Destined for Shipment Out-of-State,” see 28 Ga. St. B.J. 108 (1991). For article, “The Tax Abatement Program for Historic Properties in Georgia,” see 28 Ga. St. B.J. 129 (1992). For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005). For article, “Revenue and Taxation: Sales and Use Taxes,” see 29 Ga. St. U.L. Rev. 112 (2012).

For note discussing Georgia’s local option sales tax, Art. 2, Ch. 8, T. 48, see 31 Mercer L. Rev. 313 (1979).

For comment on *McLennan v. Undercofler*, 222 Ga. 302, 149 S.E.2d 705 (1966), see 18 Mercer L. Rev. 290 (1966).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

UNIFORMITY OF TAXATION

CLASSES OF TAXES

1. IN GENERAL
2. OCCUPATION TAX
3. AD VALOREM TAX
4. INCOME TAX

TAXATION BY MUNICIPALITIES

ESTABLISHING PROPERTY VALUE

TAX EXEMPT PROPERTY

General Consideration

The power of the legislature to impose taxes is inherent and is only circumscribed by the organic law. *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930).

Legislative power is without limit, except as provided in the Constitu-

tion. It is not a power specially granted; it is assumed to exist, and is limited by special clauses. *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930).

States’ latitude in devising fiscal systems. — When dealing with their proper domestic concerns, and not trenching upon prerogatives of national government or violating guaranties of federal

Constitution, the states have attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

States have very wide discretion in levying of their taxes. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

Taxes and assessments distinguished. — Taxes are burdens, while assessments are equivalents which are compensated by the benefits received. *Hayden v. City of Atlanta*, 70 Ga. 817 (1883).

O.C.G.A. § 48-5-28 applies to all property subject to tax. — Former Civil Code 1910, § 1140 (see now O.C.G.A. § 48-5-28) mandates payment of taxes before other claims applies to all property returned or held by a taxpayer that is subject to taxation under the state Constitution. *Cason v. Aldred*, 175 Ga. 256, 165 S.E. 221 (1932).

Section 7-1-202 not unconstitutional. — The order of distribution of assets upon insolvency of a bank which grant payments of debts due to depositors prior to payment of state taxes under Ga. L. 1927, p. 195, § 5 (see now O.C.G.A. § 7-1-202) is not an unconstitutional violation of this paragraph and Ga. Const. 1976, Art. VII, Sec. I, Paras. I and IV (see Ga. Const. 1983, Art. VII, Sec. I, Para. I and Art. VII, Sec. II, Paras. I-IV). *Felton v. McArthur*, 173 Ga. 465, 160 S.E. 419 (1931) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

This paragraph was not violated by Ga. L. 1924, p. 87 (see now O.C.G.A. § 48-5-180) abolishing fee system. *Abbott v. Commissioners of Fulton County*, 160 Ga. 657, 129 S.E. 38 (1925) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Ga. L. 1913, p. 123, § 12 (see now O.C.G.A. § 48-2-2), creating State Tax Commission (now Revenue Commissioner) did not violate this paragraph. *Ogletree v. Woodward*, 150 Ga. 691, 105 S.E. 243 (1920) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Bonds issued by a municipal corporation of this state in the hands of a

resident are not taxable. *Penick v. Foster*, 129 Ga. 217, 58 S.E. 773, 12 L.R.A. 1159, 12 Ann. Cas. 346 (1907).

This paragraph does not apply to the expenditure or distribution of money raised by taxes. *Abbott v. Commissioners of Fulton County*, 160 Ga. 657, 129 S.E. 38 (1925) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Ga. L. 1937, p. 806 (see now O.C.G.A. § 34-8-34) is not invalid as violating due process or equal protection clauses of state and federal Constitutions, or the principle of uniformity in matters of taxation, as expressed in the state Constitution. *Jeffreys-McElrath Mfg. Co. v. Huie*, 196 Ga. 710, 27 S.E.2d 385 (1943).

Payment of unemployment benefits to employees voluntarily unemployed amounts to unconstitutional donations or gratuities. — Where unemployment is voluntary or due to fault of the unemployed, to require employers, who sought to persuade them to return to work, to supply the money with which to pay them would encourage and reward idleness and impose an unjust and intolerable burden upon employers by arbitrary and discriminatory legislation. To construe Ga. L. 1945, p. 57 to authorize such payments would be to render it unconstitutional in that it would make donations or gratuities in violation of the plain inhibition of the Constitution. It would be void for the further reason that it classified employers for purpose of imposing a tax upon them while exempting others, when there is no possible relation between the basis of such classification and the objective of donations and gratuities to those workers who had qualified under the article during periods while they are voluntarily unemployed due to their own fault. *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950).

Rule delineating jurisdiction of Appeals Court and state Supreme Court. — The Court of Appeals has jurisdiction to decide questions of law that involve application, in a general sense, of unquestioned and unambiguous provisions of the state Constitution to a given state of facts, and that do not involve construction of some constitutional provision directly in ques-

General Consideration (Cont'd)

tion and doubtful either under its own terms or under decisions of the Supreme Court of Georgia or of the United States, and that do not involve the constitutionality of any law of the state or of the United States or any treaty. Under this rule, the Supreme Court and not the Court of Appeals has jurisdiction where a surety seeks to be held free of liability on grounds of constitutional provisions which made obligation unenforceable against a school system as principal. *Franklin v. Mobley*, 202 Ga. 212, 42 S.E.2d 755 (1947).

The General Assembly may fix taxing situs of all tangible or intangible personal property, but it must be by general law, and classified according to nature of the property, and not according to the nature of the owner. *County of Walton v. County of Morgan*, 120 Ga. 548, 48 S.E. 243 (1904).

Taxation to situs of personalty of deceased person, see *City of Blakely v. Hilton*, 150 Ga. 27, 102 S.E. 340 (1920).

Cited in *Cochran v. City of Thomasville*, 167 Ga. 579, 146 S.E. 462 (1928); *Case-Fowler Lumber Co. v. Winslett*, 168 Ga. 808, 149 S.E. 211 (1929); *City of Waycross v. Bell*, 169 Ga. 57, 149 S.E. 641 (1929); *Camp v. State*, 171 Ga. 25, 154 S.E. 436 (1930); *Georgia Hwy. Express v. Harrison*, 172 Ga. 431, 157 S.E. 464 (1931); *Harrison v. Southern Ry.*, 44 Ga. App. 49, 160 S.E. 656 (1931); *Harrison v. Georgia, F. & A.R.R.*, 174 Ga. 549, 163 S.E. 200 (1932); *City of Atlanta v. Kirk*, 174 Ga. 763, 164 S.E. 64 (1932); *City of Moultrie v. Moultrie Banking Co.*, 175 Ga. 738, 165 S.E. 814 (1932); *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933); *Beck & Gregg Hdwe. Co. v. State Revenue Comm'n*, 176 Ga. 896, 169 S.E. 114 (1933); *City of Moultrie v. Moultrie Banking Co.*, 177 Ga. 714, 171 S.E. 131 (1933); *Guerrey v. Harrison*, 178 Ga. 669, 173 S.E. 831 (1934); *Georgia Power Co. v. City of Decatur*, 179 Ga. 471, 176 S.E. 494 (1934); *City of Douglas v. South Ga. Grocery Co.*, 180 Ga. 519, 179 S.E. 768 (1935); *Candler v. Gilbert*, 180 Ga. 679, 180 S.E. 723 (1935); *Bennett v. Vittum*, 185 Ga. 74, 194 S.E. 363 (1937); *Gibbs v. Milk Control Bd.*, 185 Ga. 844, 196 S.E. 791 (1938); *Davison*

v. F.W. Woolworth Co., 186 Ga. 663, 198 S.E. 738 (1938); *Scott v. State*, 187 Ga. 702, 2 S.E.2d 65 (1939); *Newton v. City of Atlanta*, 189 Ga. 441, 6 S.E.2d 61 (1939); *Great Atl. & Pac. Tea Co. v. City of Columbus*, 189 Ga. 458, 6 S.E.2d 320 (1939); *Suttles v. Montgomery*, 193 Ga. 128, 17 S.E.2d 734 (1941); *Duncan v. Proctor*, 195 Ga. 499, 24 S.E.2d 791 (1943); *Lee v. City of Atlanta*, 197 Ga. 518, 29 S.E.2d 774 (1944); *Davis v. Penn Mut. Life Ins. Co.*, 198 Ga. 550, 32 S.E.2d 180 (1944); *Parke, Davis & Co. v. City of Atlanta*, 200 Ga. 296, 36 S.E.2d 773 (1946); *Davis v. Penn Mut. Life Ins. Co.*, 201 Ga. 821, 41 S.E.2d 406 (1947); *Parker v. Mayor of Savannah*, 216 Ga. 210, 115 S.E.2d 555 (1960); *National Linen Serv. Corp. v. Thompson*, 103 Ga. App. 786, 120 S.E.2d 779 (1961); *Lott Inv. Corp. v. City of Waycross*, 218 Ga. 805, 130 S.E.2d 741 (1963); *Brown v. City of Marietta*, 220 Ga. 826, 142 S.E.2d 235 (1965); *Champion Papers, Inc. v. Williams*, 221 Ga. 345, 144 S.E.2d 514 (1965); *McLennan v. Undercofler*, 222 Ga. 302, 149 S.E.2d 705 (1966); *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 403, 162 S.E.2d 333 (1968); *Blackmon v. Cobb County-Marietta Water Auth.*, 126 Ga. App. 459, 191 S.E.2d 128 (1972); *Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973); *Adams v. Smith*, 415 F. Supp. 787 (N.D. Ga. 1976); *Boynton v. Carswell*, 238 Ga. 417, 233 S.E.2d 185 (1977); *Acree v. Walls*, 240 Ga. 778, 243 S.E.2d 489 (1978); *DeKalb County v. City of Decatur*, 247 Ga. 695, 279 S.E.2d 427 (1981); *Teachers Retirement Sys. v. City of Atlanta*, 249 Ga. 196, 288 S.E.2d 200 (1982); *Board of Tax Assessors v. Clary*, 161 Ga. App. 828, 290 S.E.2d 110 (1982); *Fulton County v. Strickland*, 251 Ga. 473, 306 S.E.2d 299 (1983); *Fulton County Tax Comm'r v. GMC*, 234 Ga. App. 459, 507 S.E.2d 772 (1998).

Uniformity of Taxation

Uniform rate of taxation required on property. — Taxation on property must be upon all not exempted by Ga. Const. 1976, Art. VII, Sec. I, Para. IV (see Ga. Const. 1983, Art. VII, Sec. II, Paras. I through IV) with a uniform rate upon all kinds. *Tarver v. Mayor of Dalton*, 134 Ga. 462, 67 S.E. 929, 29 L.R.A. (n.s.) 183, 20

Ann. Cas. 281 (1910).

Taxpayer not required to receive equal benefit from tax supported facilities. — The federal and state Constitutions require an equal assessment of taxes, but there is no requirement that the persons paying the taxes receive equal benefits from facilities for which taxes are used. *Decatur Tax Payers League, Inc. v. Adams*, 236 Ga. 871, 226 S.E.2d 69 (1976).

Power to require uniformity of taxation may be delegated. — The General Assembly's power to require uniformity of taxation between counties is inherent, is not prohibited by the Constitution, and may be properly delegated to the state revenue commissioner. *Salem v. Tattnall County*, 250 Ga. 881, 302 S.E.2d 99 (1983).

Ga. L. 1927, p. 195, § 5 (see now O.C.G.A. § 7-1-202) is not unconstitutional as a violation of this paragraph since it does not affect uniformity of taxes, it does not change or make less uniform the rate of taxes fixed upon the same class of subject, nor does it affect the ad valorem taxes on all property subject to taxes within the territorial limits of the state; even though the statute fixes the priority of other claims relative to taxes. *Baggett v. Mobley*, 171 Ga. 268, 155 S.E. 334 (1930).

Systematic and comprehensive increase in value of property to raise additional revenue violates uniform taxation clause. — Where courts' tax assessors, without investigation, made a systematic and comprehensive increase in value of all property returned in the county for taxes, for a particular year, not for purpose of fixing just and fair values after investigation, or for purpose of equalizing taxes, but for the sole purpose of raising additional revenue, such assessments were null and void, as they were violative of the uniform-taxation clause of this paragraph of the state Constitution and the equal-protection clauses of the state and federal Constitutions. *Hutchins v. Howard*, 211 Ga. 830, 89 S.E.2d 183 (1955).

Where uniformity of taxation is involved, reasonableness of classification is all that is required. *Chanin v. Bibb County*, 234 Ga. 282, 216 S.E.2d 250 (1975).

Construction of uniform taxation clause. — "All taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," means that the levy for county purposes must be uniform throughout the county, and the levy for state purposes must be uniform throughout the state. *Hawes v. Conner*, 224 Ga. 567, 163 S.E.2d 724 (1968).

Creation of classes of taxpayers based on prior nonuniformity of taxation in group's differing areas unreasonable. — Where the object of the provision is to insure that uniformity within a class over the state is achieved, and where requirement for a class is that it be based upon some reasonable ground, it is per se unreasonable to create classes of taxpayers based only on prior nonuniformity of taxation within their differing areas. *Chanin v. Bibb County*, 234 Ga. 282, 216 S.E.2d 250 (1975).

The fact that a revenue or tax-raising statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction. *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933).

Instance of reasonable classification in levying tax. — State does not create an unreasonable classification in violation of the uniformity clause of this paragraph in levying a tax upon persons who hold or possess for personal use unstamped cigarettes, while exempting those who hold or possess cigarettes for such purpose which have been stamped by a dealer as required by law. *Head v. Cigarette Sales Co.*, 188 Ga. 452, 4 S.E.2d 203 (1939) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Equal protection clause of fourteenth amendment does not prohibit flexibility and variety in taxation schemes. — The states, in the exercise of their taxing power, are subject to requirements of equal protection clause of fourteenth amendment; but that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

Uniformity of Taxation (Cont'd)

Assessment at 40% of value. — Assessment of property at 40% of value did not violate the constitutional requirement of uniformity, even though statistical evidence showed the average level of assessment of other property to be 38.84% of fair market value or lower. *Bellsouth Telecommunications, Inc. v. Henry County Bd. of Assessors*, 217 Ga. App. 699, 458 S.E.2d 705 (1995).

Discharge of Chief Tax Assessor for noncompliance. — The giving of preferential treatment to one taxpayer's property violated the long-established laws requiring tax assessors to perform their duties in good faith, and to ensure that the fair market value between individual taxpayers is fairly and justly equalized, and justified the discharge of the Chief Tax Assessor of a county by the board of commissioners of that county. *Parsons v. Chatham County Bd. of Comm'rs*, 204 Ga. App. 130, 418 S.E.2d 459 (1992), overruled in part on other grounds, *Swafford v. Dade County Bd. of Comm'rs*, 266 Ga. 646, 469 S.E.2d 666 (1996).

Cigarette tax was excise tax rather than direct tax or ad valorem tax. — Tax (formerly) imposed under Ga. L. Ex. Sess. 1937-38, pp. 126-144 upon every person who received by means in this state, and who held or possessed for his or her own personal use in this state, or for the use of any member of his or her family, cigarettes which had been stamped, was an excise upon the privilege of holding or possessing such cigarettes for personal use, and not a direct or ad valorem tax upon such articles, and, accordingly, the statute did not violate the Constitution of this state because the statute was not uniform with ad valorem tax levied by the state upon tangible property. *Head v. Cigarette Sales Co.*, 188 Ga. 452, 4 S.E.2d 203 (1939).

Instance of valid uniformity taxing. — Uniformity within the state will not be violated if the tax is imposed by the county only on sales within its unincorporated areas and by municipalities on sales within their boundaries. *Chanin v. Bibb County*, 234 Ga. 282, 216 S.E.2d 250 (1975).

Single classes of property must be assessed and taxed alike. — Under this paragraph, all real and personal tangible property, except "motor vehicles, including trailers," and "mobile homes, other than those mobile homes which qualify the owner thereof for the homestead property tax exemption under Georgia law," constitutes a single class of property and must be assessed and taxed alike. *Benson-Corwin, Inc. v. Cobb County School Dist.*, 239 Ga. 199, 236 S.E.2d 361 (1977) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Motor vehicles placed in different category from other tangible property. — Clause 2 of this paragraph authorized the enactment of Ga. L. 1966, p. 517, § 2 (see now O.C.G.A. Art. 10, Ch. 5, T. 48), wherein the General Assembly placed motor vehicles in a different category from other tangible property. *Hawes v. Cordell Ford Co.*, 223 Ga. 260, 154 S.E.2d 599 (1967) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Uniform assessment required. — Having once placed motor vehicles in a separate classification of tangible property, as permitted by this paragraph, all motor vehicles must be assessed uniformly. *Hawes v. Cordell Ford Co.*, 223 Ga. 260, 154 S.E.2d 599 (1967) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Property valuation by method other than standard method. — The uniformity clause of the state constitution and the equal protection clauses of the state and federal Constitutions were not offended by a county's valuation of a motel by a method other than the standard method for motels, where the motel property was not actually being operated as a motel and there was no income stream from which to calculate room revenue for use with the standard gross income multiplier method. *Coastal Equities, Inc. v. Chatham County Bd. of Tax Assessors*, 201 Ga. App. 571, 411 S.E.2d 540, cert. denied, 201 Ga. App. 903, 411 S.E.2d 540 (1991).

Hypothetical lack of uniformity in valuation of property. — If an Act or the revenue commissioner by regulation should place a valuation upon motor vehicles based upon identity of owner or pur-

pose for which motor vehicles are held then a lack of uniformity in valuation would appear which would be clearly unconstitutional. *Hawes v. Cordell Ford Co.*, 223 Ga. 260, 154 S.E.2d 599 (1967).

Admission of evidence to prove lack of uniformity. — Where a county increased the value of properties that it had previously deemed comparable at a lower rate than the taxpayers' property, the trial court abused its discretion by refusing to admit evidence that was relevant to prove that the county might not have assessed the taxpayers' property uniformly as required by Ga. Const. 1983, Art. VII, Sec. I, Para. III(a). *Buckler v. DeKalb County Bd. of Tax Assessors*, 263 Ga. App. 305, 587 S.E.2d 797 (2003).

Assessments lacked uniformity in failing to follow the mandates of O.C.G.A. § 48-5-2 regarding consideration of "existing use of the property" and "other factors deemed pertinent in arriving at fair market value" and in failing to exempt standing timber under the mandate of O.C.G.A. §§ 48-5-7.1(a)(1) and 48-5-7.5 as set forth in this paragraph. *Leverett v. Jasper County Bd. of Tax Assessors*, 233 Ga. App. 470, 504 S.E.2d 559 (1998).

The conflict between this paragraph and the differential rollback that was established by former Code 1933, § 91A-4601 (Ga. L. 1975, p. 984, § 26A(i)(j)) was clear. — The Constitution requires uniformity, and the statute provided for nonuniformity. *Martin v. Ellis*, 242 Ga. 340, 249 S.E.2d 23 (1978) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

In a taxpayer's suit against a county and its officials, the court upheld the grant of summary judgment to the defendants because the taxpayer's mandamus failed to present evidence that any actual assessment of any particular property was other than at fair market value or that the county had failed to comply with the county's legal duty to see that all taxable property within the county is assessed and returned for taxes at the property's fair market value. *SJN Props., LLC v. Fulton County Bd. of Assessors*, 296 Ga. 793, 770 S.E.2d 832 (2015).

This paragraph was not violated by a tax on collection agencies. *Assets Realization Co. v. Lewis*, 150 Ga. 301, 103

S.E. 463 (1920) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Homestead freeze local amendment. — Trial court erred in granting summary judgment to a group of taxpayers, as a Homestead Freeze local constitutional amendment was not unconstitutional merely because it conflicted with the uniformity in taxation clause of the Ga. Const. 1983, Art. VII, Sec. I, Para. III; the local constitutional amendment was a subsequent amendment to the uniformity in taxation clause, and continued in force and effect, thus it was valid despite any conflict with the clause. *Columbus-Muscogee County Consol. Gov't v. CM Tax Equalization, Inc.*, 276 Ga. 332, 579 S.E.2d 200, cert. denied, 540 U.S. 878, 124 S. Ct. 288, 157 L. Ed. 2d 142 (2003).

Tax on stock of foreign corporation held by domestic corporation did not violate this paragraph. *Wright v. Louisville & N.R.R.*, 195 U.S. 219, 25 S. Ct. 16, 49 L. Ed. 167 (1904) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Real estate and personalty of manufacturing plant taxed as unit did not violate this paragraph. *County of Walton v. County of Morgan*, 120 Ga. 548, 48 S.E. 243 (1904) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Tax on packing house agents did not violate this paragraph. *Stewart v. Kehrer*, 115 Ga. 184, 41 S.E. 680 (1902), aff'g 197 U.S. 60, 25 S. Ct. 403, 49 L. Ed. 663 (1905) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Tax on sale of sewing machines did not violate this paragraph. *Singer Mfg. Co. v. Wright*, 33 F. 121 (N.D. Ga. 1887), appeal dismissed, 141 U.S. 696, 12 S. Ct. 103, 35 L. Ed. 906 (1891) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Statute creating special districts for the purpose of implementing a hotel/motel tax did not violate Ga. Const. 1983, Art. VII, Sec. I, Para. III. *Youngblood v. State*, 259 Ga. 864, 388 S.E.2d 671 (1990).

Tax on aircraft. — The requirement of O.C.G.A. § 48-5-16(e) to return for taxation an aircraft in the county in which it has its primary home base does not effectively create a prohibited separate class of tangible property in violation of the con-

Uniformity of Taxation (Cont'd)

stitutional requirement for uniformity of taxation. *Rogers v. DeKalb County Bd. of Tax Assessors*, 269 Ga. 31, 495 S.E.2d 33 (1998).

Challenge reviewed first on administrative appeal. — Property owners improperly challenged a tax re-valuation by a county in a Georgia trial court because the owners had an adequate remedy at law pursuant to O.C.G.A. § 48-5-311 in an appeal to a county board of tax equalization (BOE) as the BOE had to first address procedural errors and errors in methodology to value the property under § 48-5-311(e)-(g); constitutional claims, such as claims of the uniformity of assessment under Ga. Const. 1983, Art. VII, Sec. I, Para. III also had to be addressed first before the BOE. *Hooten v. Thomas*, 297 Ga. App. 487, 677 S.E.2d 670 (2009).

Classes of Taxes

1. In General

Power to classify must be exercised reasonably. — The power of the legislature to classify for purposes of taxation is unlimited, unless it exercises its power capriciously or unreasonably, and unless the classification is fictitious rather than real. *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936).

The authority of the General Assembly under the Constitution, to classify subjects for taxation cannot be successfully challenged. The power thus to classify is subject to the limitation that any classification must be reasonable, natural, and not arbitrary. *Forrester v. Edwards*, 192 Ga. 529, 15 S.E.2d 851 (1941); *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

Three classes of taxation. — The subject of taxation has been divided into three classes — capitation, property, and income; and when one or more is mentioned or treated of, the other is never intended. *Mayor of Savannah v. Hartridge*, 8 Ga. 23 (1850); *Mutual Reserve Fund Life Ass'n v. City Council*, 109 Ga. 73, 35 S.E. 71 (1900).

The basis for classification for tax purposes must be related to the objec-

tive of the ordinance. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

When the legislature makes a distinct class, it must treat each member of it alike. *McGhee v. State*, 92 Ga. 21, 17 S.E. 276 (1893); *Price v. Richardson*, 159 Ga. 299, 125 S.E. 449 (1924).

Where a proper basis for classification exists the law may classify, and uniformity within the classes thus created satisfies the Constitution. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

Realty and tangible personal property are of the same class, and the constitutional rule of uniformity in taxation requires that both be taxed alike. *Colvard v. Ridley*, 218 Ga. 490, 128 S.E.2d 732 (1962); *Register v. Langdale*, 226 Ga. 82, 172 S.E.2d 620 (1970); *Gwinnett County v. Ackerman/Indian Trail Ass'n*, 198 Ga. App. 723, 402 S.E.2d 794 (1991), overruled on other grounds, *Fulton County Bd. of Tax Assessors v. NABISCO*, 296 Ga. App. 884, 676 S.E.2d 41 (2009).

General Assembly power limited. — The General Assembly has no authority to establish different classes or subclasses of tangible property other than as fixed by this constitutional provision. *Griggs v. Greene*, 230 Ga. 257, 197 S.E.2d 116 (1973).

Different method of taxing personal property of non real estate owners and real estate owners violates this paragraph. — A policy of a board of tax assessors not to assess tangible personal property of residents of the county not owning real estate, and to assess the personal property of real estate owners at either 10 percent of the value of the real estate, or at a valuation which the assessors would “imagine” would be a reasonable figure, violates this paragraph. *Register v. Langdale*, 226 Ga. 82, 172 S.E.2d 620 (1970).

Different classifications permissible. — A person renting or offering for rent real property and one investing in securities need not be included in the same classification. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

2. Occupation Tax

Certain occupations may be taxed, and others not; but as between the subjects of taxation in the same class there must be equality. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968).

Authority to tax occupation. — There is no constitutional reason why the legislature cannot make one general class of all persons upon whose occupation it imposes taxation; and, if this were done, it would be incumbent on the legislature to make its system of taxation, as to such persons, uniform in all essential particulars, so as to operate fairly and equally upon every member of this general class; and this general class might be made to include every person engaged in any sort of business or vocation. *Hoffman & Crowell, Inc. v. Harrison*, 171 Ga. 792, 156 S.E. 685 (1931).

The legislative right to classify is nothing more or less than authority to discriminate in taxation by the process of making separate classes of different occupations, or by making different classes within a specific occupation, with the only restraint upon the power thus to classify being that it be reasonable and not arbitrary, and the only requirement of the uniformity clause of the Constitution being that the tax operate uniformly upon the members of the separate classes. *Cutliff v. Mayor of Albany*, 60 Ga. 597 (1878); *Fulton County v. Lockhart*, 202 Ga. 878, 45 S.E.2d 220 (1947).

Occupation tax. — The validity of an occupation tax depends upon whether it is confiscatory and oppressive upon the class designated, and is not unreasonable because prohibitive upon certain financially weak persons. *Adams Motor Co. v. Cler*, 149 Ga. 818, 102 S.E. 440 (1920); *Wright v. Hirsch*, 155 Ga. 229, 116 S.E. 795 (1923).

Legislative discretion. — A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or

policy, there is no denial of the equal protection of the law. *Nance v. Harrison*, 176 Ga. 674, 169 S.E. 22 (1933).

The legislature can make any classification or subclassification which is reasonable and not arbitrary. *Southern Transf. Co. v. Harrison*, 171 Ga. 358, 155 S.E. 338 (1930); *Fulton Bros. Elec. Co. v. Harrison*, 171 Ga. 571, 156 S.E. 255 (1930); *Huffman & Crowell, Inc. v. Harrison*, 171 Ga. 792, 156 S.E. 685 (1931); *Milliron v. Harrison*, 175 Ga. 764, 166 S.E. 231 (1932); *Wright v. City of Atlanta*, 50 Ga. App. 244, 177 S.E. 753 (1934); *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936); *Solomons v. Mayor of Savannah*, 183 Ga. 631, 189 S.E. 230 (1936); *Coolidge v. Mayor of Savannah*, 128 Ga. App. 704, 197 S.E.2d 773 (1973).

Power of the legislature to classify persons for purpose of imposing occupation taxes is undisputed, and necessarily includes the power to subclassify. *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936) (decided under Ga. Const. 1877, Art. VII, Sec. II, Para. I).

Limited classes within same occupation. — It is within the power of the General Assembly to make one general class of persons engaged in a particular business, for purpose of taxing their occupation; and it may constitutionally make for this purpose a more limited class composed of persons engaged in the same occupation in a particular way. *Southern Transf. Co. v. Harrison*, 171 Ga. 358, 155 S.E. 338 (1930).

The General Assembly, in the imposition of occupation taxes, may subdivide into different classes persons engaged in same business but under different conditions and surroundings; in the exercise of this power of classification they may impose an occupation tax upon only one of these classes, provided the classification and the consequent imposition of the tax is based upon sound reason, and is not arbitrary or capricious. *Milliron v. Harrison*, 175 Ga. 764, 166 S.E. 231 (1932); *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936); *Cook v. Cobb*, 72 Ga. App. 150, 33 S.E.2d 366 (1945).

Reasonable basis for subclassifications required. — The legislature can divide persons engaged in the same gen-

Classes of Taxes (Cont'd)**2. Occupation Tax (Cont'd)**

eral occupation into subdivisions, if there is reasonable ground for such subclassification, and tax members of one subdivision and exempt those of another subdivision. *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936); *Coolidge v. Mayor of Savannah*, 128 Ga. App. 704, 197 S.E.2d 773 (1973).

Discretion to determine reasonableness of classification. — Whether classification in a given instance is a reasonable one or not is a question addressed to the judgment and discretion of the taxing power, subject to review by the courts. *Decker v. McGowan*, 59 Ga. 805 (1877); *United Cigar Stores Co. v. Stewart*, 144 Ga. 724, 87 S.E. 1034 (1916).

Exemption does not necessarily destroy uniformity. — Fact of exemption of certain persons from operation of the tax imposed upon a class does not destroy the uniformity required by this paragraph, provided the exemption is not arbitrary and is based upon some good reason. *Southern Transf. Co. v. Harrison*, 171 Ga. 358, 155 S.E. 338 (1930) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Power of the legislature extends only to classifying business occupations into different branches, and laying upon each separate branch thus created such tax as is deemed proper. *Fulton County v. Lockhart*, 202 Ga. 878, 45 S.E.2d 220 (1947).

To provide a different rate of taxation as to intangible personal property from that on real property does not violate the equal protection clause of the U.S. Const., amend. 14. *Miller v. Mitchell*, 226 Ga. 892, 178 S.E.2d 175 (1970).

Uniformity not violated. — Classifications of businesses in a license tax ordinance which are related to its objective to raise revenue based upon ability to pay and the burdens upon the city in furnishing facilities and protection to the businesses do not violate the uniformity provisions of this paragraph of the Georgia Constitution. *Pharr Rd. Inv. Co. v. City of Atlanta*, 224 Ga. 752, 164 S.E.2d 803 (1968) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Classification void upon showing of unreasonableness and arbitrary clas-

sification. — Where a city is given authority under its charter to make classification of businesses into specific classes for purpose of levying occupational taxes on such businesses, the action of its regularly constituted authorities in making such classification and levying such occupational taxes will not be disturbed as being void and unconstitutional, except where it is clearly apparent that such classification has no reasonable relation to the subject matter and is therefore unreasonable and arbitrary. *Wright v. City of Atlanta*, 50 Ga. App. 244, 177 S.E. 753 (1934).

Imposition of license tax. — Right to classify businesses and occupations for purpose of imposing a license tax lies largely within discretion of the legislative body imposing the tax, and that in the absence of a clear showing of an abuse of that discretion the courts ought not to interfere with its exercise. *Lake Lanier Theatres v. Hall County*, 229 Ga. 54, 189 S.E.2d 439 (1972).

A classification based upon number of employees is not repugnant to this paragraph of the Constitution and such classification is neither unreasonable nor arbitrary. *Atlanta Laundries, Inc. v. Harrison*, 174 Ga. 448, 162 S.E. 912 (1932) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Constitutionality of O.C.G.A. § 34-8-34. — Ga. L. 1937, p. 806 (see now O.C.G.A. § 34-8-34) defining “employing unit” and providing that an employing unit which maintains two or more separate establishments within the state shall be deemed to be a single employing unit, was not violative of the due process clauses of the state or federal Constitutions on grounds that it raised an irrebuttable presumption; nor did it impose upon petitioners a higher rate of tax than “successors in the same class,” in violation of state and federal equal protection claims, since successors who acquire the benefit-experience rating of their predecessors would not be in the same class as petitioners; nor did it violate the uniformity-of-taxation clause of the state. *Cartersville Candlewick, Inc. v. Huiet*, 204 Ga. 609, 50 S.E.2d 647 (1948).

Inequality among taxpayers in the same taxing authority with respect to

distribution of benefits is not unconstitutional. Board of Comm'rs v. Cooper, 245 Ga. 251, 264 S.E.2d 193 (1980).

Instance of different constitutional classification. — Though the General Assembly exempts the business of "garages" for safe-keeping and repair of automobiles which are not located in a city or town having a population of 1,000 or more, and not located within a mile of such municipalities, from payment of an occupation tax, while imposing a special tax graduated according to population upon the occupation of keeping such garages as are located in such cities or towns and within one mile thereof, such classification is not violative of the state or the federal Constitution. Milliron v. Harrison, 175 Ga. 764, 166 S.E. 231 (1932).

The exclusion from the class of operators of garages generally of those engaged in that business in rural districts is neither arbitrary nor unreasonable. Milliron v. Harrison, 175 Ga. 764, 166 S.E. 231 (1932).

Graduated occupation tax. — The legislature can impose upon dealers an occupation tax, graduated according to the population of the towns and cities in which such dealers do business; and when the same tax is imposed upon each member of each class in every incorporated town and city in the state, and the method of its enforcement is the same, the uniformity required by the tax uniformity provision of this paragraph of the Georgia Constitution is secured. Fulton Bros. Elec. Co. v. Harrison, 171 Ga. 571, 156 S.E. 255 (1930) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

An occupation tax upon the practice of law which provided for graduated taxes according to the number of years of practice was not unconstitutional under this paragraph. Coolidge v. Mayor of Savannah, 128 Ga. App. 704, 197 S.E.2d 773 (1973) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

The classification must be based on some difference which bears a just and proper relation to the attempted classification. Wright v. City of Atlanta, 50 Ga. App. 244, 177 S.E. 753 (1934).

Graduated tax dependent on capacity. — An ordinance which requires all

gasoline filling stations to pay a license tax, the amount of which tax is graduated according to the capacity in gallons of the tanks located at such filling station, is not such an ordinance as will be declared void as being unreasonable and arbitrary. Wright v. City of Atlanta, 50 Ga. App. 244, 177 S.E. 753 (1934).

An occupation tax may show a relation to the income of the taxpayer although it is not itself an income tax. Coolidge v. Mayor of Savannah, 128 Ga. App. 704, 197 S.E.2d 773 (1973).

Occupation tax reducing railroad franchise tax. State v. Express Co., 133 Ga. 113, 65 S.E. 282 (1909).

It is perfectly competent for the legislature to impose different amounts as taxes upon wholesalers, retailers, and manufacturers. Carswell v. Wright, 133 Ga. 714, 66 S.E. 905 (1910).

Manner of enforcing tax on laundry not discriminatory. — Where although no fi. fa. had been issued against either of two other laundries subject to an occupational tax, although a fi. fa. was issued and levy made upon a truck belonging to the petitioner, the record disclosed that such proceedings against the petitioner were at the special instance and request of its counsel, in order that a test case might be made as to the legality of the ordinance in question, it could not be said that the ordinance, because of the manner of enforcement, was discriminatory and void. National Linen Serv. Corp. v. City of Gainesville, 181 Ga. 397, 182 S.E. 610 (1935).

The classification for taxation of distributors of motor fuels is not arbitrary, unreasonable, or unnatural, because it seeks to place in the same class and tax under one head distributors of motor fuel engaged in business as an occupation and for profit, and a political subdivision of the state not engaged in business, which uses such fuels for a purely governmental purpose. Wright v. Fulton County, 169 Ga. 354, 150 S.E. 262 (1929).

Taxation of sleeping cars owned by foreign corporation. — The State Revenue Commissioner has no authority to assess for county taxation railroad sleeping cars owned by an Illinois corporation,

Classes of Taxes (Cont'd)**2. Occupation Tax (Cont'd)**

the cars having no fixed situs in the county, but being temporarily out of train in a county, the assessment being based on average number and average value of the cars out of train, and being applied to one group consisting of Pullman cars which, in each day of a number of alleged taxable years, remained in the county as long as 24 hours, and another group consisting of additional cars in the county on each day of a number of alleged taxable years, the period of time being ascertained by adding the car hours for which such cars were in the county and dividing by 24. *Forrester v. Pullman Co.*, 65 Ga. App. 112, 15 S.E.2d 461 (1941).

Disparity in application between Georgia corporations and domesticated foreign corporations prohibited. — To so construe this constitutional exemption of property owned by a Georgia corporation and to deny its application to the same class or species of property when owned by a domesticated foreign corporation would violate state constitutional requirements which require that protection to person and property be impartial and complete, and that all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and would also violate that provision of the U.S. Const., amend. 14, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. *Redwine v. Southern Co.*, 206 Ga. 377, 57 S.E.2d 194 (1950).

An occupation tax conditioned upon the amount of ad valorem tax is invalid. *Wright v. Bell Tel. & Tel. Co.*, 127 Ga. 227, 56 S.E. 116 (1906).

Ad valorem tax not applicable to occupation and business taxes. — The provision of this paragraph that "and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws," has no application to occupation and business taxes. *Wright v. City of Atlanta*, 50 Ga. App. 244, 177 S.E. 753 (1934) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

A tax upon a business or occupation is not a tax upon property within the ad valorem and uniformity clause of this provision of the Constitution. *Solomons v. Mayor of Savannah*, 183 Ga. 631, 189 S.E. 230 (1936) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Uniformity taxation clause not violated. — Georgia L. 1935, p. 81 (repealed by Ga. L. 1965, p. 373) imposing an excise tax on all oleomargarine sold in this state containing any fat or oil other than certain specified fats or oils, was not violative of the uniform taxation provision of this paragraph of the Constitution. *Coy v. Linder*, 183 Ga. 583, 189 S.E. 26 (1936) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Former Code 1933, §§ 42-551 — 42-555 (repealed by Ga. L. 1972, p. 1015, § 509) did not levy any tax upon dealers, producers, or producer-distributors, but exacted merely a license fee to be used in aid of the expenses of administration of the law as a health measure did not violate this paragraph. *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S.E.2d 705 (1939) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

3. Ad Valorem Tax

Taxation on all real and tangible personal property subject to be taxed is required to be ad valorem that is, according to value, and the requirement in the Constitution that the rule of taxation shall be uniform, means that all kinds of property of the same class not absolutely exempt must be taxed alike, by the same standard of valuation, equally with other taxable property of the same class, and coextensively with the territory to which it applies; meaning the territory from which the given tax, as a whole, is to be drawn. *Hutchins v. Howard*, 211 Ga. 830, 89 S.E.2d 183 (1955); *O'Quinn v. Ellis*, 224 Ga. 328, 161 S.E.2d 832 (1968).

The requirement that the property be taxed "ad valorem" has nothing whatever to do with a business or excise tax. *Wright v. Hirsch*, 155 Ga. 229, 116 S.E. 795 (1923).

Where taxation is ad valorem, values are the ultimate objects of taxation, and they to whom the values belong

should pay the taxes. *Wells v. Mayor of Savannah*, 87 Ga. 397, 13 S.E. 442 (1887). See also *Atlanta & F.R.R. v. Wright*, 87 Ga. 487, 13 S.E. 578 (1891).

Exemption to dealer-owned vehicles. — Clause (b)(3) of Ga. Const. 1983, Art. VII, Sec. I, Para. III is broad enough to authorize the General Assembly to grant an exemption to dealer-owned vehicles, as provided in O.C.G.A. § 48-5-472(b), and is not in conflict with Ga. Const. 1983, Art. VII, Sec. II, Paras. I and II. *Lowry v. McDuffie*, 269 Ga. 202, 496 S.E.2d 727 (1998).

4. Income Tax

Income is not property in the sense of this paragraph. *Waring v. Mayor of Savannah*, 60 Ga. 93 (1878) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Right to impose income tax is inherent right of the people. The grant of this power is not necessary to enable the legislature to exercise it. There is nothing in the Constitution of this state which denies to the legislature power to impose an income tax, if it is levied without infringing some provision of the state Constitution. *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930).

The State Income-Tax Act of August 22, 1929, Ga. L. 1929, p. 92, now repealed, did not violate this paragraph, which declared that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax," for the reason that income is distinguished from property from which income flows, with the result that income was not property within the meaning of this provision, and did not need to be levied ad valorem. *Green & Milam v. State Revenue Comm'n*, 188 Ga. 442, 4 S.E.2d 144 (1939) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Taxation by Municipalities

The limitations upon the taxing power, in this paragraph, apply as well to cities and towns as to the legislature. *Burch v. Mayor of Savannah*, 42 Ga. 596 (1871) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Taxes imposed by the municipality were valid in the licensing of jitney buses. *Hazleton v. City of Atlanta*, 144 Ga. 775, 87 S.E. 1043 (1916).

Insurance company properly taxed. *Mutual Reserve Fund Life Ass'n v. City Council*, 109 Ga. 73, 35 S.E. 71 (1900).

Junk ordinance tax valid. *Shurman v. City of Atlanta*, 148 Ga. 1, 95 S.E. 698 (1918).

Stock of foreign corporation validly taxed. *Coca-Cola Co. v. City of Atlanta*, 152 Ga. 558, 110 S.E. 730, 23 A.L.R. 1339, cert. denied, 259 U.S. 581, 42 S. Ct. 585, 66 L. Ed. 1074 (1922).

Stock of domestic corporation could not be taxed. *City of Albany v. Brown*, 137 Ga. 796, 74 S.E. 518 (1912).

Tax on realty and proceeds thereof. *Sheibley v. City of Rome*, 107 Ga. 384, 33 S.E. 398 (1899).

Attorneys at law lending money illegally taxed. *Beckett v. Mayor of Savannah*, 118 Ga. 58, 44 S.E. 819 (1903).

Ordinance requiring bond partly void. *City Council v. Clark & Co.*, 124 Ga. 254, 52 S.E. 881 (1905).

This paragraph was violated by a tax upon persons redeeming tobacco tags. *United Cigar Stores Co. v. Stewart*, 144 Ga. 724, 87 S.E. 1034 (1916) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

A tax which is greater where goods are manufactured out of state is not valid. *Morgan v. State*, 13 Ga. App. 123, 78 S.E. 941 (1913).

Disproportionate tax on out-of-state water users not invalid. — Where the city has the right under its charter to furnish water to resident and nonresident users, and to classify the rates for such service, an ordinance, increasing the rates and fixing rates for nonresident users higher than for resident users, is not violative of the due process and equal protection clauses of the federal and state Constitutions. *Messenheimer v. Windt*, 211 Ga. 575, 87 S.E.2d 402 (1955).

Taxation of leasehold estate of state property. — Under the general language of this paragraph, a leasehold estate in state owned property (governor's mansion) is taxable by a municipality. *Henry Grady Hotel Co. v. City of Atlanta*, 162 Ga.

Taxation by Municipalities (Cont'd)

818, 135 S.E. 68 (1926) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Local constitutional amendment gave discretion to board of commissioners. — Local constitutional amendment authorizing county to impose business license taxes vests discretionary power in board of commissioners of that county, and the court cannot say that in imposing the tax on places of amusement charging an admission fee and not upon other places of amusement they have abused their discretion. *Lake Lanier Theatres v. Hall County*, 229 Ga. 54, 189 S.E.2d 439 (1972).

Classification must be based on reasonable ground. — Only requirement with respect to classification for taxation purposes is that the classification must be based on some reasonable ground. The classification must be based on some difference which bears a just and proper relation to the attempted classification. *Lake Lanier Theatres v. Hall County*, 229 Ga. 54, 189 S.E.2d 439 (1972).

Discretion did not violate equal protection or due process. — Reasonable exercise of discretion, even to extent of imposing tax on one class and none on other classes, does not violate constitutional guarantees of equal protection and due process. *Lake Lanier Theatres v. Hall County*, 229 Ga. 54, 189 S.E.2d 439 (1972).

This paragraph refers to subjects of taxation other than property and means only that if one kind of business, privilege, franchise, right, etc., is taxed, the tax shall be uniform and means only that if one kind of business, privilege, franchise, or right is taxed, the tax shall be uniform upon all of those who engage in that business. *Lake Lanier Theatres v. Hall County*, 229 Ga. 54, 189 S.E.2d 439 (1972) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

There is a relative sense in which mere local law can, with intelligible meaning, be called law of general obligation. — If it acts upon the whole municipal area, and upon all persons and property therein, with the same comprehensive generality as it would act throughout the state were it applicable to

the state at large, it is a law of general, though local, operation. This generality as to territory, with full generality as to subject matter, that is, that the tax shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed, within the given territory — is the generality which is needful. *Verdery v. Village of Summerville*, 82 Ga. 138, 8 S.E. 213 (1888).

Ordinance was special law. — The omission of property, which constitutionally had to be taxed under this paragraph, from village tax ordinance narrowed the ordinance into particular or special law, whereas the Constitution declares that all taxes shall be levied and collected under general laws; hence, the ordinance was void. *Verdery v. Village of Summerville*, 82 Ga. 138, 8 S.E. 213 (1888) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Property subject to tax. — The only classification of property, relative to taxation, that is made or authorized, is into exempt property, and property subject to be taxed; and taxation on all property subject to be taxed is required to be ad valorem, that is, according to value. *Verdery v. Village of Summerville*, 82 Ga. 138, 8 S.E. 213 (1888).

Enumeration of property classes exhaustive. — This paragraph has enumerated two classes of property, which enumeration the legislature, the courts, and the citizen must recognize as exhaustive. Property, whatever its species, is simply exempt or subject to tax. If exempt, it pays nothing; if subject, the amount it shall pay is measured by multiplying the fixed rate into the actual value. The result will be, in every instance, that all persons who own taxable property of equal value will pay the same amount of taxes, and all who own more than others will pay more, and all who own less will pay less. *Verdery v. Village of Summerville*, 82 Ga. 138, 8 S.E. 213 (1888) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Village tax ordinance imposing tax ad valorem upon real estate only is void by reason of conflict with the Constitution in not laying the tax ad valorem upon all property, real and personal, subject to be taxed within the territorial limits of the authority levying the

tax. *Verdery v. Village of Summerville*, 82 Ga. 138, 8 S.E. 213 (1888).

Uniformity of tax rates is not required between city and city, when the levy is for municipal taxes; but it is required between every man's property and every other man's property in the same city or village. *Verdery v. Village of Summerville*, 82 Ga. 138, 8 S.E. 213 (1888).

Storm water utility charges. — Trial court properly concluded that a storm water utility charge which Columbia County (Georgia) imposed on property owners was not an invalid tax and that the county's method of apportioning costs of storm water services was not arbitrary. *McLeod v. Columbia County*, 278 Ga. 242, 599 S.E.2d 152 (2004).

Property subject to be taxed is treated as one single class, and the only division of it contemplated or allowable is by territorial lines coinciding with the territorial limits of the various authorities by which the taxes upon it are levied. There cannot be this rate on one species of property, and that on another, though there can be different rates for different cities or villages on all taxable property whatsoever. *Verdery v. Village of Summerville*, 82 Ga. 138, 8 S.E. 213 (1888).

Suit barred by laches. — In suit in which plaintiffs sought, among other things to enjoin enforcement of tax executions, upon the ground that the city tax assessors from 1932 through 1937 intentionally and systematically discriminated against real estate and in favor of personal property in fixing the basis of value for taxation, the petition showed upon its face that the plaintiffs were guilty of such laches as to bar their claim for injunction to restrain the proposed tax sales because of alleged discrimination. *Mayor of Savannah v. Fawcett*, 186 Ga. 132, 197 S.E. 253 (1938).

County land assessment procedures, including those that involve subclassification of real property, did not offend this constitutional provision unless they affected the uniformity of tangible property assessments, which under former Code 1933, § 92-5703, (see now O.C.G.A. § 48-5-7) must be made at 40

percent of fair market value. *Tax Assessors v. Chitwood*, 235 Ga. 147, 218 S.E.2d 759 (1975) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Ga. L. 1972, p. 1094 provides an adequate remedy for failure at the county level to obtain uniformity of assessment between individual taxpayers. *Tax Assessors v. Chitwood*, 235 Ga. 147, 218 S.E.2d 759 (1975).

Part 2, Art. 4, Ch. 5, T. 3 does not impose a state tax for state purposes, which would invoke this paragraph and Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I); instead, it imposes a state tax for local purposes, and the counties' adherence to the tests of Ga. Const. 1976, Art. IX, Sec. V, Paras. I and II (see Ga. Const. 1983, Art. IX, Sec. IV, Paras. II and III), delineating the allowable scope of county purposes of taxation is all that is required. *Chanin v. Bibb County*, 234 Ga. 282, 216 S.E.2d 250 (1975) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Tax levying cost of paving assessment against street railway company not unconstitutional. — Acts amending the charter of Decatur and the ordinance padded thereunder by the municipal authorities ordering levying of cost of paving assessment against the street railway company and its property located therein and used by it in operation of said street-railway system, are not violative of U.S. Const., amend. 14, Ga. Const. 1976, Art. I, Sec. I, Para. I, and Ga. Const. 1976, Art. I, Sec. II, Para. III (see Ga. Const. 1983, Art. I, Sec. I, Para. I, and Ga. Const. 1983, Art. I, Sec. I, Para. II), neither are they in violation of Ga. Const. 1976, Art. I, Sec. III, Para. I (see Ga. Const. 1983, Art. I, Sec. I, Para. I), against the taking of private property for public use without paying adequate compensation therefor as that provision relates to the exercise of the power of eminent domain; whereas the levying of any assessment for a local public benefit is imposed as a special tax in the exercise of the police power of the state. Neither do they violate this paragraph, which provides a uniform system of taxation for the general support of the government. *Georgia Power Co. v. City of Decatur*, 170 Ga. 699, 154 S.E. 268 (1930)

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(see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Tax reasonable revenue measure. — Ordinance imposing a license tax on the right to operate butcher-shops and retail grocery stores, classified according to a graduated scale based on the number of meat blocks, or value of stock and fixtures, respectively, and number of hours operated, and applicable to all persons operating businesses of the designated classes within the city, were reasonable revenue measures, and not violative of this paragraph, Ga. Const. 1976, Art. I, Sec. I, Para. I, Ga. Const. 1976, Art. I, Sec. II, Para. III (see Ga. Const. 1983, Art. I, Sec. I, Para. I, Ga. Const. 1983 Art. I, Sec. I, Para. II), and U.S. Const., amend. 14. *Ard v. City of Macon*, 187 Ga. 127, 200 S.E. 678 (1938) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Graduated tax on different classes valid. — Provisions of a city ordinance imposing a graduated tax on those persons using the streets for business purposes who use vehicles in connection therewith, in addition to the business tax required of them, and also levying a graduated tax for doing business on the streets upon carriers for hire, was not violative of this paragraph, Ga. Const. 1976, Art. I, Sec. I, Para. I (see Ga. Const. 1983, Art. I, Sec. I, Para. I), and U.S. Const., amend. 14. *Solomons v. Mayor of Savannah*, 183 Ga. 631, 189 S.E. 230 (1936) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Tax on single person. — An amendment to a general tax assessment on property by a county commissioner which amounts to a new levy against a single tax payer violates this paragraph. *Wright v. Southern Ry.*, 28 Ga. App. 545, 112 S.E. 171 (1922) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Over assessment of railroad's property unconstitutional. — An assessment of the railroad's property at \$18,700,000.00 under the ad valorem taxation provisions for public utilities (see now O.C.G.A. Art. 11, Ch. 5, T. 48), while the properties of other taxpayers in those counties are being assessed on a basis of value which would produce an assessment

of the railroad's property at \$13,692,342.00, violates this paragraph, Ga. Const. 1976, Art. I, Sec. II, Para. III (see Ga. Const. 1983, Art. I, Sec. I, Para. I, and Ga. Const. 1983, Art. I, Sec. I, Para. II), and U.S. Const., amend. 14. *Undercofler v. Seaboard Air Line R.R.*, 222 Ga. 822, 152 S.E.2d 878 (1966).

Tax by county commissioners violated uniformity provision. — An Act authorizing the Commissioners of Fulton County to classify businesses in unincorporated areas of the county and to levy a tax thereon for general revenue purposes was invalid as being violative of the uniform-taxation provision of this paragraph. *Fulton County v. Lockhart*, 202 Ga. 878, 45 S.E.2d 220 (1947) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Ordinance imposing gross receipts tax on secondary suppliers of electricity. — A city ordinance imposing a gross receipts tax on secondary suppliers of electricity that have not entered into franchise agreements pursuant to another ordinance, also applying to secondary suppliers, did not violate uniformity requirements of the constitution. *North Ga. Elec. Membership Corp. v. City of Calhoun*, 264 Ga. 769, 450 S.E.2d 410 (1994), cert. denied, 514 U.S. 1109, 115 S. Ct. 1960, 131 L. Ed. 2d 852 (1995).

Establishing Property Value

Duty to assess at full value is not supreme but yields to the duty to avoid discrimination. *Hutchins v. Howard*, 211 Ga. 830, 89 S.E.2d 183 (1955).

Separate methods of valuation of realty and personalty may be adopted. *Mayor of Savannah v. Weed*, 84 Ga. 683, 11 S.E. 235, 8 L.R.A. 270 (1890); *McLendon v. City of La Grange*, 107 Ga. 356, 33 S.E. 405 (1899).

Methods employed in assessing value of property may be varied. — Object of tax assessors must be to determine fair market value of property subject to taxation in county and methods employed may be varied if object is attained. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

While tax assessor must use same standard — fair market value — or system —

40 percent of fair market value — in determining and fixing taxable value of all property of same class, it is not impermissible under uniformity of taxation provision of the Constitution to apply different methods of arriving at fair market value on tangible property. *Rogers v. DeKalb County Bd. of Tax Assessors*, 247 Ga. 726, 279 S.E.2d 223 (1981).

Different valuation methods used. — Utilization of different methods for determining fair market value for purposes of taxation creates no infirmity under the state Constitution or laws. *Dougherty County Bd. of Tax Assessors v. Burt Realty Co.*, 250 Ga. 467, 298 S.E.2d 475, cert. denied, 463 U.S. 1208, 103 S. Ct. 3540, 77 L. Ed. 2d 1390 (1983).

Tax assessors have the authority to place property in homogeneous groups for the purpose of determining its value in relation to other and like property, and different valuation methods may be utilized. *Harrington v. Baldwin County Bd. of Tax Assessors*, 214 Ga. App. 178, 447 S.E.2d 300 (1994).

Location as determinant of value. — Method of appraisal of rural property within a county which realistically emphasized the location of the property as determinant of value was not an impermissible subclassification of the same type of property in violation of the uniform taxation clause. *Thomas County Bd. of Tax Assessors v. Balfour Land Co.*, 214 Ga. App. 181, 446 S.E.2d 745 (1994).

Taxation on all real and tangible personal property subject to be taxed is required to be ad valorem — that is, according to value, and the requirement in the Constitution that the rule of taxation shall be uniform, means that all kinds of property of the same class not absolutely exempt must be taxed alike, by the same standard of valuation, equally with other taxable property of the same class, and coextensively with the territory to which it applies, meaning the territory from which the given tax, as a whole, is to be drawn. *Colvard v. Ridley*, 218 Ga. 490, 128 S.E.2d 732 (1962).

A classification exempting sale of agricultural products from taxation is reasonable. *City of Atlanta v. Georgia Milk Producers Confederation*, 187 Ga.

117, 200 S.E. 712 (1938).

Construction of “property.” — “Property,” within the meaning of this paragraph, providing that taxation should be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed, was not intended to include all species of property, but property upon which value can be placed, and which is capable of ownership. *City of Atlanta v. Georgia Milk Producers Confederation*, 187 Ga. 117, 200 S.E. 712 (1938) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Sales of agricultural products were not property within the meaning of this paragraph, and hence former Code 1933, § 5-603, exempting such sales from taxation, was not inhibited by Ga. Const. 1976, Art. VII, Sec. I, Para. IV (see Ga. Const. 1983, Art. VII, Sec. II, Paras. I-IV), providing that laws exempting property from taxation other than property therein enumerated were void, nor was former Code 1933, § 5-603 violative of the provision of this paragraph relating to uniformity of taxation upon the same class of subjects. *City of Atlanta v. Georgia Milk Producers Confederation*, 187 Ga. 117, 200 S.E. 712 (1938) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Legislature has authority to classify as to taxes not on property within the meaning of the Constitution, and to be uniform such taxation need not be universal; certain objects may be its subjects and others may be exempted from its operation, all the law requires being that classifications be reasonable. *City of Atlanta v. Georgia Milk Producers Confederation*, 187 Ga. 117, 200 S.E. 712 (1938).

Method of assessing land values not accurate reflection of value. — Where assessors assigned vacant land a base value according to the district in which it was located, determined by the sale price of other vacant lands purchased for development, relying upon the property’s highest and best use and the sales relied upon did not accurately reflect the value of other vacant land because such sales were often for special purposes such as schools or parks, or speculative development, evidence was sufficient to support the trial court’s ultimate judgment that the asses-

Establishing Property Value (Cont'd)

sors failed to consider the existing use of vacant land not commercial, industrial, or residential subdivision. *Cobb County Bd. of Tax Assessors v. Sibley*, 244 Ga. 404, 260 S.E.2d 313 (1979).

“Existing use of property” cannot be assigned any particular value as real property is unique and the extent to which existing use affects its value is dependent upon a great variety of other factors. *Cobb County Bd. of Tax Assessors v. Sibley*, 244 Ga. 404, 260 S.E.2d 313 (1979).

Existing use of property is not the exclusive factor in determining fair market value; the assessors are directed to consider also “existing zoning of property,” “existing covenants or restrictions in deed dedicating the property to a particular use,” or “any other factors deemed pertinent in arriving at fair market value.” *Cobb County Bd. of Tax Assessors v. Sibley*, 244 Ga. 404, 260 S.E.2d 313 (1979).

Utilization of one method of determining fair market value of real property and another method of determining the fair market value of tangible personal property does not violate this paragraph. *Wade v. Ray*, 234 Ga. 234, 214 S.E.2d 923 (1975) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Authority of county board of tax assessors. — The Court of Appeals of Georgia properly held that, although the county board of tax assessors could alter the assessment ratio proposed by the Georgia Revenue Commissioner on land owned by a utility in the course of making a final assessment of a utility’s property, it could not alter the apportioned fair market value for the property used by the Commissioner in its proposed assessment. *Monroe County v. Ga. Power Co.*, 283 Ga. 12, 655 S.E.2d 817 (2008).

Home site value added to all residences. — A taxpayer did not show that the taxpayer’s property was not uniformly taxed. The \$2,500 home site value added to all residential property in the county was only one factor in the valuation of such property, and there was no evidence that the home site value resulted in some

houses not being assessed at their fair market value. *Smith v. Elbert County Bd. of Tax Assessors*, 292 Ga. App. 417, 664 S.E.2d 786 (2008), overruled on other grounds by *Gilmer County Bd. of Tax Assessors v. Spence*, 309 Ga. App. 482, 711 S.E.2d 51 (2011).

Club membership appurtenant to property. — Although taxpayers’ memberships in a club were not subject to taxation, if a taxpayer relinquished that membership upon sale of the taxpayer’s real estate, the buyer could apply for immediate membership, and such an application would normally be granted. Therefore, a county board of tax assessors would have violated Ga. Const. 1983, Art. VII, Sec. I, Para. III and O.C.G.A. § 48-5-1 if it excluded the enhanced value of the properties attributable to the right to apply for such memberships from ad valorem taxation, because it was part of the properties’ fair market value. *Morton v. Glynn County Bd. of Tax Assessors*, 294 Ga. App. 901, 670 S.E.2d 528 (2008).

Tax Exempt Property

First sentence of this paragraph carries with it the implied right of the legislature to exempt certain property. *Wright & Council v. Long*, 34 Ga. 330 (1866) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

First sentence of this paragraph does not have reference to the levying of a tax upon public property. *State v. Western & A.R.R.*, 136 Ga. 619, 71 S.E. 1055 (1911) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Exemption under former Code 1933, § 92-201.7 (see now O.C.G.A. § 48-5-41) of 300 acres or less from provision for taxation of public real property owned by a city outside its territorial limits was not an arbitrary classification of property for taxation, because the quantity of land held by a city in a county which contained no part of the city had a reasonable relationship to the right of the county to subject the land to taxation. Since the finances of a county could be adversely affected by large quantities of tax exempt land within its boundaries, and there must be some limit of acreage in order to distinguish a smaller tract from a

larger tract, and consequently, such a classification did not offend this paragraph. *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Public property can be taxed. — Construing together the provisions of this paragraph and Ga. Const. 1976, Art. VII, Sec. I, Para. I (see Ga. Const. 1983, Art. VII, Sec. I, Para. I), the Constitution does not prohibit taxing of public property. *Wright v. Fulton County*, 169 Ga. 354, 150 S.E. 262 (1929) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Supreme Court has construed this to mean that all property within the limits of the state is subject to taxation, except such as the Constitution expressly authorizes the legislature to exempt from taxation. *Wright v. Fulton County*, 169 Ga. 354, 150 S.E. 262 (1929).

Effect of construing tax immunity as applicable to in state corporation. — To construe the tax immunity provision of the Georgia Constitution so as to make it applicable only to those cooperative, nonprofit, membership corporations which have been incorporated under the laws of this state for the purpose of engaging in rural electrification, and so as to deny its application to a like membership corporation when incorporated in another state and duly domesticated in this state for the purpose of engaging in rural electrification here, would be offensive to those provisions of the Georgia Constitution which require impartial and complete protection to person and property, and that all taxation shall be uniform upon the

same class of subjects within the territorial limits of the authority levying the tax, and also, offensive to that provision of the U.S. Const., amend. 14 which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. *City of McCaysville v. Tri-State Elec. Coop.*, 211 Ga. 5, 83 S.E.2d 598 (1954).

This paragraph shall not apply to persons, firms, or corporations hauling farm produce, livestock, and fertilizers exclusively; provided, that the width of load of trucks and trailers shall not be more than eight feet, was not unconstitutional and void as violative of this paragraph. *Southern Transf. Co. v. Harrison*, 171 Ga. 358, 155 S.E. 338 (1930) (see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

A leasehold granted to a railroad in a charter granting certain exemptions, is not taxable, and such exemptions are not affected by a subsequent merger. *Central of Ga. Ry. v. Wright*, 250 U.S. 519, 40 S. Ct. 1, 63 L. Ed. 1123 (1919), aff'g 248 U.S. 525, 39 S. Ct. 181, 63 L. Ed. 401 (1919).

County homestead exemptions did not violate the Uniformity Clause. — County homestead exemptions were constitutional under the Tax Exemption Clauses of the Georgia Constitution, Ga. Const. 1983, Art. VII, Sec. II, Para. II, although the nature of tax exemptions was at odds with the equality of taxation sought by the Uniformity Clause, Ga. Const. 1983, Art. VII, Sec. I, Para. III. *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 702 S.E.2d 145 (2010).

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City's authority to levy and collect taxes. — Authority to levy and collect taxes, not otherwise prohibited by state law or constitutional provision, may be conferred upon a city by amendment to the city charter provided such charter provision satisfies the requirements in this paragraph that the tax have uniform application throughout the territorial limits of the city and that it be for a public purpose. 1968 Op. Att'y Gen. No. 68-521.

(see Ga. Const. 1983, Art. VII, Sec. I, Para. III).

Board members are personally liable for the illegal expenditure of public tax funds. 1965-66 Op. Att'y Gen. No. 66-172.

County tax funds cannot be used to construct or maintain privately owned driveways or roads. 1965-66 Op. Att'y Gen. No. 66-172.

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, State and Local Taxation, § 113 et seq.

ALR. — Tax on automobile or on its use for cost of road or street construction, improvement, or maintenance, 24 ALR 937; 68 ALR 200.

Classification of coal for purposes of taxation, 24 ALR 1225.

Tax on automobile, or on its use, for cost of road or street construction, improvement, or maintenance, 68 ALR 200.

Constitutionality and construction of statute providing for or authorizing waiver or reduction of penalty or interest in respect of taxes in default, 68 ALR 431; 79 ALR 999.

Constitutionality of chain store tax, 73 ALR 1481; 85 ALR 736; 112 ALR 305.

Constitutionality of statute permitting payment of taxes in installments, 101 ALR 1335.

Defects in tax proceedings, affecting liability for tax, that may be remedied by curative statute, 140 ALR 959.

Legislative power to further classify within class specifically named by consti-

tutional provision in relation to taxation, 162 ALR 1051.

State taxation of motor carriers as affected by commerce clause, 17 ALR2d 421.

Real estate tax equalization, reassessment, or revaluation program commenced but not completed within the year, as violative of constitutional provisions requiring equal and uniform taxation, 76 ALR2d 1077.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining, or improving stadium for use of professional athletic team, 67 ALR3d 1186.

Property taxation of computer software, 82 ALR3d 606.

Classification, as real estate or personal property, of mobile homes or trailers for purposes of state or local taxation, 7 ALR4th 1016.

Constitutionality, construction, and application of state and local public-utility-gross-receipts-tax statutes — modern cases, 58 ALR5th 187.

SECTION II.

EXEMPTIONS FROM AD VALOREM TAXATION

Paragraph

- I. Unauthorized tax exemptions void.
- II. Exemptions from taxation of property.
- III. Exemptions which may be authorized locally.

Paragraph

- IV. Current property tax exemptions preserved.
- V. Disabled veteran's homestead exemption.

Editor's notes. — The constitutional amendment proposed in Ga. L. 1986, p. 1625, Sec. 1, which would have added a

new Paragraph VI relating to development districts, was defeated in the General Election on November 4, 1986.

Paragraph I. Unauthorized tax exemptions void.

Except as authorized in or pursuant to this Constitution, all laws exempting property from ad valorem taxation are void.

1976 Constitution. — Art. VII, Sec. I, Para. IV.

Law reviews. — For article, "Freeport Exemption from Property Taxes for Inven-

tory Stored in Georgia But Destined for Shipment Out-of-State,” see 28 Ga. St. B.J. 108 (1991). For annual survey of local

government law, see 57 Mercer L. Rev. 289 (2005).

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Exemption for dealer-owned vehicles. — Georgia Const. 1983, Art. VII, Sec. I, Para. III(b)(3) is broad enough to authorize the General Assembly to grant an exemption to dealer-owned vehicles, as provided in O.C.G.A. § 48-5-472(b), and is not in conflict with Ga. Const. 1983, Art. VII, Sec. II, Para. I or Ga. Const. 1983,

Art. VII, Sec. II, Para. II. *Lowry v. McDuffie*, 269 Ga. 202, 496 S.E.2d 727 (1998).

Cited in *Clayton County Bd. of Tax Assessors v. King*, 260 Ga. 495, 397 S.E.2d 293 (1990); *McLeod v. Columbia County*, 278 Ga. 242, 599 S.E.2d 152 (2004).

Paragraph II. Exemptions from taxation of property.

(a)(1) Except as otherwise provided in this Constitution, no property shall be exempted from ad valorem taxation unless the exemption is approved by two-thirds of the members elected to each branch of the General Assembly in a roll-call vote and by a majority of the qualified electors of the state voting in a referendum thereon.

(2) Homestead exemptions from ad valorem taxation levied by local taxing jurisdictions may be granted by local law conditioned upon approval by a majority of the qualified electors residing within the limits of the local taxing jurisdiction voting in a referendum thereon.

(3) Laws subject to the requirement of a referendum as provided in this subparagraph (a) may originate in either the Senate or the House of Representatives.

(4) The requirements of this subparagraph (a) shall not apply with respect to a law which codifies or recodifies an exemption previously authorized in the Constitution of 1976 or an exemption authorized pursuant to this Constitution.

(b) The grant of any exemption from ad valorem taxation shall be subject to the conditions, limitations, and administrative procedures specified by law.

1976 Constitution. — Art. VII, Sec. I, Para. IV.

JUDICIAL DECISIONS

Exemption for dealer-owned vehicles. — Georgia Const. 1983, Art. VII, Sec. I, Para. III(b)(3) is broad enough to authorize the General Assembly to grant an

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Art. VII, Sec. II, Para. I. *Lowry v. McDuffie*, 269 Ga. 202, 496 S.E.2d 727 (1998).

County homestead exemptions did not violate the Uniformity Clause. — County homestead exemptions were constitutional under the Tax Exemption Clauses of the Georgia Constitution, Ga.

Const. 1983, Art. VII, Sec. II, Para. II, although the nature of homestead exemptions was at odds with the equality of taxation sought by the Uniformity Clause, Ga. Const. 1983, Art. VII, Sec. I, Para. III. *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 702 S.E.2d 145 (2010).

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A homestead exemption may neither be created, nor its amount raised, without the approval of the General Assembly and a subsequent referendum. 1989 Op. Att’y Gen. No. U89-25.

Disabled veterans homestead ex-

emption. — The disabled veterans homestead exemption set forth in O.C.G.A. § 48-5-48.3, which became effective July 1, 1986, can go into effect without a referendum. 1987 Op. Att’y Gen. No. 87-2.

Paragraph III. Exemptions which may be authorized locally.

(a)(1) The governing authority of any county or municipality, subject to the approval of a majority of the qualified electors of such political subdivision voting in a referendum thereon, may exempt from ad valorem taxation, including all such taxation levied for educational purposes and for state purposes, inventories of goods in the process of manufacture or production, and inventories of finished goods.

(2) Exemptions granted pursuant to this subparagraph (a) may only be revoked by a referendum election called and conducted as provided by law. The call for such referendum shall not be issued within five years from the date such exemptions were first granted and, if the results of the election are in favor of the revocation of such exemptions, then such revocation shall be effective only at the end of a five-year period from the date of such referendum.

(3) The implementation, administration, and revocation of the exemptions authorized in this subparagraph (a) shall be provided for by law. Until otherwise provided by law, the grant of the exemption shall be subject to the same conditions, limitations, definitions, and procedures provided for the grant of such exemption in the Constitution of 1976 on June 30, 1983.

(b) Repealed.

1976 Constitution. — Art. VII, Sec. I, Para. IV.

Cross references. — Specific continuation of Ga. Const. 1976 conditions and limitations on exemption granted by subparagraph (a), § 48-5-48.2.

Editor’s notes. — Subparagraph (b) is

repealed by its own terms, effective July 1, 1986.

Law reviews. — For article, “Freeport Exemption from Property Taxes for Inventory Stored in Georgia But Destined for Shipment Out-of-State,” see 28 Ga. St. B.J. 108 (1991).

JUDICIAL DECISIONS

Approval of exemption. — It is not necessary that county voters hold a referendum to approve every amendment affecting the freeport tax exemption because, even though the voters approve the exemption, the Constitution delegates the details of implementing the exemption to

the legislature. *Delta Air Lines, Inc. v. Clayton County Bd. of Tax Assessors*, 246 Ga. App. 225, 539 S.E.2d 905 (2000).

Cited in *Fulton County Tax Comm'r v. GMC*, 234 Ga. App. 459, 507 S.E.2d 772 (1998).

Paragraph IV. Current property tax exemptions preserved.

Those types of exemptions from ad valorem taxation provided for by law on June 30, 1983, are hereby continued in effect as statutory law until otherwise provided for by law. Any law which reduces or repeals any homestead exemption in existence on June 30, 1983, or created thereafter must be approved by two-thirds of the members elected to each branch of the General Assembly in a roll-call vote and by a majority of the qualified electors of the state or the affected local taxing jurisdiction voting in a referendum thereon. Any law which reduces or repeals exemptions granted to religious or burial grounds or institutions of purely public charity must be approved by two-thirds of the members elected to each branch of the General Assembly.

1976 Constitution. — Art. VII, Sec. I, Para. IV.

Cross references. — Exemptions relating to agricultural products, § 48-8-5. Exemptions for revenue bonds issued for state, educational, or other nonprofit purposes, §§ 12-3-274, 20-2-558, 20-3-157, 20-3-170, 20-3-209, 20-3-341, 32-10-49, 32-10-109, 50-9-13, 50-9-33, and 50-26-9. Property exempt from taxation, § 48-5-41. Homestead exemptions, § 48-5-44 et seq. Exemptions from sales taxes, § 48-8-3. Exemptions for contractors of state projects, § 50-17-29. Specific continuation of homestead exemptions for certain individuals over age 65, § 48-5-47. Homestead and ad valorem exemptions for disabled veterans, §§ 48-5-48, 48-5-478.

Law reviews. — For article, “Freedom of the First Amendment in Georgia,” see 15 Ga. B.J. 405 (1953). For article discussing homestead rights as a means of protecting decedent’s surviving spouse and children, see 10 Ga. L. Rev. 447 (1976). For article discussing tax exemptions and deductions as incentives for establishment of foreign business in Georgia,

see 27 Mercer L. Rev. 629 (1976). For article surveying judicial decisions affecting Georgia’s state and local taxation laws, decided under former Code 1933, Titles 92 and 91A (now T. 48), see 31 Mercer L. Rev. 217 (1979). For article discussing ad valorem taxation and interest in real property in Georgia, prior to enactment of former Code 1933, T. 91A (now T. 48), see 31 Mercer L. Rev. 293 (1979). For survey article on local government law, see 34 Mercer L. Rev. 225 (1982). For survey article on recent developments in Georgia state and local taxation, see 34 Mercer L. Rev. 400 (1982). For article, “Freeport Exemption from Property Taxes for Inventory Stored in Georgia But Destined for Shipment Out-of-State,” see 28 Ga. St. B.J. 108 (1991).

For note discussing restrictions on the creation of public purpose corporations, see 8 Ga. L. Rev. 680 (1974).

For comment criticizing *Elder v. Home Bldg. & Loan Ass’n*, 185 Ga. 258, 194 S.E. 745 (1938), holding § 48-6-91 contravenes this paragraph, see 2 Ga. B.J. 40 (1939). For comment on *Thompson v. Atlantic C.L.R.R.*, 200 Ga. 856, 38 S.E.2d 774

(1946), see 9 Ga. B.J. 207 (1946). For comment criticizing *Elder v. Henrietta Egleston Hosp. for Children, Inc.*, 205 Ga. 489, 53 S.E.2d 751 (1949), see 1 Mercer L. Rev. 111 (1949). For comment on *Delta Airlines v. Coleman*, 219 Ga. 12, 131 S.E.2d 768 (1963), see 26 Ga. St. B.J. 201 (1963). For comment criticizing Atlanta

Fed. Sav. & Loan Ass'n v. Simmons, 224 Ga. 483, 162 S.E.2d 342 (1968), see 20 Mercer L. Rev. 330 (1969). For comment as to tax exempt status of church administrative offices, in light of *Leggett v. Macon Baptist Ass'n*, 232 Ga. 27, 205 S.E.2d 197 (1974), see 26 Mercer L. Rev. 361 (1974).

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GENERAL CONSIDERATION

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2. HOMES FOR ELDERLY

3. HOSPITALS

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5. MISCELLANEOUS INSTITUTIONS

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TAX EXEMPTION NOT APPLICABLE

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EXEMPTIONS GRANTED BY CORPORATE CHARTERS

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VII, Sec. I, Para. IV and antecedent provisions, relating to specific tax exemptions, are included in the annotations for this paragraph.

Constitution limits effect of legislative exemptions. — The constitutional provisions shall govern and, to the extent they are inconsistent therewith, shall limit the effect of legislative attempts to exempt religious, educational, and charitable institutions from taxation where such institutions act as trustees of intangible personal properties under agreement to pay income to donors or their designees. *Salvation Army v. Strickland*, 253 Ga. 758, 325 S.E.2d 147 (1985).

Tax exemptions are to be strictly construed since taxation is the rule and exemption is the exception. *Athens City Water-Works Co. v. Mayor of Athens*, 74 Ga. 413 (1885); *Mundy v. Van*

Hoose, 104 Ga. 292, 30 S.E. 783 (1898); *Leggett v. Macon Baptist Ass'n*, 232 Ga. 27, 205 S.E.2d 197 (1974).

All grants of exemptions must be strictly construed in favor of the state, and nothing passes by implication, but this rule must not be pushed to unreasonableness. *Rayle Elec. Membership Corp. v. Cook*, 195 Ga. 734, 25 S.E.2d 574 (1943); *Collins v. Mills*, 198 Ga. 18, 30 S.E.2d 866 (1944); *Church of God v. City of Dalton*, 213 Ga. 76, 97 S.E.2d 132 (1952).

All grants of exemptions must be construed against the taxpayer. *Presbyterian Ctr., Inc. v. Henson*, 221 Ga. 750, 146 S.E.2d 903 (1966); *Johnson v. Wormsloe Found., Inc.*, 228 Ga. 722, 187 S.E.2d 682 (1972).

Exemption from taxation must be strictly construed, and the exemption will not be held to be conferred unless the terms under which it is granted clearly and distinctly show that such was the intention of the legislature. *Gold Kist, Inc. v. Jones*, 231 Ga. 881, 204 S.E.2d 584 (1974).

Narrowest possible meaning not required. — The rule of strict construction of tax exemptions does not require that the narrowest possible meaning be given to words descriptive of the exemption. *Turner v. Board of County Tax Assessors*, 71 Ga. App. 374, 31 S.E.2d 61 (1944).

Ordinary rules of construction apply. — The strict construction rule does not relieve a court of the duty of interpreting the exemption by ordinary rules of construction in order to carry out the intention of the legislature, and does not apply where there is no language in an act justifying or requiring construction. A fair and reasonable construction of a statute or contract must always be adopted, giving the language used its ordinary meaning, and taking into consideration the purpose and spirit of the exemption as well as the public policy entertained at the time and the history of the times when the statute was passed. *Turner v. Board of County Tax Assessors*, 71 Ga. App. 374, 31 S.E.2d 61 (1944).

Effect of doubt. — The rule that exemptions must be strictly construed in favor of the taxing power does not mean that if there is a possibility of doubt it is to be resolved against the exemption. It simply means that if, after the application of all rules of interpretation for the purpose of ascertaining the intention of the legislature, a well founded doubt exists, then an ambiguity occurs which may be settled by the strict rule of construction. *Turner v. Board of County Tax Assessors*, 71 Ga. App. 374, 31 S.E.2d 61 (1944).

Any ambiguity in an alleged exemption from taxation must be construed favorably to the state and against the taxpayer. *Brandywine Townhouses, Inc. v. Joint City-County Bd. of Tax Assessors*, 231 Ga. 585, 203 S.E.2d 222 (1974).

All property must be taxed and no property except that specifically mentioned in the Constitution can be exempted from taxation. *Brandywine Townhouses, Inc. v. Joint City-County Bd. of Tax Assessors*, 231 Ga. 585, 203 S.E.2d 222 (1974).

Natural and ordinary meaning. — In interpreting a constitutional exemption, it is to be presumed that the words used were employed in their natural and

ordinary meaning, and where a constitutional provision or statute is plain and susceptible of but one natural and reasonable construction, a court has no authority to place a different construction upon it, but must construe it according to its terms. *Rayle Elec. Membership Corp. v. Cook*, 195 Ga. 734, 25 S.E.2d 574 (1943).

Property not deemed tax until tax levied. — Since “taxation” includes determination of rate of levy and imposition of levy, as an essential part of sovereign power and process, it follows that property will not be deemed as taxed until the tax has been levied. *Rayle Elec. Membership Corp. v. Cook*, 195 Ga. 734, 25 S.E.2d 574 (1943).

Municipality cannot exempt a class not enumerated in this paragraph. *Tarver v. Mayor of Dalton*, 134 Ga. 462, 67 S.E. 929, 29 L.R.A. (n.s.) 183, 20 Ann. Cas. 281 (1910) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Property, whatever its species, if simply exempt, pays nothing. *Georgia Fire Ins. Co. v. City of Cedartown*, 134 Ga. 87, 67 S.E. 410, 19 Ann. Cas. 954 (1910).

Contract cannot defeat government right to tax. — Aside from exemptions from taxation as exists in this paragraph, the parties cannot by contract defeat right of the government to collect taxes for which property would otherwise be liable. *Real Estate Loan Co. v. Union City*, 177 Ga. 55, 169 S.E. 301 (1933); *City of Leesburg v. Forrester*, 59 Ga. App. 503, 1 S.E.2d 584 (1939) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Special assessments not for revenue purposes are radically different from ad valorem taxes, and are not taxes within meaning of the Constitution. *Crestlawn Mem. Park v. City of Atlanta*, 235 Ga. 194, 219 S.E.2d 122 (1975).

State has not waived and cannot waive its right to tax private property on federal land and indeed the Constitution demands that it be taxed. *IBM Corp. v. Evans*, 213 Ga. 333, 99 S.E.2d 220 (1957).

Exemption not destroyed by incidental income derived from operation of charitable or educational institution. — The proviso that “the

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property so exempted be not used for purposes of private or corporate profit or income" was not intended to destroy the exemption already granted where incidental income was derived from the operation of the charitable or educational institution. *Richardson v. Executive Comm.*, 176 Ga. 705, 169 S.E. 18 (1933).

Property subject to taxation should not be exempted. — Apart from permitted exemptions, the Constitution evinces an intention that no property which is subject to taxation in this state shall be relieved therefrom, and the statutes express with equal certainty an intention by the lawmakers to lay a tax upon all property of every kind or class which the State of Georgia has jurisdiction to tax, nothing excepted. *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Airport property leased to corporation which was used for provision of inflight meals was subject to taxation where provisions of lease did not preserve the public's "rightful, equal, and uniform use" of the property as required by O.C.G.A. § 6-3-25. *Clayton County Bd. of Tax Assessors v. City of Atlanta*, 164 Ga. App. 864, 298 S.E.2d 544 (1982).

Places of Religious Worship

Test for charitable immunity from suit is not the use to which the income is put, but the nature of the source from which the income is derived. This is the same test applied in determining the taxability of property. The scheme of exemption as to other than public property seems to be this: to exempt all that is used immediately and directly as a part of the establishment in the conduct of the regular business, there carried on, but not such as may be devoted to other uses, such as farming, merchandising, manufacturing, etc., and from which profit or income is derived. *Mack v. Big Bethel A.M.E. Church, Inc.*, 125 Ga. App. 713, 188 S.E.2d 915 (1972).

Religious worship construed. — The words "religious worship" import a concept of a congregation assembling in a

place open to the public to honor the Deity through reverence and homage. *Leggett v. Macon Baptist Ass'n*, 232 Ga. 27, 205 S.E.2d 197 (1974), commented on in 26 Mercer L. Rev. 361 (1974).

In applying the exemption authorized by this paragraph and former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-41), the court must look to the use of the property, not merely its ownership, and the court must also look to the primary use of the property to determine whether it was exempt from taxation. *Leggett v. Macon Baptist Ass'n*, 232 Ga. 27, 205 S.E.2d 197 (1974), commented on in 26 Mercer L. Rev. 361 (1974) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

If property is used primarily for either profit or non-operational purposes, it is not exempt from taxes. *Leggett v. Macon Baptist Ass'n*, 232 Ga. 27, 205 S.E.2d 197 (1974), commented on in 26 Mercer L. Rev. 361 (1974).

Exemption applies to buildings where congregations gather for worship. — Exemptions from taxation of places of religious worship are intended to apply to buildings where congregations come together in a public forum for religious services. *Leggett v. Macon Baptist Ass'n*, 232 Ga. 27, 205 S.E.2d 197 (1974), commented on in 26 Mercer L. Rev. 361 (1974).

Property used to make a profit which will in turn be given or used by the church for church purposes does not confer tax exempt status. *Church of God of Union Ass'y, Inc. v. City of Dalton*, 216 Ga. 659, 119 S.E.2d 11 (1961).

Income-producing real estate, not used directly in charitable activities, is a noncharitable asset and defendant is liable to the extent of such noncharitable assets. *Mack v. Big Bethel A.M.E. Church, Inc.*, 125 Ga. App. 713, 188 S.E.2d 915 (1972).

Property used to produce income for a charity is too remote from the ultimate charitable object to be exempt. — If property is allowed to be used as taxed property it also is to be taxed. If it competes in the common business and occupations of life with the property of other owners, it must bear the tax which theirs bears, and it is a noncharitable

asset, not immune from execution of a judgment. *Mack v. Big Bethel A.M.E. Church, Inc.*, 125 Ga. App. 713, 188 S.E.2d 915 (1972).

Property subject to execution of judgment if subject to taxation. — It has been held that since the public welfare is a dominant consideration as to both the exemption from taxation and immunity from suit, and that it is the prerogative of the legislature to declare the policy of the state touching the general welfare, the test as to whether property is subject to execution of a judgment is whether the property is subject to taxation. *Mack v. Big Bethel A.M.E. Church, Inc.*, 125 Ga. App. 713, 188 S.E.2d 915 (1972).

Religious institutions are, for some purposes, considered to be matters of charity, they are not necessarily considered such for all purposes, and the word “charity” itself is given a narrower meaning in tax exemption cases. *Presbyterian Ctr., Inc. v. Henson*, 221 Ga. 750, 146 S.E.2d 903 (1966).

Only church properties enumerated in exemption statute are exempt from taxes, and all references to income relate solely to such exempted property. *Church of God of Union Ass’y, Inc. v. City of Dalton*, 216 Ga. 659, 119 S.E.2d 11 (1961).

Legislature did not intend that religious groups or institutions be considered charitable institutions for purpose of this exemption. *Presbyterian Ctr., Inc. v. Henson*, 221 Ga. 750, 146 S.E.2d 903 (1966).

Facts sufficient to qualify church for exemption of property. — In suit by church seeking equitable relief from tax execution, allegations that no dividends, income, or profits have been, or will be, distributable for the purpose of profit or personal gain, that the property upon which the execution has been levied is a place of religious worship, used in maintaining and operating a church, that the income derived therefrom is used exclusively for religious purposes, and that the primary purpose of such real estate is not that of securing an income thereon, but of providing a meeting place and quarters for members of affiliate churches placed the plaintiff squarely within the constitu-

tional and statutory exemptions. *Church of God v. City of Dalton*, 213 Ga. 76, 97 S.E.2d 132 (1957).

Exemption must be clearly intended. — An exemption from taxation will not be held to be conferred unless terms under which it is granted clearly and distinctly show that such was the intention of the legislature. *Church of God v. City of Dalton*, 213 Ga. 76, 97 S.E.2d 132 (1957).

Words given ordinary meaning. — In determining whether or not exemption claimed has in fact been granted, the words in the constitutional exemption are to be given their ordinary meaning. *Church of God v. City of Dalton*, 213 Ga. 76, 97 S.E.2d 132 (1957).

Effect of §§ 48-5-41 and 48-6-22. — The exemptions applying to a charitable institution under this paragraph and Ga. L. 1946, p. 12 and Ga. L. 1955, p. 262 placed religious, educational, and charitable institutions on same basis with reference to income, in that any income from such property must be “used exclusively for religious, educational and charitable purposes, or for either one or more of such purposes and for the purpose of maintaining and operating such institutions.” *Church of God v. City of Dalton*, 213 Ga. 76, 97 S.E.2d 132 (1957) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Burial Places

Proper suit in equity. — Suit by cemetery corporation seeking declaratory judgment that its property was not properly subject to municipal property tax and for injunction to prevent levy of this tax stated a case in equity within the jurisdiction of the Georgia Supreme Court. *City of Atlanta v. Crest Lawn Mem. Park Corp.*, 218 Ga. 497, 128 S.E.2d 722 (1962).

Public policy to protect and encourage cemeteries arises out of the common wish of mankind to ensure a fitting resting place for the dead, especially in crowded areas, while at the same time giving consideration to the safety of the living and the saving of the public from the burden of maintaining them at its expense. *Suttles v. Hill Crest Cem.*, 87 Ga. App. 343, 73 S.E.2d 760 (1952).

Burial Places (Cont'd)

Land deeded for cemetery use met exemption notwithstanding reservation for future use. — Under the constitutional and legislative provisions exempting “places of burial” from taxation, land acquired by cemetery corporation under a deed containing a restriction that it was to be used as a cemetery for human beings and for no other purpose, was, under the facts stipulated, exempt from taxation, despite the fact that the land in question was being reserved for future needs. *Suttles v. Hill Crest Cem.*, 87 Ga. App. 343, 73 S.E.2d 760 (1952).

Distinction between buildings used in cemetery. — There is a distinction between those structures in which bodies are prepared for burial, and buildings necessary for administration of the cemetery and the maintenance of the burying grounds. The latter are exempt from taxation. *City of Atlanta v. Crest Lawn Mem. Park Corp.*, 218 Ga. 497, 128 S.E.2d 722 (1962).

Exemption for portion of property used for burial. — Where the plaintiff’s petition alleged the property was exempt from taxation under state law, the plaintiff was entitled to an injunction against a levy on that portion of its property used as a place of burial. *City of Atlanta v. Crest Lawn Mem. Park Corp.*, 218 Ga. 497, 128 S.E.2d 722 (1962).

The exemption accorded to cemetery lands may extend to all property used or held exclusively for the burial of the dead or for the care, maintenance, or upkeep of such property, and ordinarily applies to a columbarium, a crematory, a mausoleum, or unsold lots, crypts or niches, and covers permanent improvements placed on the land and necessary to its use as a burying ground. *City of Atlanta v. Crest Lawn Mem. Park Corp.*, 218 Ga. 497, 128 S.E.2d 722 (1962).

Undeveloped cemetery area exempt. — Where the evidence indicated that the number of burials was increasing each year, and that the undeveloped area of cemetery tract was not disproportionate to the future needs of the area from which the burials were made, the trial judge did not err in holding that the undeveloped

portion of the area was exempt from taxation. *City of Atlanta v. Crest Lawn Mem. Park Corp.*, 218 Ga. 497, 128 S.E.2d 722 (1962).

Preservation of a historical site in a tract of land dedicated to burial purposes would not change its character as a place of burial. *City of Atlanta v. Crest Lawn Mem. Park Corp.*, 218 Ga. 497, 128 S.E.2d 722 (1962).

Institutions of Purely Public Charity**1. In General**

Georgia General Assembly may exempt all public property from ad valorem taxation, and may also exempt some portion of public property from taxation. *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978).

General Assembly may exempt some public property and refuse to exempt other public property, because the power to exempt from the burden of taxation necessarily implies the power to impose such taxes. *City of Atlanta v. Spence*, 242 Ga. 194, 249 S.E.2d 554 (1978).

Private property not converted to public property and not relieved from ad valorem taxation. — While businesses which are privately owned, but used in the exercise of governmental functions on state-owned or state-controlled property for private gain, and in accordance with the rules and regulations imposed by the state, may be exempt from occupation taxes because of threatened impairment of the functions of the state thus performed, yet private property cannot thus be said to be converted into public property in order to relieve it from ad valorem taxation. *Davis v. City of Atlanta*, 206 Ga. 652, 58 S.E.2d 140 (1950).

To qualify for ad valorem tax exemption as an “institution of purely public charity” the property itself must be dedicated to a purely public charitable use. *Johnson v. Wormsloe Found., Inc.*, 228 Ga. 722, 187 S.E.2d 682 (1972).

Tax exemption restriction. — The Constitution restricts tax exemption of institutions of charity to those and those only that are “purely” charity and also to those that are “public” charity. Georgia

Osteopathic Hosp. v. Alford, 217 Ga. 663, 124 S.E.2d 402 (1962).

Fact that an institution serves a benevolent purpose does not necessarily make it a “purely public charity.” *Rabun Gap-Nacoochee Sch. v. Thomas*, 228 Ga. 231, 184 S.E.2d 824 (1971).

Test for purely public charity. — Test of whether property is within an exemption from taxation of institutions of purely public charity is whether the property itself is dedicated to charity and used exclusively as an institution of purely public charity, and not whether the organization owning it is one of purely public charity. It is not material, however, for the purpose of determining the public nature of a charity, through what particular forms the charity may be administered. If it is established and maintained for the use and benefit of the public, and so conducted that the public can make available use of it, that is all that is required to bring it within the meaning of a statute exempting from taxation institutions of purely public charity. *Mu Beta Chapter Chi Omega House Corp. v. Davison*, 192 Ga. 124, 14 S.E.2d 744 (1941); *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Boy Scout included as charity. — The word “charity,” as used in paragraph (5) of former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-40), and in this paragraph of the Georgia Constitution authorizing its enactment, was broad enough to include the use of the property by the Boy Scout organization. *Tharpe v. Central Ga. Council of BSA*, 185 Ga. 810, 196 S.E. 762 (1938) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Intent to dedicate to public use. — Whether express or implied, an intention on the part of the owner to dedicate the owner’s property to the public use must be shown in order to claim a tax exemption. When an implied dedication is claimed, the facts relied on must be such as to clearly indicate a purpose on the part of the owner to abandon the owner’s personal dominion over the property and to devote it to a definite public use. *Johnson v. Wormsloe Found., Inc.*, 228 Ga. 722, 187 S.E.2d 682 (1972).

“Used for the operation of such institution” means that the charitable institution itself must be carrying on an operation on its real estate for benefit of the public or for some other legitimate charitable purpose. *Johnson v. Wormsloe Found., Inc.*, 228 Ga. 722, 187 S.E.2d 682 (1972).

Intent for public purpose must be accepted by public. — Use of one’s property by a small portion of the public, even for an extended period of time, will not amount to a dedication of the property to a public use, unless it appears clearly that there was an intention to dedicate and that this dedication was accepted by the public for public use. *Johnson v. Wormsloe Found., Inc.*, 228 Ga. 722, 187 S.E.2d 682 (1972).

Because charitable institutions are public, if they are open “to the whole public,” or the whole of the classes for whose relief they are intended or adapted” then the institution is exempt from taxation. It is sufficient that the property is open to the members of the organization without turning a profit. *Tharpe v. Central Ga. Council of BSA*, 185 Ga. 810, 196 S.E. 762 (1938); *Peachtree on Peachtree Inn, Inc. v. Camp*, 120 Ga. App. 403, 170 S.E.2d 709 (1969).

Merely making real estate available to other public or charitable institutions for their use is not sufficient to qualify the property of a charitable institution for the tax exemption. *Johnson v. Wormsloe Found., Inc.*, 228 Ga. 722, 187 S.E.2d 682 (1972).

2. Homes for Elderly

For a nursing home to be tax exempt, it must be purely charitable and public. *Central Bd. on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 171 S.E.2d 747 (1969).

To qualify as public it is not necessary that a nursing home be open to the entire public. It is sufficient that it be open to classes for whose relief it was intended. *Central Bd. on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 171 S.E.2d 747 (1969).

Meaning of charity. — A familiar meaning of the word “charity” is almsgiving, but as used in the law it may include

Institutions of Purely Public**Charity (Cont'd)****2. Homes for Elderly (Cont'd)**

substantially any scheme or effort to better the condition of society or any considerable part of it. *Peachtree on Peachtree Inn, Inc. v. Camp*, 120 Ga. App. 403, 170 S.E.2d 709 (1969); *Central Bd. on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 171 S.E.2d 747 (1969).

“Charity,” as used in tax exemption statutes, is not restricted to the relief of the sick or indigent, but extends to other forms of philanthropy or public beneficence, such as practical enterprises for the good of humanity, operated at moderate cost to the beneficiaries, or enterprises operated for the general improvement and happiness of mankind. *Peachtree on Peachtree Inn, Inc. v. Camp*, 120 Ga. App. 403, 170 S.E.2d 709 (1969); *Central Bd. on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 171 S.E.2d 747 (1969).

Charity not limited to needy and destitute. — Charity is not confined to relief of the needy and destitute, for aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants. *Peachtree on Peachtree Inn, Inc. v. Camp*, 120 Ga. App. 403, 170 S.E.2d 709 (1969); *Central Bd. on Care of Jewish Aged, Inc. v. Henson*, 120 Ga. App. 627, 171 S.E.2d 747 (1969).

Payment of rent. — Fact that residents are charged a rental toward expenses of operating an inn for the elderly does not necessarily destroy charitable nature of the institution especially if the payments made by the residents are insufficient to cover the direct operating expenses of the inn and all income is used for the operation, maintenance and enlarging the facilities with no part of its income being distributed to any person with an interest therein. *Peachtree on Peachtree Inn, Inc. v. Camp*, 120 Ga. App. 403, 170 S.E.2d 709 (1969).

The fact that residents paid rent according to their ability would not destroy the charitable nature of the institution. *Central Bd. on Care of Jewish Aged, Inc. v.*

Henson, 120 Ga. App. 627, 171 S.E.2d 747 (1969).

Property with a dual purpose. — Where an institution is a purely public charity and meets the requirements of Ga. L. 1946, p. 12 and Ga. L. 1955, p. 262, the portion of its property which is being used as a home for the aged is tax exempt. However, where part of the building consists of two retail stores which are leased, that part would not be tax exempt since the area where the stores are located is being used to gain rental and not for the primary purpose of operating the inn. *Peachtree on Peachtree Inn, Inc. v. Camp*, 120 Ga. App. 403, 170 S.E.2d 709 (1969).

3. Hospitals

Control by legislature. — A corporation created by the legislature and funded with state funds is a creature of the legislature and subject to the control of the legislature, while a corporation created by the legislature to be funded by private funds is not so subject to future legislative control. *Hospital Auth. v. Stewart*, 226 Ga. 530, 175 S.E.2d 857 (1970).

Organization's charter is not controlling factor. — That an organization is nonprofit and its charter as well as statute under which it is chartered declare it to be a charitable and benevolent institution exempt from taxation does not make it such. Nor does the fact that it serves a benevolent purpose make it a purely public charity. *United Hosps. Serv. Ass'n v. Fulton County*, 216 Ga. 30, 114 S.E.2d 524 (1960).

Use of property controls. — It is the use to which the property is put rather than the declaration of purpose found in its owner's charter that determines the question of exemption from taxation. *Georgia Osteopathic Hosp. v. Alford*, 217 Ga. 663, 124 S.E.2d 402 (1962).

Charging patients based on ability to pay. — Where a hospital is organized for charitable purposes, and its facilities are available alike to poor and unfortunate children, the fact that patients who are able to pay are charged for services rendered, according to their ability, does not alter its character as such, and where all of its income from all sources is used exclusively for maintenance, operation,

enlarging its charitable facilities, and for furtherance of its charitable purposes, with no part of the same distributable to any one having an interest therein, it is exempt within the meaning of this paragraph, and interpretation of this paragraph which accords with the intention of the framers of that document as shown in the Records of the Constitutional Commission 1943-1944, Volume I, pages 138-141, 388-395, 397, 528-531; Volume II, pages 58-59. *Elder v. Henrietta Egleston Hosp. for Children*, 205 Ga. 489, 53 S.E.2d 751 (1949), commented on in 1 Mercer L. Rev. 111 (1949) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Nothing provided in § 48-8-41 not already in this paragraph. — Where, by enacting this paragraph, the General Assembly exempted from taxation all of the property enumerated in this paragraph, using the identical language herein employed, it fully exhausted its constitutional power to make exemptions, and Ga. L. 1947, p. 1183, which expressly exempted from taxation all hospitals of purely public charity added nothing to what the General Assembly had previously done by Ga. L. 1946, p. 12, § 1. *Elder v. Henrietta Egleston Hosp. for Children*, 205 Ga. 489, 53 S.E.2d 751 (1949) commented on in 1 Mercer L. Rev. 111 (1949), (decided under former Code 1933, § 2-5404; see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Instance of no charitable exemption. — Where a hospital receives charitable patients without pay but it also charges for patients able to pay (the proportion being vastly in favor of the latter) the property in question is used for “corporate income,” and is not exempted from taxation. *Richardson v. Executive Comm.*, 176 Ga. 705, 169 S.E. 18 (1933).

Public property embraces only such property as is owned by the state, or some political division thereof, and title to which is vested directly in the state, or one of its subordinate political divisions, or in some person holding exclusively for the benefit of the state or subordinate public corporation. *Culbreth v. Southwest Ga. Regional Hous. Auth.*, 199 Ga. 183, 33 S.E.2d 684 (1945); *Sigman v. Brunswick Port Auth.*, 214 Ga.

332, 104 S.E.2d 467 (1958); *Hospital Auth. v. Stewart*, 226 Ga. 530, 175 S.E.2d 857 (1970).

Cases involving trusts give the word “charity” a broader meaning than the tax exemption cases. *United Hosps. Serv. Ass’n v. Fulton County*, 216 Ga. 30, 114 S.E.2d 524 (1960).

4. Public Authorities

Property may be public property so as to come within exemption from taxation although legal title is not in the state, the county, or a municipality. *Sigman v. Brunswick Port Auth.*, 214 Ga. 332, 104 S.E.2d 467 (1958).

Qualities rendering authority’s property exempt from taxation. — Where no private interest exists in the property of port authority, and the members thereof may not use it for private gain or income, and the authority holds title only for the benefit of the state and the public and the authority is an instrumentality of the state or a subordinate public authority or corporation of the state, the property and revenue bonds of the authority may be exempted from taxation. *Sigman v. Brunswick Port Auth.*, 214 Ga. 332, 104 S.E.2d 467 (1958); *Hospital Auth. v. Stewart*, 226 Ga. 530, 175 S.E.2d 857 (1970).

Property used for purpose of public convenience and welfare in matters of public travel and transportation and to facilitate public transportation and as a dock or port operation, to provide buildings which the users of the port may lease, and in which to store and process commodities transported by water, is in the aid of commerce, and is for the promotion of public transportation, public commerce and general welfare, and may properly be classified as public property and is therefore exempt from taxation. *Sigman v. Brunswick Port Auth.*, 214 Ga. 332, 104 S.E.2d 467 (1958).

Gratuity not constituted by exemption section. — Former Code 1933, § 95A-1230 (see now O.C.G.A. § 32-10-49), expressly exempting the property of the authority, its revenue bonds and income therefrom from all taxation within the state, does not constitute a donation or a gratuity in violation of Ga.

Institutions of Purely Public

Charity (Cont'd)

4. Public Authorities (Cont'd)

Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI), or offend this paragraph, which declares that all laws exempting property from taxation other than the property therein enumerated are void. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

State Tollway Authority sufficient beneficent purpose to constitute purely public charity. — The property of the Bridge Building Authority (now State Tollway Authority) is not public property, but, in view of the beneficent purpose for which it was created by the legislature, coupled with the fact that it has no shareholders or other owners of any character to which its corporate profit or income is distributable, it is an institution of purely public charity. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Exemption from taxation of the property of the Housing Authority, and its bonds, is not forbidden by the Constitution of this state, because the project involved is for public purposes, and affects the general public. *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938).

Property of municipal electric authority of Georgia is public property and exempt from taxation. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Teachers Retirement System. — Exception to the exemption from taxation in the Georgia Constitution is not applicable to public property, all of which the General Assembly is authorized to exempt from taxation and a teacher's retirement system may hold tax-exempt real property for income purposes. *Teachers Retirement Sys. v. City of Atlanta*, 249 Ga. 196, 288 S.E.2d 200 (1982).

Dwelling house built by electric membership corporation. — Where the dominant consideration of the corporation in building and maintaining the dwelling house near its office to be occu-

pied as a residence for its manager was to promote efficient and prompt service, day and night, to its members rather than merely to furnish a place of habitation for its employee, the building should thereby be considered as being used by it in supplying rural electrification to its members. The property is therefore exempt from taxation. The fact that the manager paid the corporation rent and the dwelling house was not located on the premises of its home office does not require a different result. *Flint Elec. Membership Corp. v. Adams*, 214 Ga. 280, 104 S.E.2d 431 (1958).

Effect of construing "profit" in pari materia with § 46-1-2 and Art. 2, Ch. 3, T. 46. — The word "profit" as employed in the Constitution did not, when construed in pari materia with former Code 1933, §§ 93-413, 94-1101 and the former provisions on nonprofit rural electrification membership corporations (see now O.C.G.A. § 46-1-2) exclude the electric corporations created under the former statutory provisions from the class of electric companies engaged in the business of generating and transmitting electricity. *Lamar Elec. Membership Corp. v. Carroll*, 89 Ga. App. 440, 79 S.E.2d 832 (1953).

5. Miscellaneous Institutions

Bonds issued by the state or its institutions are public instrumentalities, and thus, properly exempted from taxation under this paragraph. *Rich v. State*, 237 Ga. 291, 227 S.E.2d 761 (1976) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

License fee not revenue raising measure. — The license fee provided for in the motor vehicle registration law is nothing more than a license fee and is not in essence a revenue-raising measure, and therefore does not amount to the levying of a tax against public property. *Burkett v. State*, 198 Ga. 747, 32 S.E.2d 797 (1945).

College, Academy, and Seminary Buildings

Fraternity houses tax exempt. — The fraternity houses are buildings erected for and used as a college, and not used for the purpose of making either

private or corporate income or profit for the university, and they shall be exempt from taxes. *Alford v. Emory Univ.*, 216 Ga. 391, 116 S.E.2d 596 (1960).

Seminary not intended as charitable institution. — Since this paragraph exempts certain specified property owned by a seminary of learning and then exempts “all institutions of purely public charity,” it appears that it was the intention of the drafters of the Constitution that a seminary of learning not be considered as a charitable institution for the purpose of this exemption. *Rabun Gap-Nacoochee Sch. v. Thomas*, 228 Ga. 231, 184 S.E.2d 824 (1971) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

A university-owned radio station, operated as any commercial broadcasting station, is not exempt from payment of city business license fee under this paragraph authorizing the exemption from taxation of educational institutions, notwithstanding the fact that its purpose of operation was said to be educational. *City of Atlanta v. Oglethorpe Univ.*, 178 Ga. 379, 173 S.E. 110 (1934) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

It is the use of the property which renders it exempt or nonexempt, not the use of the income derived from it. *Elder v. Atlanta-Southern Dental College*, 183 Ga. 634, 189 S.E. 254 (1936).

Evidence authorized findings that dental college, chartered as purely educational institution, was not used for purpose of making either private or corporate income or profit to the corporation or owners, so as to make it liable for municipal taxes. *Elder v. Atlanta-Southern Dental College*, 183 Ga. 634, 189 S.E. 254 (1936).

Exemption for School Purposes

Use of property controls. — It is the use to which property of an educational institution is put, rather than the declaration of the purpose of the institution found in its charter, that determines the question of exemption from taxation. *Rabun Gap-Nacoochee Sch. v. Thomas*, 228 Ga. 231, 184 S.E.2d 824 (1971).

It is the use of the property which renders it exempt or nonexempt, not the use of the income derived from it. Prop-

erty used to produce income to be expended in charity is too remote from the ultimate charitable object to be exempt. If property competes in the common business and occupations of life with the property of other owners, it must bear the tax which theirs bears. *Rabun Gap-Nacoochee Sch. v. Thomas*, 228 Ga. 231, 184 S.E.2d 824 (1971).

Homestead exemption for school purposes. — This paragraph on homestead is to be construed as exempting personal property from taxation for all purposes, from and after January 1, 1938. This would include exemption from ad valorem taxation for payment of principal and interest on a proposed bonded indebtedness of a consolidated school district, a political division of the state, incurred for the purpose of building a schoolhouse. *Campbell v. Red Bud Consol. Sch. Dist.*, 186 Ga. 541, 198 S.E. 225 (1938) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

The homestead exemption from taxation for “school purposes” should not be construed to include exemption for purpose of building a schoolhouse. *Campbell v. Red Bud Consol. Sch. Dist.*, 186 Ga. 541, 198 S.E. 225 (1938).

Taxation for school purposes in Clarke County. — In 1964 and in 1968 the people of the state did not authorize an additional homestead exemption for certain persons 65 years of age or over, but an increase in amount of the homestead granted other persons. Since the people of Clarke County had already expressly waived the homestead exemption as to “school purposes,” the later constitutional amendments, which expressly created an additional increase in the old age homestead exemption amount and clarified persons who might claim it, were not intended to apply to taxation for school purposes in Clarke County. *Logan v. Davison*, 225 Ga. 575, 170 S.E.2d 297 (1969).

Property devoted to public purposes not always tax exempt. — Although the State School Building Authority (now Georgia Education Authority (Schools)) is empowered to own and use properties for public school purposes, it is, nevertheless, the owner of that property and the authority is not “the state, or a

Exemption for School Purposes (Cont'd)

part of the state, or an agency of the state." Therefore, the property exempt is not public property as contemplated by the Constitution. The fact that the property is devoted exclusively to public purposes would not make it public property and authorize the legislature to exempt it from taxation. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

The properties of the State School Building Authority (now Georgia Education Authority (Schools)) are devoted exclusively to public charity as contemplated by the Constitution. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

Section 20-2-571 does not constitute gratuity or donation in violation of this paragraph. — Ga. L. 1951, p. 241, § 21 (see now O.C.G.A. § 20-2-571), which expressly exempts the property of the authority from all taxation, does not constitute a donation or a gratuity in violation of Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI), nor offend the last sentence of this paragraph, which declares that all laws exempting property from taxation other than the property therein enumerated are void. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Homestead Exemption

The purpose of this paragraph is to exempt the homestead of each bona fide resident of the state from taxation to the extent provided. *Turner v. Board of County Tax Assessors*, 71 Ga. App. 374, 31 S.E.2d 61 (1944) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Intent. — The reasonable intent of the homestead exemption provisions of the Constitution and statutes is to include in rural homesteads the entire tract of land upon which the house is situated, regardless of whether the land surrounding the dwelling is used simply as an extended approach to the building or put to agricultural uses. *Jones v. Johnson*, 80 Ga. App. 340, 55 S.E.2d 904 (1949).

There is no limitation as to the size or physical proportions of the property to be embraced within the homestead provision, and the purpose of the constitutional provision and statute pursuant thereto in fixing a maximum valuation was by so doing to equalize the exemption as between applicants on the basis of value, regardless of the extent of the tract involved. *Jones v. Johnson*, 80 Ga. App. 340, 55 S.E.2d 904 (1949).

Actual occupancy construed. — The provisions for actual occupancy by the owner, in this paragraph, enter into the definition of bona fide homestead, and do not mean in everyday life that the owner must occupy the property in person every day in the year, or a majority of the days of a year, but that there must be such occupancy by the owner as is not inconsistent with ownership and maintenance of the dwelling as the owner's homestead and place of abode. *Turner v. Board of County Tax Assessors*, 71 Ga. App. 374, 31 S.E.2d 61 (1944) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

One may actually occupy a home through the agency of others so long as it is maintained as a home, and the control is not changed in character, since the emphasis in the words used in this paragraph is not on the actual occupancy, but on the provision as a whole, the actual occupancy primarily as a residence or homestead. *Turner v. Board of County Tax Assessors*, 71 Ga. App. 374, 31 S.E.2d 61 (1944).

Effect of § 48-5-40. — The provisions in former Code 1933, § 92-233 (see now O.C.G.A. § 48-5-40), that exempted homestead shall be the legal residence and domicile of such person for all purposes, meant no more than was required by this paragraph, which required actual occupancy primarily as a residence or homestead. *Turner v. Board of County Tax Assessors*, 71 Ga. App. 374, 31 S.E.2d 61 (1944) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Rules and regulations of constitutional amendment. — The rules and regulations contained in this paragraph providing the manner in which the taxing officials should determine the eligibility of a resident to receive the exemption are not

violative of the constitutional amendment upon which Ga. L. Ex. Sess. 1937-38, p. 145 (see now O.C.G.A. § 48-5-49) was based. *Duncan v. Proctor*, 195 Ga. 499, 24 S.E.2d 791 (1943) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

The Constitution requires that property claimed as a homestead be reasonably separated and separately valued, instead of being commingled with other property under a gross valuation. *Harper v. Davis*, 197 Ga. 762, 30 S.E.2d 481 (1944).

Applicant not entitled to an exemption. — Fact that applicant's entire property on which were located several buildings, was assessed at only \$1,550.00, which is less than the maximum exemption allowable under the Constitution, did not entitle the applicant to an exemption where the applicant did not show the separate value of the property actually occupied by the applicant as a residence, nor give any data by which it could be ascertained. *Harper v. Davis*, 197 Ga. 762, 30 S.E.2d 481 (1944).

Farm Products Exemption

Intent. — The obvious intent of exemption for farm products is to relieve the farmer by giving the farmer a year after harvest in which to sell the farmer's products; therefore, during that period until the farmer sells the farmer's products, the farmer is exempt from ad valorem taxation thereupon. *Gold Kist, Inc. v. Jones*, 231 Ga. 881, 204 S.E.2d 584 (1974).

Section 48-5-41. — Language of this paragraph and former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-41) did not contemplate an exemption for farm products either after an outright sale, or when placed in the hands of another for future sale or processing with advance payment to the producer. *Gold Kist, Inc. v. Jones*, 231 Ga. 881, 204 S.E.2d 584 (1974) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Amendment of § 48-5-41. — Georgia Law 1913, p. 122, which amended former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-41), was passed for the express purpose of putting "in force" the constitutional amendment of 1912, amending this paragraph, and the descriptive words

were the same as in the constitutional amendment. *Collins v. Mills*, 198 Ga. 18, 30 S.E.2d 866 (1944) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Lumber not classed as farm product. — Since according to its usual signification, the term "lumber" would not ordinarily be classified as a farm product; it would be presumed prima facie that it was not such a product, and in the circumstances, it was not sufficient to allege in general terms that this lumber was a farm product and as such exempt from taxation. *Collins v. Mills*, 198 Ga. 18, 30 S.E.2d 866 (1944).

Tax Exemption Not Applicable

Debts evidenced by notes not exempt. — Debts evidenced by notes are not embraced in the properties which the Constitution authorizes the General Assembly to exempt from taxation. It follows that since former Code 1933, § 92-2407 (see § 48-6-81) exempted from taxation property made subject to taxes by O.C.G.A. § 48-1-2 and since such property was not embraced in that which the Constitution authorized to be exempted from taxation, the statute offended the Constitution and was void. *Elder v. Home Bldg. & Loan Ass'n*, 188 Ga. 113, 3 S.E.2d 75 (1939).

Noncharitable hospital. — Where a hospital operated generally for profit, and while there was some evidence that it did on occasion treat indigent patients, the general practice of the institution was to collect all that it could from its patients, and only charge off as charity those bills it was unable to collect, the hospital is engaged principally for noncharitable purposes and apparently chiefly for benefit of its staff, and not exempt from taxation. *Georgia Osteopathic Hosp. v. Alford*, 217 Ga. 663, 124 S.E.2d 402 (1962).

Where a hospital is not chartered as a purely public charity, the use of its property is not put to purely public charity, and neither its income nor its surplus is used exclusively for purely public charity, it does not bring itself within the strict requirements for the ad valorem tax exemption sought. *St. Joseph Hosp. v. Bohler*, 229 Ga. 577, 193 S.E.2d 603 (1972).

Tax Exemption Not Applicable (Cont'd)

Nonexempt property. — Property owned for profit by church such as: (1) apartment buildings leased for rent by church; (2) property formerly used as a dining hall but now as an apartment rented to a widow who sometimes pays rent; and (3) lot and dwelling house rented sometimes to a widow who pays rent when the widow can is not exempt from taxation. *Church of God of Union Ass'y, Inc. v. City of Dalton*, 216 Ga. 659, 119 S.E.2d 11 (1961).

Interpreting private or corporate income. — Interpreting "private or corporate income" to mean any income which is not public, productive property used as capital to raise money to expend in charity is used for private income when the owner is a private individual, and for corporate income when the owner is a corporation. It is no more allowable under the Constitution for a charitable association to accumulate money by the use of exempt property, to be disbursed in charity, than it is for a common citizen to do it. *Richardson v. Executive Comm.*, 176 Ga. 705, 169 S.E. 18 (1933).

The terms "private or corporate" are employed in contradistinction to public. — Public property is not taxed, whether income is derived from it or not; but private or corporate property, though it may be connected with the external, visible "institution," is not exempt if used for income, since the income from such property must, by reason of its ownership, be either private or corporate; these terms being comprehensive enough to include all income whatsoever that is not public. *Richardson v. Executive Comm.*, 176 Ga. 705, 169 S.E. 18 (1933).

Acquisition of moneys or gains for disbursal not tax-exempt. — Insofar as charitable organizations are administrators and disbursers of purely public charity, their property permanently in use for that purpose is exempt from taxation; but, insofar as they are capitalists or proprietors engaged in acquiring money or effects to be so disbursed, property of any and every kind from which their income is derived is subject to be taxed the same as

property generally. *Richardson v. Executive Comm.*, 176 Ga. 705, 169 S.E. 18 (1933).

Property purchased by contractor for eventual purchase by city not tax exempt. — A contractor who contracts with a municipality to construct a waterworks system, and who purchased property within and without the state to use in such construction, is a "user" and a "consumer" of such property and is liable to the state for use and sales tax on the sale of such property, even though the title to such property finally vests in the city, and the city would have been exempt from taxation had it purchased the property directly. *J.W. Meadors & Co. v. State*, 89 Ga. App. 583, 80 S.E.2d 86 (1954).

Effect of local authorities actions. — Where law of this state as applied to facts required taxation of credits in question, no interpretation or practice to the contrary by local authorities could properly be adopted by the court in determining their taxability. *Suttles v. Northwestern Mut. Life Ins. Co.*, 193 Ga. 495, 19 S.E.2d 396 (1942), later appeal, 201 Ga. 84, 38 S.E.2d 786 (1946).

Former Code 1933, § 41A-813 (see now O.C.G.A. § 7-1-202) did not violate this paragraph; even though the section fixes the priority of other claims relative to taxes. *Baggett v. Mobley*, 171 Ga. 268, 155 S.E. 334 (1930) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Former Code 1933, § 41A-813 (see now O.C.G.A. § 7-1-202) may render the execution issued by a tax collector unfruitful, in view of the fact that claims which are given priority may exhaust the property classed among assets of the bank; but no attempt was made by the section to exempt the property from taxation even though the statute fixed the priority of other claims relative to taxes. *Baggett v. Mobley*, 171 Ga. 268, 155 S.E. 334 (1930).

Order of distribution of insolvent bank not unconstitutional. — The order of distribution of assets upon the insolvency of a bank which grant payments of debts due to depositors prior to payment of state taxes pursuant to Ga. L. 1927, p. 195, § 5 (see now O.C.G.A. § 7-1-202) is not an unconstitutional vio-

lation of Ga. Const. 1976, Art. VII, Sec. I, Para. I and III (see Ga. Const. 1983, Art. VII, Sec. I, Paras. I and III). *Felton v. McArthur*, 173 Ga. 465, 160 S.E. 419 (1931) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Paragraph not applicable to insolvent bank property. — The last sentence of this paragraph provides that “all laws exempting property from taxation, other than the property herein enumerated, shall be void.” The above exceptions do not include taxes of the character accruing against the property or assets of a bank after it has been taken over by the Superintendent of Banks for liquidation. *Tharpe v. Gormley*, 48 Ga. App. 731, 173 S.E. 212 (1934) (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Assets in bank’s possession for liquidation. — The property and assets of a bank which are in the possession of the Superintendent of Banks, for the purpose of liquidation, are not exempt from taxation. *Tharpe v. Gormley*, 184 Ga. 605, 192 S.E. 211 (1937).

Uniform Application of Tax Exemption

Exemption uniformly applicable to state and foreign corporations alike. — To so construe this constitutional and statutory exemption of property owned by a Georgia corporation and to deny its application to the same class or species of property when owned by a domesticated foreign corporation would violate state constitutional requirements which require that protection to person and property be impartial and complete, and that all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and would also violate that provision of the fourteenth amendment of the Constitution of the United States which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. *Redwine v. Southern Co.*, 206 Ga. 377, 57 S.E.2d 194 (1950).

Business tax exemption applicable to foreign corporation. — Constitutional and statutory provisions exempting from ad valorem intangible taxes common voting stock of a subsidiary corporation

not doing business in this state, if at least 90 percent of such common voting stock is owned by a Georgia corporation with its principal place of business located in this state and was acquired or is held for the purpose of enabling the parent company to carry on some part of its established line of business through such subsidiary, applies to a domesticated foreign corporation as fully and as completely as it does to a corporation created under the laws of Georgia. *Redwine v. Southern Co.*, 206 Ga. 377, 57 S.E.2d 194 (1950).

Tax exemption applicable to cooperative, nonprofit corporation. — There is no merit in the contention that a cooperative, nonprofit, membership corporation, which has been incorporated in a sister state for the purpose of engaging in a rural electrification, and which has been subsequently domesticated in Georgia for the conduct of its corporate purpose here, is not entitled to tax immunity. After being duly domesticated in Georgia such a corporation and its stockholders have the same powers, privileges, and immunities as a similar corporation created under the laws of Georgia, and it, and its stockholders, are subject to the same obligations, duties, liabilities, and disabilities as that of a corporation originally created in Georgia. *City of McCaysville v. Tri-State Elec. Coop.*, 211 Ga. 5, 83 S.E.2d 598 (1954).

Provision of the city charter relating to compensation for granting franchises was not impliedly repealed by ratification of the Constitution of 1945 or by enactment of Art. 2, Ch. 3, T. 46, since the charter provision does not per se relate to electric membership corporations, but to the right of the city to grant easements for the use of its streets by whatever kind of public service corporation. *Tri-State Elec. Coop. v. City of Blue Ridge*, 88 Ga. App. 717, 77 S.E.2d 547 (1953).

Claim barred by laches. — In this suit by citizens of Savannah, in which plaintiffs sought, among other things to enjoin enforcement of tax executions, upon grounds that city tax assessors from 1932 through 1937 intentionally and systematically discriminated against real estate and in favor of personal property in fixing the basis of value for taxation, the petition showed upon its face that the

Uniform Application of Tax Exemption (Cont'd)

plaintiffs were guilty of such laches as to bar their claim for injunction to restrain the proposed tax sales because of alleged discrimination. *Mayor of Savannah v. Fawcett*, 186 Ga. 132, 197 S.E. 253 (1938).

Exemptions Granted by Corporate Charters

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VII, Sec. I, Para. V and antecedent provisions, which provided: "All exemptions from taxation heretofore granted to corporate charters are declared to be henceforth null and void.", are included in the annotations for this paragraph.

Effect of charter provision limiting tax on stock of corporation. — Where a charter provision limits the tax on the "stock" of the corporation to 1/2 of 1 percent "on the net proceeds of their investments," it is a property tax and constitutes no bar to collection by the state under Ga. L. 1931, Ex. Sess., p. 24 (see now O.C.G.A. § 48-7-50), of an income tax from a lessee of the corporation on its net income derived from the use of the corporate property on which the charter thus limits the property tax. *Thompson v. Atlantic Coast Line R.R.*, 200 Ga. 856, 38 S.E.2d 774 (1946), *aff'd sub nom. Atlantic Coast Line R.R. v. Phillips*, 332 U.S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947) commented on in 9 Ga. B.J. 207 (1946).

Suit by railroad company for declaratory judgment and injunction against collection of ad valorem taxes is in substance and effect an action against the state and it is not maintainable, unless the state has consented to be sued. *Musgrove v. Georgia R.R. & Banking Co.*, 204 Ga. 139, 49 S.E.2d 26 (1948), appeal dismissed, 335 U.S. 900, 69 S. Ct. 407, 93 L. Ed. 435 (1949).

Suits to restrain state officials from executing an unconstitutional statute. — It is a well recognized general rule that a suit to restrain a state official from executing an unconstitutional statute in violation of plaintiff's rights and to plaintiff's irreparable damage is not a suit

against the state, for in such a case the officer is stripped of official or representative character and is subject in the officer's person to the consequences of the officer's individual conduct. Seemingly, the same principle would apply where the officer claims to act under a provision of the state Constitution, provided such provision is void as being in violation of the United States Constitution, and is duly challenged. It has no application where the suit is by a railroad company against the state revenue commissioner for declaratory judgment and injunction to prevent assessment of ad valorem taxes in violation of a company's charter. *Musgrove v. Georgia R.R. & Banking Co.*, 204 Ga. 139, 49 S.E.2d 26 (1948), appeal dismissed, 335 U.S. 900, 69 S. Ct. 407, 93 L. Ed. 435 (1949).

Legislative intent in enacting exemption clause construed. — Where there existed in Georgia at the time the corporation charter exemption was enacted no general law which would subject the corporation to payment of an income tax, and in the exemption clause it was expressly stated that the limitation provided was upon the taxation of stock of the corporation, hence, the General Assembly of Georgia, in enacting this exemption clause, did not intend to include an income tax. Such limitation or exemption was not necessary, because in the absence of the same, no income tax, under the law as it then existed, would have been exacted of the corporation. *Thompson v. Atlantic Coast Line R.R.*, 200 Ga. 856, 38 S.E.2d 774 (1946), *aff'd sub nom. Atlantic Coast Line R.R. v. Phillips*, 332 U.S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947) commented on in 9 Ga. B.J. 207 (1946).

This provision does not purport to be retroactive; and even if it was expressly made retroactive, it would nevertheless be completely ineffective insofar as the fixed and established rights of the party are concerned. *Thompson v. Atlantic Coast Line R.R.*, 200 Ga. 856, 38 S.E.2d 774 (1946), *aff'd sub nom. Atlantic Coast Line R.R. v. Phillips*, 332 U.S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947) commented on in 9 Ga. B.J. 207 (1946). (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

A perpetual corporate charter granted by the legislature conferring tax exemption upon the corporation is irrevocable. Accordingly, this paragraph purporting to revoke such charter provisions, is void and of no effect. *Thompson v. Atlantic Coast Line R.R.*, 200 Ga. 856, 38 S.E.2d 774 (1946), aff'd sub nom. *Atlantic Coast Line R.R. v. Phillips*, 332 U.S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947) commented on in 9 Ga. B.J. 207 (1946).

State cannot impair its contractual obligations. — This state is powerless by legislative enactment or constitutional provision to nullify or impair in any respect whatsoever its existing contractual obligations. *Thompson v. Atlantic Coast Line R.R.*, 200 Ga. 856, 38 S.E.2d 774 (1946), aff'd sub nom. *Atlantic Coast Line R.R. v. Phillips*, 332 U.S. 168, 67 S. Ct. 1584, 91 L. Ed. 1977 (1947) commented on in 9 Ga. B.J. 207 (1946).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

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General Consideration

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. VII, Sec. I, Para. IV and antecedent provisions, relating to specific tax exemptions, are included in the annotations for this paragraph.

This paragraph is exclusive in the matter of exemptions from taxation and supersedes any other law. 1954-56 Op. Att'y Gen. p. 708 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Items not included in gross income. — The General Assembly did not intend to exclude from computation for income tax purposes those items not included in gross income; otherwise, the words "from all sources" would not have been used nor would reference have been made to certain benefits not included in gross income; to construe the amendment as requiring that only income which is included in gross income for income tax purposes be considered in determining whether a person is entitled to the increased exemption

would render the words "from all sources" surplusage. 1972 Op. Att'y Gen. No. 72-28.

Ga. L. 1946, p. 12, § 1 (see now O.C.G.A. §§ 48-5-42 and 48-5-44) was authorized by this paragraph. 1952-53 Op. Att'y Gen. p. 439 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Land owned by an organization, which is normally tax exempt, is subject to taxation when leased for commercial purposes. 1954-56 Op. Att'y Gen. p. 716.

Responsibility and authority of tax administrators limited. — Tax administrators have from time to time the responsibility to determine whether or not a particular piece of property is exempt property under the provisions of the Constitution and the statutes lawfully enacted thereunder; they do not have the authority to create any special exemption. 1969 Op. Att'y Gen. No. 69-457.

Public Property

Public property is exempt from taxation and motor vehicles owned by polit-

Public Property (Cont'd)

ical subdivisions of the state, such as a public school system, are exempt from taxation as public property. 1969 Op. Att'y Gen. No. 69-237.

Properties of Religious Groups

Land owned by a religious organization is exempt from taxation so long as it is used for religious worship or as a recreational park for purely public charity. 1954-56 Op. Att'y Gen. p. 716.

A single family residence owned by a church is exempt from ad valorem taxes as long as no income is derived therefrom; the same rule applies where the church owns two or more residences. 1970 Op. Att'y Gen. No. U70-172.

Residences of pastor and minister of education are tax exempt. — Two single family residences owned by a church, one of which is occupied rent free by the pastor as the pastor's residence, and the other of which is occupied rent free by the minister of education as the minister's residence, are both exempt from ad valorem taxes. 1970 Op. Att'y Gen. No. U70-94.

Motor vehicles owned by churches are not exempt from taxation. 1957 Op. Att'y Gen. p. 287.

Automobiles are not exempt from ad valorem tax because they are owned by and registered in name of a church organization. 1969 Op. Att'y Gen. No. 69-47.

Burial Places

Cemeteries are exempt from property taxation, even land not yet sold as burial lots. 1960-61 Op. Att'y Gen. p. 474.

Ownership of property. — Property utilized as a cemetery or place of burial is exempt from taxation without regard for fact that the property is owned by either a public or private corporation or by individuals, collectively or severally. 1975 Op. Att'y Gen. No. U75-15.

Institutions of Purely Public Charity

All property, both real and personal, is taxable except that which is

exempt under this paragraph; there is no classification under the property tax exemptions enumerated in the Constitution that could include the property of the legion post, even though it is a nonprofit organization being operated solely for the benefit of its membership and the American Legion and its property was fully acquired through the donations of the citizens of the community and the membership of the post. 1948-49 Op. Att'y Gen. p. 668 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Description in charter that an institution is charitable is not necessarily controlling; institution's tangible personal property is taxable where it appears proceeds may inure to benefit of private person. 1962 Op. Att'y Gen. p. 523.

Georgia Warm Springs Foundation and comparable organizations. — Any property used by an institution of the character of Georgia Warm Springs Foundation in its operation and any operation necessary thereto is exempted from taxation; however, any real estate owned by such an institution that is not necessary to the direct operation but is merely owned by them is subject to taxation. 1948-49 Op. Att'y Gen. p. 576.

Camp grounds owned and operated by Conference of Seventh-day Adventists are exempt from taxation as institution of purely public charity. 1962 Op. Att'y Gen. p. 499.

A hospital supported largely by income derived from pay patients is not entitled to an exemption on its intangible personal property since it cannot be classified as an institution of "purely public charity." 1945-47 Op. Att'y Gen. p. 574.

A Veterans of Foreign Wars post is not exempt from ad valorem taxation. 1957 Op. Att'y Gen. p. 291.

Colleges, Academies, and Seminaries

For discussion of what educational and religious institution property is exempt from taxation. See 1952-53 Op. Att'y Gen. p. 181.

Law libraries not included in personalty subject to exemption from ad valorem taxes. 1962 Op. Att'y Gen. p. 499.

If a motel owned by a college is held or used as an endowment, such property is not exempt from ad valorem taxation because it is invested in real estate. 1969 Op. Att'y Gen. No. 69-362.

Motor vehicles owned and used by private educational institutions are not exempt from ad valorem taxation. 1969 Op. Att'y Gen. No. 69-237.

Homestead Exemption

The purpose of this paragraph was to exempt the homestead of each bona fide resident to the extent provided. 1945-47 Op. Att'y Gen. p. 563 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

The homestead exemption exempts only real property. 1970 Op. Att'y Gen. No. U70-1.

Homestead exemption relates to state and county taxes; if a city wished to extend this or a similar exemption to municipal taxes, a constitutional amendment would be needed. 1971 Op. Att'y Gen. No. U71-98.

Homestead exemption can be applied to only one house. 1970 Op. Att'y Gen. No. U70-3.

It is necessary that the applicant seeking exemption must have a permanent residence on property owned by the applicant to receive an exemption. 1977 Op. Att'y Gen. No. U77-6.

Federal old-age, survivor, or disability benefits not included in determining to increase exemption. — Prior to the 1972 amendment to this paragraph, all income including federal old-age, survivor, or disability benefits was included in income in determining whether a person met the income requirements for the increased homestead exemption; the change made by the 1972 amendment, insofar as the income requirements are concerned, was to provide specifically that federal old-age, survivor, or disability benefits would not be included in income for such purposes. 1973 Op. Att'y Gen. No. 73-38.

Ordinance exempting parcels exceeding five acres. — Any city ordinance exempting parcels of property exceeding five acres in area from ad valorem taxes until the parcel is subdivided violates this

paragraph and is void. 1972 Op. Att'y Gen. No. U72-100 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Exemption extended to administrator, executor, or trustee. — The 1970 amendment to this paragraph, dealing with exemptions granted to homesteads, extends the homestead exemption to property in which title is vested in an administrator, executor, or trustee where an heir or cestui que use resides on the property and claims the exemption. 1975 Op. Att'y Gen. No. 75-7 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Section 48-5-40. — The 1970 amendment to this paragraph was intended to clarify former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-40) by making it clear that in instances of multiple, undivided interests, qualified applicants could properly seek a proportionate exemption. 1975 Op. Att'y Gen. No. 75-7 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

The 1970 amendment to this paragraph extends, as former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-40) did in part, the homestead exemption to owner-occupants holding an undivided interest in property. 1975 Op. Att'y Gen. No. 75-7 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

The 1970 amendment to this paragraph made it clear, which former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-40) did not do, that an individual can apply for exemption if the individual was the only owner actually occupying the property. 1975 Op. Att'y Gen. No. 75-7 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Joint ownership. — Where there is joint ownership of the homestead property, each owner may only assert the owner's claim as an applicant for an exemption based upon the interest the owner holds in the property. 1975 Op. Att'y Gen. No. 75-7.

Joint property owners entitled to claim interest proportion to interest in property. — Where title to real estate is vested in two or more owners, or in an administrator, executor, or trustee, and one of the joint owners, or an heir or cestui que use, who resides on the property meets the criteria for one of the applicable homestead exemptions and applies for the

Homestead Exemption (Cont'd)

homestead exemption, the applicant is only entitled to claim a proportionate exemption of the amount allowed by law in proportion to which the applicant's interest bears to the total interest of the property. 1975 Op. Att'y Gen. No. 75-7.

Invoking benefits triggers limitation clause of benefit. — If a taxpayer is qualified for and chooses to invoke benefits of any one of the exemptions from any one of the types of ad valorem taxes, the taxpayer necessarily triggers the limitation clause of that exemption; any attempt to take two or more similar exemptions would violate the limitation clause of each of the exemptions and cannot be done. 1974 Op. Att'y Gen. No. U74-83.

Amount of exemption qualified taxpayer entitled to. — A taxpayer who meets the qualifications of both the 1964 and 1974 exemptions would be entitled to an exemption of no more than \$4,000.00 from state ad valorem taxes, \$4,000.00 from county ad valorem taxes excluding those taxes levied for educational purposes, and \$10,000.00 from ad valorem taxes levied for educational purposes. 1974 Op. Att'y Gen. No. U74-83.

Not more than one homestead exemption may be claimed in connection with the occupancy of one building except in the case of duplex or double occupancy dwellings when the line of division follows a natural and bona fide plan as to both land and buildings and the two units thus formed are separately owned and occupied. 1971 Op. Att'y Gen. No. U71-138.

Where nonprofit housing facilities are made available to members of public whose incomes are insufficient to enable them to acquire adequate housing, such facilities may be charitable property, and exempt from ad valorem tax; the fact that some charge is made for accommodations will not alter this, provided no profit is made, and no income therefrom can inure to any private person. 1970 Op. Att'y Gen. No. U70-186.

Life tenant with remainderman responsible for ad valorem taxes. — A covenant contained in a deed conveying a life estate which makes the remainder

interest responsible for paying the ad valorem taxes does not alter the ownership interests in the property for purposes of eligibility to claim the homestead exemptions allowed for the elderly. 1983 Op. Att'y Gen. No. U83-71.

The board of assessors may raise a taxpayer's homestead exemption and should do so, as the taxpayer has not waived any part of the full exemption provided in this paragraph. 1963-65 Op. Att'y Gen. p. 142 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Veterans Exemption

Method for construction of paragraph. — The amendment to this paragraph, granting an exemption of \$10,000.00 to a disabled veteran, is to be read in pari materia with the original homestead provision in this paragraph, and the statutory provisions (see now O.C.G.A. Part 1, Art. 2, Ch. 5, T. 48), passed to carry the original provision into effect, should be applied also to this paragraph. 1960-61 Op. Att'y Gen. p. 492 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

O.C.G.A. § 48-5-40 is applicable to disabled veterans and a disabled veteran is entitled to an exemption of \$5,000.00 where the disabled veteran has a 50 percent interest in the property. 1960-61 Op. Att'y Gen. p. 492.

Amount of exemption available to disabled veteran and spouse. — A disabled veteran was entitled to a homestead exemption under this paragraph upon property owned jointly by the veteran and the veteran's spouse would, under former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-40), be entitled to claim only half the amount prescribed by this paragraph; the veteran's spouse could claim an exemption of \$1,000.00 on the spouse's half of the property. 1958-59 Op. Att'y Gen. p. 340 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Veterans exemption in lieu of general exemption. — The special \$25,000 homestead exemption granted to disabled veterans is in lieu of and not in addition to the \$2,000.00 homestead exemption available to the general citizenry of this state. 1977 Op. Att'y Gen. No. 77-3.

Nonservice connected pensions received by World War I veterans must be considered in determining whether a person meets income requirements for increased homestead exemption. 1972 Op. Att'y Gen. No. 72-28.

Automobiles. — Disabled veteran is not exempt from payment of ad valorem taxes on the disabled's veteran's automobile. 1962 Op. Att'y Gen. p. 487.

Disabled veteran's \$25,000 homestead exemption is limited to real property and does not include an automobile. 1962 Op. Att'y Gen. p. 494.

The language of the exemption makes it clear that unless the vehicle is owned by the disabled veteran, the exemption may not be granted. 1979 Op. Att'y Gen. No. 79-19.

PERSONS AGE 65 AND OVER =cd.

Homestead exemption allowed to persons 65 years of age or over is a personal right of those individuals where the income limitation is met; where there is joint ownership of the homestead property, each owner may assert the owner's claim as an applicant for an exemption based upon the interest the owner holds in the property. 1969 Op. Att'y Gen. No. 69-60.

This paragraph, authorizing homestead exemptions from school taxes for certain elderly persons, is not self-executing, as demonstrated by the change in the words "shall be exempt" to "may be exempt," the decision of whether or not to grant exemptions having been left to the discretion of the legislature. 1973 Op. Att'y Gen. No. 73-2 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Exemption enacted by 1972 amendment must be implemented on state-wide application. — The 1972 amendments to this paragraph, relating to exemptions from ad valorem taxes for educational purposes for certain persons over 62 years of age, cannot be implemented on a district by district basis but must be implemented, if at all, so as to have state-wide application. 1973 Op. Att'y Gen. No. 73-52 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Does not apply to municipalities. — This paragraph, granting a homestead

exemption of \$4,000.00 to certain persons 65 years of age and over, grants direct constitutional exemption from all state and county ad valorem taxes, including taxes levied for school purposes and for purposes of paying interest on and retiring bonded indebtedness, but grants no exemption from ad valorem taxes levied by municipalities. 1963-65 Op. Att'y Gen. p. 733 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Income limitation. — To be entitled to the homestead exemption for persons over 65 years of age, income must not exceed \$4,000.00 after subtracting all deductions allowed by law from gross income. 1969 Op. Att'y Gen. No. 69-17.

General Assembly did not intend for Ga. L. 1969, p. 960, § 1(see now O.C.G.A. § 48-5-20) to apply to persons claiming the increased homestead exemption; the provisions of Ga. L. 1969, p. 960, § 1 do not eliminate the requirement that persons claiming the increased homestead exemption of \$4,000.00 file an annual application for such exemption. 1969 Op. Att'y Gen. No. 69-236.

Social security benefits must be included in computation in determining whether or not a person over 65 and that person's spouse has met income requirements for increased homestead exemption. 1969 Op. Att'y Gen. No. 69-112.

Pension and retirement benefits. — Although this paragraph first refers to "net income," which would not include certain retirement or pension payments, these pension and retirement payments must be included. 1971 Op. Att'y Gen. No. U71-53 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Personal exemptions and credits are not considered in arriving at net income. 1969 Op. Att'y Gen. No. 69-17.

"From all sources." — That something more than "taxable net income" was intended by the framers of this paragraph is indicated by the insertion of the words "from all sources" in the term "income from all sources." 1963-65 Op. Att'y Gen. p. 749 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Responsible for city property tax. — A home having a value of less than

\$4,000.00 which is owned and occupied by a 75-year-old person having an income of less than \$4,000.00 per year, is subject to city property tax, but is exempt from state and county property tax; all personal clothing and furniture owned by a taxpayer are exempted from all state, county, city, and school district ad valorem tax in an amount not to exceed \$300.00. 1970 Op. Att'y Gen. No. U70-198.

Farm Products

Interpretation of farm products exemption clause. — This paragraph states: "The General Assembly shall further have power to exempt from taxation, farm products, including baled cotton grown in this state and remaining in the hands of the producer, but not longer than for the year next after their production"; this constitutional exemption simply means that agricultural products in the hands of the producer or the farmer are exempted for a year after their production; any other exemption of agricultural products would be void. 1948-49 Op. Att'y Gen. p. 658 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

The term "farm products" is not limited to products of the soil, but also encompasses livestock and poultry, including laying hens, which are commonly regarded as agricultural products; such products are exempt from taxation so long as they meet other statutory criteria. 1969 Op. Att'y Gen. No. 69-359.

Chickens remaining in hands of the producer are "farm products" exempt from ad valorem taxation for the next year after their production. 1969 Op. Att'y Gen. No. 69-359.

Effect of federal ownership. — As farm products within the hands of the producer, within the year next after their production, and all property within the scope of federal ownership are exempt from taxation, farm products owned by the producer and stored by the federal government are not within the classification of properties taxable by a municipal corporation. 1963-65 Op. Att'y Gen. p. 238.

Instance of ineligibility for exemption. — A person owning and operating a farm, working on the farm and being on the farm practically all day year round,

but eating and sleeping in a home not owned by that person about two miles from the person's property in the same county, would not be eligible for an exemption. 1963-65 Op. Att'y Gen. p. 153.

A person who only lived on the person's property a few days out of the year would not be entitled to the exemption; this would not be the case if the person was away from the person's home serving in the armed forces. 1963-65 Op. Att'y Gen. p. 153.

Farm products in the hands of warehousemen who are not producers are not exempt from property taxation. 1969 Op. Att'y Gen. No. 69-283.

Nursery products such as ornamental garden shrubs are not farm products as that term is used in this paragraph and are subject to property taxation. 1969 Op. Att'y Gen. No. 69-407 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Industry and Business Exemption

In view of this paragraph, towns and counties are prohibited from granting tax exemptions to industries or businesses. 1950-51 Op. Att'y Gen. p. 114 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Provision in city charter which would exempt corporations from taxation of realty is unconstitutional. 1962 Op. Att'y Gen. p. 487.

Exemption of property from ad valorem taxation for industrial development purposes is prohibited by the Constitution and can only be allowed with respect to specific localities by constitutional amendment. 1962 Op. Att'y Gen. p. 504.

Board of commissioners of a county cannot grant any exemptions from ad valorem taxation; the General Assembly may, by law, grant exemptions from ad valorem taxation but only on property enumerated in this paragraph. 1967 Op. Att'y Gen. No. 67-328 (see Ga. Const. 1983, Art. VII, Sec. II, Para. IV).

Exemptions to promote business growth prohibited. — County commissioners cannot exempt new businesses or industries from ad valorem taxation for a given period in order to induce them to

move into the county; even though the General Assembly has some authority to exempt certain property from taxation, only property specifically enumerated in this paragraph may be exempted. 1970 Op. Att'y Gen. No. U70-174 (see Ga. Const. 1983, Art VII, Sec. II, Para. IV).

If a city is located within a county, its gas facility located in the county is not subject to ad valorem taxation by the county. 1970 Op. Att'y Gen. No. 70-191.

Property returned for taxation on January first and later sold to a mu-

nicipality is not subject to be levied on for taxes in the hands of the municipality. 1954-56 Op. Att'y Gen. p. 680.

An electric cooperative organized under foreign state law and doing business in this state is not exempt from payment of state ad valorem taxes. 1952-53 Op. Att'y Gen. p. 183.

Property owned by a mutual fund. — Neither former Code 1933, § 92-201 (see now O.C.G.A. § 48-5-41) nor the Constitution exempt from ad valorem taxation taxable property owned by a mutual fund. 1968 Op. Att'y Gen. No. 68-195.

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, State and Local Taxation, § 232 et seq.

C.J.S. — 84 C.J.S., Taxation, § 252 et seq.

ALR. — Constitutionality of exemption of particular educational, religious, or charitable institution from taxation, 2 ALR 471.

Taxation of property owned by public body but not devoted to public use, 3 ALR 1439; 23 ALR 248; 101 ALR 787; 129 ALR 480; 54 ALR3d 402.

Constitutional enumeration of subjects of tax exemption as affecting power of Legislature to free government securities or property from taxation, 9 ALR 436.

Taxation: exemption of parsonage or residence of minister or priest, 13 ALR 1196.

Construction of exemption of religious body or society from taxation or special assessment, 17 ALR 1027.

Tax on automobile or on its use for cost of road or street construction, improvement, or maintenance, 24 ALR 937; 68 ALR 200.

Tombstone and funeral expenses as deductible items in computation of inheritance or succession tax, 28 ALR 671; 83 ALR 931.

Bond or warrant of governmental subdivision as subject of taxation or exemption, 44 ALR 510.

Tax on automobile, or on its use, for cost of road or street construction, improvement, or maintenance, 68 ALR 200.

Exemption from taxation of property of fraternal or relief associations, 83 ALR 773.

Enumeration in constitutional provision of subjects of tax as exclusive of power of Legislature to add other subjects, 100 ALR 859.

What amounts to "obligation to pay money" within tax law, 100 ALR 871.

Who is within tax or license exemption extended to mechanics or persons engaged in mechanical pursuits, 100 ALR 1033.

Taxation of property owned by public body but not devoted to public use, 101 ALR 787; 129 ALR 480.

Constitutional or statutory tax exemption as applied to tax for purpose of refunding bonds issued after the exemption, to retire indebtedness incurred before the exemption, 102 ALR 672.

Exemption of charitable organization from taxation or special assessment, 108 ALR 284.

What is a municipal corporation within constitutional or statutory tax exemption provisions, 108 ALR 577.

Tax exemption as unconstitutionally impairing public obligations antedating the exemption, 109 ALR 817.

Tax exemption as affected by failure to claim or delay in claiming it for past years, 115 ALR 1484.

Exemption of property or bonds of housing authority from taxation, 133 ALR 365; 152 ALR 239.

Tax exemption in respect of property held subject to an express trust by a charitable, religious, or similar body generally within benefits of exemption, 138 ALR 116.

Constitutional guaranty of freedom of

religion as applied to license taxes or regulations, 141 ALR 538; 146 ALR 109; 152 ALR 322.

Tax exemption of educational institutions as extending to athletic fields or property used for social or recreation purposes, 143 ALR 274.

“Business situs” for purposes of property taxation of intangibles in state other than domicile of owner, 143 ALR 361.

Hospital as within tax exemption provision not specifically naming hospitals, 144 ALR 1483.

Exemption of property or bonds of housing authority from taxation, 152 ALR 239.

Tax exemption of property of religious, educational, or charitable body as extending to property or income thereof used in publication or sale of literature, 154 ALR 895.

Equitable title under executory contract for purchase of real property as sustaining exemption from taxation, 156 ALR 1301.

Property acquired by a taxing unit for delinquent taxes as exempt from taxation by another taxing unit, 162 ALR 1119.

Scope and application of exemption of cemeteries from taxation, 168 ALR 283.

Consent to state taxation of federal property or instrumentalities as affecting exemption thereof under provision of State Enabling Act, Constitution, or statute, 168 ALR 547.

Construction of exemption of religious body or society from taxation or special assessment, 168 ALR 1222.

Exemption from taxation of property of labor organization, 172 ALR 1070.

Tax exemptions and the contract clause, 173 ALR 15.

Constitutional exemption from taxation as subject to legislative regulation respecting conditions of its assertion, 4 ALR2d 744.

Property used by personnel as living quarters or for recreation purposes as within contemplation of tax exemptions extended to property of religious, educational, charitable, or hospital organizations, 15 ALR2d 1064; 55 ALR3d 356; 55 ALR3d 485; 61 ALR4th 1105.

State taxation of motor carriers as affected by commerce clause, 17 ALR2d 421.

What is a “scientific institution” within property tax exemption provisions, 34 ALR2d 1221.

Tax exemption of real property as affected by time of acquisition of title by private owner entitled to exemption, 54 ALR2d 996.

What state exemption law, in point of time, governs bankrupt’s exemption rights, 61 ALR2d 748.

Legislative power to exempt from taxation property, purposes, or uses additional to those specified in Constitution, 61 ALR2d 1031.

Exemption from taxation of college fraternity or sorority house, 66 ALR2d 904.

Property used as dining rooms or restaurants as within tax exemptions extended to property of religious, educational, charitable, or hospital organizations, 72 ALR2d 521.

Church parking lots as entitled to tax exemptions, 75 ALR2d 1106.

Tax exemption of Blue Cross, Blue Shield, or other hospital or medical service corporation, 88 ALR2d 1414.

Exemption from taxation of property of agricultural fair society or association, 89 ALR2d 1104.

Charitable, educational, or religious tax exemption of property held in trust for tax-exempt organization, 94 ALR2d 626.

Succession and estate tax; construction of statute or regulation exempting gifts to foreign charitable, educational, or religious body on reciprocal basis, 12 ALR3d 918.

Exemption of public school property from assessments for local improvements, 15 ALR3d 847.

Homes for the aged as exempt from property taxation, 37 ALR3d 565.

Receipt of pay from beneficiaries as affecting tax exemption of charitable institutions, 37 ALR3d 1191.

Availability of tax exemption to property held on lease from exempt owner, 54 ALR3d 402.

Taxation: Exemption of parsonage or residence of minister, priest, rabbi, or other church personnel, 55 ALR3d 356.

Property tax: Exemption of property leased by and used for purposes of otherwise tax-exempt body, 55 ALR3d 430.

Tax exemption of property of educational body as extending to property used by personnel as living quarters, 55 ALR3d 485.

Validity of municipal admission tax for college football games or other college sponsored public events, 60 ALR3d 1027.

Validity and construction of statute or ordinance allowing tax exemption for property used in pollution control, 65 ALR3d 434.

Property taxation of computer software, 82 ALR3d 606.

Validity, construction, and effect of state statutes affording preferential property tax treatment to land used for agricultural purposes, 98 ALR3d 916.

What are educational institutions or schools within state property tax exemption provisions, 34 ALR4th 698.

Exemption from real-property taxation of residential facilities maintained by hospital for patients, staff, or others, 61 ALR4th 1105.

Nursing homes as exempt from property taxation, 34 ALR5th 529.

Computer software or printout transactions as subject to state sales or use tax, 36 ALR5th 133.

Paragraph V. Disabled veteran's homestead exemption.

Except as otherwise provided in this paragraph, the amount of the homestead exemption granted to disabled veterans shall be the greater of \$32,500.00 or the maximum amount which may be granted to a disabled veteran under Section 802 of Title 38 of the United States Code as hereafter amended. Such exemption shall be granted to: those persons eligible for such exemption on June 30, 1983; to disabled American veterans of any war or armed conflict who are disabled due to loss or loss of use of one lower extremity together with the loss or loss of use of one upper extremity which so affects the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair; and to disabled veterans hereafter becoming eligible for assistance in acquiring housing under Section 801 of the United States Code as hereafter amended. The General Assembly may by general law provide for a different amount or a different method of determining the amount of or eligibility for the homestead exemption granted to disabled veterans. Any such law shall be enacted by a simple majority of the votes of all the members to which each house is entitled and may become effective without referendum. Such law may provide that the amount of or eligibility for the exemption shall be determined by reference to laws enacted by the United States Congress. (Ga. Const. 1983, Art. 7, § 2, Para. 5, approved by Ga. L. 1984, p. 1707, § 1/HR 185.)

Editor's notes. — The constitutional amendment (Ga. L. 1984, p. 1707, § 1) which added this Paragraph was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

Section 802 of Title 38 of the United States Code is now Section 2102 of Title 38 of the United States Code.

OPINIONS OF THE ATTORNEY GENERAL

No referendum required. — The disabled veterans homestead exemption set

forth in § O.C.G.A. 48-5-48.3, which became effective July 1, 1986, can go into

effect without a referendum. 1987 Op.
Att’y Gen. No. 87-2.

SECTION IIA.

HOMEOWNER’S INCENTIVE ADJUSTMENT

Paragraph
I. State grants; adjustment
amount.

Paragraph I. State grants; adjustment amount.

For each taxable year, a homeowner’s incentive adjustment may be applied to the return of each taxpayer claiming such state-wide homestead exemption as may be specified by general law. The amount of such adjustment may provide a taxpayer with a benefit equivalent to a homestead exemption of up to \$18,000.00 of the assessed value of a taxpayer’s homestead or the taxpayer’s ad valorem property tax liability on the homestead, whichever is lower. The General Assembly may appropriate such amount each year for grants to local governments and school districts as homeowner tax relief grants. The adjustments and grants authorized by this Paragraph shall be made in such manner and shall be subject to the procedures and conditions as may be specified by general law heretofore or hereafter enacted. (Ga. Const. 1983, Art. 7, § 2A, Para. 1, approved by Ga. L. 1999, p. 1275, § 1/HR 269)

Editor’s notes. — The constitutional amendment (Ga. L. 1999, p. 1275, § 1), which added Section IIA and this Paragraph, was approved by a majority of the voters voting at the general election held on November 7, 2000.

SECTION III.

PURPOSES AND METHOD OF STATE TAXATION

Paragraph
I. Taxation; purposes for which
powers may be exercised.
II. Revenue to be paid into general
fund.

Paragraph
III. Grants to counties and municipalities.

JUDICIAL DECISIONS

Cited in Campbell v. State Rd. &
Tollway Auth., 276 Ga. 714, 583 S.E.2d 32
(2003).

Paragraph I. Taxation; purposes for which powers may be exercised.

(a) Except as otherwise provided in this Constitution, the power of taxation over the whole state may be exercised for any purpose authorized by law. Any purpose for which the powers of taxation over the whole state could have been exercised on June 30, 1983, shall continue to be a purpose for which such powers may be exercised.

(b) Subject to conditions and limitations as may be provided by law, the power of taxation may be exercised to make grants for tax relief purposes to persons for sales tax paid and not otherwise reimbursed on prescription drugs. Credits or relief provided hereunder may be limited only to such reasonable classifications of taxpayers as may be specified by law.

1976 Constitution. — Art. VII, Sec. II, Para. I.

Cross references. — Public debt, Ga. Const. 1983, Art. VII, Sec. IV, Paras. I through XI. State sinking fund, Ga. Const. 1983, Art. VII, Sec. V, Para. III. Education, Ga. Const. 1983, Art. VIII, Sec. I, Para. I and Ga. Const. 1983, Art. VIII, Sec. VII, Para. I. Purposes of county taxation, Ga. Const. 1983, Art. IX, Sec. IV, Para. III. Retirement systems for public employees, Ga. Const. 1983, Art. III, Sec. X, Paras. I through V.

Law reviews. — For article, "School

Systems, Segregation and the Supreme Court," see 6 Mercer L. Rev. 189 (1955). For article, "Quasi-Municipal Tort Liability in Georgia," see 6 Mercer L. Rev. 287 (1955). For article, "The County Spending Power: An Abbreviated Audit of the Account," see 16 Ga. L. Rev. 599 (1982).

For note discussing Georgia's local options sales tax, Art. 2, Ch. 8, T. 48, see 31 Mercer L. Rev. 313 (1979).

For comment on *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969) as to the constitutionality of Art. 2, Ch. 19, T. 15, see 21 Mercer L. Rev. 355 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PURPOSE FOR EXERCISING POWERS OF TAXATION

1. SUPPORT OF STATE GOVERNMENT AND PUBLIC INSTITUTIONS
2. EDUCATIONAL PURPOSES
3. PAYMENT OF PUBLIC DEBT
4. CONSTRUCTION AND MAINTENANCE OF STATE FACILITIES
5. CONTRIBUTIONS TO STATE EMPLOYEES' RETIREMENT SYSTEMS

General Consideration

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VII, Sec. II, Para. I and antecedent provisions, providing for specific allowable purposes of taxation, are included in the annotations for this paragraph.

Power of taxation limited. — The General Assembly has only those powers

of taxation over the state which it is permitted to exercise under the grant of power contained in the Constitution. *Brown v. Martin*, 162 Ga. 172, 132 S.E. 896 (1926).

Sole purposes for which the state may tax are listed in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I) and Ga. Const. 1976, Art. VII, Sec. II, Para. IV (see

General Consideration (Cont'd)

Ga. Const. 1983, Art. VII, Sec. III, Para. III). *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

List of purposes in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I) and Ga. Const. 1976, Art. VII, Sec. II, Para. IV (see Ga. Const. 1983, Art. VII, Sec. III, Para. III) is the only source of purposes of taxation for which the state may validly delegate to its creatures the power to tax. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

Express constitutional authorization is required to validate a tax levy by a creature of the state. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

This paragraph is not applicable to a taxation act by county. *Columbus S. Ry. v. Wright*, 89 Ga. 574, 15 S.E. 293 (1892), *aff'd*, 151 U.S. 470, 14 S. Ct. 396, 38 L. Ed. 238 (1894) (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

County tax for purpose of paying pensions is invalid. *Verdery v. Walton*, 137 Ga. 213, 73 S.E. 390 (1911).

Taxing to grant funds to municipalities is not delegable. — Though the purposes listed in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I) are capable of delegation, the right of the state to tax in order to grant funds to municipalities under Ga. Const. 1976, Art. VII, Sec. II, Para. IV (see Ga. Const. 1983, Art. VII, Sec. III, Para. III) is not capable of delegation to counties or to any other subdivision of the state. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

It can never be a valid county purpose to provide revenue to a municipality, because municipalities are not citizens of nor creatures of counties — they are an entirely different form of government. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

Restitution does not fully satisfy injury which results to one from wrongful levy and collection of a tax for payment of which the person is not legally liable. *Agricultural Commodities*

Auth. v. Balkcom, 215 Ga. 107, 109 S.E.2d 276 (1959).

General Assembly exceeded tax power. — The assessment which the agricultural commodities authority was empowered to levy and collect from the producers of the commodity peanuts, under the attacked section of former Code 1933, Ch. 5-26, § 10 of Ga. L. 1951, p. 717, as amended by Ga. L. 1958, p. 237, was unquestionably a tax on that particular agricultural commodity, which was levied and collected by the state through one of its instrumentalities solely for the purpose of advertising and promoting such commodity by the authority; and since it was not a tax which the General Assembly has constitutional power to impose only on that particular agricultural commodity for any one of the purposes enumerated in this provision of the Constitution, the General Assembly was without constitutional authority to create an instrumentality of the state and clothe it with power to impose a tax on such commodity. *Agricultural Commodities Auth. v. Balkcom*, 215 Ga. 107, 109 S.E.2d 276 (1959).

Wrongful tax not cured by refund. — Invalidity of former Code 1933, Ch. 5-26, § 10 of Ga. L. 1951, p. 717, as amended by Ga. L. 1958, p. 237, empowering agricultural commodities authority to levy and collect from procedures of the commodity peanuts, was not cured by the election provided for by § 7 of the act or by provision in § 10 for refund to dissatisfied producer. *Agricultural Commodities Auth. v. Balkcom*, 215 Ga. 107, 109 S.E.2d 276 (1959).

Term “debt,” as used in this paragraph, refers to the principal of the debt due, exclusive of unearned interest on the debt. *City Council v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S.E. 907 (1899); *Epping v. City of Columbus*, 117 Ga. 263, 43 S.E. 803 (1903), overruled on other grounds, 141 Ga. 322, 80 S.E. 1010 (1914) (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

None of the purposes of taxation enumerated by this paragraph are broad enough to include acquisition of a railroad. *Park v. Candler*, 113 Ga. 647, 39 S.E. 89 (1901) (see Ga. Const.

1983, Art. VII, Sec. III, Para. I).

Purpose for Exercising Powers of Taxation

1. Support of State Government and Public Institutions

This paragraph authorizes levy of an ad valorem tax upon all property in the state for support of public institutions, which includes the superior courts. *Clark v. Hammond*, 134 Ga. 792, 68 S.E. 600 (1910) (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

2. Educational Purposes

Constitution adheres to the strict requirement that all school funds be devoted to educational purposes as defined in the statutes and Constitution of this state. *Sheley v. Board of Pub. Educ.*, 132 Ga. App. 314, 208 S.E.2d 126 (1974), cert. dismissed, 233 Ga. 487, 212 S.E.2d 627 (1975).

Neither payment nor settlement of a claim is within the ambit of "educational purpose" for which alone a school board may spend its funds. *Sheley v. Board of Pub. Educ.*, 132 Ga. App. 314, 208 S.E.2d 126 (1974), cert. dismissed, 233 Ga. 487, 212 S.E.2d 627 (1975).

3. Payment of Public Debt

Loaning of money to political subdivisions of this state or authorities controlled by them is not a permitted purpose for which public funds may be used under this paragraph and, therefore, it is not a facility or service of the state within the meaning of that term in Ga. Const. 1976, Art. IX, Sec. VI, Para. I (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I). *Mulkey v. Quillian*, 213 Ga. 507, 100 S.E.2d 268 (1957) (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

Former Code 1933, § 58-706.1 (see now O.C.G.A. Art. 4, Ch. 5, T. 3) did not impose a state tax for state purposes, which would invoke this paragraph and Ga. Const. 1976, Art. VII, Sec. I, Para. III (see Ga. Const. 1983, Art. VII, Sec. I, Para. III); instead, it imposes a state tax for local purposes, and the counties' adherence to the tests of Ga. Const. 1976, Art.

IX, Sec. V, Paras. I and II (see Ga. Const. 1983, Art. IX, Sec. IV), delineating the allowable scope of county purposes of taxation is all that is required. *Chanin v. Bibb County*, 234 Ga. 282, 216 S.E.2d 250 (1975) (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

4. Construction and Maintenance of State Facilities

Provided the authority has been established for a valid public purpose, the legislature may appropriate money for administrative expenses of that authority and such appropriation would be a valid use of tax funds under this paragraph. *Rich v. State*, 237 Ga. 291, 227 S.E.2d 761 (1976) (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

State docks and promotion of natural resources. — This paragraph authorizes the state to levy taxes to be used to construct and maintain state docks, and to promote natural resources of the state. The acquisition, construction, maintenance, and operation of public ports, docks, wharves and related facilities is a function ordinarily carried on by the state, or a state instrumentality, and is a legitimate function of state government. *Sigman v. Brunswick Port Auth.*, 214 Ga. 332, 104 S.E.2d 467 (1958).

The Ports Authority is a creature of the state, and in the operation of the docks, wharves, etc., it does so as the instrumentality of the state for governmental purposes as authorized by the Constitution. The Ports Authority as an employer comes within the exception provision of 29 U.S.C. §§ 151-168 of the National Labor Relations Act and is not subject to the jurisdiction of the National Labor Relations Board. *International Longshoremen's Ass'n v. Georgia Ports Auth.*, 217 Ga. 712, 124 S.E.2d 733, cert. denied, 370 U.S. 922, 82 S. Ct. 1561, 8 L. Ed. 2d 503 (1962).

This paragraph and Ga. Const., Art. IX, Sec. VI, Para. I (see Ga. Const. 1983, Art. IX, Sec. III, Para. I), are in *pari materia*, and must be construed together. When so construed, ample authority is found in the Constitution for those provisions of former Code 1933, Ch. 95A-12 (see now O.C.G.A. Art. 1, Ch. 10, T.

Purpose for Exercising Powers of Taxation (Cont'd)

4. Construction and Maintenance of State Facilities (Cont'd)

32) which authorize the State Highway Department (now Department of Transportation) to expend appropriated tax funds for purpose of renting bridge facilities from the State Bridge Building (now Georgia Highway) Authority for state highway uses. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953) (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

5. Contributions to State Employees' Retirement Systems

Allocation of a portion of the fines and forfeitures collected in this state to the Peace Officers' Annuity and Benefit Fund is not an unauthorized tax in violation of this paragraph. *McCallum v. Moore*, 215 Ga. 705, 113 S.E.2d 202 (1960); *Cole v. Foster*, 207 Ga. 416, 61 S.E.2d 814 (1950) (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

PURPOSES SUPPORTABLE BY EXERCISE OF TAXATION POWERS

1. STATE GOVERNMENT AND PUBLIC INSTITUTIONS
2. EDUCATIONAL PURPOSES
3. WELFARE BENEFITS
4. STATE EMPLOYEES RETIREMENT SYSTEMS
5. SCHOOL LUNCH PURPOSES
6. PROMOTION OF STATE QUALITIES AND RESOURCES
7. PUBLIC TRANSPORTATION
8. SUPPORT SCHOOL PROGRAMS

General Consideration

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. VII, Sec. II, Para. I and antecedent provisions, relating to specific allowable purposes of taxation, are included in the annotations for this paragraph.

Former Code 1933, § 32-403 (see now O.C.G.A. § 20-2-11) did not exceed this paragraph's constitutional limitations on the use of moneys derived from state taxation. 1963-65 Op. Att'y Gen. p. 697. (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

For the state to provide with state funds an awards luncheon would violate Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (1) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI) prohibiting granting any donation or gratuity in favor of any person, corporation, or association. 1971 Op. Att'y Gen. No. 71-42.

Department of Public Safety may expend funds allotted by the Office of

Planning and Budget for purpose of printing posters and leaflets in connection with campaign to promote safe driving. 1945-47 Op. Att'y Gen. p. 601.

Purposes Supportable by Exercise of Taxation Powers

1. State Government and Public Institutions

State departments, institutions, or agencies can pay dues and membership fees in various state and national organizations from state appropriated funds. 1968 Op. Att'y Gen. No. 68-110.

2. Educational Purposes

Expression "for educational purpose" is to be given the broadest significance; the expression is "... broad enough to cover all things necessary or incidental to the furtherance of education ...," but the scope of the expression does

not extend to any measure that might incidentally prove to be of assistance to a program of education. 1975 Op. Att'y Gen. No. 75-33.

The phrase "educational purposes" in this paragraph does not include a school lunch program. 1952-53 Op. Att'y Gen. p. 71. (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

Expenditure not necessarily for school purpose because of name. — Since the impediment to the expenditure of school funds for purposes other than school or educational purposes is constitutional, suffice it to say with reference to the statutory authorization in § 20-2-184, that simply "calling" a proposed expenditure an expenditure "for school purposes" does not necessarily make it an expenditure "for school purposes." 1977 Op. Att'y Gen. No. 77-52.

Local school boards may spend state and local tax funds to maintain debate program; these expenditures may include payment of debate meet registration fees for individuals and schools. 1981 Op. Att'y Gen. No. 81-20.

State tax funds may be spent on individual and school registration fees for centrally located debate meets. 1981 Op. Att'y Gen. No. 81-20.

Local, but not state, tax funds may be spent on room or board for students attending centrally located debate meets. 1981 Op. Att'y Gen. No. 81-20.

Medical services may or may not be for school purposes. — Answering of the question of whether a given expenditure can be said to be an expenditure "for school purposes" is exceedingly difficult and an area as broad as "medical services" is not one which can be said to be either wholly within or wholly without the outer limits of a lawful expenditure "for school purposes." 1977 Op. Att'y Gen. No. 77-52.

Some forms of medical service have such direct and substantial relationship to the educational process as to render it unlikely a court would not authorize expenditure of school funds for such service at least where arguably authorized by statute. 1976 Op. Att'y Gen. No. 76-44.

School funds cannot lawfully be expended to provide pupils with full

medical care. 1976 Op. Att'y Gen. No. 76-44.

Expenditure of school funds for construction of public library facilities is educational purpose. — In view of the inherent nature of library facilities as a learning tool and the pervasive relationship between educational authorities and library systems on both state and local governmental levels, together with the stated legislative policy that establishment of a public library service is to be part of the provisions for public education in this state, the use of common school funds for construction of public library facilities is an expenditure for educational purposes. 1975 Op. Att'y Gen. No. 75-33.

An expenditure involving expenses for conducting a Junior Fire Marshal Camp is not an illegal expenditure, it being a constitutional and authorized educational expense authorized by Ga. L. 1949, p. 1057, § 26 (see now O.C.G.A. § 25-2-31). 1963-65 Op. Att'y Gen. p. 446.

Expenditure of school funds for payment of rewards offered for information concerning damage to and destruction of school property is not an expenditure for educational purposes, and therefore not a lawful use of general school funds. 1974 Op. Att'y Gen. No. 74-122.

Paying school personnel for unused sick or personal leave. — Concerning the legality of a school system paying personnel for unused sick or personal leave, there does not seem to be any extant constitutional or statutory prohibition of making such payments as a part of an overall compensation plan, provided that specific peripheral statutory requirements, such as those pertaining to the maximum number of days of sick leave which can be accumulated, are not violated. 1986 Op. Att'y Gen. No. U86-19 (decided under former § 20-2-284).

3. Welfare Benefits

Payment of unemployment compensation coverage for state or local employees of public hospitals and institutions of higher learning would be authorized by this paragraph and Ga. Const. 1976, Art. IX, Sec. V, Para. II (8) (see Ga. Const. 1983, Art. IX, Sec. IV,

Purposes Supportable by Exercise of Taxation Powers (Cont'd)

3. Welfare Benefits (Cont'd)

Para. II) to provide necessary welfare benefits as specified by the General Assembly. 1971 Op. Att'y Gen. No. 71-35 (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

4. State Employees Retirement Systems

Must be actual employee, dependent, or survivor. — No one except employees actually in employment of such governmental agencies, or dependents, or survivors of such employees can be covered by an act of the General Assembly relating to any program of benefits financed through taxation of public funds raised by taxation. 1958-59 Op. Att'y Gen. p. 233.

5. School Lunch Purposes

Use of public funds for school lunches not applicable to independent school systems. — This paragraph, enabling the General Assembly to authorize counties to use public funds for school lunch purposes, does not confer any authority or enable the General Assembly to confer any authority upon independent school systems to use public funds for such purposes. 1960-61 Op. Att'y Gen. p. 167.

State Board of Education determines allocation of lunch funds. — The proper authority to determine how much of the state funds allocated for school lunch purposes shall be spent is the State Board of Education which in determining what it believes to be necessary in the way of state fiscal assistance could presumably take into account the amount of available funds from other areas such as local taxation and federal grants. 1977 Op. Att'y Gen. No. 77-8.

Effect of federal funds. — Provided that state funds allocated by the State Board of Education "for school lunch purposes" are expended for this purpose and none other, there is no legal, as opposed to state board policy, restriction on the use of such funds flowing from the fact that the school lunch programs of local school sys-

tems also receive federal fiscal support. 1977 Op. Att'y Gen. No. 77-8.

Restrictions on use established by State Board of Education. — Provided that state funds appropriated for support of school lunch programs of local school systems are not expended for other than school lunch purposes, restrictions on and reasonable conditions appertaining to the use of such funds by local school systems is a matter to be determined by policies, rules, and regulations of the State Board of Education. 1977 Op. Att'y Gen. No. 77-8.

Neither state nor local school funds may be used to provide lunches for children not enrolled in the public school program. 1974 Op. Att'y Gen. No. 74-155.

Students not enrolled in public school. — No direct provision of law prohibits a local school system from providing school lunches for children not enrolled in the public school program, assuming full reimbursement is made to the school system for expenses incurred in the providing of such service. 1974 Op. Att'y Gen. No. 74-155.

Charges for school meals sold to employees. — From a viewpoint of state law, since there are no longer any apparent state constitutional restrictions (as opposed to statutory and regulatory authorizations and restraints) respecting charges for school meals, in determining the sum it will charge teachers and other school employees for school meals, a local school system may properly exclude those indirect costs which the school system would have to bear whether or not the meals were sold to teachers and employees as well as to students; it would be permissible for a local school system to calculate the sum to be charged to the teacher or other employee based upon direct costs only. 1985 Op. Att'y Gen. No. 85-23.

6. Promotion of State Qualities and Resources

Grant of donation or gratuity prohibited even though General Assembly can appropriate funds for comparable purposes. — The General Assembly could tax for, and appropriate

funds for, the same purposes as may be intended by Ducks Unlimited, e.g., recreation, conservation of the natural resources of the state, etc.; however, this does not mean the General Assembly may grant a donation or gratuity, in violation of Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (1) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI) prohibition, in order to effectuate the purposes for which it is authorized to levy taxes. 1971 Op. Att'y Gen. No. 71-128.

An agency or department of the state may employ Atlanta Historical Society to obtain information in connection with advertising and promoting historical resources. 1945-47 Op. Att'y Gen. p. 287.

7. Public Transportation

Under this paragraph, it is immaterial that the state appropriation might exceed 10 percent of some individual contract, as long as 10 percent of the total overall cost of the project is not exceeded. 1969 Op. Att'y Gen. No. 69-318. (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

Partial reimbursement allowed. — This paragraph allows partial reimbursement of expenses incurred by two or more separate instrumentalities, working on the same transportation project. 1969 Op. Att'y Gen. No. 69-318. (see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

8. Support School Programs

Valid expenditure of school funds by county school board. — The expenditure of public school funds by a county board of education to run sewer lines from its schools to city sewer lines on nearby city streets, and to purchase sewage disposal services from the city, would not violate any constitutional or statutory provision of the State of Georgia. 1967 Op. Att'y Gen. No. 67-85.

In-service training for teachers. — The State Board of Education is fully authorized by law to make grants to local school systems for purpose of enabling local systems to provide in-service train-

ing for teachers in their employment. 1965-66 Op. Att'y Gen. No. 65-79.

Common school funds can lawfully be used for support of "community school programs," which programs are ordinarily conducted after normal school hours and consist of various activities of an educational nature provided for the general citizenry without violating constitutional prohibitions on the expenditure of school funds for purposes other than "school" or "educational" purposes. 1977 Op. Att'y Gen. No. 77-60.

Public school funds cannot lawfully be expended for extra-curricular athletic teams such as football and basketball teams. 1971 Op. Att'y Gen. No. 71-10; 1979 Op. Att'y Gen. No. U79-6.

School funds may not legally be used to purchase uniforms for school lunch personnel. 1967 Op. Att'y Gen. No. 67-182.

Correction of drainage problem at stadium owned by public authority not educational purpose. — Where the State Board of Education received \$15,000 from the Governor's Emergency Fund and these funds were then transferred to the Dougherty County Board of Education, and the Dougherty County Board of Education used the funds to alleviate a drainage problem at the Mills Memorial Stadium, which is owned and operated by the Albany Stadium Authority; the funds involved in this transfer were state funds, and correction of the drainage problems at the stadium is not an "educational purpose" and was an improper expenditure of state funds. 1979 Op. Att'y Gen. No. 79-41.

Neither the State Board of Education nor local boards of education can lawfully use school funds for room and board, other than school lunches, or for medical, including psychiatric treatment or services beyond such evaluation as is necessary to placement and the determination of the proper educational program for a given child. 1979 Op. Att'y Gen. No. 79-1.

Improper expenditures of school funds. — Expenditures for an annual physical examination of a School Superin-

Purposes Supportable by Exercise of Taxation Powers (Cont'd)**8. Support School Programs (Cont'd)**

tendent, for a faculty banquet, and for

payment of insurance premiums for members of a high school football team would be improper objects for the expenditure of common school funds. 1971 Op. Att'y Gen. No. 71-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, State and Local Taxation, § 36 et seq.

C.J.S. — 84 C.J.S., Taxation, § 21 et seq.

ALR. — Constitutionality of statutes providing for bounty or pension for soldiers, 7 ALR 1636; 13 ALR 587; 15 ALR 1359; 147 ALR 1432; 156 ALR 1458.

Construction and effect of soldiers' bounty laws, 13 ALR 594; 35 ALR 791; 22 ALR2d 1134.

Taxes paid or due to federal government as deductible in computing state personal property or income tax, 35 ALR 1457.

Scope and effect of express constitutional provisions prohibiting Legislature from imposing taxes for county and corporate purposes, or providing that Legislature may invest power to levy such taxes in local authorities, 46 ALR 609; 106 ALR 906.

Power of state to tax royalties from patents, 55 ALR 931.

What are "commodities" within meaning of constitutional provision for excise tax, 63 ALR 956.

Schools: free textbooks and other school supplies for individual use of pupils, 67 ALR 1196.

Classification as regards counties or other political divisions permissible in statute imposing cost of construction or maintenance of highways upon property specially benefited, 77 ALR 1285.

Obligation payable from special fund created by imposition of fees, penalties, or excise taxes as a "debt" within constitutional debt limitation, 100 ALR 900.

Scope and effect of express constitutional provisions prohibiting Legislature from imposing tax for county or corporate purposes, or providing that Legislature may invest power to levy such taxes in local authorities, 106 ALR 906.

Constitutionality of chain store tax, 112 ALR 305.

Encouragement or promotion of industry not in nature of public utility, carried on by private enterprise, as public purpose for which tax may be imposed or public money appropriated, 112 ALR 571.

Statute or ordinance in relation to advertising as interference with interstate commerce, 115 ALR 952.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of establishing or maintaining highway, 123 ALR 1462.

State taxation of livestock as affected by federal constitutional or statutory provisions relating to imports, exports, or interstate commerce, 130 ALR 969.

Validity of statute or municipal ordinance which provides generally that occupations or businesses for which no specific license tax has been imposed, shall be subject to a license tax of a specified amount or rate, 134 ALR 841.

Constitutionality, construction, and application of statute imposing tax on business of acquiring notes or other forms of indebtedness secured by retaining title to, or by liens upon, motor vehicles or other specified articles, 140 ALR 1037.

Constitutionality, construction, and application of statute or ordinance imposing license fee or tax upon automobiles or trailers used for habitation, 150 ALR 853.

Tolls as taxes within constitutional provisions respecting taxes, 167 ALR 1356.

What constitutes moral obligation justifying appropriation of public moneys for benefit of an individual, 172 ALR 1407.

Construction and effect of veterans' bonus laws during and after World War II, 22 ALR2d 1134.

Validity, construction, and application of state statutes forbidding possession, transportation, or sale of unstamped or unlicensed cigarettes or other tobacco products, 46 ALR3d 1342.

Paragraph II. Revenue to be paid into general fund.

(a) Except as otherwise provided in this Constitution, all revenue collected from taxes, fees, and assessments for state purposes, as authorized by revenue measures enacted by the General Assembly, shall be paid into the general fund of the state treasury.

(b)(1) As authorized by law providing for the promotion of any one or more types of agricultural products, fees, assessments, and other charges collected on the sale or processing of agricultural products need not be paid into the general fund of the state treasury. The uniformity requirement of this article shall be satisfied by the application of the agricultural promotion program upon the affected products.

(2) As used in this subparagraph, “agricultural products” includes, but is not limited to, registered livestock and livestock products, poultry and poultry products, timber and timber products, fish and seafood, and the products of the farms and forests of this state.

1976 Constitution. — Art. VII, Sec. II, Paras. II, III.

Cross references. — Appropriations, Ga. Const. 1983, Art. III, Sec. IX, Paras. I through VII, and § 50-17-23. Agricultural commodities promotion generally, Ch. 8, T. 2. Marketing facilities, organizations, and programs, Ch. 10, T. 2. Disposition of collected revenues, § 48-2-17. Exemption

of agricultural products from sales and use taxes, §§ 48-8-4 and 48-8-5.

Editor’s notes. — The constitutional amendment (Ga. L. 1996, p. 1671, § 1), which would have rewritten subsection (b), was defeated by a majority of the qualified voters voting at the general election held on November 5, 1996.

JUDICIAL DECISIONS

Georgia Constitution is a limitation upon the power of the General Assembly to tax, and the Constitution requires that the General Assembly not tax except where express constitutional authorization has been granted. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

Express constitutional authorization is required to validate a tax levy by a creature of the state. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

Purpose of Ga. Const. 1976, Art. III, Sec. X, Para. VII (see Ga. Const. 1983,

Art. III, Sec. IX, Para. VII), and of this paragraph was to end the practice of allocating or earmarking particular taxes for the use by any specific department, and to require the General Assembly to appropriate from the general fund specific amounts for each fiscal year for support of each department or agency. *Gregory v. Hamilton*, 215 Ga. 735, 113 S.E.2d 395 (1960) (see Ga. Const. 1983, Art. VII, Sec. III, Para. II).

Cited in *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969); *Board of Comm’rs v. Cooper*, 245 Ga. 251, 264 S.E.2d 193 (1980).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

DISPOSITION OF FUNDS

1. PAYABLE INTO STATE TREASURY
2. RETAINED BY AGENCY

General Consideration

Constitutional requirements generally prohibit state organizations from collecting money and using that money for their own programs. 1971 Op. Att'y Gen. No. 71-126.

This provision was designed to give the General Assembly a more complete and continuous control over state finances than it had previously, when many sources of state income were earmarked for specific purposes. 1977 Op. Att'y Gen. No. 77-77.

Purpose of this paragraph and Ga. Const. 1976, Art. III, Sec. X, Para. I in conjunction with Ga. Const. 1976, Art. III, Sec. X, Para. VII. — Ga. Const. 1976, Art. VII, Sec. II, Paras. II and III (see now Ga. Const. 1983, Art. VII, Sec. III, Para. II), and Ga. Const. 1976, Art. III, Sec. X, Para. I (see Ga. Const. 1983, Art. III, Sec. IX, Para. I), when read in conjunction with Ga. Const. 1976, Art. III, Sec. X, Para. VII (see Ga. Const. 1983, Art. III, Sec. IX, Para. VI), preclude both the practice of allocating particular sources of income for the use of a particular agency and the allocation of the fees, or any part of the fees, collected by the various examining boards to meet their expenses, and further preclude any implied commitment on the part of the General Assembly to appropriate to the examining boards an amount equal to the total fees generated. 1976 Op. Att'y Gen. No. 76-93.

The statutory counterpart to this paragraph is found in Ga. L. 1962, p. 17, § 1 (see now O.C.G.A. § 45-12-92). 1977 Op. Att'y Gen. No. 77-77 (see Ga. Const. 1983, Art. VII, Sec. III, Para. II).

Grant of donation or gratuity prohibited even though General Assembly can appropriate funds for comparable activities. — The General Assembly could tax for, and appropriate funds for, the same purposes as may be intended by Ducks Unlimited, e.g., recreation, conservation of the natural resources of the state, etc.; however, this does not mean the General Assembly may

grant a donation or gratuity, in violation of the state constitutional prohibition, in order to effectuate the purposes for which it is authorized to levy taxes. 1971 Op. Att'y Gen. No. 71-128.

Section 20-2-832 possibly ineffective. — Former Code 1933, § 32-1302 (see now O.C.G.A. § 20-2-832) was now ineffective since adoption of the 1945 Constitution which abolished, by provisions of this paragraph, special or allocated funds and required that all funds of the state be paid into the general fund of the state treasury and appropriated therefrom as required by the Constitution, and Ga. Const. 1976, Art. VII, Sec. III, Para. I (see Ga. Const. 1983, Art. VII, Sec. IV, Paras. I through V) limited the purposes and the amounts to those therein specified that may be borrowed by the state. 1948-49 Op. Att'y Gen. p. 642 (see Ga. Const. 1983, Art. VII, Sec. III, Para. II).

Method of funding Real Estate Commission. — The lawful method of distribution of funds to the Real Estate Commission calls for the Secretary of State to exercise the Secretary's discretion in dividing the total appropriation for the Joint Secretary's office among the various examining boards including the Georgia Real Estate Commission. 1976 Op. Att'y Gen. No. 76-93.

Constitutional amendment required for assessment program. — Absent a constitutional amendment, a program to assess testing of equines for equine infectious anemia cannot be established. 1995 Op. Att'y Gen. No. 95-18.

Disposition of Funds**1. Payable into State Treasury**

A state agency is not authorized to collect fees and deposit those fees in its own account, but rather such fees must be paid over in compliance with this paragraph and Ga. Const. 1976, Art. III, Sec. X, Para. I (see Ga. Const. 1983, Art. III, Sec. IX, Para. I). 1948-49 Op. Att'y Gen. p. 631. (see Ga. Const. 1983, Art. VII, Sec. III, Para. II).

Payment into treasury of money recovered for contractual violations as delinquent accounts. — While the constitutional provisions concerning collections and appropriations do not specifically provide that money recovered for contractual violations or delinquent accounts be paid into the treasury, such money must be paid into the state treasury, and not earmarked. 1971 Op. Att’y Gen. No. 71-126.

Funds received from delinquent state teachers’ scholarships. — Constitutional provisions require that any money which is collected by State Board of Education from delinquent state teachers’ scholarships must be paid into general fund of state treasury and cannot be used in making future scholarship commitments by the State Board of Education. 1971 Op. Att’y Gen. No. 71-126.

Assessments under § 34-9-63. — Assessments made by the State Board of Workers’ Compensation pursuant to authority under former Code 1933, § 114-717 (see now O.C.G.A. § 34-9-63) must be paid into the general fund of the state treasury and the operating expenses of the State Board of Workers’ Compensation may be funded only through an appropriation by the General Assembly. 1974 Op. Att’y Gen. No. 74-62.

Property sales proceeds regulated by statute and payable into state treasury. — Proceeds of property sales may constitutionally be retained by the agency concerned, because such proceeds are not “taxes,” “fees,” or “assessments.” As a matter of statute, however, most such proceeds must be paid into the state treasury: first, such proceeds would in general constitute “other moneys” within the meaning of Ga. L. 1962, p. 17, § 1 (see now O.C.G.A. § 45-12-92); and, second, former Code 1933, § 91-804 provided that the proceeds of sales of unserviceable property shall be paid into the treasury. 1977 Op. Att’y Gen. No. 77-77.

Application fees by the joint secretary, State Examining Boards, which are paid into the state treasury are nonrefundable unless there is express statutory authority to do so. 1975 Op. Att’y Gen. No. 75-69.

2. Retained by Agency

When agencies permitted to retain funds. — If the collection of funds does not depend upon a statutory premise, a statutory command or authorization to collect the funds, then the funds may be retained by the agency concerned. 1977 Op. Att’y Gen. No. 77-77.

All incoming funds are to be placed in the state treasury, unless a specific reason can be found which justifies their retention by an individual agency. 1977 Op. Att’y Gen. No. 77-77.

Gifts and grants, whether federal or private, may be retained by an agency recipient as gifts and grants and are not “taxes,” “fees,” or “assessments”; nor is an agency under a legal duty to collect them, although some agencies are by law authorized or required to accept whatever gifts may be made available to them. 1977 Op. Att’y Gen. No. 77-77.

Revenues received by one agency from another agency need not be deposited in state treasury. — The constitutional and statutory provisions, when they speak of revenues, refer to outside receipts; revenues which are received by one agency from another agency, unlike outside receipts, are already subject to the annual appropriations process; therefore, such revenues need not be deposited into the state treasury to insure that the General Assembly can exercise control over state finances. 1977 Op. Att’y Gen. No. 77-77.

With respect to character examination fees paid by prospective members of the bar, neither the Constitution nor Ga. L. 1962, p. 17, § 1 (see now O.C.G.A. Part 1, Art. 4, Ch. 12, T. 45) requires that such fees be deposited into the state treasury. 1977 Op. Att’y Gen. No. 77-77.

Other bar examination fees not remitted to state treasury. — Fees, generated by proposed rules of the Supreme Court creating a board to determine fitness of bar applicants and an office of bar admissions (now Board of Bar Examiners), are not to be collected pursuant to any revenue statute and these fees do not have to be remitted to the state treasury. 1977 Op. Att’y Gen. No. U77-10.1.

Disposition of Funds (Cont'd)
2. Retained by Agency (Cont'd)

Income generated by judicial branch. — Certain income generated by the judicial branch of government, including dues paid by members of the State Bar of Georgia, fees paid to the office of bar admissions (now Board of Bar Examiners) by applicants for admission to the bar, and fees paid by court reporters to the board of court reporting of the judicial council, may be retained by the judicial branch. 1977 Op. Att'y Gen. No. 77-77.

Funds Department of Offender Rehabilitation (now Department of Corrections) and Department of Human Resources permitted to retain. — As there is no specific statutory premise for collecting room and board charges from probationers, by the Department of Offender Rehabilitation (now Department of Corrections), or for collecting meal money from employees working in group homes operated by the Department of Human Resources, these funds may be retained by the respective departments. 1977 Op. Att'y Gen. No. 77-77.

Funds donated to and accepted by the Department of Public Safety for a designated purpose need not be deposited in the state treasury. 1974 Op. Att'y Gen. No. 74-140.

Company funds to public entity for specific research purpose. — Funds made available to the Surface Mined Land Use Board (now Environmental Protection Division of Department of Natural Resources) by a mining company for specific research need not be paid into the general fund of the state treasury since the moneys involved do not constitute money collected from taxes, fees, and assessments under the authority of revenue statutes of this state. 1970 Op. Att'y Gen. No. 70-29.

Subsequent Injury Trust Fund. — The Subsequent Injury Trust Fund is not subject to the requirement that monies be paid into the general fund of the state treasury. 1993 Op. Att'y Gen. No. 93-28.

Commissions paid state agencies by telephone companies for the privilege of locating pay telephones on state property are not required to be deposited into the state treasury. 1997 Op. Att'y Gen. No. 97-26.

RESEARCH REFERENCES

ALR. — Validity of special statute authorizing exemption of industrial concern from taxation, 64 ALR 1217.

Encouragement or promotion of industry not in nature of public utility, carried on by private enterprise, as public pur-

pose for which tax may be imposed or public money appropriated, 112 ALR 571.

What constitutes moral obligation justifying appropriation of public moneys for benefit of an individual, 172 ALR 1407.

Paragraph III. Grants to counties and municipalities.

State funds may be granted to counties and municipalities within the state. The grants authorized by this Paragraph shall be made in such manner and form and subject to the procedures and conditions specified by law. The law providing for any such grant may limit the purposes for which the grant funds may be expended.

1976 Constitution. — Art. VII, Sec. II, Para. IV.

Cross references. — Grants of state funds to municipal corporations, Ch. 40, T. 36.

Law reviews. — For article, "The

County Spending Power: An Abbreviated Audit of the Account," see 16 Ga. L. Rev. 599 (1982).

For note discussing Georgia's local options sales tax, Art. 2, Ch. 8, T. 48, see 31 Mercer L. Rev. 313 (1979).

JUDICIAL DECISIONS

Purposes for which the state may tax are listed in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I) and Ga. Const, 1976, Art. VII, Sec. II, Para. IV (see Ga. Const. 1983, Art. VII, Sec. III, Para III). City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

It can never be a valid county purpose to provide revenue to a municipality, because municipalities are not citizens of nor creatures of counties — they are an entirely different form of government. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

Express constitutional authorization is required to validate a tax levy by a creature of the state. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

Source for purposes of levying taxes. — The list of purposes for which the state may tax listed in Ga. Const.

1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I), and Ga. Const, 1976, Art. VII, Sec. II, Para. IV (see Ga. Const. 1983, Art. VII, Sec. III, Para III) is the only source of purposes of taxation for which the state may validly delegate to its creatures the power to tax. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

Right of state to tax to grant funds to municipalities not delegable. — Though the purposes listed in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I) are capable of delegation, the right of the state to tax in order to grant funds to municipalities pursuant to this paragraph is not capable of delegation to counties or to any other subdivision of the state. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

Cited in City of Valdosta v. Blum, 182 Ga. 174, 184 S.E. 700 (1936).

OPINIONS OF THE ATTORNEY GENERAL

Legislature has a great deal of latitude in providing the manner, form and procedure for granting of funds to municipalities, including the authority to amend the present law so as to include municipalities incorporated later than 1960. 1967 Op. Att’y Gen. No. 67-409.

Grants to insolvent counties. — The General Assembly may make grants of state funds to insolvent counties upon such reasonable conditions as are not otherwise constitutionally prohibited. 1986 Op. Att’y Gen. No. U86-3.

RESEARCH REFERENCES

ALR. — Home rule charter as affecting power of Legislature in respect of municipal taxation, 106 ALR 1202.

What constitutes moral obligation justifying appropriation of public moneys for benefit of an individual, 172 ALR 1407.

Paragraph IV. Increase in state income tax rate prohibited.

The General Assembly shall not increase the maximum marginal rate of the state income tax above that in effect on January 1, 2015. (Ga. Const. 1983, Art. 7, § 3, Para. 4, approved by Ga. L. 2014, p. 88, § 1/SR 415.)

Editor’s notes. — The constitutional amendment (Ga. L. 2014, p. 88, § 1/SR 415) which added this section was ratified

at the general election held on November 4, 2014.

SECTION IV.

STATE DEBT

Paragraph	Paragraph
I. Purposes for which debt may be incurred.	Investment Commission; duties.
II. State general obligation debt and guaranteed revenue debt; limitations.	VIII. State aid forbidden.
III. State general obligation debt and guaranteed revenue debt; conditions upon issuance; sinking funds and reserve funds.	IX. Construction.
IV. Certain contracts prohibited.	X. Assumption of debts forbidden; exceptions.
V. Refunding of debt.	XI. Section not to unlawfully impair contracts or revive obligations previously voided.
VI. Faith and credit of state pledged debt may be validated.	XII. Multiyear contracts for energy efficiency or conservation improvement.
VII. Georgia State Financing and	XIII. Multiyear rental agreements.

Cross references. — Financing of public projects by local entities, § 36-80-25.

Editor’s notes. — The constitutional amendment proposed by Ga. L. 2010, p. 1263, § 1, which would have added Para-

graph XII to allow the state to execute multiyear contracts for long-term transportation projects, was defeated at the general election held on November 2, 2010.

Paragraph I. Purposes for which debt may be incurred.

- The state may incur:
- (a) Public debt without limit to repel invasion, suppress insurrection, and defend the state in time of war.
 - (b) Public debt to supply a temporary deficit in the state treasury in any fiscal year created by a delay in collecting the taxes of that year. Such debt shall not exceed, in the aggregate, 5 percent of the total revenue receipts, less refunds, of the state treasury in the fiscal year immediately preceding the year in which such debt is incurred. The debt incurred shall be repaid on or before the last day of the fiscal year in which it is incurred out of taxes levied for that fiscal year. No such debt may be incurred in any fiscal year under the provisions of this subparagraph (b) if there is then outstanding unpaid debt from any previous fiscal year which was incurred to supply a temporary deficit in the state treasury.
 - (c) General obligation debt to acquire, construct, develop, extend, enlarge, or improve land; waters, property, highways, buildings,

structures, equipment, or facilities of the state, its agencies, departments, institutions, and of those state authorities which were created and activated prior to November 8, 1960.

(d) General obligation debt to provide educational facilities for county and independent school systems and to provide public library facilities for county and independent school systems, counties, municipalities, and boards of trustees of public libraries or boards of trustees of public library systems, and, when the construction of such educational or library facilities has been completed, the title to such facilities shall be vested in the respective local boards of education, counties, municipalities, or public library boards of trustees for which such facilities were constructed.

(e) General obligation debt in order to make loans to counties, municipal corporations, political subdivisions, local authorities, and other local government entities for water or sewerage facilities or systems or for regional or multijurisdictional solid waste recycling or solid waste facilities or systems. It shall not be necessary for the state or a state authority to hold title to or otherwise be the owner of such facilities or systems. General obligation debt for these purposes may be authorized and incurred for administration and disbursement by a state authority created and activated before, on, or after November 8, 1960.

(f) Guaranteed revenue debt by guaranteeing the payment of revenue obligations issued by an instrumentality of the state if such revenue obligations are issued to finance:

(1) Toll bridges or toll roads.

(2) Land public transportation facilities or systems.

(3) Water facilities or systems.

(4) Sewage facilities or systems.

(5) Loans to, and loan programs for, citizens of the state for educational purposes.

(6) Regional or multijurisdictional solid waste recycling or solid waste facilities or systems. (Ga. Const. 1983, Art. 7, § 4, Para. 1; Ga. L. 1984, p. 1713, § 1/SR 300; Ga. L. 1986, p. 1612, § 1/HR 363; Ga. L. 1992, p. 3329, §§ 1, 2/HR 732)

1976 Constitution. — Art. VII, Sec. III, Para. I.

Cross references. — Sinking fund, Ga. Const. 1983, Art. VII, Sec. IV, Para. III, and § 50-17-23. County and municipal debts, Ga. Const. 1983, Art. IX, Sec. V, Paras. I through VII. Duties incurred for

defense, § 38-2-173. As to general obligation debt and guaranteed revenue debt, § 50-17-23. Administration of public debt, § 50-17-24 et seq.

Editor's notes. — The constitutional amendment (Ga. L. 1984, p. 1713, § 1) which revised subparagraph (d) by insert-

ing “and to provide public library facilities...of public library systems,” inserting “or library” preceding “facilities has been completed,” and inserting “counties, municipalities, or...boards of trustees” preceding “for which such facilities,” and deleting “educational” preceding “facilities shall be vested,” was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

The constitutional amendment (Ga. L. 1986, p. 1612, § 1) which redesignated

former subparagraph (e) as subparagraph (f) and which added present subparagraph (e) was approved by a majority of the qualified voters voting at the general election held on November 4, 1986.

The constitutional amendment (Ga. L. 1992, p. 3329, §§ 1, 2) which revised subparagraphs (e) and (f) to add provisions as to regional or multijurisdictional solid waste recycling or solid waste facilities or systems was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VII, Sec. III, Para. I and antecedent provisions are included in the annotations for this paragraph. Current provisions on the same subjects and cases construing them now appear in this paragraph and Paragraphs II through IV of this section.

This paragraph was not violated by Ga. L. 1912, p. 230 for discounting the rentals of the Western and Atlantic Railroad. *Wright v. Hardwick*, 152 Ga. 302, 109 S.E. 903 (1921) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

Proper construction of this paragraph and former Ga. Const. 1976, Art. IX, Sec. VI, Para. I (see now Ga. Const. 1983, Art. VII, Sec. IV, Para. III). — This paragraph and former Ga. Const. 1976, Art. IX, Sec. VI, Para. I (see now Ga. Const. 1983, Art. VII, Sec. IV, Para. III), were each in the Constitution of 1945 when it was adopted. They deal with the same subject matter, namely, “finance, taxation & public debt.” They are of equal dignity and to give full force and effect to the will of the people, as thus expressed, they must be construed together, in *pari materia*. The latter lifts out of the former any inhibition against creation of a debt insofar as creation of a debt is authorized by the latter clause. Any other construction would render one of them meaningless and the Supreme Court will not ascribe to the people an intention to adopt a Constitution containing inconsistent provisions. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953)

(decided under Ga. Const. 1945, Art. IX, Sec. VI, Para. I; see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

This paragraph permits the legislature to authorize debt for any purpose that is consistent with the terms of subparagraph (c). *Fuller v. State*, 232 Ga. 581, 208 S.E.2d 85 (1974) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

An authority, being an agent of the state but not the state, is not restricted by state's debt limitation under this paragraph. *Rich v. State*, 237 Ga. 291, 227 S.E.2d 761 (1976) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

Word “debt” means any obligation of the state to pay money or other thing of value, which obligation arises the very moment that it is undertaken, and continues until discharged by payment. *Barwick v. Roberts*, 188 Ga. 655, 4 S.E.2d 664 (1939).

Warrant does not evidence a debt on the part of the state. It creates no contract. *Harrison v. Hardman*, 169 Ga. 435, 150 S.E. 542 (1929).

Effect of tendering executive warrant upon state treasury. — An executive warrant upon the state treasury, authorizing payment of money in pursuance of an appropriation made by law, is not a contract nor in the nature of a contract, but is only a license or power, and is revocable so long as the payment which it warranted has not been made. *Harrison v. Hardman*, 169 Ga. 435, 150 S.E. 542 (1929).

Should a fund fail to materialize, whatever rights and privileges purchasers

of warrants may have had, had not their obligations against state been so met, are not absolutely extinguished in all respects, but shall continue to exist or remain in abeyance for benefit of holders of corresponding warrants should the specific fund for their payment fail to materialize. No debt is thus created by or on behalf of the state, but as part of consideration for sale and discount of the warrants. The holders in a given contingency are allowed certain rights which other obligees formerly had against the state which had never been entirely extinguished, but had been preserved for such holders upon a contingency. *Harrison v. Hardman*, 169 Ga. 435, 150 S.E. 542 (1929).

Instance of debt inhibited and invalid pursuant to state Constitution.

— An agreement between the Commissioner of Agriculture and an individual, whereby the Commissioner, in consideration of an assignment to the Commissioner of a number of leases to lands on which the state farm market is located, promises to pay the assignor, in addition to the consideration expressed in the assignment, \$100.00 per month for a period of several years, such promise is a debt inhibited by the Constitution, and cannot be enforced, nor would full performance by the assignor of the agreement impose any legal duty on the state or its officials to comply with such invalid contract. *Barwick v. Roberts*, 188 Ga. 655, 4 S.E.2d 664 (1939).

Section 32-10-9 does not violate the debt restriction and limitation provision of the state Constitution. — Neither Ga. L. 1953, Jan.-Feb. Sess., p. 626 (see now O.C.G.A. Art. 1, Ch. 10, T. 32), nor the lease contract which the state highway department (now Department of Transportation) made with the State Bridge Building (now Georgia Highway) Authority under and pursuant to Ga. L. 1953, Jan.-Feb. Sess., p. 626, § 8 (see now O.C.G.A. § 32-10-9) for the use of its facilities or services violates the debt restriction and limitation provision of the Constitution. On their face they do not run counter to the Constitution, and the Supreme Court will not attribute to state lawmakers a purpose to circumvent the

provisions of that instrument. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Ga. L. 1953, Jan.-Feb. Sess., p. 626, § 14 (see now O.C.G.A. § 32-10-30), insofar as it authorized issuance of negotiable revenue bonds, did not offend the constitutional provisions. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Highway Authority's revenue bonds not state obligations or debts.

— While the State Bridge Building (now Georgia Highway) Authority is an instrumentality of the state, it is nevertheless not the state, nor a part of the state, nor an agency of the state. It is a mere creature of the state, having a distinct corporate entity. Its revenue bonds are not obligations or debts of the state, nor a pledge of the credit of the state, but they are payable solely and exclusively from revenue derived from use of its facilities; and the state is not directly, indirectly, or contingently obligated to levy or pledge any form of taxation whatsoever therefor or to make any appropriation for the payment of them, and Ga. L. 1953, Jan.-Feb. Sess., p. 626, § 23 (see now O.C.G.A. § 32-10-39), requires that the bonds, when issued, must contain recitals on their face to this effect. They are first, last, and always a corporate debt of the authority and in no sense a debt of the state. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Ga. L. 1949, p. 1009 (see now O.C.G.A. Art. 5, Ch. 3, T. 20), forbids any attempt to obligate the state, pledge the state's faith or credit, or donate anything belonging to the state; therefore, neither the article, lease contract executed thereunder, nor the revenue bonds issued pursuant thereto offend constitutional inhibitions against state debts, donations, or pledging the faith and credit of the state. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

An obligation incurred by the Board of Regents of the University System of Georgia, is not a debt of the state, and therefore is not affected by constitutional limitations upon state indebtedness. *State v. Regents of Univ. Sys.*, 179 Ga. 210, 175 S.E. 567 (1934).

It cannot be said that creation of a debt by the Regents of the University System of Georgia is unconstitutional under this paragraph. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

Instance of debt contemplated by this paragraph. — Even though the statute establishing state farmers markets provides that fees shall be charged by the markets and used to pay the expenses of establishing and operating them, since the statute does not prohibit other assets of the state from being used in paying such expenses, a debt for an alleged sale of leases of the land on which the market was situated, constituted a debt as contemplated by this paragraph of the state Constitution. *Barwick v. Roberts*, 188 Ga. 655, 4 S.E.2d 664 (1939) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

Conclusiveness of court judgment validating revenue certificates under Art. 3, Ch. 82, T. 36. — A judgment of the superior court validating revenue certificates under Ga. L. 1957, p. 36, § 1 (see now O.C.G.A. Art. 3, Ch. 82, T. 36),

unexcepted to, or affirmed on review, is conclusive against the municipality and the citizens of the municipality upon all questions, including the constitutionality of the statute under which the proceedings are had. *Cox v. Georgia Educ. Auth.*, 225 Ga. 542, 170 S.E.2d 240 (1969).

Construction and improvement of water and sewage treatment facilities are activities that the Georgia Development Authority was expressly empowered to undertake by Ga. L. 1983, pp. 1024, 1026 and are not germane to the authority's powers as they existed before November 8, 1960; therefore, the state may not incur general obligation debt for these new purposes. *Georgia State Fin. & Inv. Comm'n v. State*, 253 Ga. 766, 325 S.E.2d 162 (1985).

Cited in *State Ports Auth. v. Arnall*, 201 Ga. 713, 41 S.E.2d 246 (1947); *State v. State Toll Bridge Auth.*, 210 Ga. 690, 82 S.E.2d 626 (1954); *State v. Blasingame*, 212 Ga. 222, 91 S.E.2d 341 (1956); *Gordon v. Clinkscales*, 215 Ga. 843, 114 S.E.2d 15 (1960); *Carter v. Burson*, 230 Ga. 511, 198 S.E.2d 151 (1973); *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions noted under former Ga. Const. 1976, Art. VII, Sec. III, Para. I and antecedent provisions are included in the annotations for this paragraph. Current provisions on the same subjects and opinions construing them now appear in this paragraph and Paragraphs II through IV of this section.

Section 20-2-832 possibly ineffective. — Former Code 1933, § 32-1302, (see now O.C.G.A. § 20-2-832) was ineffective since adoption of the 1945 Constitution which abolished, by provisions of Ga. Const. 1976, Art. VII, Sec. II, Para. III (see Ga. Const. 1983, Art. VII, Sec. III, Para. II), special or allocated funds and required that all funds of the state be paid into the general fund of the state treasury and appropriated therefrom as required by the Constitution, and this paragraph limited the purposes and the amounts to those therein specified that may be bor-

rowed by the state. 1948-49 Op. Att'y Gen. p. 642. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

County board of education authority to expend funds on facility located on property owned by Georgia Education Authority (Schools). — Since a board of education can expend money to construct a facility and then convey that facility to a public authority, a county board of education is constitutionally authorized to expend funds on a facility that will be located on property owned by the Georgia Education Authority (Schools) since the legal and practical effect is no different; the specific authority in any particular situation will be governed by any local law that might exist. 1975 Op. Att'y Gen. No. 75-51.

Limitations on purposes for issuances of general debt. — In absence of constitutional authority, the state cannot issue general obligation debt to acquire,

construct, develop, extend, or enlarge property of counties or municipalities of the state. 1975 Op. Att'y Gen. No. 75-51.

The state cannot issue general obligation debt with contemplation that title to the financed facility will be given to the county, municipality, or school district because of the constitutional limitation on the purposes for which general obligation debt can be issued. 1975 Op. Att'y Gen. No. 75-51.

Unemployment compensation. — Payment of unemployment compensation is not a purpose for which public debt may be incurred as set forth in Ga. Const. 1976, Art. VII, Sec. II, Paras. I and II (see Ga. Const. 1983, Art. VII, Sec. III, Paras. I and II). 1982 Op. Att'y Gen. No. 82-35.

Funds of private individuals requiring reimbursement. — The Department of Transportation could not use funds of private individuals to construct a project and agree to reimburse those individuals at a later date. 1973 Op. Att'y Gen. No. 73-27.

Contractual obligation violated Constitution. — It is not legal for the Department of Natural Resources or the Parks and Historic Sites Division to incur a contractual obligation with respect to future maintenance of erosion control structures at historic sites. 1965-66 Op. Att'y Gen. No. 65-44.

State park expansion funds. — Commissioner of the Department of Natural Resources is authorized to request issuance of general obligation bonds and execute any subsequent contracts to effect state park expansion project in accordance with powers otherwise vested in the department. 1982 Op. Att'y Gen. No. 82-12.

The state may incur general obligation debt for construction of highways; however, the Department of Transportation is not authorized to incur this debt on behalf of the state because the constitutional amendment gives this power only to the Financing and Investment Commission. 1973 Op. Att'y Gen. No. 73-27.

The Board of Regents cannot contract debts or obligations on behalf of the state in violation of this paragraph of the Constitution. 1948-49 Op.

Att'y Gen. p. 141. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

Obligations running on accounts not prohibited. While this paragraph prohibits the state or its agencies from contracting debts except for certain specified purposes, it does not and could not prohibit incurrence of obligations on running account. 1948-49 Op. Att'y Gen. p. 350.

A repurchase agreement transaction can be an authorized investment of Teachers Retirement System, Employees' Retirement System, and Georgia State Financing and Investment Commission so long as the transaction is intended by the parties to be a sale and repurchase of securities on terms under which such securities might normally be sold, the documents supporting the transaction adequately record that intention of the parties, and the securities involved are those in which the state entity is otherwise authorized to invest. 1979 Op. Att'y Gen. No. 79-62.

Imprudent for state agencies to execute multi-year installment purchase agreements. — While it is not apparent on the face of multi-year installment purchase agreements that a state agency is being asked to pledge the credit in an impermissible manner, the totality of the provisions typically contained in such agreements indicate that they could be construed in their essence to constitute a debt; as such a debt is not one of those authorized by the state Constitution under this paragraph, it is imprudent for state agencies to execute agreements which create such obligations. 1978 Op. Att'y Gen. p. 267. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. I).

Department of Medical Assistance (now Department of Community Health) may not forbear collection of overpayments made to providers. 1980 Op. Att'y Gen. No. 80-89.

Entering into and payment pursuant to enforceable contract for prepayment of professional services is not unlawful. 1981 Op. Att'y Gen. No. 81-29.

Contract to prepay for professional services does not constitute loan of credit. — Prohibition against loaning

credit of state does not prevent state department from entering into enforceable contract to prepay for professional services and to make payment according to such contract. By entering into contract to prepay for professional services one does not promise to make a loan but promises to pay in advance in return for a promise by the other party to perform a service. The payment is not a loan but the satisfaction of an obligation for services to be provided. 1981 Op. Att’y Gen. No. 81-29.

Contract clause requiring state agency to indemnify and hold harmless a private corporation violates paragraph. — Indemnify and hold harmless clause in proposed contract, under which clause a state agency would indem-

nify a private corporation, constitutes both a gratuity and a pledge of state’s credit and thus falls within the prohibitions contained in Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI) and this paragraph. 1980 Op. Att’y Gen. No. 80-67.

State agency or public official cannot hold federal government harmless for claims against it. — Any attempt by a state agency or public official to hold the federal government harmless for claims against it would be an unconstitutional attempt to pledge the credit of the sovereign State of Georgia and, therefore, ultra vires. 1980 Op. Att’y Gen. No. U80-34.

RESEARCH REFERENCES

Am. Jur. 2d. — 72 Am. Jur. 2d, States, Territories, and Dependencies, § 83 et seq.

C.J.S. — 81A C.J.S., States, §§ 365 et seq., 446 et seq.

ALR. — Power of Legislature to add to or make more onerous the conditions or limitations prescribed by Constitution upon incurring public debts, 106 ALR 231.

Right to call governmental bonds in advance of their maturity, 109 ALR 988.

What are “necessary expenses” within exception in constitutional or statutory provision requiring vote of people to authorize contracting of debt by municipality, county, or other political body, or limiting amount of such indebtedness, 113 ALR 1202.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 ALR2d 515.

Paragraph II. State general obligation debt and guaranteed revenue debt; limitations.

(a) As used in this Paragraph and Paragraph III of this section, “annual debt service requirements” means the total principal and interest coming due in any state fiscal year. With regard to any issue of debt incurred wholly or in part on a term basis, “annual debt service requirements” means an amount equal to the total principal and interest payments required to retire such issue in full divided by the number of years from its issue date to its maturity date.

(b) No debt may be incurred under subparagraphs (c), (d), and (e) of Paragraph I of this section or Paragraph V of this section at any time when the highest aggregate annual debt service requirements for the then current year or any subsequent year for outstanding general obligation debt and guaranteed revenue debt, including the proposed debt, and the highest aggregate annual payments for the then current year or any subsequent fiscal year of the state under all contracts then in force to which the provisions of the second paragraph of Article IX,

Section VI, Paragraph I(a) of the Constitution of 1976 are applicable, exceed 10 percent of the total revenue receipts, less refunds of the state treasury in the fiscal year immediately preceding the year in which any such debt is to be incurred.

(c) No debt may be incurred under subparagraphs (c) and (d) of Paragraph I of this section at any time when the term of the debt is in excess of 25 years.

(d) No guaranteed revenue debt may be incurred to finance water or sewage treatment facilities or systems when the highest aggregate annual debt service requirements for the then current year or any subsequent fiscal year of the state for outstanding or proposed guaranteed revenue debt for water facilities or systems or sewage facilities or systems exceed 1 percent of the total revenue receipts less refunds, of the state treasury in the fiscal year immediately preceding the year in which any such debt is to be incurred.

(e) The aggregate amount of guaranteed revenue debt incurred to make loans for educational purposes that may be outstanding at any time shall not exceed \$18 million, and the aggregate amount of guaranteed revenue debt incurred to purchase, or to lend or deposit against the security of, loans for educational purposes that may be outstanding at any time shall not exceed \$72 million.

1976 Constitution. — Art. VII, Sec. III, Para. I.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. VII, Sec. III, Para. I and antecedent provisions are included in the annotations for this paragraph. Current provisions on the same subjects and cases construing them now appear in this paragraph and Paragraphs I, III, and IV of this section.

An authority, being an agent of the state but not the state, is not restricted by state's debt limitation under this paragraph. *Rich v. State*, 237 Ga. 291, 227 S.E.2d 761 (1976) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. II).

Section 32-10-9 not violative of debt restriction and limitation provision of state Constitution. — Neither Ga. L. 1953, Jan.-Feb. Sess., p. 626 (see now O.C.G.A. Art. 1, Ch. 10, T. 32), nor the

lease contract which the state highway department (now Department of Transportation) made with the State Bridge Building (now Georgia Highway) Authority under and pursuant to Ga. L. 1953, Jan.-Feb. Sess., p. 626, § 8 (see now O.C.G.A. § 32-10-9) for the use of its facilities or services violates the debt restriction and limitation provision of the Constitution. On their face they do not run counter to the Constitution; and the Supreme Court will not attribute to state lawmakers a purpose to circumvent the provisions of that instrument. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

An obligation incurred by the Board of Regents of the University System of Georgia, is not a debt of the state, and therefore is not affected by

constitutional limitations upon state indebtedness. *State v. Regents of Univ. Sys.*, 179 Ga. 210, 175 S.E. 567 (1934).

It cannot be said that creation of a

debt by the Regents of the University System of Georgia is unconstitutional. *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. VII, Sec. III, Para. I and antecedent provisions are included in the annotations for this paragraph. Current provisions on the same subjects and cases construing them now appear in this paragraph and Paragraphs I, III, and IV of this section.

Construction of paragraph. — This paragraph is construed as prohibiting incurring a fiscal liability not to be discharged by taxes levied within the year in which the liability is undertaken. 1971 Op. Att'y Gen. No. 71-103. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. II).

"Debt" defined. — Debt, as used in this paragraph and Ga. Const. 1976, Art. IX, Sec. VII, Para. I (see Ga. Const. 1983, Art. IX, Sec. V, Para. I), which forms the basis of the restriction upon public debt, means the incurring of a fiscal liability not to be discharged by taxes levied within the year in which the liability is undertaken.

1975 Op. Att'y Gen. No. 75-19 (decided under Ga. Const. 1945, Art. VII, Sec. III, Para. I; see Ga. Const. 1983, Art. VII, Sec. IV, Para. II).

State contracts in excess of one year are not enforceable. 1970 Op. Att'y Gen. No. 70-8.

As a general rule, a contract which fiscally obligates the state for a period longer than one year is invalid. 1972 Op. Att'y Gen. No. 72-132.

An Area Vocational-Technical School Board may not borrow money to be repaid to the lender over a period of time extending beyond the fiscal year in which the loan was made. 1975 Op. Att'y Gen. No. 75-19 (decided under Ga. Const. 1945, Art. VII, Sec. III, Para. I).

A golf-cart lease contract creating state liability for over a year is in violation of this paragraph. 1972 Op. Att'y Gen. No. 72-59. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. II).

RESEARCH REFERENCES

ALR. — Conclusiveness of official determination of existence of emergency within the contemplation of constitutional or statutory provisions permitting excess of maximum limit of tax or indebtedness in an "emergency", 90 ALR 328.

Obligation payable from special fund created by imposition of fees, penalties, or excise taxes as a "debt" within constitutional debt limitation, 100 ALR 900.

Bonds issued by state officer or board payable solely out of proceeds of obligations of political subdivisions pledged as security as within constitutional or statu-

tory provisions which impose a limit on state indebtedness or require consent of electors, 100 ALR 1114.

Power of Legislature to add to or make more onerous the conditions or limitations prescribed by Constitution upon incurring public deeds, 106 ALR 231.

Obligation to meet which money is appropriated at the time of its creation as an indebtedness within limitation of indebtedness, 134 ALR 1399.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 ALR2d 515.

Paragraph III. State general obligation debt and guaranteed revenue debt; conditions upon issuance; sinking funds and reserve funds.

(a)(1) General obligation debt may not be incurred until legislation is enacted stating the purposes, in general or specific terms, for which such issue of debt is to be incurred, specifying the maximum principal amount of such issue and appropriating an amount at least sufficient to pay the highest annual debt service requirements for such issue. All such appropriations for debt service purposes shall not lapse for any reason and shall continue in effect until the debt for which such appropriation was authorized shall have been incurred, but the General Assembly may repeal any such appropriation at any time prior to the incurring of such debt. The General Assembly shall raise by taxation and appropriate each fiscal year, in addition to the sum necessary to make all payments required under contracts entitled to the protection of the second paragraph of Paragraph I(a), Section VI, Article IX of the Constitution of 1976, such amounts as are necessary to pay debt service requirements in such fiscal year on all general obligation debt.

(2)(A) The General Assembly shall appropriate to a special trust fund to be designated "State of Georgia General Obligation Debt Sinking Fund" such amounts as are necessary to pay annual debt service requirements on all general obligation debt. The sinking fund shall be used solely for the retirement of general obligation debt payable from the fund. If for any reason the monies in the sinking fund are insufficient to make, when due, all payments required with respect to such general obligation debt, the first revenues thereafter received in the general fund of the state shall be set aside by the appropriate state fiscal officer to the extent necessary to cure the deficiency and shall be deposited by the fiscal officer into the sinking fund. The appropriate state fiscal officer may be required to set aside and apply such revenues at the suit of any holder of any general obligation debt incurred under this section.

(B) The obligation to make sinking fund deposits as provided in subparagraph (2)(A) shall be subordinate to the obligation imposed upon the fiscal officers of the state pursuant to the provisions of the second paragraph of Paragraph I(a) of Section VI of Article IX of the Constitution of 1976.

(b)(1) Guaranteed revenue debt may not be incurred until legislation has been enacted authorizing the guarantee of the specific issue of revenue obligations then proposed, reciting that the General Assembly has determined such obligations will be self-liquidating over the

life of the issue (which determination shall be conclusive), specifying the maximum principal amount of such issue and appropriating an amount at least equal to the highest annual debt service requirements for such issue.

(2)(A) Each appropriation made for the purposes of subparagraph (b)(1) shall be paid upon the issuance of said obligations into a special trust fund to be designated "State of Georgia Guaranteed Revenue Debt Common Reserve Fund" to be held together with all other sums similarly appropriated as a common reserve for any payments which may be required by virtue of any guarantee entered into in connection with any issue of guaranteed revenue obligations. No appropriations for the benefit of guaranteed revenue debt shall lapse unless repealed prior to the payment of the appropriation into the common reserve fund.

(B) If any payments are required to be made from the common reserve fund to meet debt service requirements on guaranteed revenue obligations by virtue of an insufficiency of revenues, the amount necessary to cure the deficiency shall be paid from the common reserve fund by the appropriate state fiscal officer. Upon any such payment, the common reserve fund shall be reimbursed from the general funds of the state within ten days following the commencement of any fiscal year of the state for any amounts so paid; provided, however, the obligation to make any such reimbursements shall be subordinate to the obligation imposed upon the fiscal officers of the state pursuant to the second paragraph of Paragraph I(a) of Section VI, Article IX of the Constitution of 1976 and shall also be subordinate to the obligation to make sinking fund deposits for the benefit of general obligation debt. The appropriate state fiscal officer may be required to apply such funds as provided in this subparagraph (b)(2)(B) at the suit of any holder of any such guaranteed revenue obligations.

(C) The amount to the credit of the common reserve fund shall at all times be at least equal to the aggregate highest annual debt service requirements on all outstanding guaranteed revenue obligations entitled to the benefit of the fund. If at the end of any fiscal year of the state the fund is in excess of the required amount, the appropriate state fiscal officer, as designated by law, shall transfer the excess amount to the general funds of the state free of said trust.

(c) The funds in the general obligation debt sinking fund and the guaranteed revenue debt common reserve fund shall be as fully invested as is practicable, consistent with the requirements to make current principal and interest payments. Any such investments shall be restricted to obligations constituting direct and general obligations of

the United States government or obligations unconditionally guaranteed as to the payment of principal and interest by the United States government, maturing no longer than 12 months from date of purchase.

1976 Constitution. — Art. VII, Sec. III, Paras. I, X; Art. IX, Sec. VI, Para. I.

Cross references. — Sinking funds for educational system indebtedness, §§ 20-2-567 and 20-3-166.

Editor's notes. — The subject matter of this paragraph formerly appeared in various portions of the 1976 Constitution (Art. VII, Sec. III, Paras. I and IX and Art.

IX, Sec. VI, Para. I) and antecedent provisions. Cases construing these provisions now appear under Paragraphs I and II of this section and Ga. Const. 1983, Art. IX, Sec. III, Para. I.

Law reviews. — For note discussing and comparing the prudent man rule and the legal list rule in trustee investment, see 15 Mercer L. Rev. 530 (1964).

OPINIONS OF THE ATTORNEY GENERAL

Under this paragraph, the state becomes liable upon a lease contract with an authority; this is an enforceable obligation of the state. This is not to say that the bonds of an authority are direct obligations of the state. 1963-65 Op. Att'y Gen. p. 29. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. III).

General state obligations. — Revenue bonds issued by authorities created

by special acts of legislature and secured by lease rentals from various departments and agencies of state are general obligations of state. 1962 Op. Att'y Gen. p. 25.

County cannot make donations to a water and sewerage authority, but it can enter into contracts with such an authority. 1970 Op. Att'y Gen. No. U70-225.

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 5, 12, 329.

C.J.S. — 81A C.J.S., States, § 365 et seq.

in determining whether indebtedness or proposed indebtedness of municipality or other political subdivision exceeds constitutional or statutory limit, 125 ALR 1393.

ALR. — Existing sinking fund as factor

Paragraph IV. Certain contracts prohibited.

The state, and all state institutions, departments and agencies of the state are prohibited from entering into any contract, except contracts pertaining to guaranteed revenue debt, with any public agency, public corporation, authority, or similar entity if such contract is intended to constitute security for bonds or other obligations issued by any such public agency, public corporation, or authority and, in the event any contract between the state, or any state institution, department or agency of the state and any public agency, public corporation, authority or similar entity, or any revenues from any such contract, is pledged or assigned as security for the repayment of bonds or other obligations, then and in either such event, the appropriation or expenditure of any funds of the state for the payment of obligations under any such contract shall likewise be prohibited.

1976 Constitution. — Art. III, Sec. X, Para. V; Art. VII, Sec. III, Para. I.

JUDICIAL DECISIONS

Garbage collection contract valid. — There was no merit in a resident's arguments that the provision in a contract in which a county agreed to reimburse a private enterprise for a percentage of uncollected fees for garbage collection services prior to the county's recovery of those fees from residents by means pro-

vided by O.C.G.A. § 12-8-39.3 violated Ga. Const. 1983, Art. VII, Sec. IV, Para. IV, prohibiting the state from entering contracts with any public agency, public corporation, authority, or similar entity as security for bonds or other obligations. *Strykr v. Long County Bd. of Comm'rs*, 277 Ga. 624, 593 S.E.2d 348 (2004).

RESEARCH REFERENCES

ALR. — Right of creditor of public body to full or pro rata payment when fund out of which obligation is payable is insufficient to pay all like obligations of equal dignity, 90 ALR 717; 171 ALR 1033.

Bonds issued by state officer or board

payable solely out of proceeds of obligations of political subdivisions pledged as security as within constitutional or statutory provisions which impose a limit on state indebtedness or require consent of electors, 100 ALR 1114.

Paragraph V. Refunding of debt.

The state may incur general obligation debt or guaranteed revenue debt to fund or refund any such debt or to fund or refund any obligations issued upon the security of contracts to which the provisions of the second paragraph of Paragraph I(a), Section VI, Article IX of the Constitution of 1976 are applicable. The issuance of any such debt for the purposes of said funding or refunding shall be subject to the 10 percent limitation in Paragraph II(b) of this section to the same extent as debt incurred under Paragraph I of this section; provided, however, in making such computation the annual debt service requirements and annual contract payments remaining on the debt or obligations being funded or refunded shall not be taken into account. The issuance of such debt may be accomplished by resolution of the Georgia State Financing and Investment Commission without any action on the part of the General Assembly and any appropriation made or required to be made with respect to the debt or obligation being funded or refunded shall immediately attach and inure to the benefit of the obligations to be issued in connection with such funding or refunding. Debt incurred in connection with any such funding or refunding shall be the same as that originally authorized by the General Assembly, except that general obligation debt may be incurred to fund or refund obligations issued upon the security of contracts to which the provisions of the second paragraph of Paragraph I(a), Section VI, Article IX of the Constitution of 1976 are applicable and the continuing appropriations required to be made under this Constitution shall immediately attach and inure to the benefit of the obligation to be issued in connection with such funding or

refunding with the same force and effect as though said obligations so funded or refunded had originally been issued as a general obligation debt authorized hereunder. The term of a funding or refunding issue pursuant to this Paragraph shall not extend beyond the term of the original debt or obligation and the total interest on the funding or refunding issue shall not exceed the total interest to be paid on such original debt or obligation. The principal amount of any debt issued in connection with such funding or refunding may exceed the principal amount being funded or refunded to the extent necessary to provide for the payment of any premium thereby incurred.

1976 Constitution. — Art. VII, Sec. III, Para. I.

Paragraph VI. Faith and credit of state pledged debt may be validated.

The full faith, credit, and taxing power of the state are hereby pledged to the payment of all public debt incurred under this article and all such debt and the interest on the debt shall be exempt from taxation. Such debt may be validated by judicial proceedings in the manner provided by law. Such validation shall be incontestable and conclusive.

1976 Constitution. — Art. VII, Sec. III, Para. II.

Cross references. — State debt, investment, and depositories, Ch. 17, T. 50.

JUDICIAL DECISIONS

Purpose of paragraph. — The purpose of this paragraph is to provide that every valid bond of the state should be paid, whether the state was liable thereon as principal or as endorser. *Park v. Candler*, 113 Ga. 647, 39 S.E. 89 (1901) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VI).

The debt of an authority or agency of the state does not obligate the state or pledge credit of the state as is required to be made explicit by the authority on the face of the bonds it issues. *Rich v. State*, 237 Ga. 291, 227 S.E.2d 761 (1976).

Revenue bonds of authority not state obligations. — While the State Bridge Building (now Georgia Highway) Authority is an instrumentality of the state, it is nevertheless not the state, nor a part of the state, nor an agency of the state. It is a mere creature of the state; a distinct corporate entity. Its revenue

bonds are not obligations or debts of the state, nor a pledge of the credit of the state, but they are payable solely and exclusively from revenue derived from a use of its facilities; and the state is not directly, indirectly, or contingently obligated to levy or pledge any form of taxation whatsoever therefor or to make any appropriation for the payment of them, and Ga. L. 1953, Jan.-Feb. Sess., p. 626, § 23 (see now O.C.G.A. § 32-10-39) required that the bonds, when issued, must contain recitals on their face to this effect. They are first, last, and always a corporate debt of the authority and in no sense a debt of the state. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Ga. L. 1953, Jan.-Feb. Sess., p. 626 (see now O.C.G.A. Art. 1, Ch. 10, T. 32), insofar as it authorized the issuance of negotiable revenue bonds, did not offend the constitutional provisions. *McLucas v.*

State Bridge Bldg. Auth., 210 Ga. 1, 77 S.E.2d 531 (1953).

Ga. L. 1949, p. 1009 (see now O.C.G.A. Art. 5, Ch. 3, T. 20), forbid any attempt to obligate the state, pledge the state's faith or credit or donate anything belonging to the state; therefore, neither the article, lease contract executed thereunder, nor the revenue bonds issued pursuant thereto offend constitutional inhibitions against state debts, donations, or pledging the faith and credit of the state. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

An obligation incurred by the Board of Regents of the University System of Georgia is not a debt of the state and, therefore, is not affected by constitutional limitations upon state indebtedness. *State v. Regents of Univ. Sys.*, 179 Ga. 210, 175 S.E. 567 (1934).

Cited in *State v. State Toll Bridge Auth.*, 210 Ga. 690, 82 S.E.2d 626 (1954); *Carter v. Burson*, 230 Ga. 511, 198 S.E.2d 151 (1973); *Fuller v. State*, 232 Ga. 581, 208 S.E.2d 85 (1974).

OPINIONS OF THE ATTORNEY GENERAL

Unemployment compensation. — Payment of unemployment compensation is not a purpose for which public debt may be incurred as set forth in Ga. Const.

1976, Art. VII, Sec. II, Paras. I and II (see Ga. Const. 1983, Art. VII, Sec. III, Paras. I and II). 1982 Op. Att'y Gen. No. 82-35.

Paragraph VII. Georgia State Financing and Investment Commission; duties.

(a) There shall be a Georgia State Financing and Investment Commission. The commission shall consist of the Governor, the President of the Senate, the Speaker of the House of Representatives, the State Auditor, the Attorney General, the director, Fiscal Division, Department of Administrative Services, or such other officer as may be designated by law, and the Commissioner of Agriculture. The commission shall be responsible for the issuance of all public debt and for the proper application, as provided by law, of the proceeds of such debt to the purposes for which it is incurred; provided, however, the proceeds from guaranteed revenue obligations shall be paid to the issuer thereof and such proceeds and the application thereof shall be the responsibility of such issuer. Debt to be incurred at the same time for more than one purpose may be combined in one issue without stating the purpose separately but the proceeds thereof must be allocated, disbursed and used solely in accordance with the original purpose and without exceeding the principal amount authorized for each purpose set forth in the authorization of the General Assembly and to the extent not so used shall be used to purchase and retire public debt. The commission shall be responsible for the investment of all proceeds to be administered by it and, as provided by law, the income earned on any such investments may be used to pay operating expenses of the commission or placed in a common debt retirement fund and used to purchase and retire any public debt, or any bonds or obligations issued by any public agency, public corporation or authority which are secured by a contract to which the provisions of the second paragraph of Paragraph I(a) of Section VI,

Article IX of the Constitution of 1976 are applicable. The commission shall have such additional responsibilities, powers, and duties as are provided by law.

(b) Notwithstanding subparagraph (a) of this Paragraph, proceeds from general obligation debt issued for making loans to local government entities for water or sewerage facilities or systems or for regional or multijurisdictional solid waste recycling or solid waste facilities or systems as provided in Paragraph I(e) of this section shall be paid or transferred to and administered and invested by the unit of state government or state authority made responsible by law for such activities, and the proceeds and investment earnings thereof shall be applied and disbursed by such unit or authority. (Ga. Const. 1983, Art. 7, § 4, Para. 7; Ga. L. 1986, p. 1612, § 2/HR 363; Ga. L. 1992, p. 3329, § 3/HR 732.)

1976 Constitution. — Art. VII, Sec. III, Para. III.

Cross references. — Generally, § 50-17-20 et seq.

Editor's notes. — The constitutional amendment (Ga. L. 1986, p. 1612, § 2) which designated the existing provisions of this Paragraph as subparagraph (a) and which added subparagraph (b) was approved by a majority of the qualified voters voting at the general election held on November 4, 1986.

The constitutional amendment (Ga. L. 1988, p. 2116, § 1) which would have

revised subparagraph (a) to remove the Attorney General from the Georgia State Financing and Investment Commission was defeated at the general election on November 8, 1988.

The constitutional amendment (Ga. L. 1992, p. 3329, § 3) which revised subparagraph (b) to add provisions as to regional or multijurisdictional solid waste recycling or solid waste facilities or systems was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

JUDICIAL DECISIONS

This paragraph was not violated by Ga. L. 1921, p. 230, for discounting the rentals of the W. & A. Railroad. *Wright v. Hardwick*, 152 Ga. 302, 109 S.E. 903 (1921) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VII).

Procedure of commission to incur debt obligating state. — Under this constitutional method of incurring state debt, if the legislature authorizes the Georgia State Financing and Investment Commission to incur debt in a specified amount for a specified purpose and makes the specified appropriation to the "State of Georgia General Obligation Debt Sinking Fund," then the commission created by

the Constitution can resolve to incur the authorized debt, have it procedurally validated, deliver evidences of the state debt to the lenders, and receive the proceeds from the lenders; and once the commission created by the Constitution receives the proceeds of the debt incurred from the lenders, then the commission itself is responsible for "the proper application of the proceeds of such debt to the purposes for which it is incurred." *Fuller v. State*, 232 Ga. 581, 208 S.E.2d 85 (1974).

Cited in *Harrison v. Hardman*, 169 Ga. 435, 150 S.E. 542 (1929); *Carter v. Burson*, 230 Ga. 511, 198 S.E.2d 151 (1973).

OPINIONS OF THE ATTORNEY GENERAL

Borrowing for unemployment compensation fund. — There does not appear to be any basis in the Constitution or the Georgia State Financing and Investment Commission Act which would authorize the Employment Security Agency, Georgia Department of Labor to borrow or obtain advances from the federal unem-

ployment account in the unemployment trust fund for payment of unemployment compensation. 1982 Op. Att'y Gen. No. 82-35.

Legal ability of board of regents of university system to incur debt by issuing revenue obligations is doubtful. 1988 Op. Att'y Gen. No. 88-21.

Paragraph VIII. State aid forbidden.

Except as provided in this Constitution, the credit of the state shall not be pledged or loaned to any individual, company, corporation, or association. The state shall not become a joint owner or stockholder in or with any individual, company, association, or corporation.

1976 Constitution. — Art. VII, Sec. III, Para. IV.

Law reviews. — For note discussing

restrictions on the creation of public purpose corporations, see 8 Ga. L. Rev. 680 (1974).

JUDICIAL DECISIONS

Ga. L. 1949, p. 1009 (see now O.C.G.A. Art. 5, Ch. 3, T. 20), forbids any attempt to obligate the state, pledge the state's faith or credit or donate anything belonging to the state; therefore, neither the article, lease contract executed thereunder, nor the revenue bonds issued pursuant thereto offend constitutional inhibitions against state debts, donations or pledging the faith and credit of the state. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

Ga. L. 1953, Jan.-Feb. Sess., p. 626 (see Art. 1, Ch. 10, T. 32), insofar as it authorized issuance of negotiable revenue bonds did not offend constitutional provisions. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Revenue bonds of authority not state obligations. — While the State Bridge Building (now Georgia Highway) Authority is an instrumentality of the state, it is nevertheless not the state, nor a part of the state, nor an agency of the state. It is a mere creature of the state; a distinct corporate entity. Its revenue bonds are not obligations or debts of the state, nor a pledge of the credit of the state, but they are payable solely and exclusively from revenue derived from a

use of its facilities; and the state is not directly, indirectly, or contingently obligated to levy or pledge any form of taxation whatsoever therefor or to make any appropriation for the payment of them, and Ga. L. 1953, Jan.-Feb. Sess., p. 626 (see now O.C.G.A. § 32-10-39) required that the bonds, when issued, must contain recitals on their face to this effect. They are first, last, and always a corporate debt of the authority and in no sense a debt of the state. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Long term contract between municipality and corporation not unconstitutional. — A contract between a municipality and another corporation for a lease for a term of 35 years of land owned by the municipality, in consideration of care of the poor of the city by the lessee to the extent of supplying specified medical and surgical treatment in a clinic or hospital existing on such land, is not unlawful as violating any of the provisions of the Constitution. *Aven v. Steiner Cancer Hosp.*, 189 Ga. 126, 5 S.E.2d 356 (1939).

Secretary of State not authorized in refusing charter to private persons incorporating "Bank of State of Geor-

gia." *Manley v. McLendon*, 158 Ga. 659, 124 S.E. 138 (1924).

Cited in *Morris v. Tatum*, 178 Ga. 728, 174 S.E. 340 (1934); *Morris v. Tatum*, 50 Ga. App. 315, 178 S.E. 167 (1935); *State v. State Toll Bridge Auth.*, 210 Ga. 690, 82

S.E.2d 626 (1954); *Bradfield v. Hospital Auth.*, 226 Ga. 575, 176 S.E.2d 92 (1970); *Carter v. Burson*, 230 Ga. 511, 198 S.E.2d 151 (1973); *Fuller v. State*, 232 Ga. 581, 208 S.E.2d 85 (1974).

OPINIONS OF THE ATTORNEY GENERAL

Proposed acquisition of game and fish areas by the state for custody in the Department of Natural Resources, in which sellers reserve timber rights for a limited time, will not violate the constitutional prohibition against the state becoming a joint owner. 1989 Op. Att'y Gen. No. 89-16.

Former Code 1933, § 100-101 et seq. (see now O.C.G.A. Art. 3, Ch. 17, T. 50) did not pledge the credit of the state in violation of the prohibition contained in this paragraph of the Constitution. 1948-49 Op. Att'y Gen. p. 435 (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII).

The state may not participate in a cooperative, since it would in effect be pledging the aid of the state to a private company. 1954-56 Op. Att'y Gen. p. 635 (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII).

The Department of Industry and Trade would not violate this paragraph by staffing a welcome station constructed by private funds. 1960-61 Op. Att'y Gen. p. 446.

When fee simple title required. — The State of Georgia may not accept a deed conveying anything less than fee simple title where it is contemplated that state funds will be expended in connection with use and enjoyment of the property; however, one exception to the above rule has been where the improvements, though considered "permanent" in the sense that under general principles of law they would become a part of the realty, were of such a nature as to be easily removable without material damage thereto and the deed or other instrument of conveyance contained a clause giving the state the right to remove these improvements either before or within a reasonable time after abandonment by the state. 1967 Op. Att'y Gen. No. 67-226.

Unconstitutional conveyance. — Property conveyed to the state containing

a reversionary interest in the grantor would, after being improved with state funds or by the labors of state personnel, be in violation of this paragraph. 1960-61 Op. Att'y Gen. p. 384. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII).

Medicaid agreements must limit financial liability. — Medicaid provider agreements, or any arrangement through which Department of Human Resources reimburses medicaid providers, must limit potential financial liabilities of the state so as to insure that such liabilities cannot exceed the unobligated funds appropriated for the fiscal year in which the agreements are executed. 1975 Op. Att'y Gen. No. 75-88; 1978 Op. Att'y Gen. p. 267.

Effect of federally financed program providing state funded school resources to public and private school. — So long as Title II of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2881-2922, is wholly financed by the federal government and no state matching funds are involved, the State Board of Education may lawfully administer a state plan adopted under Title II of the act even though it contemplates providing school library resources, textbooks, and other printed instructional materials for use of students and teachers in private as well as public schools. 1965-66 Op. Att'y Gen. No. 65-4.

The use of convict labor on private property is permissible where the sole benefit flows to the state. 1969 Op. Att'y Gen. No. 69-158.

The State Highway Department (now Department of Transportation) can contract with a private property owner to use prison labor or state maintenance forces to remove and reset fences upon the private property which is to be used as a right of way since the utilization of this prison labor is to benefit

the state; the department cannot guarantee to a county that it will perform these acts or expend this money if a county in turn entered into such an agreement with the private landowner which guaranteed to the private landowner that the state would perform such acts. 1969 Op. Att'y Gen. No. 69-158.

The (State) Forestry Commission may not legally assist a private corporation in the construction of a dam on property belonging to the latter, notwithstanding the fact that the state would receive considerable benefit therefrom. 1952-53 Op. Att'y Gen. p. 95.

Sections 45-7-25 through 45-7-28. — The use of public funds for the purposes authorized under Ga. L. 1973, p. 842, §§ 1-4 (see now O.C.G.A. §§ 45-7-25 through 45-7-28) did not violate Ga. Const. 1976, Art. III, Sec. VIII, Para. XII(1) (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI), or this paragraph. 1973 Op. Att'y Gen. No. 73-87. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII).

The procedures authorized by Ga. L. 1973, p. 842, §§ 1-4 (see now O.C.G.A. §§ 45-7-25 through 45-7-28) did not constitute either a gratuity or a loan to an employee; payments to an employee to compensate the employee for expenses to be incurred in rendering services to the state clearly do not constitute a gratuity where the employee is accountable for the employee's failure to employ the funds for that purpose; nor do such payments constitute a loan simply because there is a

requirement that the employee account for such funds. 1973 Op. Att'y Gen. No. 73-87.

Board donation to professional council unauthorized. — The making of a donation by the State Board of Engineers (see State Board of Registration for Professional Engineers and Land Surveyors) to the Engineers' Council for Professional Development would be an illegal and unwarranted expenditure of state funds. 1945-47 Op. Att'y Gen. p. 491.

Expenditure of state funds unauthorized. — The Department of Natural Resources is without authority to expend funds to be used in the construction of a fence which, upon completion, will be jointly owned by the state and a private individual. 1952-53 Op. Att'y Gen. p. 100.

The Board of Regents cannot pledge the credit or property of the state to any individual, company, corporation, or association, nor shall the state "become a joint owner or stockholder in or with, any individual, company, association or corporation," in violation of this paragraph of the state Constitution. 1948-49 Op. Att'y Gen. p. 141 (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII).

Sponsorship agreements between the Georgia Tech Athletic Association and MacDonald's Corporation in which MacDonald's permanently acquires the preeminent right to associate its name and reputation commercially with the property, goodwill, and programs of the state violates the constitution. 1995 Op. Att'y Gen. No. 95-9.

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Public Funds, § 3.

ALR. — Deposit of public funds in bank as violation of constitutional or statutory provision against lending of public credit or money, 87 ALR 168.

Constitutionality of legislation which

contemplates use of public funds or credit for purpose of making, guaranteeing or discounting loans on home mortgages, 98 ALR 1367.

Constitutionality of statute authorizing state to loan money or engage in business of a private nature, 115 ALR 1456.

Paragraph IX. Construction.

Paragraphs I through VIII of this section are for the purpose of providing an effective method of financing the state's needs and their provisions and any law now or hereafter enacted by the General Assembly in furtherance of their provisions shall be liberally construed

to effect such purpose. Insofar as any such provisions or any such law may be inconsistent with any other provisions of this Constitution or of any other law, the provisions of such Paragraphs and laws enacted in furtherance of such Paragraphs shall be controlling; provided, however, the provisions of such Paragraphs shall not be so broadly construed as to cause the same to be unconstitutional and in connection with any such construction such Paragraphs shall be deemed to contain such implied limitations as shall be required to accomplish the foregoing.

1976 Constitution. — Art. VII, Sec. III, Para. V.

JUDICIAL DECISIONS

Cited in *State v. State Toll Bridge Auth.*, 210 Ga. 690, 82 S.E.2d 626 (1954); *Fuller v. State*, 232 Ga. 581, 208 S.E.2d 85 (1974).

Paragraph X. Assumption of debts forbidden; exceptions.

The state shall not assume the debt, or any part thereof, of any county, municipality, or other political subdivision of the state, unless such debt be contracted to enable the state to repel invasion, suppress civil disorders or insurrection, or defend itself in time of war.

1976 Constitution. — Art. VII, Sec. III, Para. VI.

JUDICIAL DECISIONS

Ga. L. 1919, p. 242 (see now O.C.G.A. Art. 1, Ch. 2, T. 32), creating the Highway Commission (now Commissioner of Transportation), does not violate this paragraph. *Faver v. Mayor of Washington*, 159 Ga. 568, 126 S.E. 464 (1925) (see Ga. Const. 1983, Art. VII, Sec. IV, Para. X).

Ga. L. 1949, p. 1009 (see now O.C.G.A. Art. 5, Ch. 3, T. 20), forbids any attempt to obligate the state, pledge the state's faith or credit or donate anything belonging to the state; therefore, neither the article, lease contract executed thereunder, nor the revenue bonds issued pursuant thereto offend constitutional inhibitions against state debts, donations, or pledging the faith and credit of the state. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

Bonds issued by Georgia Highway Authority not violative of Constitution. — There is no merit in the contention that the bonds which may be issued

under and pursuant to Ga. L. 1953, Jan.-Feb. Sess., p. 626 (see now O.C.G.A. Part 1, Art. 1, Ch. 10, T. 32), create an obligation against the state in violation of the provisions of the Constitution of this state, which declares that the state shall not assume the debt, nor any part thereof, of any county, municipal corporation, or political subdivision of the state, unless such debt is contracted to enable the state to repel invasion, suppress insurrection, or defend itself in time of war. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Costs and attorney's fees for public defender. — Because appointment of counsel to represent a defendant in a death penalty case occurred before its effective date, the application of former O.C.G.A. § 17-12-127(b) regarding payment of costs and attorney's fees by the Georgia Public Defender Standards Council did not violate the prohibition on the

state's assumption of prior debts as set forth in Ga. Const. 1983, Art. VII, Sec. IV, Para. X. Ga. Pub. Defender Stds. Council v. State, 285 Ga. 169, 675 S.E.2d 25 (2009).

Cited in Burns v. Decatur County, 178 Ga. 275, 173 S.E. 127 (1934); State Hwy.

Dep't v. Richmond County, 179 Ga. 642, 177 S.E. 504 (1934); Madronah Sales Co. v. Wilburn, 180 Ga. 837, 181 S.E. 173 (1935); Stewart County v. Holloway, 69 Ga. App. 344, 25 S.E.2d 315 (1943); Jamerson v. Campbell, 217 Ga. 766, 125 S.E.2d 205 (1962).

OPINIONS OF THE ATTORNEY GENERAL

Constitutionality of Art. 4, Ch. 3, T. 20. — Ga. L. 1958, p. 47 (see now O.C.G.A. Art. 4, Ch. 3, T. 20), did not violate any of Ga. Const. 1976, Art. III, Sec. I, Para. I, Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. I, Para. I, Ga. Const. 1983, Art. III, Sec. VI, Para. VI), or this paragraph. 1963-65 Op. Att'y Gen. p. 100. (see Ga. Const. 1983, Art. VII, Sec. IV, Para. X).

Transfer of leave time constitutes

assumption of debt. — No leave accrued by a county employee under a county personnel system can be transferred when the employee becomes a state employee since assumption of such leave by the state would be a gratuity prohibited by Ga. Const. 1983, Art. III, Sec. VI, Para. VI and would violate Ga. Const. 1983, Art. VII, Sec. IV, Para. X, which prohibits the assumption of any debt owed by the county. 1984 Op. Att'y Gen. No. 84-38.

RESEARCH REFERENCES

ALR. — Scope and effect of express constitutional provisions prohibiting Legislature from imposing tax for county or corporate purposes, or providing that Legislature may invest power to levy such taxes in local authorities, 106 ALR 906.

What amounts to "indebtedness" to

state within constitutional or statutory provision as to release or compromise of same, 108 ALR 376.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of establishing or maintaining highway, 123 ALR 1462.

Paragraph XI. Section not to unlawfully impair contracts or revive obligations previously voided.

The provisions of this section shall not be construed so as to:

(a) Unlawfully impair the obligation of any contract in effect on June 30, 1983.

(b) Revive or permit the revival of the obligation of any bond or security declared to be void by the Constitution of 1976 or any previous Constitution of this state.

1976 Constitution. — There were no similar provisions in the 1976 Constitution.

Paragraph XII. Multiyear contracts for energy efficiency or conservation improvement.

The General Assembly may by general law authorize state governmental entities to incur debt for the purpose of entering into multiyear

contracts for governmental energy efficiency or conservation improvement projects in which payments are guaranteed over the term of the contract by vendors based on the realization of specified savings or revenue gains attributable solely to the improvements; provided, however, that any such contract shall not exceed ten years unless otherwise provided by general law. (Ga. Const. 1983, Art. 7, § 4, Para. 12, approved by Ga. L. 2010, p. 1264, § 1/SR 1231.)

Editor’s notes. — The constitutional amendment (Ga. L. 2010, p. 1264, § 1), which added Paragraph XII to authorize state multiyear contracts for governmen-

tal energy efficiency or conservation improvement projects, was ratified at the general election held on November 2, 2010.

Paragraph XIII. Multiyear rental agreements.

The General Assembly may by general law authorize the State Properties Commission, the Board of Regents of the University System of Georgia, and the Georgia Department of Labor to enter into rental agreements for the possession and use of real property without obligating present funds for the full amount of obligation the state may bear under the full term of any such rental agreement. Any such agreement shall provide for the termination of the agreement in the event of insufficient funds. (Ga. Const. 1983, Art. 7, § 4, Para. 13, approved by Ga. L. 2012, p. 1363, § 1/SR 84.)

Editor’s notes. — The constitutional amendment (Ga. L. 2012, p. 1363, § 1/SR 84), which added Paragraph XIII to authorize state multiyear rental agreements for

the possession and use of real property without obligating present funds, was ratified at the general election held on November 6, 2012.

ARTICLE VIII.

EDUCATION

- Section
- I. Public Education.
 - II. State Board of Education.
 - III. State School Superintendent.
 - IV. Board of Regents.
 - V. Local School Systems.
 - VI. Local Taxation for Education.
 - VII. Educational Assistance.

Law reviews. — For article, “An Overview of the New Georgia Constitution,” see 35 Mercer L. Rev. 1 (1983). For article, “‘Simplify You, Classify You’: Stigma, Stereotypes and Civil Rights in Disability

Classification Systems,” see 25 Ga. St. U.L. Rev. 607 (2009). For article, “Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities,” see 25 Ga. St. U.L. Rev. 641 (2009).

SECTION I.

PUBLIC EDUCATION

- Paragraph

I. Public education; free public education prior to college or
- postsecondary level; support by taxation.

Law reviews. — For comment, “Is Economic Integration the Fourth Wave in

School Finance Litigation,” see 56 Emory L.J. 1613 (2007).

Paragraph I. Public education; free public education prior to college or postsecondary level; support by taxation.

The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation, and the General Assembly may by general law provide for the establishment of education policies for such public education. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law. (Ga. Const. 1983, Art. 8, § 1, Para. 1; Ga. L. 2012, p. 1364, § 1/HR 1162.)

1976 Constitution. — Art. VIII, Sec. I, Para. I; Art. VIII, Sec. VIII, Para. I.

Cross references. — Generally, § 20-2-131. Power of counties to levy and

collect taxes for educational purposes, § 48-5-400.

Editor’s notes. — The constitutional amendment (Ga. L. 2012, p. 1364, § 1/HR

1162), which added “, and the General Assembly may by general law provide for the establishment of education policies for such public education” at the end of the second sentence, was ratified at the general election held on November 6, 2012.

Law reviews. — For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982). For survey article on local government law, see 34 Mercer L. Rev. 225 (1982). For article on the 2012 Constitutional amendment, see 29 Ga. St. U.L. Rev. 1 (2012).

For comment on *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979), see 31 Mercer L. Rev. 341 (1979). For comment, “Enforcing the Right to a Public Education for Children Afflicted with AIDS,” see 36 Emory L.J. 603 (1987). For comment, “Teacher Competency Testing: ‘Decertification’ and the Federal Constitution and Title VII,” see 37 Emory L.J. 1077 (1988).

For note and comment, “School Choice: Constitutionality and Possibility in Georgia,” see 24 Ga. St. U.L. Rev. 587 (2007).

JUDICIAL DECISIONS

Immunity of school district. — School district was not an arm of the state for purposes of federal immunity, even though the district carried out the state’s constitutional duty to provide public education. *Lightfoot v. Henry County Sch. Dist.*, 771 F.3d 764 (11th Cir. 2014).

System of financing public education is not violative of state equal protection as it bears a rational relationship to legitimate state purposes. *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981).

Paragraph neither restricts districts from improving opportunities nor requires state to equalize opportunities between districts. — “Adequate education” provisions of Constitution do not restrict local school districts from doing what they can to improve educational opportunities within district, nor do they require the state to equalize educational opportunities between districts. *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981) (see Ga. Const. 1983, Art. VIII, Sec. I, Para. I).

Time period tuition-free education guaranteed. — Although the right to a free education is guaranteed by the Constitution of the State of Georgia, this right is presently limited to 180 days of tuition-free education. *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979), commented on in 31 Mercer L. Rev. 341.

There is no constitutional right to attend school for summer quarter. Therefore, the denial of attendance at summer school to students who do not pay

a tuition or students who reside in school districts which choose not to conduct summer school sessions is not a denial of equal protection under this paragraph. *Crim v. McWhorter*, 242 Ga. 863, 252 S.E.2d 421 (1979), commented on in 31 Mercer L. Rev. 341.

A common school department in a private school is subject to the laws governing common schools. *Wilson v. Stanford*, 133 Ga. 483, 66 S.E. 258 (1909).

High schools included. — The state system of education provided for in this paragraph of the Constitution embraces high schools operated by funds whether derived from taxation or otherwise; and no matriculation fee can be charged for children within the school age. *Brinson v. Jackson*, 168 Ga. 353, 148 S.E. 96 (1929) (see Ga. Const. 1983, Art. VIII, Sec. I, Para. I).

Acceptance of state funds estops school from excluding children in district. — A consolidated public school or high school established and maintained in a consolidated school district in part by state funds is a common school of this state, admission to which must be free. The trustees (school board) by accepting the benefits of such funds are estopped from denying that this school is subject to the constitutional provision making the common schools free to the children of the state residing in the district. *Wilson v. Stanford*, 133 Ga. 483, 66 S.E. 258 (1909); *Brinson v. Jackson*, 168 Ga. 353, 148 S.E. 96 (1929).

Discrimination based on payment of matriculation fees prohibited. — A

public school which discriminates between children of parents who pay matriculation fees and children of parents who do not pay such fees violates this provision of the Constitution that the public schools shall be free to all children of this state. *Moore v. Brinson*, 170 Ga. 680, 154 S.E. 141 (1930) (see Ga. Const. 1983, Art. VIII, Sec. I, Para. I).

A child residing in school district cannot be charged a fee for matriculation. *Mayor of Gainesville v. Simmons*, 96 Ga. 477, 23 S.E. 508 (1895); *Mayor of Gainesville v. Simmons*, 99 Ga. 400, 27 S.E. 710 (1896); *Brewer v. Ray*, 149 Ga. 596, 101 S.E. 667 (1919); *Moore v. Brinson*, 170 Ga. 680, 154 S.E. 141 (1930).

The purpose for which the funds are to be used is immaterial. *Wilson v. Stanford*, 133 Ga. 483, 66 S.E. 258 (1909).

It is doubtful if a matriculation fee can be imposed before entrance in a high school. *Brewer v. Ray*, 149 Ga. 596, 101 S.E. 667 (1919).

Deducting funds for unfunded pension expenses from charter schools. — Pursuant to the plain language of O.C.G.A. § 20-2-2068.1(c), a school system and school board had no authority or discretion to deduct the system's unfunded pension expense of \$ 38.6 million from their calculation of local revenue to be distributed to start-up charter schools; the start-up charter schools were entitled to mandamus relief. *Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch.*, 293 Ga. 629, 748 S.E.2d 884 (2013).

These rules do not apply to nonresidents. *Irvin v. Gregory*, 86 Ga. 605, 13 S.E. 120 (1891).

Having extended to all children in Georgia the right to an education, the state cannot arbitrarily withdraw that right. *Wells v. Banks*, 153 Ga. App. 581, 266 S.E.2d 270 (1980).

Interscholastic sports not essential to curriculum. — Although an important part of a school's program, interscholastic sports are extracurricular and not essential to the prescribed curriculum which must be made available to all of Georgia's children. *Smith v. Crim*, 240 Ga. 390, 240 S.E.2d 884 (1977).

Those choosing to resort to the educational institutions maintained

with funds of the state are subject to the commands of the state and the Board of Education of a city is a governmental agency, and those wishing to avail themselves of the free education provided by the public schools of that city are amenable to the reasonable commands of its supervising body, the City Board of Education. *Leoles v. Landers*, 184 Ga. 580, 192 S.E. 218, appeal dismissed, 302 U.S. 656, 58 S. Ct. 364, 82 L. Ed. 507 (1937).

The salute of the United States flag by a pupil "is by no stretch of the imagination a religious rite." It is a gesture of patriotism, signifying respect for the American government and its institutions and ideals, and where a pupil of one of the schools of the public school system of a city absolutely and continuously refuses to salute the United States flag, the privilege extended to such child of free education afforded by such school may be withdrawn and the child expelled from school. *Leoles v. Landers*, 184 Ga. 580, 192 S.E. 218, appeal dismissed, 302 U.S. 656, 58 S. Ct. 364, 82 L. Ed. 507 (1937).

Refusal to salute flag. — Requirement of school authorities that all pupils shall salute the flag of the United States, and their action in expelling from school a pupil who refuses to salute the flag, violates no rights secured to the child by the Constitution of the United States or of the State of Georgia, even though the child is a member of a religious sect calling themselves "Jehovah's Witnesses," who deem it a sin to salute the United States flag, in that such act constitutes a violation of one of the precepts of their religion forbidding "them to worship any image, emblem, person, or thing, save and except Almighty God." *Leoles v. Landers*, 184 Ga. 580, 192 S.E. 218, appeal dismissed, 302 U.S. 656, 58 S. Ct. 364, 82 L. Ed. 507 (1937).

Permanent expulsion of a student for disciplinary reasons was not contrary to law since the constitutional right to free public education may be limited and the applicable statute, O.C.G.A. § 20-2-751, does not prohibit permanent expulsion; further, such expulsion does not conflict with or violate O.C.G.A. § 20-2-690.1, the compulsory attendance

law. *D.B. v. Clarke County Bd. of Educ.*, 220 Ga. App. 330, 469 S.E.2d 438 (1996).

State is not strictly liable for alleged unlawful segregation activities by local schools. However, it has continuing authority and obligation to insure that local education agencies have completely eliminated all vestiges of the dual system and have not adopted practices that will cause racial separation. *Georgia State Conference v. Georgia*, 570 F. Supp. 314 (S.D. Ga. 1983).

Cited in *Cumming v. Richmond County Bd. of Educ.*, 103 Ga. 691, 29 S.E. 488 (1898); *Callihan v. Reid*, 149 Ga. 704, 101 S.E. 914 (1920); *Smith v. Tolbert*, 160 Ga. 268, 127 S.E. 868 (1925); *Hooten v. Hooten*, 168 Ga. 86, 147 S.E. 373 (1929);

Board of Educ. & Orphanage v. State Bd. of Educ., 186 Ga. 200, 197 S.E. 261 (1938); *County Bd. of Educ. v. Young*, 187 Ga. 644, 1 S.E.2d 739 (1939); *Board of Pub. Educ. & Orphanage v. State Bd. of Educ.*, 190 Ga. 581, 10 S.E.2d 365 (1940); *Bennett v. Day*, 92 Ga. App. 680, 89 S.E.2d 674 (1955); *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961); *McCorkle v. Woddail*, 220 Ga. 626, 140 S.E.2d 849 (1965); *Young v. State*, 132 Ga. App. 790, 209 S.E.2d 96 (1974); *Williams v. Owen*, 241 Ga. 363, 245 S.E.2d 638 (1978); *Concerned School Patrons & Taxpayers v. Ware County Bd. of Educ.*, 245 Ga. 202, 263 S.E.2d 925 (1980); *Deriso v. Cooper*, 246 Ga. 540, 272 S.E.2d 274 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Students not required to pay fee for course in public schools offered by regulatory board. — To permit a regulatory board, such as the State Board of Cosmetology, created by Ga. L. 1963, p. 45, §§ 1 and 2, Ch. 10, T. 43, to administer a course of study in the public school system, to impose a registration fee upon a public school and a license fee upon teachers therein and to require a registration fee from students taking a course of study in the public schools, would be in violation of this paragraph, former Code 1933, § 32-403 (see now O.C.G.A. §§ 20-2-11 and former 20-2-671 (repealed)); therefore, public schools offering courses in cosmetology are not required to pay the school registration fee; the teachers license fee, and students in such schools taking cosmetology courses are not required to pay the students registration fee required by Ga. L. 1963, p. 45. 1963-65 Op. Att'y Gen. p. 250 (see Ga. Const. 1983, Art. VIII, Sec. I, Para. I).

A charge for matriculation cannot be imposed as a condition precedent to admission of children to a public school which forms a part of the general school system of children living in the territory of the school and otherwise qualified; however, the right of school authorities to charge tuition for children who are nonresidents of the territory where the school is located has never been and can-

not be seriously doubted. 1958-59 Op. Att'y Gen. p. 137.

No matriculation fee for military or R.O.T.C. training. — The State Board of Education has no specific regulation concerning military or R.O.T.C. training; however, the local board of education has a discretionary authority to include such training in its curriculum but no state educational funds would come into the program. Should the local board of education see fit to include military or R.O.T.C. training as a part of its curriculum, no tuition or matriculation fee could be charged by the local school authorities as a condition precedent to a pupil enrolling in a course in military or R.O.T.C. training. 1957 Op. Att'y Gen. p. 108.

Provision of free tuition has not been extended to include nonresidents of the state or school area when such nonresidents enter Georgia schools even where the nonresident pays school property taxes on Georgia property. 1948-49 Op. Att'y Gen. p. 140.

This paragraph neither states nor implies that no educational services may be provided to noncitizens in Georgia public schools, with tuition charged therefor. 1980 Op. Att'y Gen. No. 80-152 (see Ga. Const. 1983, Art. VIII, Sec. I, Para. I).

Attendance outside of district. — The school laws of the State of Georgia do

not prohibit a child from receiving an education in a school system other than that in which the child resides; however, if a child desires to enter a school in any other territory, it is permissible to charge such child tuition for the privilege. 1974 Op. Att'y Gen. No. 74-70.

A board of education may charge nonresident students tuition. 1963-65 Op. Att'y Gen. p. 737.

Application procedure for participation in summer program need not consider difficulty of private school students to participate. — The Superintendent is authorized to select screening procedures for selection for participation in a summer educational program without

regard as to whether or not the application of procedures, at least where reasonable from an educational or administrative viewpoint, makes it difficult or even impossible for students who have enrolled in a private or parochial school during the prior school year to participate. 1963-65 Op. Att'y Gen. p. 430.

Tuition for school enrichment courses. — Once the Quality Basic Education Act, O.C.G.A. § 20-2-130 et seq., becomes effective, a local school system may offer driver's education and other enrichment courses during the regular school day and may charge tuition or fees for the provision of the courses. 1985 Op. Att'y Gen. No. 85-35.

RESEARCH REFERENCES

ALR. — Schools: extent of legislative power with respect to attendance and curriculum, 53 ALR 832.

Power of Legislature to impose noneducational function upon state educational institution or instructors therein, 67 ALR 1032.

What is common or public school within contemplation of constitutional or statutory provisions, 113 ALR 697.

Validity of legislative delegation of taxing power to school districts in absence of

express constitutional provision authorizing such delegation, 113 ALR 1416.

Validity of exaction of fees from children attending elementary or secondary public schools, 41 ALR3d 752.

Validity of basing public school financing system on local property taxes, 41 ALR3d 1220.

AIDS infection as affecting right to attend public school, 60 ALR4th 15.

Procedural issues concerning public school funding cases, 115 ALR5th 563.

SECTION II.

STATE BOARD OF EDUCATION

Paragraph

I. State Board of Education.

Paragraph I. State Board of Education.

(a) There shall be a State Board of Education which shall consist of one member from each congressional district in the state appointed by the Governor and confirmed by the Senate. The Governor shall not be a member of said board. The ten members in office on June 30, 1983, shall serve out the remainder of their respective terms. As each term of office expires, the Governor shall appoint a successor as herein provided. The terms of office of all members appointed after the effective date of this Constitution shall be for seven years. Members shall serve until their successors are appointed and qualified. In the event of a vacancy on the board by death, resignation, removal, or any reason

other than expiration of a member’s term, the Governor shall fill such vacancy; and the person so appointed shall serve until confirmed by the Senate and, upon confirmation, shall serve for the unexpired term of office.

(b) The State Board of Education shall have such powers and duties as provided by law.

(c) The State Board of Education may accept bequests, donations, grants, and transfers of land, buildings, and other property for the use of the state educational system.

(d) The qualifications, compensation, and removal from office of the members of the board of education shall be as provided by law.

1976 Constitution. — Art. VIII, Sec. II, Para. I; Art. VIII, Sec. VI, Para. I.

Cross references. — State Board of Education generally, § 20-2-1 et seq. Ac-

ceptance of donations, grants, and other aid by State Board of Education, § 20-2-14 et seq.

JUDICIAL DECISIONS

All suits by, or against, a county shall be in the name thereof. Since the Constitution of 1877, all suits by or against a county must be in the name of a county. *Commissioners of Rds. & Revenue v. Howard*, 59 Ga. App. 451, 1 S.E.2d 222 (1939).

State is not strictly liable for alleged unlawful segregation activities by local schools. However, it has continuing authority and an obligation to insure that local education agencies have

completely eliminated all vestiges of the dual system and have not adopted practices that will cause racial separation. *Georgia State Conference v. Georgia*, 570 F. Supp. 314 (S.D. Ga. 1983).

Cited in *Verner v. Board of Educ.*, 203 Ga. 521, 47 S.E.2d 500 (1948); *Mayor of Union Point v. Jones*, 88 Ga. App. 848, 78 S.E.2d 348 (1953); *Morman v. Pritchard*, 108 Ga. App. 247, 132 S.E.2d 561 (1963); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Terms “school purpose” and “educational purpose” construed. — The term “school purpose” is more limited in meaning, nature, and scope than the term “educational purpose,” and that although the terms are similar to the extent that the former is certainly included within the latter, the two terms themselves are not, in all their ramifications, sufficiently alike in meaning and significance as to be termed synonymous with each other; this is particularly true where such terms are used in conjunction with creation of charitable trusts. 1962 Op. Att’y Gen. p. 157.

Authority of Superintendent of Schools in employment and dismissal

of department’s employees. — The Superintendent of Schools has no authority in law to employ or dismiss employees of the Department of Education but the Superintendent has the authority and the duty to recommend employment and dismissal from employment of employees of the department to the State Board of Education; employees of the department are employed and dismissed by the State Board of Education, but only on the recommendation of the Superintendent; the state board may not concur with recommendations made by the Superintendent but the board cannot employ or dismiss employees of the department without a

recommendation to such effect by the State Superintendent of Schools. 1962 Op. Att’y Gen. p. 177.

“Professional” construed. — The word “professional” within the context of this paragraph and former Code 1933, § 32-401 (see now O.C.G.A. § 20-2-4) refers to educational, rather than to legal capacity. 1971 Op. Att’y Gen. No. U71-124 (decided under former § 2-6501; see Ga. Const. 1983, Art. VIII, Sec. I, Para. I)

Instance of unwarranted disqualifi-

cation from appointment to board. — Receipt by an attorney at law under a legal partnership agreement of a prorated share of a fee for legal services furnished by the attorney’s partner to a local board of education does not disqualify the attorney from appointment to the state board of education under this paragraph or under § 20-2-4. 1971 Op. Att’y Gen. No. U71-124 (see Ga. Const. 1983, Art. VIII, Sec. II, Para. I).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Schools, § 66 et seq.

C.J.S. — 78 C.J.S., Schools and School Districts, § 92 et seq.

ALR. — Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.

SECTION III.

STATE SCHOOL SUPERINTENDENT

Paragraph

I. State School Superintendent.

Paragraph I. State School Superintendent.

There shall be a State School Superintendent, who shall be the executive officer of the State Board of Education, elected at the same time and in the same manner and for the same term as that of the Governor. The State School Superintendent shall have such qualifications and shall be paid such compensation as may be fixed by law. No member of the State Board of Education shall be eligible for election as State School Superintendent during the time for which such member shall have been appointed.

1976 Constitution. — Art. VIII, Sec. III, Para. I.

Cross references. — State School Superintendent generally, § 20-2-30 et seq.

Editor’s notes. — The constitutional amendment (Ga. L. 1984, p. 1716, § 4) and (Ga. L. 1988, p. 2100, § 6) which

would have provided for the office of commissioner of education in place of the office of State School Superintendent and to authorize the State Board of Education to appoint said commissioner of education was defeated at the general election on November 6, 1984, and November 8, 1988.

JUDICIAL DECISIONS

Cited in McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981).

RESEARCH REFERENCES

ALR. — Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.

SECTION IV.

BOARD OF REGENTS

Paragraph

- I. University System of Georgia;
board of regents.

Paragraph I. University System of Georgia; board of regents.

(a) There shall be a Board of Regents of the University System of Georgia which shall consist of one member from each congressional district in the state and five additional members from the state at large, appointed by the Governor and confirmed by the Senate. The Governor shall not be a member of said board. The members in office on June 30, 1983, shall serve out the remainder of their respective terms. As each term of office expires, the Governor shall appoint a successor as herein provided. All such terms of members shall be for seven years. Members shall serve until their successors are appointed and qualified. In the event of a vacancy on the board by death, resignation, removal, or any reason other than the expiration of a member's term, the Governor shall fill such vacancy; and the person so appointed shall serve until confirmed by the Senate and, upon confirmation, shall serve for the unexpired term of office.

(b) The board of regents shall have the exclusive authority to create new public colleges, junior colleges, and universities in the State of Georgia, subject to approval by majority vote in the House of Representatives and the Senate. Such vote shall not be required to change the status of a college, institution or university existing on the effective date of this Constitution. The government, control, and management of the University System of Georgia and all of the institutions in said system shall be vested in the Board of Regents of the University System of Georgia.

(c) All appropriations made for the use of any or all institutions in the university system shall be paid to the board of regents in a lump sum, with the power and authority in said board to allocate and distribute the same among the institutions under its control in such way and manner and in such amounts as will further an efficient and economical administration of the university system.

(d) The board of regents may hold, purchase, lease, sell, convey, or otherwise dispose of public property, execute conveyances thereon, and

utilize the proceeds arising therefrom; may exercise the power of eminent domain in the manner provided by law; and shall have such other powers and duties as provided by law.

(e) The board of regents may accept bequests, donations, grants, and transfers of land, buildings, and other property for the use of the University System of Georgia.

(f) The qualifications, compensation, and removal from office of the members of the board of regents shall be as provided by law.

1976 Constitution. — Art. VIII, Sec. IV, Para. I; Art. VIII, Sec. V, Para. VI; Art. VIII, Sec. VI, Para. I.

Cross references. — Board of Regents generally, § 20-3-20 et seq.

Editor's notes. — Pursuant to subparagraph (b) of this Paragraph, by Ga. L. 2005, p. 1521, the General Assembly approved the creation of a new four-year college in Gwinnett County by the Board of Regents of the University System of Georgia.

Law reviews. — For article, "The Legal History of the University of Georgia," see 1 Ga. L. Rev. 3 (1927).

For note discussing constitutional implications of higher nonresident tuition fees charged by state universities, see 8 Ga. St. B.J. 86 (1971).

For comment on *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948), see 11 Ga. B.J. 489 (1949).

JUDICIAL DECISIONS

The Board of Regents is an agency of the state with sovereign immunity from tort liability. It performs a governmental function, i.e., the education of its citizens, and is supported by state funds. *Azizi v. Board of Regents*, 132 Ga. App. 384, 208 S.E.2d 153 (1974), cert. dismissed, 233 Ga. 487, 212 S.E.2d 627 (1975).

Lower courts properly dismissed the foreign college students' declaratory judgment action seeking in-state tuition because the suit against the University System of Georgia's Board of Regents was barred by sovereign immunity and waiver did not apply. *Olvera v. Univ. Sys. of Georgia's Bd. of Regents*, 298 Ga. 425, 782 S.E.2d 436 (2016).

O.C.G.A. § 20-3-36 attempts to diminish powers and duties of Board of Regents contrary to Constitution. — Since it is clear that the power to sue and be sued existed in Board of Regents at the time of adoption of the 1943 constitutional amendment and 1945 Constitution and was reenacted as part of the 1976 Constitution, an Act attempting to provide sovereign immunity for the Board of Regents

is in direct conflict with the Constitution. As to the Board of Regents, O.C.G.A. § 20-3-36 is an attempt to diminish its powers and duties contrary to the Constitution and in no way prevents the Board of Regents from suing to protect its other powers and duties or from being sued. *McCafferty v. Medical College*, 249 Ga. 62, 287 S.E.2d 171 (1982).

Medical College of Georgia lacks power to sue and be sued. — Powers and duties of Board of Regents as they existed in 1943 are preserved in the Constitution, and include power to sue and be sued. On the other hand, the similar power of the Medical College of Georgia to sue and be sued was transferred to Board of Regents in 1931 and leaves the Medical College without power to sue and be sued. Trial court erred in granting motion to dismiss by Board of Regents but did not err in dismissing the Medical College of Georgia. *McCafferty v. Medical College*, 249 Ga. 62, 287 S.E.2d 171 (1982).

Regents are governmental agency. — The Regents of the University System of Georgia is a governmental agency of the state in charge of property of which title is

in the state. *Azizi v. Board of Regents*, 132 Ga. App. 384, 208 S.E.2d 153 (1974), cert. dismissed, 233 Ga. 487, 212 S.E.2d 627 (1975).

Ownership of property and authority to contract. — The state is the equitable and beneficial owner of all property now vested in the Regents of the University System, and the corporation by that name is the holder only of legal title; but it does not follow that the corporation may not enter into any contract which in its reasonable discretion is necessary for the usefulness of the institution, or may not incur liabilities in its own name for that purpose. Being a distinct legal entity, any such liability would be a debt of the corporation and not a debt of the state. *State v. Regents of Univ. Sys.*, 179 Ga. 210, 175 S.E. 567 (1934).

The regents and Board of Regents are not two separate entities. There is but one entity in which are vested the government, control, and management of the University System of Georgia. *Azizi v. Board of Regents*, 132 Ga. App. 384, 208 S.E.2d 153 (1974), cert. dismissed, 233 Ga. 487, 212 S.E.2d 627 (1975).

Cited in *Villyard v. Regents of Univ. Sys.*, 204 Ga. 517, 50 S.E.2d 313 (1948); *Perry v. Regents of Univ. Sys.*, 127 Ga. App. 42, 192 S.E.2d 518 (1972); *Marshall v. Georgia S.W. College*, 489 F. Supp. 1322 (M.D. Ga. 1980); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *McCroan v. Bailey*, 543 F. Supp. 1201 (S.D. Ga. 1982); *Board of Regents v. Atlanta Journal*, 259 Ga. 214, 378 S.E.2d 305 (1989); *Board of Regents of the Univ. Sys. v. Doe*, 278 Ga. App. 878, 630 S.E.2d 85 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Terms “school purpose” and “educational purpose” construed. — The term “school purpose” is more limited in meaning, nature, and scope than the term “educational purpose,” and that though the terms are similar to the extent that the former is certainly included within the latter, the two terms themselves are not, in all their ramifications, sufficiently alike in meaning and significance as to be termed synonymous with each other; this is particularly true where such terms are used in conjunction with creation of charitable trusts. 1962 Op. Att’y Gen. p. 157.

The Board of Regents does not fall under the classification of a “political subdivision.” 1970 Op. Att’y Gen. No. 70-161.

This paragraph does not prevent the regents from operating as a corporate entity as provided for by statutory enactment; the fact that control and management of the university system are vested in the Board of Regents by the Constitution does not prevent or prohibit the regents from operating as a distinct corporate entity. 1945-47 Op. Att’y Gen. p. 231 (see Ga. Const. 1983, Art. VIII, Sec. IV, Para. I).

It does no more than make the Board of Regents constitutional officers of this state, and as such, the Board

of Regents becomes a department of the state government; however, this does not mean that the corporate entity is a department of state. It follows that the corporation is fully authorized to enter into any contract or issue revenue bonds which, in its reasonable discretion, may be necessary for the usefulness of the university system or any one of its institutions. This liability incurred in the corporate name is not a liability of the state, but rather a separate legal obligation of the corporation. 1945-47 Op. Att’y Gen. p. 231.

A joint resolution of the General Assembly which has the effect of law may not infringe upon the constitutional authority of the Board of Regents to govern, control, and manage the University System of Georgia. 1996 Op. Att’y Gen. No. U96-12.

The powers of the board in exercising management over the various phases of the state educational system are very broad and comprehensive. 1948-49 Op. Att’y Gen. p. 141.

Board has authority to merge institutions in university system. 1988 Op. Att’y Gen. No. 88-12.

Conversion of county technical school. — General Assembly approval is required for the Board of Regents to acquire a county technical institute and con-

vert the institute to a public college. 1994 Op. Att'y Gen. No. 94-9.

The Board of Regents may be classified as a governmental unit of this state for purposes of funding under the National Highway Safety Act of 1966, 23 U.S.C. § 401. 1970 Op. Att'y Gen. No. 70-161.

The Board of Regents cannot contract debts or obligations on behalf of the state in violation of Ga. Const. 1976, Art. VII, Sec. III, Para. I (see Ga. Const. 1983, Art. VII, Sec. IV, Paras. I through V) of the Constitution. 1948-49 Op. Att'y Gen. p. 141.

The Board of Regents cannot pledge the credit or property of the state to any individual, company, corporation, or association, nor shall the state "become a joint owner or stockholder in or with, any individual, company, association or corporation," in violation of Ga. Const. 1976, Art. VII, Sec. III, Para. IV (see Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII). 1948-49 Op. Att'y Gen. p. 141.

Legal ability of board to incur debt by issuing revenue obligations is doubtful. 1988 Op. Att'y Gen. No. 88-21.

Members of the board are public officials and are subject to all limitations and restrictions of law to the same extent as other public officials of this state; the members of the Board of Regents are constitutional officers. 1945-47 Op. Att'y Gen. p. 235.

State university is authorized to purchase a vehicle to transport students to and from woodlands off campus for the purpose of research in wildlife conservation. 1950-51 Op. Att'y Gen. p. 288.

Veterinary school. — The Board of Regents of the University System of Georgia is authorized to control and manage the university system which includes the veterinary school; if the board determines that it is necessary to maintain an ambulatory clinic in order to carry out the duties and responsibilities of the veterinary school, then there is no reason why proper equipment should not be purchased by the state for this project. 1948-49 Op. Att'y Gen. p. 146.

Georgia Athletic Association may incorporate and borrow money as a private corporation to finance its activities but must operate under the supervision of the Board of Regents. 1948-49 Op. Att'y Gen. p. 141.

Board of Regents has jurisdiction over misappropriation of funds by University of Georgia students from the sale of football tickets. 1948-49 Op. Att'y Gen. p. 143.

Board of Regents may lease lands in return for the endowment of a research chair if the endowment is equal to the fair market value of the lease and the term of the lease is reasonable. 1995 Op. Att'y Gen. No. 95-25.

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Colleges and Universities, §§ 3, 5, 9 et seq., 42.

ALR. — Gift for public school as a valid charitable gift, 48 ALR 1126.

Gift for lectures as a valid charitable gift, 48 ALR 1142.

Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.

Validity of municipal admission tax for college football games or other college sponsored public events, 60 ALR3d 1027.

Tort liability of college, university, fraternity, or sorority for injury or death of member or prospective member by hazing or initiation activity, 68 ALR4th 228.

SECTION V.

LOCAL SCHOOL SYSTEMS

Paragraph

- I. School systems continued; consolidation of school systems authorized; new independent school systems prohibited.
- II. Boards of education.
- III. School superintendents.
- IV. [Reserved].

Paragraph

- V. Power of boards to contract with each other.
- VI. Power of boards to accept bequests, donations, grants, and transfers.
- VII. Special schools.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2015, p. 1498, § 1/SR 287, if ratified, would revise Article V by adding a new Paragraph VIII, to read as follows: “Paragraph VIII. *Opportunity School District.* Notwithstanding the provisions of Paragraph II of this section, the General Assembly may provide by general law for the creation of an Opportunity School District and authorize the state to assume the supervision, management,

and operation of public elementary and secondary schools which have been determined to be failing through any governance model allowed by law. Such authorization shall include the power to receive, control, and expend state, federal, and local funds appropriated for schools under the current or prior supervision, management, or operation of the Opportunity School District, all in the manner provided by and in accordance with general law.”

Paragraph I. School systems continued; consolidation of school systems authorized; new independent school systems prohibited.

Authority is granted to county and area boards of education to establish and maintain public schools within their limits; provided, however, that the authority provided for in this Paragraph shall not diminish any authority of the General Assembly otherwise granted under this article, including the authority to establish special schools as provided for in Article VIII, Section V, Paragraph VII. Existing county and independent school systems shall be continued, except that the General Assembly may provide by law for the consolidation of two or more county school systems, independent school systems, portions thereof, or any combination thereof into a single county or area school system under the control and management of a county or area board of education, under such terms and conditions as the General Assembly may prescribe; but no such consolidation shall become effective until approved by a majority of the qualified voters voting thereon in each separate school system proposed to be consolidated. No independent school system shall hereafter be established. (Ga. Const. 1983, Art. 8, § 5, Para. 1; Ga. L. 2012, p. 1364, § 2/HR 1162.)

1976 Constitution. — Art. VIII, Sec. V, Paras. I, VI.

Cross references. — Generally, § 20-2-50. Consolidation of county schools, § 20-2-60. Consolidation or merger of school systems, § 20-2-370. Separate school districts within a county, § 20-2-431.

Editor's notes. — The constitutional amendment (Ga. L. 2012, p. 1364, § 2/HR 1162), which added “; provided, however, that the authority provided for in this Paragraph shall not diminish any authority of the General Assembly otherwise granted under this article, including the authority to establish special schools as provided for in Article VIII, Section V, Paragraph VII” at the end of the first

sentence, was ratified at the general election held on November 6, 2012.

As of July 1, 2015, the independent school systems are Atlanta, Bremen, Buford, Calhoun, Carrollton, Cartersville, Chickamauga, Commerce, Dalton, Decatur, Dublin, Gainesville, Jefferson, Marietta, Pelham, Rome, Social Circle, Thomasville, Trion, Valdosta, and Vidalia.

Law reviews. — For article, “Cities and Towns in Georgia: A Distinction With a Difference?,” see 14 Mercer L. Rev. 385 (1963). For survey article on constitutional law, see 34 Mercer L. Rev. 53 (1982). For article on the 2012 Constitutional amendment, see 29 Ga. St. U.L. Rev. 1 (2012).

JUDICIAL DECISIONS

“Maintain” construed. — Word “maintain” as used in this paragraph does not constitute a constitutional prohibition upon the growth of municipal school systems. *Upton County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Prohibition on “establishment” is prohibition on “creation.” — Prohibition on “establishment” of new independent school systems is a prohibition on their “creation.” *Upton County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981).

Territorial expansion of existing city school system by annexation of territory into corporate limits of city is not “creation” or “establishment” of independent school system in contravention of this paragraph. *Upton County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Construction of paragraph. — The provision in this paragraph that authority was granted to counties to establish and maintain public schools within their limits, and that each county, exclusive of any independent school system now in existence in a county would be confined to the control and management of a county board of education amounted to complete constitutional vesting of authority to man-

age and control county schools in the county board of education. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Paragraph does not prescribe exclusive method by which school systems can be merged, but merely establishes procedure by which two school districts or any portions thereof can be combined to create a new entity, an area school district, which is separate and distinct from either of merged school districts. *Upton County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Annexation by municipality also extends city school system limits. — Absent expression of legislative intent clearly to the contrary or a valid agreement between school systems involved, annexation of territory into corporate limits of municipality operating independent school system also extends limits of city school system, so that limits of city school district remain coterminous with city's corporate limits. *Upton County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981).

Intent. — This provision of the Constitution was intended to do only one thing insofar as independent school systems were concerned, and that was to prohibit

the creation of independent systems after adoption of the Constitution, and to preserve those in existence until consolidated or merged as provided by law. *Bailey v. County Bd. of Educ.*, 213 Ga. 308, 99 S.E.2d 124 (1957) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Immunity. — School district, as established by Georgia law, was not an arm of the state for purposes of Eleventh Amendment immunity. *Lightfoot v. Henry County Sch. Dist.*, 771 F.3d 764 (11th Cir. 2014).

Control and management of public schools is in the county boards of education, and will not be interfered with by the courts except in cases where that control and management is contrary to law. *Colston v. Hutchinson*, 208 Ga. 559, 67 S.E.2d 763 (1951).

Other than independent school systems existing in 1945. *Colston v. Hutchinson*, 208 Ga. 559, 67 S.E.2d 763 (1951).

Local school board power limited. — Local school boards, existing only by virtue of the state Constitution, must be restricted to those powers either expressly granted or necessarily implied by statute, since their composition and function are extensively regulated by the state. *Davis v. Griffin-Spalding County Bd. of Educ.*, 445 F. Supp. 1048 (N.D. Ga. 1975).

In its control and management of schools, the county board of education has broad discretionary powers. *Patterson v. Boyd*, 211 Ga. 679, 87 S.E.2d 861 (1955).

Effect of board's broad powers. — Since a county board of education has complete control and management of the schools in the county and is empowered to reorganize them and fix the number of grades to be taught in each, action taken by it with respect thereto is not void and of no legal effect, though it may be erroneous. *Patterson v. Boyd*, 211 Ga. 679, 87 S.E.2d 861 (1955).

Board and School Superintendent authority to contract for employment of teachers settled. — The right and power of the county boards of education and the county superintendents of education to operate the schools of the counties and to make contracts of employment

with teachers is settled by the Constitution and laws of this state, as construed by this court. *Jones v. Ellis*, 182 Ga. 380, 185 S.E. 510 (1936).

It is the board of education and not a court which is empowered by law to manage a county school system, and it is their duty to hire and fire teachers as necessary. To this end, the law grants the board and its Superintendent broad discretion. The orderly operation of the schools depends upon their expertise and not upon whatever skills a judge may possess in the area of school administration. The board's discretion, though, is not unbounded. Standards which they use in the evaluation of prospective teachers must be reasonably related to teaching competency and effectiveness. Their standards must be applied in a uniform fashion so that no group of prospective teachers is singled out for greater scrutiny than other prospective teachers and employment cannot be conditioned upon factors which infringe upon the free exercise of constitutionally protected rights. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

Exercise of constitutional rights does not prohibit termination of teacher. — The constitutional guarantees of free speech, free association, and free exercise of religion do not mean that a school board has no control over the activities or actions of its teachers. A school board may fire, refuse to rehire, or refuse to hire a teacher who has exercised constitutionally protected rights in such a manner as to seriously impair or destroy the teacher's effectiveness as a teacher. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

In an action against the State Board of Education for discriminatory hiring practices, the burden of proof is on the state to prove justification of its actions once a plaintiff has shown that the state action stemmed from the plaintiff's exercise of constitutionally protected rights. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

Finality of board's decision. — When sitting as a court to hear and determine an issue over which it has jurisdiction, decision of school board is final unless an appeal therefrom is taken. *Patterson v. Boyd*, 211 Ga. 679, 87 S.E.2d 861 (1955).

Limited interference by courts. — Unless the board violates some law, or its action is such a gross abuse of discretion as amounts to a violation of law, courts should not and cannot interfere. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Judicial intervention requires gross abuse of discretion that must be such as of itself amounts to a violation of law. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Necessary showing for equity jurisdiction. — In the absence of a showing of the inadequacy of the remedy of appeal to the State Board of Education equity would not take jurisdiction and grant relief in a school matter contrary to former Code 1933, § 37-120 (see now O.C.G.A. § 20-3-4). *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956) (case decided under former § 32-414 re: appeals).

Equity will not interfere with the management of schools unless it clearly appears that the board has acted without authority of law. *Patterson v. Boyd*, 211 Ga. 679, 87 S.E.2d 861 (1955).

Provision for equitable relief construed. — Statement that decisions of the boards of education will not be interfered with by courts of equity unless they amount to a violation of law or are a gross abuse of discretion must be read and considered along with the rule of law that remedies at law, if adequate, must be exhausted before resort to equity will be allowed; when thus construed they mean simply that, when the remedy by appeal has failed to eliminate the law violation or gross abuse of discretion which is its equivalent, equity will grant relief or, as is permissible in all cases to prevent irreparable injury, or where equity alone can grant adequate relief, exhaustion of the statutory remedy of appeal is not a prerequisite to relief in equity. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Court must balance exercise of rights with effectiveness of schools. — A court must balance the individual's interest in free exercise of the individual's rights with the government's need to maintain appropriate order and effective-

ness in the operation of schools. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

Rule governing review by Court of Appeals. — The Court of Appeals has jurisdiction to decide questions of law that involve application, in a general sense, of unquestioned and unambiguous provisions of the Constitution to a given state of facts, and that do not involve construction of some constitutional provision directly in question and doubtful either under its own terms or under decisions of the Supreme Court of the state or of the United States, and that do not involve the constitutionality of any law of the state or of the United States or any treaty. Under this rule, the Supreme Court and not the Court of Appeals has jurisdiction where a surety seeks to be held free of liability on grounds of constitutional provisions which made obligation unenforceable against school system as principal. *Franklin v. Mobley*, 202 Ga. 212, 42 S.E.2d 755 (1947).

Legislative intent by enactment of § 20-3-59. — Conditions affecting schools and the operation of them frequently change materially and it was unquestionably the intention of the legislature, by former Code 1933, § 32-933 (see now O.C.G.A. § 20-3-59), to give county boards of education power to so deal with their schools whenever, in their opinion, the welfare of the schools and the best interests of the pupils require it. *Patterson v. Boyd*, 211 Ga. 679, 87 S.E.2d 861 (1955).

Liability of county education board members. — Members of the county boards of education are not individually liable for the negligent performance of their official duties unless it is shown that their negligence amounts to malicious, or willful and wanton misconduct. *Krasner v. Harper*, 90 Ga. App. 128, 82 S.E.2d 267 (1954).

Under this paragraph, there is no prima facie authority existing in any school district in this state to levy a district school tax. To state a prima facie case that shows a duty upon the defendants to levy a district school tax, the petition for mandamus must show that such tax levy has been authorized as required by this constitutional provision. In the absence of such averments, a petition shows neither the authority nor duty

of the secretary and treasurer and county superintendent of schools to levy a district tax. *Wrightsville Consol. Sch. Dist. v. Selig Co.*, 195 Ga. 408, 24 S.E.2d 306 (1943) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Effect of mandamus proceeding requiring levy of tax to pay judgment obtained against district school. — A local school district is a body corporate or legal entity subject to be sued for any liability which it may lawfully incur, but the judgment rendered in such suit does not adjudicate the authority to levy a local tax for the purpose of paying the claim upon which the judgment is based; and in a mandamus proceeding to require levy of a district tax for purpose of paying such a judgment, the court will look behind the judgment and determine whether or not the claim upon which it is based is one for which a tax may be levied; and if it is not, the writ of mandamus will be denied. *Wrightsville Consol. Sch. Dist. v. Selig Co.*, 195 Ga. 408, 24 S.E.2d 306 (1943).

Contract for continuance of school cannot arise by implication. — In the absence of any constitutional or statutory provision authorizing contracts for continuance of a school, as opposed to consolidation with another school, for an indefinite period of time, a contract for continuance may not arise by implication because citizens and patrons of the school have been

generous and have donated good facilities for the use and benefit of the children of the school district. *Crawford v. Irwin*, 211 Ga. 241, 85 S.E.2d 8 (1954).

Inappropriate division of authority. — A town cannot be marked off inside a school district, and granted power to exercise all municipal functions and the school district none. *Neal v. McWhorter*, 122 Ga. 431, 50 S.E. 381 (1905).

Exercise of eminent domain by municipality for enlargement of school grounds. — The provision of the municipal charter of the City of Edison is sufficiently broad to authorize exercise of the power of eminent domain by the municipality for enlargement of school grounds maintained by the city for public schools. *Sheppard v. City of Edison*, 166 Ga. 111, 142 S.E. 535 (1928).

High schools. — The board of education of any county has the right to establish one or more necessary high schools or junior high schools. *Smith v. Tolbert*, 160 Ga. 268, 127 S.E. 868 (1925).

County board of education is not prohibited by law from contracting with a city board for education of children residing within its jurisdiction. *Walton County Bd. of Educ. v. Academy of Social Circle*, 229 Ga. 114, 189 S.E.2d 690 (1972).

Cited in *Gwinnett County Sch. Dist. v. Cox*, 289 Ga. 265, 710 S.E.2d 773 (2011).

OPINIONS OF THE ATTORNEY GENERAL

Constitutional amendment is not necessary to achieve merger of two school systems. 1979 Op. Att'y Gen. No. 79-40.

Former Code 1933, § 32-1201 (see now O.C.G.A. § 20-2-370) was not superseded or repealed by this paragraph. 1952-53 Op. Att'y Gen. p. 67 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Constitution manifests General Assembly's and peoples intent to create two political subdivisions for handling schools. — Ga. Const. 1976, Art. VIII, Sec. VII, Para. I (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I) and this paragraph indicate that it was the intention of the General Assembly proposing the new Constitution, and of the people in adopting same, that there should be two

political subdivisions for handling school affairs: first, the county district composed of the territory lying outside of the independent system, which territory should be under the control and management of a county board of education and, secondly, independent systems operated by municipal corporations. 1948-49 Op. Att'y Gen. p. 115 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Requirements governing election of candidates to county boards of education. — Candidates for election to county boards of education must comply with the requirements of this paragraph and Ga. Const. 1976, Art. VIII, Sec. V, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II), concerning qualification of candidates except that they must qual-

ify within the time specified by former Code 1933, § 34-1904 (see now O.C.G.A. § 21-2-132). 1976 Op. Att'y Gen. No. 76-128 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

County boards of education are county offices. — County boards of education, even though appointive and created by statute prior to and existent at the time of adoption of the Constitution of 1877, have consistently been held by appellate courts to be county offices. 1962 Op. Att'y Gen. p. 58.

Control and management of public schools of a county school district is confined to the county board of education, including the assignment of pupils to a particular school within a county. 1958-59 Op. Att'y Gen. p. 135.

This paragraph seems to imply that no more independent school systems other than those now in existence shall be established; it would appear, therefore, that a military reservation could not be a part of the state in such manner as to be a part of or constitute a local unit of administration of the state public school system. 1948-49 Op. Att'y Gen. p. 516 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Effect of discontinuance of independent school system prior to 1945. — If a city's discontinuance of its independent school system was accomplished under provisions of former Code 1933, Ch. 32-11, prior to 1945, then it would not have had an existing independent school system as contemplated by this paragraph and thus would not be able to reactivate, maintain, or preserve a city system. 1950-51 Op. Att'y Gen. p. 49 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

County-wide school districts as successors to local school districts can incur bonded indebtedness independently of county indebtedness. — Former local school districts have been recognized as separate political divisions of the state, such as were entitled to incur a bonded indebtedness independently of county bonded obligations; upon merger by the General Assembly of local school districts, in harmony with the provisions of this paragraph into county-wide school districts, the new county-wide district

would likewise constitute a separate political entity under Ga. Const. 1976, Art. IX, Sec. VII, Para. III (see Ga. Code 1983, Art. IX, Sec. V, Para. I), and could do as a unit that which its previous component parts could have done separately, and could therefore incur a bonded indebtedness independently of any indebtedness for general authorized county purposes. 1958-59 Op. Att'y Gen. p. 123 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Restriction on consolidation by local school districts. — Local school districts may not consolidate under this paragraph so as to make the consolidated district liable for the bonded indebtedness of any one of the districts consolidated, unless approved by voters in each district affected. 1945-47 Op. Att'y Gen. p. 127 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Restriction on consolidation of local school districts by county board of education. — A county board of education cannot consolidate local school districts for the purpose of making a nonbonded district liable for bonds of a bonded district unless there had been separate elections in each district. 1945-47 Op. Att'y Gen. p. 126.

Contracting between local education boards. — Local boards of education may contract with each other for care, education, and transportation of pupils, but not for joint management, operation, and control of school facilities. 1975 Op. Att'y Gen. No. U75-32.

Where county board of education and independent system contract with each other for education, transportation and care of pupils under this paragraph and Ga. Const. 1976, Art. VIII, Sec. V, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II), this does not give residents of independent system the right to vote in election held to select county school superintendent, nor may such right be given by contract; such a contract does not amount to merger. Where election requirements were set out by former statute neither individuals nor groups could alter such legislative intent by contract. 1954-56 Op. Att'y Gen. p. 216 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Paragraph grants local school systems broad managerial authority. —

Power granted under this paragraph is construed as granting local school systems broad authority to manage and control their own programs and affairs, absent some constitutional or statutory prohibition. 1981 Op. Att'y Gen. No. U81-2 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Management and control of local school systems are vested at the local level in this state, specifically in the boards of education of the various county and independent city school systems, and this very broad power includes, subject to minimum standards as may be established by the State Board of Education as a condition of continued state fiscal assistance, the right to decide upon educational programs, curricula, course offerings, and general educational opportunities. 1977 Op. Att'y Gen. No. 77-60.

Authority of State Board of Education to preempt local education boards from promoting students invalid. — Inasmuch as former Code 1933 §§ 32-901, 32-1101, 32-907, and 32-912 (see now O.C.G.A. §§ 20-2-50, 20-2-57, and 20-2-59) Ga. Const. 1976, Art. VIII, Sec. V, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Paras. II, IV), and this paragraph have been judicially endorsed numerous times, and in consideration of the fact that the State Board of Education has no express authority to preempt local boards in decisions concerning promotion of individual students, it would appear that the state board could not directly stop an individual student from passing to the next grade level should the county board feel the child is reading sufficiently. 1975 Op. Att'y Gen. No. 75-63 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Implementation of reading requirements as prerequisite to grade passage permissible. — Although the State Board of Education does not have explicit authority to directly preclude a student in a local school district from progressing from one grade level to another if the child is not capable of reading in the higher grade level, the board may, as a condition of continued state fiscal assistance, require local boards of education to implement state board established reading re-

quirements to be imposed on public school students for passage to the next grade level. 1975 Op. Att'y Gen. No. 75-63.

Attendance outside of school district. — The school laws of the State of Georgia do not prohibit a child from receiving an education in a school system other than that in which the child resides; however, if a child desires to enter a school in any other territory, it is permissible to charge such child tuition for the privilege. 1974 Op. Att'y Gen. No. 74-70.

Place county board of education members selected from. — It was clear from this paragraph, Ga. Const. 1976, Art. VIII, Sec. V, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I) and former Code 1933, §§ 32-901 and 32-1101 (see now O.C.G.A. § 20-2-50) that members of the county board of education should be selected from that portion of the county not embraced within the territory of an independent school district. 1948-49 Op. Att'y Gen. p. 510 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

County board of education can determine where a pupil may attend school and can deny a pupil, in their discretion, the right to attend a school of the pupil's choice; where, however, it can be shown that the county board of education was abusing the discretion vested in it, then the aggrieved party could take proper action as provided by law. 1950-51 Op. Att'y Gen. p. 273.

County board of education authority to divide county into attendance area and require mandatory attendance. — A county board of education may not divide the county into school districts, but by the authority of this paragraph and former Code 1933, §§ 32-901 and 32-1101 (see now O.C.G.A. § 20-2-50) it appears that a county board does have the power to divide the county into attendance areas and require that persons of school age living in a certain area attend the school in that area. 1950-51 Op. Att'y Gen. p. 41 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Failure of United States Justice Department to approve change in election procedures leaves prior law in effect. 1976 Op. Att'y Gen. No. U76-14.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Schools, §§ 20 et seq., 48 et seq.

ALR. — Discretion of administrative officers as to changing boundaries of school district, 65 ALR 1523; 135 ALR 1096.

Unionization, centralization, or consolidation of school districts as affecting indebtedness and property of the individual districts, 121 ALR 826.

Discretion of administrative officers as

to changing boundaries of school district, 135 ALR 1096.

Power of school district or school board to employ counsel, 75 ALR2d 1339.

Validity of regulation by public school authorities as to clothes or personal appearance of pupils, 14 ALR3d 1201.

Zoning regulations as applied to public elementary and high schools, 74 ALR3d 136.

Paragraph II. Boards of education.

Each school system shall be under the management and control of a board of education, the members of which shall be elected as provided by law. School board members shall reside within the territory embraced by the school system and shall have such compensation and additional qualifications as may be provided by law. Any board of education to which the members are appointed as of December 31, 1992, shall continue as an appointed board of education through December 31, 1993, and the appointed members of such board of education who are in office on December 31, 1992, shall continue in office as members of such appointed board until December 31, 1993, on which date the terms of office of all appointed members shall end. (Ga. Const. 1983, Art. 8, § 5, Para. 2; Ga. L. 1991, p. 2032, § 1/HR 288.)

1976 Constitution. — Art. VIII, Sec. V, Para. II.

Editor's notes. — The constitutional amendment (Ga. L. 1991, p. 2032, § 1) which revised Paragraph II to provide that members of any board of education to which members are appointed as of December 31, 1992, shall continue as an appointed board through December 31,

1993, and that the appointed members of such board in office on December 31, 1992, shall continue in office until December 31, 1993, at which time the terms of office of all appointed members shall end was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COUNTY-WIDE SCHOOL DISTRICTS

COUNTY EDUCATION BOARDS

1. CONTROL AND MANAGEMENT AUTHORITY
2. ELECTION OR APPOINTMENT
3. EQUAL PROTECTION AND ELECTIONS
4. DUTY TO HIRE AND FIRE TEACHERS
5. PROOF REQUIREMENT FOR COURT INTERFERENCE

COUNTY SCHOOL SUPERINTENDENT

General Consideration

Effect on existing independent school systems. — This paragraph does not give county school districts constitutional status superior to existing independent school systems. *Upson County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Section 20-2-52 superseded by this paragraph before amendment of 1965. — The provision of former Code 1933, § 32-903 (see now O.C.G.A. § 20-2-52) which declared that the grand jury in selecting the members of the county board of education could not select any two of them from the same militia district or locality was unquestionably superseded by this paragraph. Under the plain and unambiguous provisions of the amendment, the people could elect one, any, or all of the members of the county board of education from any portion of the county which was not embraced within the territory of an independent school district. *Garmon v. Crawford*, 211 Ga. 682, 87 S.E.2d 844 (1955) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Construction of paragraph. — The provision in this paragraph providing that authority was granted to counties to establish and maintain public schools within their limits, and that each county, exclusive of any independent school system now in existence in a county would be confined to the control and management of a county board of education amounted to complete constitutional vesting of authority to manage and control county schools in the county board of education. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Effect of Ga. Const., 1945 on school laws. — The Ga. Const., 1945 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. III) did not purport to disturb the state's comprehensive code of statutory school laws other than to make the offices of county school superintendent and county boards of education constitutional offices rather than statutory offices. A member of the board of education, whose term had not expired at the time of the adoption of the Constitution, was entitled to hold office

until the member's successor was elected and qualified. *Powell v. Price*, 201 Ga. 833, 41 S.E.2d 539 (1947).

This paragraph and Art. 3, Ch. 2, T. 20 not conflicting. — This paragraph created a constitutional board of education for each county and also made provision for the number, method of appointment, and terms of the members of such board; but since it made no provision as to the qualification of such members, there was therefore, no conflict between the statutory requirements already in existence when the Constitution was adopted, and former Code 1933, § 32-901 et seq., (see now O.C.G.A. Art. 3, Ch. 2, T. 20), insofar as they pertain to qualifications of board members and provisions of this Constitution. *Estes v. Jones*, 203 Ga. 686, 48 S.E.2d 99 (1948).

Constitutional provisions evidence no intent for repeal of statutory requirements on qualifications of board members. — Construing this paragraph and former Ga. Const. 1976, Art. XI, Sec. I, Para. III (see Ga. Const. 1983, Art. IX, Sec. I, Para. II) together, there is no evident intent that the statutory requirements as to qualifications of members of county boards of education be repealed by the Constitution. *McCollum v. Bass*, 201 Ga. 537, 40 S.E.2d 650 (1946) (decided under Ga. Const. 1945, Art. XI, Sec. I, Para. III; see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Court intervened in school affairs improperly. — The trial court ordered the school board to repair the schools slated for closure, construct any new buildings needed at those sites, and apply for and take all appropriate measures to receive and utilize state outlay capital funds to so renovate, modernize, and replace the schools; in entering such an order, the trial court made decisions involving the management and control of the county schools, matters that the Georgia Constitution has delegated to the local board of education, not the courts. In the absence of evidence that the board of education's decisions violated law or were such a gross abuse of discretion as to be a violation of law, the trial court erred when it intervened in the affairs of the school system by ordering the local board to take

General Consideration (Cont'd)

specified action. *Powell v. Studstill*, 264 Ga. 109, 441 S.E.2d 52 (1994).

Trial court's order requiring a student's reinstatement as a student and a member of a university's varsity football team was reversed due to a lack of a justiciable controversy as: (1) Ga. Const. 1983, Art. VIII, Sec. V, Para. II clearly manifested an intent to entrust the schools to supervising authorities rather than the courts; (2) the student admitted that the suspension arose from a telephone call the student made to facilitate a drug sale and it was not clearly erroneous or arbitrary and capricious for lack of evidence; (3) the student suffered no deprivation of constitutional or statutory rights as there was no right to participate in extracurricular sports; and (4) the suspension did not prejudice the student's substantial rights as the suspension was tailored to permit the student's eventual re-enrollment to complete the student's degree requirements, did not render the student ineligible for a scholarship, and was not a deprivation of major proportion warranting judicial intervention. *Bd. of Regents of the Univ. Sys. of Ga. v. Houston*, 282 Ga. App. 412, 638 S.E.2d 750 (2006).

Persons eligible for board election by grand jury. — As electors and in exercise of their constitutional power as such, the members of a grand jury could elect any person, except one who was a member of the electing grand jury, who possessed the qualifications prescribed by former Code 1933, § 32-903 (see now O.C.G.A. § 20-2-52). *Hobbs v. Peavy*, 210 Ga. 671, 82 S.E.2d 224 (1954).

Annexation by municipality also extends city school system limits. — Absent an expression of legislative intent clearly to the contrary or a valid agreement between the school systems involved, annexation of territory into the corporate limits of a municipality operating an independent school system also extends the limits of the city school system, so that the limits of the city school district remain coterminous with the city's corporate limits. *Upson County Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 281 S.E.2d 537 (1981).

Cited in *Boatright v. Copeland*, 336 Ga. App. 107, No. A15A2043, 2016 Ga. App. LEXIS 134 (2016).

County-wide School Districts

County-wide school districts as successors to local school districts can incur bonded indebtedness independently of county indebtedness. — Upon the merger by the General Assembly of local school districts, in harmony with the provisions of Ga. Const. 1976, Art. VIII, Sec. V, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I), into county-wide school districts, the new county-wide district would likewise constitute a separate political entity and could do as a unit that which its previous component parts could have done separately, and could therefore incur a bonded indebtedness independent of any indebtedness for general authorized county purposes. *Pinion v. Walker County Sch. Dist.*, 203 Ga. 99, 45 S.E.2d 405 (1947).

A consolidated county school district is a separate political division of this state such as is authorized to incur a bonded indebtedness up to seven percent of the assessed valuation of its taxable property, independent of and in addition to any outstanding bonded indebtedness incurred by any of its component former local school districts prior to their merger into a county-wide school district. *Pinion v. Walker County Sch. Dist.*, 203 Ga. 99, 45 S.E.2d 405 (1947).

Contract for continuance of school cannot arise by implication. — In the absence of any constitutional or statutory provision authorizing contracts for the continuance of a school, as opposed to consolidation with another school, for an indefinite period of time, a contract for continuance may not arise by implication because citizens and patrons of the school have been generous and have donated good facilities for the use and benefit of the children of the school district. *Crawford v. Irwin*, 211 Ga. 241, 85 S.E.2d 8 (1954).

County Education Boards**1. Control and Management Authority**

Each county of the state is made a school district, and management and

control of the schools of the county is confided in the county board of education. *Pass v. Pickens*, 204 Ga. 629, 51 S.E.2d 405 (1949); *Burton v. Kearse*, 204 Ga. 765, 51 S.E.2d 796 (1949).

Control and management of public schools must be left largely to discretion of the county board of education; and when this discretion is exercised within the limits of their jurisdiction, there is no ground for complaint. *Pearce v. Wisdom*, 175 Ga. 663, 165 S.E. 574 (1932).

Paragraph does not take away power. — This paragraph did not operate to take away from the county school district powers as were exercised by the former local school districts such as those powers enumerated in former Code 1933, §§ 32-113, 32-115, and 32-1104 (see now O.C.G.A. §§ 20-2-437 and 20-3-51). *Nelms v. Stephens County Sch. Dist.*, 201 Ga. 274, 39 S.E.2d 651 (1946) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Effect of merger of the local school districts into one county school district is to transfer the basis for the authorized debt from a percentage of the assessed valuation of the taxable property located within the separate local school districts to a percentage of the assessed valuation of the taxable property within the consolidated county school district as a whole. No larger debt is rendered possible by the merger of the local school districts into one county school district. *Nelms v. Stephens County Sch. Dist.*, 201 Ga. 274, 39 S.E.2d 651 (1946).

Action involving parents organization and school authorities regarding the reassignment of high schools in a county to another region for purposes of interscholastic athletic competition did not present a justiciable controversy. *Parents Against Realignment v. Georgia High School Association*, 271 Ga. 114, 515 S.E.2d 528 (1999).

Right to determine what is best for school pupils is vested in the board of education. *Deriso v. Cooper*, 246 Ga. 540, 272 S.E.2d 274 (1980).

Courts should not determine what is best for pupils. — Authority to manage and control county schools is vested by this paragraph in the county board of education, and any challenge of acts of

county board relating to control and operation of schools must be weighed in the light of this sweeping power, which clearly manifests an intent to entrust the schools to the boards of education rather than the courts. *Deriso v. Cooper*, 246 Ga. 540, 272 S.E.2d 274 (1980) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Exclusive control by county board of education. — By the Constitution, the control and management of the public schools, other than independent school systems existing in 1945, is placed under the exclusive control and management of the county boards of education. *Colston v. Hutchinson*, 208 Ga. 559, 67 S.E.2d 763 (1951).

Limited judicial interference. — Control and management of public schools will not be interfered with by the courts except where that control and management is contrary to law. *Colston v. Hutchinson*, 208 Ga. 559, 67 S.E.2d 763 (1951).

Funding for start-up charter schools. — Pursuant to the plain language of O.C.G.A. § 20-2-2068.1(c), a school system and school board had no authority or discretion to deduct the system's unfunded pension expense of \$ 38.6 million from their calculation of local revenue to be distributed to start-up charter schools; the start-up charter schools were entitled to mandamus relief. *Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch.*, 293 Ga. 629, 748 S.E.2d 884 (2013).

County residents' challenge to a school board candidate's residency qualification under O.C.G.A. § 45-2-1(1) and Ga. Const. 1983, Art. VIII, Sec. V, Para. II, was barred by res judicata because another challenger had raised the same challenge, and the challenge had been resolved against the challenger by the county's board of elections. *Lilly v. Heard*, 295 Ga. 399, 761 S.E.2d 46 (2014).

2. Election or Appointment

Subsection (b) of this paragraph is permissive as it relates to the requirement that local laws affecting school boards be approved by referendum. *Williamson v. Schmid*, 237 Ga. 630, 229 S.E.2d 400 (1976) (see Ga. Const. 1983,

County Education Boards (Cont'd)
2. Election or Appointment (Cont'd)

Art. VIII, Sec. V, Para. II).

Subsection (b) does not restrict authority of the General Assembly to enact local laws pertaining to school boards under authority of prior amendments to Ga. Const. 1976, Art. VIII, Sec. V, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I). *Williamson v. Schmid*, 237 Ga. 630, 229 S.E.2d 400 (1976).

The grand jury is an appropriate vehicle for the selection of county board members. *Wallis v. Blue*, 263 F. Supp. 965 (N.D. Ga. 1967).

Failure of official to give notice of election not sufficient to invalidate election. — A constitutional amendment, duly ratified by the people (Ga. L. 1955, pp. 711, 714), creating election of the six members of the Board of Education of Wheeler County by militia districts, having provided by law for the time of regular election, the notice of election to be given by the judge of the probate court is directory, and the judge's failure to perform this duty does not invalidate the election thus held on that date. *McNair v. Achord*, 215 Ga. 540, 111 S.E.2d 236 (1959).

Construction and interpretation of local election amendment. — Where a local amendment to the Constitution provided that Ware County "Elections for members of the board of education shall be held and conducted in the same manner as elections for other county officials are held," there was a clearly disclosed legislative intent to provide for removal from office of members of the board and replacement by the procedure stated in Ga. Const. 1976, Art. IX, Sec. I, Para. VIII (see Ga. Const. 1983, Art. IX, Sec. I, Para. III), which applied to county officials in general, and not by the procedure stated in former Code 1933, § 32-905 (see now O.C.G.A. § 20-2-53) and this paragraph, which applied to boards of education specifically. *Thigpen v. State*, 229 Ga. 820, 194 S.E.2d 423 (1972).

Terms of school board members. — Term limitations of Telfair County Tenure Law, 1963 Ga. Laws 705, do not apply to school board members because the Tenure Law amends Ga. Const. 1983, Art. IX and

not Ga. Const. 1983, Art. VIII; thus, a member who was serving a third consecutive term was not subject to the Tenure Law. *Dyal v. Pope*, 283 Ga. 463, 660 S.E.2d 725 (2008).

O.C.G.A. § 20-2-52 did not limit terms school board member could serve under the Telfair County Tenure Law, 1963 Ga. Laws 705; although the Telfair County Tenure Law is a constitutional amendment, it is not a constitutional amendment that applies to Ga. Const. 1983, Art. VIII and school board members. *Dyal v. Pope*, 283 Ga. 463, 660 S.E.2d 725 (2008).

Use of quo warranto to oust board members. — Where the plaintiff contends the defendants are illegally holding office because of the alleged unconstitutionality of this paragraph of the Georgia Constitution providing for the means of their selection, quo warranto would be an adequate remedy. *Boatright v. Brown*, 222 Ga. 497, 150 S.E.2d 680 (1966) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Removal of county board of education members. — Superior court erred in denying the county board of education members' request to reverse the governor's order removing the members from office under O.C.G.A. § 45-10-4 for violating O.C.G.A. § 45-10-3; O.C.G.A. § 45-10-3 does not embrace entities created by the Constitution of Georgia, and county school boards are creations of Ga. Const. 1983, Art. VIII, Sec. V, Para. II. *Roberts v. Deal*, 290 Ga. 705, 723 S.E.2d 901 (2012).

Whether characterized as setting a qualification for continued service on the local board in the extraordinary circumstance of an imminent loss of accreditation, or whether characterized as providing for removal for malfeasance, misfeasance, or nonfeasance in office, O.C.G.A. § 20-2-73 was held by the Georgia Supreme Court to be a permissible exercise of the legislative power to provide for the removal for cause of members of local boards. *DeKalb County Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 751 S.E.2d 827 (2013).

Georgia Supreme Court held that the removal of local school board members under O.C.G.A. § 20-2-73 was not an unconstitutional infringement upon the gov-

erning authority of local school boards, nor was it a violation of any other constitutional provision or right. *DeKalb County Sch. Dist. v. Ga. State Bd. of Educ.*, 294 Ga. 349, 751 S.E.2d 827 (2013).

3. Equal Protection and Elections

Limitation of school board membership to freeholders violates the equal protection clause of the fourteenth amendment. *Turner v. Fouche*, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970).

Scheme for selecting board members not unfair. — The state's constitutional and statutory scheme for selecting its grand juries and boards of education is not inherently unfair, or necessarily incapable of administration without regard to race; the federal courts are not powerless to remedy unconstitutional departures from Georgia law by declaratory and injunctive relief. *Turner v. Fouche*, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970).

Employment by other school boards of different method to control quality of education evince no denial of equal protection. — Since the Georgia Constitution and Code provide local school boards with sweeping authority in the governing of local school systems, the fact that other school boards may choose to employ other methods to control the quality of education in their systems does not evince a denial of equal protection. *Wells v. Banks*, 153 Ga. App. 581, 266 S.E.2d 270 (1980).

4. Duty to Hire and Fire Teachers

It is the Board of Education's duty to hire and fire teachers as necessary. To this end, the law grants the board and its Superintendent broad discretion. The orderly operation of the schools depends upon their expertise and not upon whatever skills a judge may possess in the area of school administration. The Board's discretion, though, is not unbounded. Standards which they use in the evaluation of prospective teachers must be reasonably related to teaching competency and effectiveness. Their standards must be applied in a uniform fashion so that no group of prospective teachers is singled out for

greater scrutiny than other prospective teachers and employment cannot be conditioned upon factors which infringe upon the free exercise of constitutionally protected rights. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

The law vests full power and authority for operation of schools in county boards of education. Trustees may recommend, but the power to employ teachers is exclusively in the county board of education. Contracts made by school trustees under powers conferred by this section are subject to approval by the county board of education. *Fordham v. Harrell*, 197 Ga. 135, 28 S.E.2d 463 (1943) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Termination of teachers for exercise of constitutional rights. — Constitutional guarantees of free speech, free association, and free exercise of religion do not mean that a school board has no control over activities or actions of its teachers. A school board may fire, refuse to rehire, or refuse to hire a teacher who has exercised constitutionally protected rights in such a manner as to seriously impair or destroy the teacher's effectiveness as a teacher. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

Balance between constitutional rights and school order. — A court must balance the individual's interest in the free exercise of the individual's rights with the government's need to maintain appropriate order and effectiveness in operation of schools. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

In an action against State Board of Education for discriminatory hiring practices the burden of proof is on the state to prove justification of its actions once a plaintiff has shown that the state action stemmed from the plaintiff's exercise of constitutionally protected rights. *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973).

5. Proof Requirement for Court Interference

Degree of discretionary abuse needed to justify interference by court. — Unless the act of a board violates some law, or is such a gross abuse of

County Education Boards (Cont'd)

5. Proof Requirement for Court

Interference (Cont'd)

discretion as amounts to a violation of law, courts should not and cannot interfere. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Abuse of discretion must violate law to justify judicial intervention. —

A gross abuse of discretion by the county board of education which will authorize resort to courts must be such as of itself amounts to a violation of the law. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Provision for equitable relief construed. —

Statement that decisions of the boards of education will not be interfered with by courts of equity unless they amount to a violation of law or are a gross abuse of discretion must be read and considered along with the rule of law that remedies at law, if adequate, must be exhausted before resort to equity will be allowed; when thus construed they mean simply that, when the remedy by appeal has failed to eliminate the law violation or gross abuse of discretion which is its equivalent, equity will grant relief or, as is permissible in all cases to prevent irrepa-

rable injury, or where equity alone can grant adequate relief, exhaustion of the statutory remedy of appeal is not a prerequisite to relief in equity. *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

Equity will not interfere with management of a county board of education unless the board has acted without authority of law. *Burton v. Kearse*, 204 Ga. 765, 51 S.E.2d 796 (1949).

In absence of a showing of the inadequacy of appeal to State Board of Education, equity would not take jurisdiction and grant relief in a school matter contrary to former Code 1933, § 37-120 (see now O.C.G.A. § 23-1-4). *Bedingfield v. Parkerson*, 212 Ga. 654, 94 S.E.2d 714 (1956).

County School Superintendent

Office of county school superintendent is a constitutional office.

The county superintendent is to be elected by the voters of the district, the superintendent's district being the county of the superintendent's residence exclusive of any independent school system in existence in such county. *Kemp v. Mitchell County Democratic Executive Comm.*, 216 Ga. 276, 116 S.E.2d 321 (1960).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

COUNTY BOARDS OF EDUCATION

1. APPOINTMENT OF MEMBERS
2. ELECTION OF MEMBERS
3. CONTROL AND MANAGEMENT AUTHORITY
4. UNAUTHORIZED ACTS

STATE BOARD OF EDUCATION

General Consideration

Constitutional language required reorganization and rearrangement of board members' terms. —

It was the intention of the framers of the Constitution to provide for a reorganization of all county boards of education, and the words "the first election of board members under this Constitution shall be for such terms that will provide for the expiration of the term of one member ... each year" clearly

imply that the grand juries of the counties were required to reorganize and rearrange the terms of the members in accordance with the scheme set out in this paragraph, at the first board election after the Constitution took effect. 1948-49 Op. Att'y Gen. p. 103 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Paragraph (c) construed on manner of election of board members. —

The first sentence of this paragraph permits the residence requirements to be

changed by local legislation upon referendum, and the second sentence of this paragraph provides for “further qualifications as may be provided by law”; however, this provision as to general qualifications to be provided by law was construed to mean by general law, such as that contained in former Code 1933, §§ 32-907, 23-908, 32-909, 32-910, and 32-912 (see now O.C.G.A. §§ 20-2-57, 20-2-58, 20-2-520, and 20-2-1160); if an attempt were made to enlarge the qualification requirements, other than residence requirements, by local law, there would be a violation of Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), which prohibits special legislation in cases where provision has been made by existing general law. 1972 Op. Att’y Gen. No. U72-103.

Applicable to local school board members. — School board members selected by the local governing body are appointed boards within the meaning of the 1992 amendment to Ga. Const. 1983, Art. VIII, Sec. V, Para. II, which provided for elected boards of education. 1992 Op. Att’y Gen. No. 92-34.

County Boards of Education

1. Appointment of Members

To the extent that provisions of Ga. L. 1953, Nov.Dec. Sess., p. 334, § 1 and former Code 1933, § 32-903 §§ 20-2-51 and 20-2-52 conflict with this paragraph, the latter constitutional provision controls, but such conflict does not otherwise render other provisions contained in said sections invalid. 1960-61 Op. Att’y Gen. p. 151 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

Ga. L. 1953, Nov.-Dec. Sess., p. 334, § 1 and former Code 1933, § 32-903 (see now O.C.G.A. §§ 20-2-51 and 20-2-52) must be read in conjunction with and pursuant to the constitutional provision. 1960-61 Op. Att’y Gen. p. 155.

This paragraph means that the grand jury is the appointing power of the members of the county board of education and that if they are in session at the time a vacancy occurs, it would be the duty of the grand jury at that time to

fill the vacancy. 1948-49 Op. Att’y Gen. p. 502.

Absent any local constitutional amendment, county school board members were not elected by voters, but were appointed by the grand jury under this paragraph; within the meaning of former Code 1933 § 89-103 (see now O.C.G.A. § 45-2-2), it may be that a member of a county board of education was not a “county officer.” 1958-59 Op. Att’y Gen. p. 146 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I).

“Hold office until.” — The words “hold office until” indicate that the individual elected by the board has no right to serve beyond the time of the appointment by the grand jury. Undoubtedly, the board is given such authority because of the fact that in many counties in Georgia there will be a considerable lapse of time between terms of court. For this reason, a grand jury is not bound to appoint the same successor elected by the board. 1957 Op. Att’y Gen. p. 104.

The grand jury may not select two members of the county board of education from the same militia district or locality. 1945-47 Op. Att’y Gen. p. 143.

If a county had less than five militia districts, the application of former Code 1933, § 32-903 (see now O.C.G.A. § 20-2-52) was in conflict with this paragraph which provided for a five-member county board of education and when there was only four militia districts in a county, two members of the board of education may come from one district. 1954-56 Op. Att’y Gen. p. 176 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

When a county has only four militia districts, one member of the county board of education should be selected from the county at large. 1945-47 Op. Att’y Gen. p. 146.

Procedure for filling vacancies on school board. — Since this paragraph superseded that portion of former Code § 32-905 (see now O.C.G.A. § 20-2-53) giving judges of superior courts power to fill vacancies on a county board of education, the Constitution meant that the grand jury was the appointing power of the members of the county board of edu-

County Boards of Education (Cont'd)
1. Appointment of Members (Cont'd)

cation and that if they were in session at the time a vacancy occurred, it would be the duty of the grand jury at that time to fill the vacancy; if a vacancy occurred at a time when the grand jury was not in session and when it cannot make the appointment, there should be no vacancy between that time and the convening of the grand jury and, therefore, in such a case this paragraph provided that members of the county board of education by secret ballot shall elect a person to hold office until the grand jury convened, so that the grand jury can make the appointment for the unexpired term as contemplated by the Constitution. 1948-49 Op. Att'y Gen. p. 502; 1950-51 Op. Att'y Gen. p. 38 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

The "next grand jury" refers to the succeeding grand jury which convenes on the fourth Monday in October. Also, failure of the board of education to elect would in no way affect the right of the grand jury to appoint the successor. 1957 Op. Att'y Gen. p. 104.

County boards held county offices by appellate courts. — County boards of education, even though appointive and created by statute prior to and existent at the time of adoption of the Constitution of 1877, have consistently been held by the appellate courts to be county offices. 1962 Op. Att'y Gen. p. 58.

Term of office of members elected by grand jury prescribed by law. — There is no provision in the law whereby a county grand jury can elect a member to the county board of education, commencing with the expiration of a preceding member's term of office, for a period of time either greater or less than that prescribed by law. 1960-61 Op. Att'y Gen. p. 155.

Grand jury may fix first term. — The grand jury of the county is clothed with power to fix beginning and ending of term of the first appointees made after adoption of the state Constitution and thereafter all subsequent terms are to conform with the beginning of the term of the first appointee. 1960-61 Op. Att'y Gen. p. 155.

Local school district trustees selected under statute remain in office under the Constitution. 1945-47 Op. Att'y Gen. p. 178.

Appointment of local school board members not controlled by § 15-12-67 regarding secrecy of meetings. — Responsibility of grand jury to appoint members of local school board under this paragraph was not controlled by former Code 1933, §§ 59-208 and 59-210 (see now O.C.G.A. § 15-12-67) relating to secrecy of meetings of that body. 1980 Op. Att'y Gen. No. U80-44 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

2. Election of Members

Changing methods of electing board members. — Selection of a county board of education can be changed from an appointive method to an elective one by complying with this paragraph; where this is done, the "one-man, one-vote" principle of the U.S. Const., amend. 14, is not violated by requirement that members reside in particular militia districts, so long as their election is on a county-wide basis. 1971 Op. Att'y Gen. No. U71-14.1 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Requirements. — Candidates for election to county boards of education must comply with the requirements of Ga. Const. 1976, Art. VIII, Sec. V, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I), and this paragraph concerning the qualification of candidates except that they must qualify within the time specified by former Code 1933, § 34-1904 (see now O.C.G.A. § 21-2-132). 1976 Op. Att'y Gen. No. 76-128 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Residency requirements for the election of local school board members cannot be established by board bylaws. 1997 Op. Att'y Gen. No. U97-25.

Holding over in office. — A member of a county board of education may hold over in office until the member's successor is elected and qualified. 1993 Op. Att'y Gen. No. U93-16.

Failure of a person elected as a member of the county board of education to accept the member's commission creates a vacancy in the office.

1945-47 Op. Att'y Gen. p. 144.

Chairman of a county board of education may vote to make or break a tie on some issue before the board. 1957 Op. Att'y Gen. p. 104.

Failure of United States Justice Department to approve change in election procedures leaves prior law in effect. 1976 Op. Att'y Gen. No. U76-14.

Members of the county board of education are public officers, and their election, term of office, and method of filling vacancies are determined by the state Constitution. 1945-47 Op. Att'y Gen. p. 144.

Effect of constitutional provisions on statutory school laws. — This paragraph and Ga. Const. 1976, Art. VIII, Sec. V, Para. V (see Ga. Const. 1983, Art. VIII, Sec. V, Paras. III and IV) simply made constitutional Arts. 9 through 11 and 25, Ch. 2, T. 20, Part 3, Art. 16, Ch. 2, T. 20, Part 9, Art. 17, T. 20, and § 20-2-1074 thereby creating a constitutional board of education for the counties; they did not purport to disturb the comprehensive code of statutory school laws other than to make the offices of county school superintendent and county boards of education constitutional rather than statutory offices. 1958-59 Op. Att'y Gen. p. 143 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Independent school system not given right to vote for county school superintendent by contract with county board of education. — Where the county board of education and the independent system contract with each other for the education, transportation, and care of pupils under Ga. Const. 1976, Art. VIII, Sec. V, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I), and this paragraph, this does not give residents of the independent system the right to vote in election held to select county school superintendent, nor may such right be given by contract; such a contract does not amount to merger. Where election requirements were set out by statute in former Code 1933, § 32-1002 (former § 20-2-101) neither individuals nor groups could alter such legislative intent by contract. 1954-56 Op. Att'y Gen. p. 216 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II).

Independent school district can participate in selection of board members. — A citizen resident of an independent school district is not disqualified from participating in selection of a member of a county board of education by a grand jury of which the citizen is a member. 1960-61 Op. Att'y Gen. p. 151.

Residential qualifications. — Where members of board resided in portion of county not embraced within territory of independent school district at the time of their selection, they met qualifications and acquired legal title to offices. 1958-59 Op. Att'y Gen. p. 101.

Quo warranto proceedings necessary for removal of board members serving unlawfully. — Members of a county board of education who because of extension of corporate limits of a city, find themselves residing within territorial boundaries of an independent public school district, do not lose their membership on such board; they continue to hold office until removed by quo warranto proceedings. 1958-59 Op. Att'y Gen. p. 101.

3. Control and Management Authority

The county board of education is a political subdivision of the state and serves as the agency through which the county acts in school matters. 1957 Op. Att'y Gen. p. 99.

Management and control of local school systems are vested at the local level in Georgia, specifically in the boards of education of the various county and independent city school systems, and this very broad power includes, subject to such minimum standards as may be established by the State Board of Education as a condition of continued state fiscal assistance, the right to decide upon educational programs, curricula, course offerings, and general educational opportunities. 1977 Op. Att'y Gen. No. 77-60.

Local school board assigns students to a particular school within a county. 1958-59 Op. Att'y Gen. p. 135; 1960-61 Op. Att'y Gen. p. 142.

Charging a fee for school transcripts is a local matter within the discretion of the county board of education. 1957 Op. Att'y Gen. p. 97.

County Boards of Education (Cont'd)**3. Control and Management****Authority (Cont'd)**

Transfer of a teacher from one school to another notwithstanding objections of School Superintendent. 1962 Op. Att'y Gen. p. 152.

Minimum age necessary for a student to enroll in public schools of Georgia is an administrative question to be decided by each county or city board of education. 1954-56 Op. Att'y Gen. p. 274.

Constitutional power to contract limited. — The constitutional powers to contract in Ga. Const. 1976, Art. VIII, Sec. V, Para. IV, and Ga. Const. 1976, Art. IX, Sec. VI, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. V, and Ga. Const. 1983, Art. IX, Sec. III, Para. I) are limited by this constitutional provision which states that control and management of county schools shall be confined to the county board of education; the power to exercise judgment and discretion cannot be delegated by a county board of education. 1958-59 Op. Att'y Gen. p. 116.

Law vests full power and authority for the operation of schools in the county board of education. 1958-59 Op. Att'y Gen. p. 137.

Minimum and maximum ages of children who may be taught in public schools is a matter which addresses itself to the local boards of education. 1965-66 Op. Att'y Gen. No. 65-10.

Assignment of pupils. — A local board of education has the authority to designate which school within its school district shall be attended by a particular pupil, i.e., assignment of pupils in the public schools. 1958-59 Op. Att'y Gen. p. 137.

Local boards cannot contract for joint management. — Local boards of education may contract with each other for care, education, and transportation of pupils, but not for joint management, operation, and control of school facilities. 1975 Op. Att'y Gen. No. U75-32.

County board of education and school superintendent official relationship. — The power to manage and control county school systems in Georgia rests in the county board of education; the county school superintendent is obliged to

comply with and carry out all rules, regulations, and instructions of the county board of education. 1974 Op. Att'y Gen. No. U74-65.

Superintendent's duty to run system upon recall of board. — The county school superintendent is charged with the duty of continuing to effectuate and enforce the rules, regulations, and instructions of the county board of education and continuing to operate the county school system during the period of time between the successful recall of all or a majority of the county board of education and the filling of the vacancies on the county board of education by special election. 1985 Op. Att'y Gen. No. U85-43.

Contracts between neighboring boards of education for services. — A contract between a local Board of Education and neighboring Board of Education to provide education and related services for all of its students is specifically contemplated in the Constitution of Georgia and would be authorized unless a particular provision of the contract or a related service was otherwise illegal. 1989 Op. Att'y Gen. 89-41.

Authority to employ counsel implied from board's management and responsibility power. — It is inconceivable that the intent of the framers of the Constitution or the members of the General Assembly in giving these boards control, management, and responsibility as to local schools did not imply authority to employ adequate counsel to represent the board in litigation and give legal advice as to the administration of school laws. 1957 Op. Att'y Gen. p. 99.

County board of education has authority to expend public school funds for employing attorneys to represent members of a county board of education where the controversy involves the power of a local board of education (local school district) or an officer and the validity of the exercise of such power. The local board of education has no power to employ counsel for a purpose outside its proper function, nor may counsel be employed at public expense to prosecute or defend actions by or against such board members in their individual capacities. 1957 Op. Att'y Gen. p. 99.

Charges for lost or damaged books. — Local school boards are authorized to assess charges against students for lost and unnecessarily damaged text books or library materials but local school boards may not withhold transferring a student's record to another school system when there are unpaid charges or student fees. 1990 Op. Att'y Gen. No. 90-29.

4. Unauthorized Acts

Private audit of funds unauthorized. — County board of education cannot expend county education funds for private audit of funds derived from extracurricular school activities; such an expenditure of education funds is not an expenditure for an "educational purpose" within the meaning of such term. 1962 Op. Att'y Gen. p. 155.

Even though maintaining custody and control of funds in their custody is a proper matter for regulation by local boards of education, and regulation, supervision and control includes maintenance of records pertaining thereto and audit of funds derived therefrom; should a local board of education desire a private audit of such funds, the expense of obtaining such audit must be paid out of funds derived from such activities. 1962 Op. Att'y Gen. p. 155.

A county board of education may not pay insurance premiums for protection of school buildings owned by a municipality. 1945-47 Op. Att'y Gen. p. 144.

Incorporation by school boards or membership in nonprofit corporations prohibited. — While county boards of education are vested with broad powers respecting management and control of the school systems they administer under former Code 1933, § 32-909 (see now O.C.G.A. § 20-2-520), including the right to contract with each other under Ga. Const. 1976, Art. VIII, Sec. V, Para. IV

(see Ga. Const. 1983, Art. VIII, Sec. V, Para. V), the general laws pertaining to creation of nonprofit corporations appear to exclude the possibility of school boards incorporating or being members of nonprofit corporations as a county board of education is not a corporation, partnership, association, or other "person." 1978 Op. Att'y Gen. No. 78-4.

State Board of Education

Authority of State Board of Education to preempt local education boards from promoting students invalid. — Inasmuch as former Code 1933, §§ 32-901, 32-907, 32-912 and 32-1101 (see now O.C.G.A. §§ 20-2-50, 20-2-57, and 20-2-59), this paragraph, and Ga. Const. 1976, Art. VIII, Sec. V, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I) have been judicially endorsed, and in consideration of the fact that State Board of Education had no express authority to preempt local boards in decisions concerning promotion of individual students, it would appear that the state board could not directly stop an individual student from passing to the next grade level should the county board feel the child was reading sufficiently. 1975 Op. Att'y Gen. No. 75-63.

Implementation of reading requirements as prerequisite to grade promotion permissible. — Although the State Board of Education does not have explicit authority to directly preclude a student in a local school district from progressing from one grade level to another if the child is not capable of reading in the higher grade level, the board may, as a condition of continued state fiscal assistance, require local boards of education to implement state board established reading requirements to be imposed on public school students for passage to the next grade level. 1975 Op. Att'y Gen. No. 75-63.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Schools, § 66 et seq.

C.J.S. — 78 C.J.S., Schools and School Districts, § 98 et seq.

ALR. — Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.

Legislative power to prescribe qualifica-

tions for or conditions of eligibility to constitutional office, 34 ALR2d 155.

Power of school district or school board to employ counsel, 75 ALR2d 1339.

Applicability and application of § 2 of Voting Rights Act of 1965 (42 USCS § 1973) to members of school board, 105 ALR Fed. 254.

Paragraph III. School superintendents.

There shall be a school superintendent of each system appointed by the board of education who shall be the executive officer of the board of education and shall have such qualifications, powers, and duties as provided by general law. Any elected school superintendent in office on January 1, 1993, shall continue to serve out the remainder of his or her respective term of office and shall be replaced by an appointee of the board of education at the expiration of such term. (Ga. Const. 1983, Art. 8, § 5, Para. 3; Ga. L. 1991, p. 2032, § 2/HR 288.)

1976 Constitution. — Art. VIII, Sec. V, Para. V.

Editor's notes. — The constitutional amendment (Ga. L. 1991, p. 2032, § 2) which revised Paragraph III to provide for appointment of school superintendents and to provide that elected superinten-

dents in office on January 1, 1993, shall serve out their terms and be replaced by appointed superintendents at the expiration of such terms was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

JUDICIAL DECISIONS

Office of county school superintendent is a constitutional office. The county superintendent is to be elected by the voters of the superintendent's district, the superintendent's district being the county of his residence exclusive of any independent school system in existence in such county. *Kemp v. Mitchell County Democratic Executive Comm.*, 216 Ga. 276, 116 S.E.2d 321 (1960).

Effect of Ga. Const., 1945 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. III) on school laws. — Georgia Const., 1945 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. III) did not purport to disturb the state's comprehensive code of statutory school laws other than to make the offices of county school superintendent and county boards of education constitutional offices rather than statutory offices. A member of the board of education, whose term had not expired at the time of the adoption of the Constitution, was entitled to hold office until the member's successor was elected and qualified. *Saxon v. Bell*, 201 Ga. 797, 41 S.E.2d 536 (1947); *Powell v. Price*, 201 Ga. 833, 41 S.E.2d 539 (1947).

Office of county school superintendent was not abolished by the Constitution of 1945; it was simply changed from a statutory office to a constitutional one (see Ga. Const. 1983, Art. VIII, Sec. V, Para. III). *Saxon v. Bell*, 201 Ga. 797, 41 S.E.2d 536 (1947).

Local constitutional amendment. — A local constitutional amendment which prohibits "county officers" from succeeding themselves after two successive terms in office does not govern the qualifications or eligibility for the office of superintendent of the Telfair County School District. *Bradfield v. Wells*, 262 Ga. 198, 415 S.E.2d 638 (1992).

Cited in *Dougherty County v. Jones*, 43 Ga. App. 188, 158 S.E. 432 (1931); *Southern Ry. v. Paulding County*, 44 Ga. App. 806, 162 S.E. 919 (1932); *Davis v. Had-dock*, 191 Ga. 639, 13 S.E.2d 657 (1941); *Guy v. Nelson*, 202 Ga. 728, 44 S.E.2d 775 (1947); *Huff v. Anderson*, 212 Ga. 32, 90 S.E.2d 329 (1955); *Smith v. Maynard*, 214 Ga. 764, 107 S.E.2d 815 (1959); *State Bd. of Educ. v. Elbert County Bd. of Educ.*, 112 Ga. App. 840, 146 S.E.2d 344 (1965);

Knight v. Troup County Bd. of Educ., 144 Ga. App. 634, 242 S.E.2d 263 (1978); Thomaston, 248 Ga. 98, 281 S.E.2d 537 (1981).
Upson County Sch. Dist. v. City of

OPINIONS OF THE ATTORNEY GENERAL

Procedure to permit elected superintendent of one county to serve as appointed superintendent of another county. — Because of uncertainty as to how courts would interpret former Code 1933, §§ 32-1004 and 89-101 (see former O.C.G.A. §§ 20-2-102 and 45-2-1, respectively), the safer route to take, should it be desired to permit an elected superintendent of one county to serve as the appointed superintendent of another county, would have been to proceed through the enactment of local legislation conditioned upon voter approval under this para-

graph, and not to attempt to rely upon the authorization contained in former Code 1933, § 89-101 (see now O.C.G.A. § 45-2-1). 1977 Op. Att’y Gen. No. 77-11.
Voters residing in an independent school system are not entitled to vote for the county school superintendent who is an officer of that part of the county which lies outside of independent school systems. 1948-49 Op. Att’y Gen. p. 115.
Failure of United States Justice Department to approve change in election procedures leaves prior law in effect. 1976 Op. Att’y Gen. No. U76-14.

RESEARCH REFERENCES

C.J.S. — 78 C.J.S., Schools and School Districts, § 287 et seq.
ALR. — Time as of which eligibility or ineligibility to office is to be determined, 143 ALR 1026.
Legislative power to prescribe qualifica-

tions for or conditions of eligibility to constitutional office, 34 ALR2d 155.
Validity of requirement that candidate or public officer have been resident of governmental unit for specified period, 65 ALR3d 1048.

Paragraph IV. Reserved.

1976 Constitution. — Art. VIII, Sec. V, Paras. II and V.
Editor’s notes. — The constitutional amendment (Ga. L. 1991, p. 2032, § 3) which repealed Paragraph IV as inconsis-

tent with the proposed amendments to Paragraphs II and III was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

OPINIONS OF THE ATTORNEY GENERAL

Changes in selection method for Muscogee County Board of Education. — Any changes by local law in the method of selection of members of the Muscogee County Board of Education must be conditioned upon approval by a

majority of the qualified voters voting thereon in the school system and must be precleared pursuant to § 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973c), before being implemented. 1987 Op. Att’y Gen. No. U87-1.

Paragraph V. Power of boards to contract with each other.

(a) Any two or more boards of education may contract with each other for the care, education, and transportation of pupils and for such other activities as they may be authorized by law to perform.

(b) The General Assembly may provide by law for the sharing of facilities or services by and between local boards of education under such joint administrative authority as may be authorized.

1976 Constitution. — Art. VIII, Sec. V, Para. IV.

for construction, maintenance, and use of buildings, § 20-2-432 et seq.

Cross references. — Joint contracts

JUDICIAL DECISIONS

Equal authority is conferred upon both county boards of education and local school districts to make contracts. Downer v. Stevens, 194 Ga. 598, 22 S.E.2d 139 (1942).

Relationship between county boards and local school district trustees not altered. — This paragraph was not intended to and did not have the effect of changing or altering the relationship of county boards of education and the trustees of the school districts. Downer v. Stevens, 194 Ga. 598, 22 S.E.2d 139 (1942) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. V).

Contracts must be in conformity with existing law. — Local school district contracts must be executed in conformity with the existing law. Downer v. Stevens, 194 Ga. 598, 22 S.E.2d 139 (1942).

County board's approval required for acts of school district trustees. — Since supreme authority for operation of the schools is vested in the county board of education, all acts upon the part of the trustees of the school districts must have the approval of the county board. Downer v. Stevens, 194 Ga. 598, 22 S.E.2d 139 (1942).

County may contract state funds to city district. — Under a contract entered into between a city school district and a county, pursuant to which the district agrees to educate all school children resid-

ing in certain designated areas of the county outside the city limits, and which provides that the district shall receive from the State Board of Education all funds which would ordinarily go to the county board of education for those pupils from the county attending the district public schools, tax rebate funds under the former Tax Rebate Act, former O.C.G.A. § 20-2-330, should be distributed to the district. Cowen v. Snellgrove, 169 Ga. App. 271, 312 S.E.2d 623 (1983).

Judgment for reasonable cost not error. — Where there is an agreement between school boards for the education of certain students and the agreed cost is not shown, it is not error for the court to render judgment for the reasonable cost thereof. Walton County Bd. of Educ. v. Academy of Social Circle, 229 Ga. 114, 189 S.E.2d 690 (1972).

Due process or equal protection of law not denied. — A court order which requires a county to pay county school taxes to the city for education of children from its district does not deny citizens and taxpayers of the county due process or equal protection of the law. Walton County Bd. of Educ. v. Academy of Social Circle, 229 Ga. 114, 189 S.E.2d 690 (1972).

State funds flow to system educating the child. Wilson v. Strange, 235 Ga. 156, 219 S.E.2d 88 (1975).

Cited in Snipes v. Anderson, 179 Ga. 251, 175 S.E. 650 (1934).

OPINIONS OF THE ATTORNEY GENERAL

Out of state contracts prohibited. — School laws of this state do not authorize local boards of education to enter into contracts with out-of-state school systems for education of pupils residing in this state. 1974 Op. Att'y Gen. No. 74-98.

Joint management between local boards prohibited. — Local boards of education may contract with each other for the care, education, and transportation of pupils, but not for joint management, operation, and control of school fa-

cilities. 1975 Op. Att’y Gen. No. U75-32.

Independent school systems may contract with county boards for the purpose of receiving greater allotment of state-paid teachers than would normally be received. 1948-49 Op. Att’y Gen. p. 514.

County board of education can contract to pay county school funds to an independent school system in consideration for the latter educating certain school children of the former; this authority would include all the funds necessary to educate these children including capital outlay, i.e., funds for school buildings and additions thereto of the independent school district. 1958-59 Op. Att’y Gen. p. 116.

Constitutional powers to contract in this paragraph and Ga. Const. 1976, Art. IX, Sec. VI, Para. I (see Ga. Const. 1983, Art. IX, Sec. III, Para. I), are limited by Ga. Const. 1976, Art. VIII, Sec. V, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II), which states that control and management of county schools shall be confined to the county board of education; the power to exercise judgment and discretion cannot be delegated by a county board of education. 1958-59 Op.

Att’y Gen. p. 116 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. V).

Agent for disbursing state allotted money. — If two local school districts enter into contract with respect to who shall receive state money allotted for education of a child, the Department of Education should disburse the money in accordance with the terms of the contract. 1958-59 Op. Att’y Gen. p. 124.

Incorporation or membership in nonprofit corporation by school boards prohibited. — While county boards of education were vested with broad powers respecting the management and control of school systems they administer under former Code 1933, § 32-908 (see now O.C.G.A. § 20-2-520), including the right to contract with each other under this paragraph, the general laws pertaining to the creation of nonprofit corporations, (see now O.C.G.A. § 14-3-601 and § 14-3-201, respectively) appear to exclude the possibility of school boards incorporating or being members of nonprofit corporations as a county board of education was not a corporation, partnership, association, or other “person.” 1978 Op. Att’y Gen. No. 78-4 (see Ga. Const. 1983, Art. VIII, Sec. V, Para. V).

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Schools, §§ 66 et seq., 78 et seq.

ALR. — Interruption of school session as affecting contract other than with teacher, 15 ALR 725.

Power of school or local authorities as to granting leases of school property, 111 ALR 1051.

Paragraph VI. Power of boards to accept bequests, donations, grants, and transfers.

The board of education of each school system may accept bequests, donations, grants, and transfers of land, buildings, and other property for the use of such system.

1976 Constitution. — Art. VIII, Sec. VI, Para. II.

JUDICIAL DECISIONS

Donation of county taxation funds not authorized. — When the applicable revenue statutes, former Civil Code 1910, §§ 339, 400, 504, 506, and 513 (see

O.C.G.A. §§ 36-9-5, 48-5-220, and former 48-5-223, 48-5-225, and 48-5-227 (see § 48-5-220)), were construed together with Ga. Const. 1976, Art. IX, Sec. VII, Para. I (see Ga. Const., 1983, Art. IX, Sec. V, Para. I) and this paragraph, it was held that they did not confer power or authority on a county board of commissioners to donate county funds derived from taxation or from other sources to a chamber of commerce, freight, bureau or convention

and tourist bureau even if such donations were intended to accomplish a lawful purpose. *Atlanta Chamber of Commerce v. McRae*, 174 Ga. 590, 163 S.E. 701 (1932) (see Ga. Const. 1983, Art. VIII, Sec. V, Para. VI).

Cited in *Parker v. Board of Educ.*, 209 Ga. 5, 70 S.E.2d 369 (1952); *Ken Stanton Music, Inc. v. Board of Educ.*, 227 Ga. 393, 181 S.E.2d 67 (1971).

RESEARCH REFERENCES

ALR. — Constitutionality, construction, and application of statute or ordinance imposing license fee or tax upon automo-

biles or trailers used for habitation, 150 ALR 853.

Paragraph VII. Special schools.

(a) The General Assembly may provide by law for the creation of special schools in such areas as may require them and may provide for the participation of local boards of education in the establishment of such schools under such terms and conditions as it may provide; but no bonded indebtedness may be incurred nor a school tax levied for the support of special schools without the approval of the local board of education and a majority of the qualified voters voting thereon in each of the systems affected. Any special schools shall be operated in conformity with regulations of the State Board of Education pursuant to provisions of law. Special schools may include state charter schools; provided, however, that special schools shall only be public schools. A state charter school under this section shall mean a public school that operates under the terms of a charter between the State Board of Education and a charter petitioner; provided, however, that such state charter schools shall not include private, sectarian, religious, or for profit schools or private educational institutions; provided, further, that this Paragraph shall not be construed to prohibit a local board of education from establishing a local charter school pursuant to Article VIII, Section V, Paragraph I. The state is authorized to expend state funds for the support and maintenance of special schools in such amount and manner as may be provided by law; provided, however, no deduction shall be made to any state funding which a local school system is otherwise authorized to receive pursuant to general law as a direct result or consequence of the enrollment in a state charter school of a specific student or students who reside within the geographic boundaries of the local school system.

(b) Nothing contained herein shall be construed to affect the authority of local boards of education or of the state to support and maintain

special schools created prior to June 30, 1983. (Ga. Const. 1983, Art. 8, § 5, Para. 7; Ga. L. 2012, p. 1364, § 3/HR 1162.)

1976 Constitution. — Art. VIII, Sec. IX, Para. I.

Cross references. — Generally, § 20-2-150 et seq. Charter schools act of 1998, § 20-2-2060 et seq.

Editor's notes. — The constitutional amendment (Ga. L. 2012, p. 1364, § 3/HR 1162), which substituted the present provisions of subparagraph (a) for the former provisions, which read: “(a) The General Assembly may provide by law for the creation of special schools in such areas as may require them and may provide for the participation of local boards of education in the establishment of such schools under such terms and conditions as it may provide; but no bonded indebtedness may be incurred nor a school tax levied for the support of special schools without the approval of a majority of the qualified voters voting thereon in each of the systems

affected. Any special schools shall be operated in conformity with regulations of the State Board of Education pursuant to provisions of law. The state is authorized to expend funds for the support and maintenance of special schools in such amount and manner as may be provided by law.”, was ratified at the general election held on November 6, 2012.

Law reviews. — For article, “Cities and Towns in Georgia: A Distinction With a Difference?,” see 14 Mercer L. Rev. 385 (1963). For article on the 2012 Constitutional amendment, see 29 Ga. St. U.L. Rev. 1 (2012). For article, “Education: Elementary and Secondary Education,” see 29 Ga. St. U.L. Rev. 1 (2012).

For note and comment, “School Choice: Constitutionality and Possibility in Georgia,” see 24 Ga. St. U.L. Rev. 587 (2007).

JUDICIAL DECISIONS

Constitutional amendment prevails when conflicts with previous provisions. — If a constitutional amendment duly adopted dealing with the establishment of area schools necessarily conflicts with some previous provision, the amendment, being the latest expression of the sovereign will of the people, will prevail as an implied modification pro tanto of the former provision. *Cason v. State*, 217 Ga. 339, 122 S.E.2d 232 (1961).

Amendment not violative of Constitution. — A constitutional amendment, adopted by voters in a general election, that deals with only one subject matter, the establishment of area schools, which under the amendment can be established only by contract between counties, or municipalities, or a county and a municipality, or combination thereof, is germane to the provisions of the Constitution, pertaining to the contractual powers of counties and municipalities, and does not violate the Constitution. *Cason v. State*, 217 Ga. 339, 122 S.E.2d 232 (1961).

State Charter School Act conflicts with provision. — Georgia Charter

Schools Commission Act, O.C.G.A. § 20-2-2081 et seq., violated the special schools provision of Ga. Const. 1983, Art. VIII, Sec. V, Para. VII(a) by authorizing a state commission to establish competing state-created general K-12 schools under the guise of being special schools. The special schools authorized by the constitution were not competitors with locally controlled schools in regard to the education of general K-12 students; rather, the constitutionally significant matters that made a school “special” were directly related to the school itself, the school’s student body, and the school’s curriculum. *Gwinnett County Sch. Dist. v. Cox*, 289 Ga. 265, 710 S.E.2d 773 (2011).

Cited in *Smith v. Hospital Auth.*, 210 Ga. 801, 82 S.E.2d 827 (1954); *Tippins v. Cobb County Parking Auth.*, 213 Ga. 685, 100 S.E.2d 893 (1957); *Smith v. Maynard*, 214 Ga. 764, 107 S.E.2d 815 (1959); *Wright v. Absalom*, 224 Ga. 6, 159 S.E.2d 413 (1968); *Miller v. Columbus*, 229 Ga. 234, 190 S.E.2d 535 (1972); *Shead v. Scholes*, 239 Ga. 804, 238 S.E.2d 859 (1977).

OPINIONS OF THE ATTORNEY GENERAL

School serving multi-district area. — The General Assembly may create a statutory mechanism by which one school could serve a multi-district area and provide for its governance by a governing board appointed by the local boards of the affected systems. 1998 Op. Att’y Gen. No. U98-2.

Taxing for support of vocational schools. — The governing authorities of counties or municipalities desiring to establish and maintain area vocational trade schools are authorized to levy a tax for such purposes; the circumstances under which the tax could be levied would be where the participating subdivisions have entered into an agreement for the establishment and maintenance of an area vo-

cational trade school. 1967 Op. Att’y Gen. No. 67-153.

State charter schools. — A local school board has constitutional authority to manage and control schools within its system, but its authority is limited by the constitutional provision; therefore, the General Assembly may mandate additional requirements for state charter schools. 2001 Op. Att’y Gen. No. 2001-9.

Out-of-state contracts prohibited. — The general school laws of this state do not authorize local boards of education to enter into contracts with out-of-state school systems for the education of pupils residing in this state. 1974 Op. Att’y Gen. No. 74-98.

RESEARCH REFERENCES

ALR. — Zoning regulations as applied to public elementary and high schools, 74 ALR3d 136.

SECTION VI.

LOCAL TAXATION FOR EDUCATION

Paragraph

- I. Local taxation for education.
- II. Increasing or removing tax rate.
- III. School tax collection reimbursement.

Paragraph

- IV. Sales tax for educational purposes.

Paragraph I. Local taxation for education.

(a) The board of education of each school system shall annually certify to its fiscal authority or authorities a school tax not greater than 20 mills per dollar for the support and maintenance of education. Said fiscal authority or authorities shall annually levy said tax upon the assessed value of all taxable property within the territory served by said school system, provided that the levy made by an area board of education, which levy shall not be greater than 20 mills per dollar, shall be in such amount and within such limits as may be prescribed by local law applicable thereto.

(b) School tax funds shall be expended only for the support and maintenance of public schools, public vocational-technical schools,

public education, and activities necessary or incidental thereto, including school lunch purposes.

(c) The 20 mill limitation provided for in subparagraph (a) of this Paragraph shall not apply to those school systems which are authorized on June 30, 1983, to levy a school tax in excess thereof.

(d) The method of certification and levy of the school tax provided for in subparagraph (a) of this Paragraph shall not apply to those systems that are authorized on June 30, 1983, to utilize a different method of certification and levy of such tax; but the General Assembly may by law require that such systems be brought into conformity with the method of certification and levy herein provided.

1976 Constitution. — Art. VIII, Sec. V, Para. VI; Art. VIII, Sec. VII, Para. I.

effect of grants to be shown on tax bill, § 20-2-334. Taxing power of counties, § 48-5-400 et seq.

Cross references. — Computation of

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Ga. L. 1956, p. 2764 is unconstitutional and void as being in violation of this paragraph. *Harrison v. May*, 228 Ga. 684, 187 S.E.2d 673 (1972) (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

Property subject to tax levy. — The taxes provided for by this paragraph can only be levied upon “all taxable property of the county outside of independent local (school) systems” for the support of county schools under the control of county boards of education. *Almand v. Board of Educ.*, 161 Ga. 911, 131 S.E. 897 (1926) (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

Exclusive financing method. — Ga. Const. 1983, Art. VIII, Sec. VI, Para. I establishes an exclusive financing method such that a school system is prohibited from receiving funds from any local tax source other than ad valorem taxes levied in accordance therewith. *Atlanta Indep. Sch. Sys v. Lane*, 266 Ga. 657, 469 S.E.2d 22 (1996).

An agreement between a city and school system whereby the system received an amount equal to 30% of the city’s local option sales tax receipts was not valid since it was in violation of Ga. Const. 1983, Art. VIII, Sec. VI, Para. I. *Atlanta Indep. Sch. Sys v. Lane*, 266 Ga. 657, 469 S.E.2d 22 (1996).

Authority over finances and taxing. — The board of county commissioners, and not the board of tax assessors, has

jurisdiction over county finances and levying and collection of taxes for county purposes. *Green v. Calhoun*, 204 Ga. 550, 50 S.E.2d 209 (1948).

The board of commissioners has no discretion in levying taxes; its action is ministerial. The amount of the levy is discretionary with the board of education, within limits fixed by the Constitution or statute, and when duly determined it is mandatory. *Rosser v. Meriwether County*, 125 Ga. App. 239, 186 S.E.2d 788 (1971).

Mandatory on county board of commissioners to follow county boards of education recommendation on levying taxes. — Under this provision of the Constitution, it is mandatory upon county boards of commissioners, or other fiscal authorities levying taxes for the county, to follow the recommendation of county boards of education as to the tax levy to be made for the support of education where such recommendation is within the limitation defined by the Constitution. *County Bd. of Educ. v. Board of Comm’rs of Rds. & Revenues*, 201 Ga. 815, 41 S.E.2d 398 (1947).

The limitation of this paragraph is not imposed upon independent school systems. *Ingram v. Payton*, 222 Ga. 503, 150 S.E.2d 825 (1966) (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

School system within the grandfather clause of Ga. Const. 1983, Art. VIII,

Sec. VI, Para. I was authorized to levy school taxes in excess of 20 mills. *Lane v. City of Atlanta*, 267 Ga. 843, 483 S.E.2d 575 (1997).

Georgia Const. 1976, Art. IX, Sec. VII, Para. I (see Ga. Const. 1983, Art. IX, Sec. V, Para. I) applies only to elections for bonds, and not to elections authorizing levy of an additional educational tax in local school districts. *Crye v. Pearce*, 175 Ga. 85, 165 S.E. 121 (1932).

Illegality of providing additional revenue for education purposes by unlawful scheme. — The evidence was sufficient to authorize the court to find that the increase of 25 percent on the valuations of realty on the returns of the petitioners and other taxpayers was not a process of equalizing such valuations, but was an unlawful and arbitrary attempt to provide additional revenue for educational purposes, and to grant an interlocutory injunction against the defendants from making up, compiling, or listing any report or digest incorporating or including therein any increased assessment or changes or alterations in the returns of the taxpayers of the county, and enjoining the tax receiver of the county, from transmitting to the State Department of Revenue or the Comptroller General or the tax collector of the county or any tax authorities of the county or state any report, list, or other compilation or digest including or incorporating therein any increase or change or alteration in the return filed with the tax receiver by any taxpayer thereof. *Green v. Calhoun*, 204 Ga. 550, 50 S.E.2d 209 (1948).

The provisions of this paragraph are not intended to suffice for all phases of educational expenditures, but are separate from the power to levy a tax for the payment of bonded indebtedness for the erection of school buildings. *Nelms v. Stephens County Sch. Dist.*, 201 Ga. 274, 39 S.E.2d 651 (1946) (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

Delegation of power without authorization prohibited. — Without specific legislative authorization, a school board has no authority, by contract or otherwise, to delegate to others the duties placed on the board by the Constitution and laws of

Georgia. *Chatham Ass'n of Educators v. Board of Pub. Educ.*, 231 Ga. 806, 204 S.E.2d 138 (1974).

Necessary qualities for additional revenue amendment to comply with due process and equal protection. — A proposed amendment allowing a school district to receive additional revenues from municipalities for school purposes had to be drafted to include all areas within the county school districts and ratified by the voters of each school district therein on a consolidated basis in order to comply with the due process and equal protection of law under the state and federal Constitution. *City of Lithonia v. DeKalb County Bd. of Educ.*, 231 Ga. 150, 200 S.E.2d 698 (1973).

"Assessed value" defined. — The words "assessed value" in this constitutional provision means the correctly assessed value, i.e., the assessed value approved by the revenue commissioner, not an incorrectly assessed value. *Board of Comm'rs v. Allgood*, 234 Ga. 9, 214 S.E.2d 522 (1975) (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

"Assessed value" is the correctly assessed fair market value. *Benson-Corwin, Inc. v. Cobb County Sch. Dist.*, 239 Ga. 199, 236 S.E.2d 361 (1977).

To freeze the assessed value of property at an amount below its fair market value would obfuscate application of this paragraph. *Benson-Corwin, Inc. v. Cobb County Sch. Dist.*, 239 Ga. 199, 236 S.E.2d 361 (1977) (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

Return of funds based on excessive tax assessment. — Where city received more tax revenue from taxpayers than they lawfully owed, which error resulted in the city remitting more tax funds to the school board than it was entitled to receive, the school board was required to refund its pro-rata share of the taxes, penalties, and interest due the taxpayers because of the improper assessment. The city was effectively acting as an agent for the school board. *Atlanta Bd. of Educ. v. City of Atlanta*, 262 Ga. 15, 413 S.E.2d 716 (1992).

Payment for garbage disposal associated with school lunch program

proper. — Garbage disposal resulting from the school lunch program is incidental to that program which is assigned to the school district by the Constitution and “the county boards of education shall have the power to ... make all arrangements necessary to the efficient operation of the schools”; accordingly, the school districts have the authority and obligation to contract and pay for the service provided by the county in disposing of garbage resulting from the operation of the school lunch program. *Fletcher v. Russell*, 151 Ga. App. 229, 259 S.E.2d 212, rev’d on other grounds, 244 Ga. 854, 262 S.E.2d 138 (1979).

School district being an independent political entity may provide and compensate school crossing guards. *Russell v. Fletcher*, 244 Ga. 854, 262 S.E.2d 138 (1979).

Payment for county road improvements not authorized. — Improvements to a county public road leading to a school were the responsibility of the county because such improvements were not “necessary and incidental” to public education. Any representation by the school district supervisor of construction to the contrary did not bind the district to pay for the improvements. *DeKalb County Sch. Dist. v. DeKalb County*, 263 Ga. 879, 440 S.E.2d 185 (1994).

The use of school taxes to finance a redevelopment plan along 22 miles of historical rail segments violated Ga. Const. 1983, Art. VIII, Sec. VI, Para. I(b) because it was not “necessary or incidental” to public schools or public education. The plan benefitted all citizens and had little if any nexus to the actual operation of public schools. *Woodham v. City of Atlanta*, 283 Ga. 95, 657 S.E.2d 528 (2008).

Use of local school taxes for redevelopment. — School system, development authority, and others were properly granted summary judgment in a suit challenging the allocation of school taxes because the 2008 amendments to Ga. Const. 1983, Art. IX, Sec. II, Para. VII(b) and O.C.G.A. § 36-44-9(g), governing tax allocation districts, changed the law and retroactively allowed use of local school taxes for general redevelopment purposes.

Sherman v. Atlanta Indep. Sch. Sys., 293 Ga. 268, 744 S.E.2d 26 (2013).

Instance of county children paying fee to attend city school not applicable. — Where a city school used funds raised from a county-wide tax and from federal and state funds based in part on students not in the city, children from the county could attend city schools without paying a charge or matriculation fee. *Peak v. Board of Educ.*, 177 Ga. 476, 170 S.E. 488 (1933).

Homestead exemption did not violate this paragraph. — Court rejected a taxpayer’s contention that a school tax homestead exemption violated Ga. Const. 1983, Art. VIII, Sec. VI, Para. I, which required that school taxes be imposed on correctly assessed values, because the school taxes would be imposed on correctly assessed values, but the values of certain properties would then be reduced by the homestead exemption. *Blevins v. Dade County Bd. of Tax Assessors*, 288 Ga. 113, 702 S.E.2d 145 (2010).

Rule governing jurisdiction of Court of Appeals and Supreme Court. — The Court of Appeals has jurisdiction to decide questions of law that involve application, in a general sense, of unquestioned and unambiguous provisions of the Constitution to a given state of facts, and that do not involve construction of some constitutional provision directly in question and doubtful either under its own terms or under the decisions of the Supreme Court of the state or of the United States, and that do not involve the constitutionality of any law of the state or of the United States or of any treaty. Under this rule, the Supreme Court and not the Court of Appeals has jurisdiction where surety seeks to be held free of liability on grounds of constitutional provisions which made obligation unenforceable against school system as principal. *Franklin v. Mobley*, 202 Ga. 212, 42 S.E.2d 755 (1947).

Cited in *Dougherty County v. Jones*, 43 Ga. App. 188, 158 S.E. 432 (1931); *Southern Ry. v. Paulding County*, 44 Ga. App. 806, 162 S.E. 919 (1932); *Richards v. Zentner*, 176 Ga. 222, 167 S.E. 516 (1933); *Keever v. Board of Educ.*, 188 Ga. 299, 3 S.E.2d 886 (1939); *Davis v. Haddock*, 191 Ga. 639, 13 S.E.2d 657 (1941); *Board of*

Comm'rs of Rds. & Revenues v. Bond, 203 Ga. 558, 47 S.E.2d 511 (1948); Towns v. Suttles, 208 Ga. 838, 69 S.E.2d 742 (1952); Commissioners of Chatham County v. Savannah Elec. & Power Co., 215 Ga. 636, 112 S.E.2d 655 (1960); McLennan v. Aldredge, 223 Ga. 879, 159 S.E.2d 682 (1968); Grimes v. Clark, 226 Ga. 195, 173 S.E.2d 686 (1970); Watkins v. Jackson, 227 Ga. 213, 179 S.E.2d 747 (1971); Board of Pub. Educ. & Orphanage v. Zimmerman, 231 Ga. 562, 203 S.E.2d 178 (1974); Young v. State, 132 Ga. App. 790, 209 S.E.2d 96 (1974); Coleman v. Kiley,

236 Ga. 751, 225 S.E.2d 273 (1976); Smith v. Crim, 240 Ga. 390, 240 S.E.2d 884 (1977); DeKalb County v. Hinson, 243 Ga. 623, 255 S.E.2d 722 (1979); Concerned Sch. Patrons & Taxpayers v. Ware County Bd. of Educ., 245 Ga. 202, 263 S.E.2d 925 (1980); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981); Lomax v. McBrayer, 248 Ga. 753, 286 S.E.2d 35 (1982); Board of Comm'rs v. Clayton County Sch. Dist., 250 Ga. 244, 297 S.E.2d 724 (1982); Salem v. Tattnall County, 250 Ga. 881, 302 S.E.2d 99 (1983).

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Constitution manifests General Assembly's and people's intent to create two political subdivisions for handling schools. — This paragraph, Ga. Const. 1976, Art. VIII, Sec. V, Para. VI (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I), and Ga. Const. 1976, Art. VIII, Sec. V, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I) indicate that it was the intention of the General Assembly proposing the new Constitution, and of the people in adopting the new constitution, that there should be two political subdivisions for handling school affairs; first, the county district composed of the territory lying outside of the independent system, which territory should be under the control and management of a county board of education, and secondly, independent systems operated by municipal corporations. 1948-49 Op. Att'y Gen. p. 115 (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

County boards of education have authority to recommend to county boards of commissioners the tax to be levied for school purposes. 1957 Op. Att'y Gen. p. 96.

Board of education must recommend the new rate to the taxing authority of the county. Their recommendation must precede the setting of the new tax levy by the taxing authorities. No specific date may be stated or recommended as the latest for the election. The date to be decided upon depends upon local conditions, but the constitutional provision must be complied with as to the

method of removal and the determination of the new rate. 1957 Op. Att'y Gen. p. 44.

County fiscal authorities must levy taxes for education as recommended by county board of education. 1960-61 Op. Att'y Gen. p. 184.

Board of commissioners of a county has no discretion to refuse to levy any portion of the school tax recommended by the county board of education, so long as the amount of the recommended levy falls within the limits prescribed by law. 1989 Op. Att'y Gen. No. U89-22.

It is mandatory upon the fiscal authorities of a county levying taxes to follow recommendation of the county board of education as to tax levy to be made for support of education where such recommendation is within the limits defined by the Constitution; in effect, the action of the county board of commissioners is purely ministerial and they have no choice other than to make the tax levy recommended by the county board of education. 1958-59 Op. Att'y Gen. p. 37.

Tax limitation could be removed effective same year election is held for removal. 1957 Op. Att'y Gen. p. 44.

County board of education may not levy a county-wide school tax on property located in an independent school district. 1945-47 Op. Att'y Gen. p. 148.

Exclusive use of tax for purpose specified. — Interest earned on education taxes and in special county taxes becomes part of the tax proceeds in the account fund, which fund is required to be

used exclusively for the purpose(s) specified in the resolution or ordinance calling for the imposition of the tax. 2001 Op. Att'y Gen. No. 2001-3.

Establishment of a separate digest for school purposes would violate the spirit and intention of this paragraph. 1963-65 Op. Att'y Gen. p. 69 (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

Tax assessors may not lawfully create a separate tax digest or arbitrarily increase county tax digest for the purpose of providing additional revenue for educational purposes. 1963-65 Op. Att'y Gen. p. 69.

Term of contractual employment limited. — This paragraph, Ga. Const. 1976, Art. IX, Sec. V, Para. I (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II), and Ga. Const. 1976, Art. IX, Sec. VII, Para. IV (see Ga. Const. 1983, Art. IX, Sec. V, Para. V), impliedly limit the term of contractual employment of employees by county boards of education to one school year. 1963-65 Op. Att'y Gen. p. 79 (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I).

A bonded indebtedness created by a subdistrict is not the debt of a county board of education but the debt of the political subdivision known as the school district. The county board of education would not have the right or power to levy special bond tax on all of the property of the county outside of independent school systems for the purpose of providing a sinking fund to pay the principal and interest of a debt created by one of the districts. 1945-47 Op. Att'y Gen. p. 170.

A county board of education may use surplus county school funds to retire matured bonds issued by a local school district prior to the 1945 Constitution for the erection of schoolhouses, title to which has vested in the county board of education. 1945-47 Op. Att'y Gen. p. 170.

County maintained roads. — Board of education may not use its funds for laying out, altering, maintaining and improving a public, county maintained road even though school transportation would be facilitated thereby; it is the sole duty and responsibility of the local officials in charge of county matters to lay out, alter, maintain, and improve the subject road in the manner they deem best suited to the

needs of the county. 1962 Op. Att'y Gen. p. 189.

Items of a personal nature such as military uniforms are probably not legal expenditures for a local board of education; if a court subsequently held otherwise, the local superintendent would be held personally liable on the superintendent's bond for any such illegal expenditures. 1957 Op. Att'y Gen. p. 114.

The general arrangement for financing of independent school systems by a municipality is intended to be carried out upon a year to year basis upon the annual recommendations of the board of education to the municipality as to the rate of tax levy to be made by the municipal corporation, and upon such taxes as levied and collected for support of such independent school systems as appropriated when collected by the governing authority of the municipality to the board of education. 1962 Op. Att'y Gen. p. 186.

School funds cannot be used by a local school system to purchase billboard space for the display of public relations advertisements. 1984 Op. Att'y Gen. No. 84-85.

Charges for school meals sold to employees. — From a viewpoint of state law, since there are no longer any apparent state constitutional restrictions (as opposed to statutory and regulatory authorizations and restraints) respecting charges for school meals, in determining the sum it will charge teachers and other school employees for school meals, a local school system may properly exclude those indirect costs which the school system would have to bear whether or not the meals were sold to teachers and employees as well as to students; it would be permissible for a local school system to calculate the sum to be charged to the teacher or other employee based upon direct costs only. 1985 Op. Att'y Gen. No. 85-23.

Local school funds may not be used to pay chamber of commerce membership dues of the county school superintendent. 1990 Op. Att'y Gen. No. U90-3.

Lease of vehicles for students' extracurricular use. — A local board of education may not provide transportation to students for extracurricular activities

by leasing vehicles for that use. 1995 Op. Att'y Gen. No. 95-2.

Sharing of services between boards of education unauthorized. — Georgia boards of education are not empowered to share services by creating and utilizing a

nonprofit corporation such as the Consortium for Adequate School Funding in Georgia, Inc., for the purpose of challenging state school funding by litigation or otherwise. 2009 Op. Att'y Gen. No. 2009-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 68 Am. Jur. 2d, Schools, §§ 58 et seq., 110 et seq.

C.J.S. — 78 C.J.S., Schools and School Districts, § 103 et seq.

ALR. — Validity of legislative delegation of taxing power to school districts in absence of express constitutional provi-

sion authorizing such delegation, 113 ALR 1416.

Validity of basing public school financing system on local property taxes, 41 ALR3d 1220.

Procedural issues concerning public school funding cases, 115 ALR5th 563.

Paragraph II. Increasing or removing tax rate.

The mill limitation in effect on June 30, 1983, for any school system may be increased or removed by action of the respective boards of education, but only after such action has been approved by a majority of the qualified voters voting thereon in the particular school system to be affected in the manner provided by law.

1976 Constitution. — Art. VIII, Sec. VII, Para. II.

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Constitutional referendum requirement implied in statute authorizing tax levy in excess of limit. — Where a local statute authorizes a school tax levy in excess of the constitutional limit without also requiring the constitutionally mandated referendum on the in-

crease, the statute must be interpreted to include the constitutional referendum requirement. *Atlantic C.L.R.R. v. City of Bainbridge*, 175 Ga. 160, 165 S.E. 107 (1932).

Cited in *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981).

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Reducing limitation. — The procedures afforded by Ga. Const. 1983, Art. VIII, Sec. VI, Para. II may not be used to

reduce a school millage limitation in effect on June 30, 1983. 1984 Op. Att'y Gen. No. U84-40.

Paragraph III. School tax collection reimbursement.

The General Assembly may by general law require local boards of education to reimburse the appropriate governing authority for the collection of school taxes, provided that any rate established may be reduced by local act.

1976 Constitution. — There were no similar provisions in the 1976 Constitution.

Law reviews. — For annual survey of local government law, see 56 Mercer L. Rev. 351 (2004).

Paragraph IV. Sales tax for educational purposes.

(a) The board of education of each school district in a county in which no independent school district is located may by resolution and the board of education of each county school district and the board of education of each independent school district located within such county may by concurrent resolutions impose, levy, and collect a sales and use tax for educational purposes of such school districts conditioned upon approval by a majority of the qualified voters residing within the limits of the local taxing jurisdiction voting in a referendum thereon. This tax shall be at the rate of 1 percent and shall be imposed for a period of time not to exceed five years, but in all other respects, except as otherwise provided in this Paragraph, shall correspond to and be levied in the same manner as the tax provided for by Article 3 of Chapter 8 of Title 48 of the Official Code of Georgia Annotated, relating to the special county 1 percent sales and use tax, as now or hereafter amended. Proceedings for the reimposition of such tax shall be in the same manner as proceedings for the initial imposition of the tax, but the newly authorized tax shall not be imposed until the expiration of the tax then in effect.

(b) The purpose or purposes for which the proceeds of the tax are to be used and may be expended include:

(1) Capital outlay projects for educational purposes;

(2) The retirement of previously incurred general obligation debt with respect only to capital outlay projects of the school system; provided, however, that the tax authorized under this Paragraph shall only be expended for the purpose authorized under this subparagraph (b)(2) if all ad valorem property taxes levied or scheduled to be levied prior to the maturity of any such then outstanding general obligation debt to be retired by the proceeds of the tax imposed under this Paragraph shall be reduced by a total amount equal to the total amount of proceeds of the tax imposed under this Paragraph to be applied to retire such bonded indebtedness. In the event of failure to comply with the requirements of this subparagraph (b)(2), as certified by the Department of Revenue, no further funds shall be expended under this subparagraph (b)(2) by such county or independent board of education and all such funds shall be maintained in a separate, restricted account and held solely for the expenditure for future capital outlay projects for educational purposes; or

(3) A combination of the foregoing.

(c) The resolution calling for the imposition of the tax and the ballot question shall each describe:

(1) The specific capital outlay projects to be funded, or the specific debt to be retired, or both, if applicable;

(2) The maximum cost of such project or projects and, if applicable, the maximum amount of debt to be retired, which cost and amount of debt shall also be the maximum amount of net proceeds to be raised by the tax; and

(3) The maximum period of time, to be stated in calendar years or calendar quarters and not to exceed five years.

(d) Nothing in this Paragraph shall prohibit a county and those municipalities located in such county from imposing as additional taxes local sales and use taxes authorized by general law.

(e) The tax imposed pursuant to this Paragraph shall not be subject to and shall not count with respect to any general law limitation regarding the maximum amount of local sales and use taxes which may be levied in any jurisdiction in this state.

(f) The tax imposed pursuant to this Paragraph shall not be subject to any sales and use tax exemption with respect to the sale or use of food and beverages which is imposed by law.

(g) The net proceeds of the tax shall be distributed between the county school district and the independent school districts, or portion thereof, located in such county according to the ratio the student enrollment in each school district, or portion thereof, bears to the total student enrollment of all school districts in the county or upon such other formula for distribution as may be authorized by local law. For purposes of this subparagraph, student enrollment shall be based on the latest FTE count prior to the referendum on imposing the tax.

(h) Excess proceeds of the tax which remain following expenditure of proceeds for authorized projects or purposes for education shall be used solely for the purpose of reducing any indebtedness of the school system. In the event there is no indebtedness, such excess proceeds shall be used by such school system for the purpose of reducing its millage rate in an amount equivalent to the amount of such excess proceeds.

(i) The tax authorized by this Paragraph may be imposed, levied, and collected as provided in this Paragraph without further action by the General Assembly, but the General Assembly shall be authorized by general law to further define and implement its provisions including, but not limited to, the authority to specify the percentage of net proceeds to be allocated among the projects and purposes for which the tax was levied.

(j)(1) Notwithstanding any provision of any constitutional amendment continued in force and effect pursuant to Article XI, Section I, Paragraph IV(a) and except as otherwise provided in subparagraph (j)(2) of this Paragraph, any political subdivision whose ad valorem taxing powers are restricted pursuant to such a constitutional amendment may receive the proceeds of the tax authorized under this Paragraph or of any local sales and use tax authorized by general law, or any combination of such taxes, without any corresponding limitation of its ad valorem taxing powers which would otherwise be required under such constitutional amendment.

(2) The restriction on and limitation of ad valorem taxing powers described in subparagraph (j)(1) of this Paragraph shall remain applicable with respect to proceeds received from the levy of a local sales and use tax specifically authorized by a constitutional amendment in force and effect pursuant to Article XI, Section I, Paragraph IV(a), as opposed to a local sales and use tax authorized by this Paragraph or by general law. (Ga. Const. 1983, Art. 8, § 6, Para. 4, approved by Ga. L. 1996, p. 1668, § 1/HR 728.)

1976 Constitution. — There were no similar provisions in the 1976 Constitution.

Editor's notes. — The constitutional amendment (Ga. L. 1996, p. 1668, § 1)

which enacted this paragraph was approved by a majority of the qualified voters voting at the general election held on November 5, 1996.

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Term “capital outlay projects for educational purposes” in subsection (b)(1) of Ga. Const. 1983, Art. VIII, Sec. VI, Para. IV includes school buses and equipment with an extended useful life. 1997 Op. Att’y Gen. No. 97-7.

Referendum required. — A referendum is required before a school board may

borrow money for a term longer than 12 calendar months where the loan is to be repaid from expected sales tax for educational purposes. A school board may, without such referendum, borrow money for a term of one calendar year or less, if certain legal requirements are met. 1997 Op. Att’y Gen. No. 97-30.

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Use of proceeds for unspecified projects. — School board had no authority, under Ga. Const. 1983, Art. VIII, Sec. VI, Para. IV(a) to use the proceeds of a special purpose local option sales tax to provide middle and high school students with lap top computers because: (1) the board was bound by projects detailed in promotional literature prior to adoption of the tax; (2) the board’s desired use was not the functional equivalent of a specified project to “restore obsolete work stations,” as it only gave computers to middle and

high school students, but the literature said the tax was to update computer laboratory workstations used by all students; and (3) the board could not abandon the original initiatives the tax was to fund, which were still feasible, so it was appropriate to issue a writ of mandamus to enjoin the board from using the proceeds for other uses. *Johnstone v. Thompson*, 280 Ga. 611, 631 S.E.2d 650 (2006).

Local school board had discretion, under Ga. Const. 1983, Art. VIII, Sec. VI, Para. IV(a) to make decisions that fell

within the authorization of a special purpose local option sales tax referendum as long as any alteration in its plans did not contravene the terms of the referendum or otherwise violate the law. *Johnstone v. Thompson*, 280 Ga. 611, 631 S.E.2d 650 (2006).

No excess proceeds to refund. — Trial court properly denied a taxpayer’s

writ of mandamus filed under Ga. Const. 1983, Art. VIII, Sec. VI, Para. IV(h) against a school district seeking the return of excess proceeds collected pursuant to an educational sales and use tax approved by referendum because there was no excess to refund. *Marsh v. Clarke County Sch. Dist.*, 292 Ga. 28, 732 S.E.2d 443 (2012).

SECTION VII.

EDUCATIONAL ASSISTANCE

- | | |
|--|--------------------------|
| Paragraph | Paragraph |
| I. Educational assistance programs authorized. | III. Public authorities. |
| II. Guaranteed revenue debt. | IV. Waiver of tuition. |

Paragraph I. Educational assistance programs authorized.

(a) Pursuant to laws now or hereafter enacted by the General Assembly, public funds may be expended for any of the following purposes:

- (1) To provide grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes.
- (2) To provide for a program of guaranteed loans to students and to parents of students for educational purposes and to pay interest, interest subsidies, and fees to lenders on such loans. The General Assembly is authorized to provide such tax exemptions to lenders as shall be deemed advisable in connection with such program.
- (3) To match funds now or hereafter available for student assistance pursuant to any federal law.
- (4) To provide grants, scholarships, loans, or other assistance to public employees for educational purposes.
- (5) To provide for the purchase of loans made to students for educational purposes who have completed a program of study in a field in which critical shortages exist and for cancellation of repayment of such loans, interest, and charges thereon.

(b) Contributions made in support of any educational assistance program now or hereafter established under provisions of this section may be deductible for state income tax purposes as now or hereafter provided by law.

(c) The General Assembly shall be authorized by general law to provide for an education trust fund to assist students and parents of

students in financing postsecondary education and to provide for contracts between the fund and purchasers for the advance payment of tuition by each purchaser for a qualified beneficiary to attend a state institution of higher education. Such general law shall provide for such terms, conditions, and limitations as the General Assembly shall deem necessary for the implementation of this subparagraph. Notwithstanding any provision of this Constitution to the contrary, the General Assembly shall be authorized to provide for the guarantee of such contracts with state revenues. (Ga. Const. 1983, Art. 8, § 7, Para. 1; Ga. L. 1990, p. 2433, § 1/HR 763.)

1976 Constitution. — Art. VIII, Sec. IV, Para. III; Art. X, Sec. II, Paras. I, II, VI-VIII, X, XI, XIII-XV.

Cross references. — Free attendance at state universities for citizens age 62 and older, § 20-3-31.1. Programs for scholarships, loans, and grants for post-secondary education, § 20-3-230 et seq. Tuition equalization grants for persons

attending private colleges and universities, § 20-3-410 et seq. Board of Regents' medical scholarship program, § 20-3-510.

Editor's notes. — Constitutional amendment (Ga. L. 1990, p. 2433, § 1) which added subparagraph (c) was approved by a majority of the qualified voters voting at the general election held on November 6, 1990.

JUDICIAL DECISIONS

Cited in Hunnicutt v. Burge, 356 F. Supp. 1227 (M.D. Ga. 1973).

OPINIONS OF THE ATTORNEY GENERAL

Fiscal resources of Georgia Agricultural Commodity Commission for milk may not be expended to fund student scholarships in the dairy science curricula at the University of Georgia or to participate in funding a private scholarship foundation for students matriculating in such curricula. 1976 Op. Att'y Gen. No. 76-115.

Constitutional prohibition on gratuities, Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI), does not apply to state grants for educational purposes. 1971 Op. Att'y Gen. No. 71-147.

Georgia Forest Research Council may make educational grants only if the General Assembly has first appropriated funds to it for use in obtaining federal funds for scholarships and the combined state and federal funds are used for purposes authorized by the federal government. 1968 Op. Att'y Gen. No. 68-268.

An applicant must be a citizen of

the United States in order to qualify for a medical education scholarship loan under this paragraph. 1972 Op. Att'y Gen. No. 72-68 (decided under Ga. Const. 1945, Art. VII, Sec. I, Para. II).

State funds cannot be used for payment of interest on loans to noncitizens of Georgia. — Georgia Higher Education Assistance Corporation is authorized to establish and administer a program of guaranteed educational loans to eligible parents, but guarantee of and payment of interest on loans to parents who are not Georgia citizens must be by private, not state appropriated, funds. 1980 Op. Att'y Gen. No. 80-153.

College courses should presumptively be considered beyond the scope of the ordinary training agencies may provide employees in state government, although, in certain narrow circumstances, agencies may train employees in college courses which provide job-specific instruction. 1998 Op. Att'y Gen. No. 98-16.

A state department or agency may

implement a doctoral-level training program for employees, provided that it does so using regularly appropriated funds to obtain federal matching funds. 1973 Op. Att’y Gen. No. 73-154.

Federal education assistance program prerequisite to grants to board’s employees. — This paragraph would not authorize legislation, let alone board of education regulations, which would permit grants to the state board’s employees independently of a federal education assistance program. 1963-65 Op. Att’y Gen. p. 758 (see Ga. Const. 1983, Art. VIII, Sec. VII, Para. I).

Delinquent state teachers’ scholarships. — Constitutional provisions require that any money which is collected by the State Board of Education from delinquent state teachers’ scholarships must be paid into the general fund of the state treasury and cannot be used in making future scholarship commitments by the State Board of Education. 1971 Op. Att’y Gen. No. 71-126.

Grants to extant teachers prohibited. — The phrase “interested in becoming teachers” would not be construed by the courts as authorizing grants to per-

sons who already are teachers. 1963-65 Op. Att’y Gen. p. 758 (decided under Ga. Const. 1945, Art. VII, Sec. I, Para. II).

Funds used to pay scholarships may be paid directly to colleges where students are attending; the board of education has authority to prescribe the terms and the conditions of the scholarships granted and this is an entirely reasonable and proper regulation to require for the receipt of scholarship aid. 1958-59 Op. Att’y Gen. p. 142.

Condition for Board of Regents’ scholarships. — Current statutory law relating to Board of Regents’ “scholarships” requires that the award of such scholarships continue to be conditioned upon the current “service of Georgia” requirement. 1986 Op. Att’y Gen. No. 86-25.

Compliance with Fair and Open Grants Act in administering scholarships. — It was not the intent of the General Assembly that the Georgia Student Finance Commission comply with the Fair and Open Grants Act, O.C.G.A. § 28-5-120 et seq., in administering the HOPE Scholarship, Hope Grant, and other state scholarship and grant programs. 2002 Op. Att’y Gen. No. 2002-2.

RESEARCH REFERENCES

ALR. — Student’s right to compel school officials to issue degree, diploma, or the like, 11 ALR4th 1182.

Validity of, and sufficiency of compliance with, state standards for approval of

private school to receive public placements of students or reimbursement for their educational costs, 48 ALR4th 1231.

Validity of public school funding systems, 110 ALR5th 293.

Paragraph II. Guaranteed revenue debt.

Guaranteed revenue debt may be incurred to provide funds to make loans to students and to parents of students for educational purposes, to purchase loans made to students and to parents of students for educational purposes, or to lend or make deposits of such funds with lenders which shall be secured by loans made to students and to parents of students for educational purposes. Any such debt shall be incurred in accordance with the procedures and requirements of Article VII, Section IV of this Constitution.

1976 Constitution. — Art. X, Sec. II, Para. XIV.

Cross references. — Georgia Higher

Education Assistance Corporation, § 20-3-260 et seq. Creation of Georgia Student Finance Authority, § 20-3-313.

OPINIONS OF THE ATTORNEY GENERAL

Investable default reserve funds. — The Georgia Higher Education Assistance Corporation may invest default reserve funds consisting of: (1) funds appropriated to the corporation by the State of Georgia; (2) funds allocated to the corporation by the federal government; (3) insurance premiums charged to lenders by the corporation for the guarantee of student loans; and (4) investment income of the corpora-

tion resulting from investment of the three foregoing classifications of funds and from reinvestment of prior investment-earned income with federal savings and loan associations and with state-chartered building and loan associations which are insured by the Federal Savings and Loan Insurance Corporation. 1969 Op. Att'y Gen. No. 69-215.

Paragraph III. Public authorities.

Public authorities or public corporations heretofore or hereafter created for such purposes shall be authorized to administer educational assistance programs and, in connection therewith, may exercise such powers as may now or hereafter be provided by law.

1976 Constitution. — Art. X, Sec. II, Para. XIV. Education Assistance Corporation, § 20-3-260 et seq. Creation of Georgia

Cross references. — Georgia Higher Student Finance Authority, § 20-3-313.

Paragraph IV. Waiver of tuition.

The Board of Regents of the University System of Georgia shall be authorized to establish programs allowing attendance at units of the University System of Georgia without payment of tuition or other fees, but the General Assembly may provide by law for the establishment of any such program for the benefit of elderly citizens of the state.

1976 Constitution. — Art. VIII, Sec. IV, Para. II; Art. X, Sec. II.

ARTICLE IX.

COUNTIES AND MUNICIPAL CORPORATIONS

Section

- I. Counties.
- II. Home Rule for Counties and Municipalities.
- III. Intergovernmental Relations.
- IV. Taxation Power of County and Municipal Governments.
- V. Limitation on Local Debt.
- VI. Revenue Bonds.
- VII. Community Improvement Districts.

Editor’s notes. — The constitutional amendment proposed in Ga. L. 2007, p. 775, § 1, which would have revised Article IX by adding a new Section VIII, authorizing the General Assembly to provide by general law for the creation and comprehensive regulation of infrastructure development districts, was defeated in the general election held on November 4, 2008.

Law reviews. — For article, “An Overview of the New Georgia Constitution,” see 35 Mercer L. Rev. 1 (1983). For annual survey of local government law, see 44

Mercer L. Rev. 309 (1992). For annual survey article on local government law, see 46 Mercer L. Rev. 363 (1994). For student article, “Georgia Local Government Law: Court Resolution of County Government Disagreements,” see 46 Mercer L. Rev. 599 (1994). For annual survey article on local government law, see 52 Mercer L. Rev. 341 (2000). For survey article on local government law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 353 (2003).

SECTION I.
COUNTIES

Paragraph

- I. Counties a body corporate and politic.
- II. Number of counties limited; county boundaries and county sites; county consolidation.

Paragraph

- III. County officers; election; term; compensation.
- IV. Civil service systems.

Paragraph I. Counties a body corporate and politic.

Each county shall be a body corporate and politic with such governing authority and with such powers and limitations as are provided in this Constitution and as provided by law. The governing authorities of the several counties shall remain as prescribed by law on June 30, 1983, until otherwise provided by law.

1976 Constitution. — Art. IX, Sec. I, Paras. I, VII.

Cross references. — Acts changing term of office of incumbent prohibited, § 1-3-11. Local government provisions ap-

plicable to counties only, Ch. 1, T. 36. Changing of county boundary lines, § 36-3-1. Boundary line disputes, § 36-3-20. County governing authorities generally, § 36-5-20 et seq. Power of Gen-

eral Assembly to fix compensation for and abolish office of county treasurer, § 36-6-1.

Law reviews. — For article, “Actions for Wrongful Death in Georgia Part Three and Four,” see 21 Ga. B.J. 339 (1959). For article on the historical interpretation and validity of statutes pertaining to Georgia county commissioners, see 15 Mercer L. Rev. 258 (1963). For article surveying important general legal principles of municipal and county government purchasing

and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965). For article discussing homestead rights as a means of protecting decedent’s surviving spouse and children, see 10 Ga. L. Rev. 447 (1976). For article examining history of recall in Georgia local government law, and considering future developments, see 10 Ga. L. Rev. 883 (1976). For article surveying judicial developments in Georgia’s trial practice and procedure laws, see 31 Mercer L. Rev. 249 (1979).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

BODY CORPORATE

- 1. GENERAL CONSIDERATION
- 2. POWERS
- 3. LIABILITY
- 4. ACTIONS

COUNTY GOVERNMENT

COUNTY COMMISSIONERS

General Consideration

Cited in McGinnis v. McKinnon, 165 Ga. 713, 141 S.E. 910 (1928); Vincent v. MacNeill, 186 Ga. 427, 198 S.E. 68 (1938); Miller v. Head, 186 Ga. 694, 198 S.E. 680 (1938); Smith v. Commissioners of Rds. & Revenue, 198 Ga. 322, 31 S.E.2d 648 (1944); Norris v. Nixon, 78 Ga. App. 769, 52 S.E.2d 529 (1949); Banks County v. Stark, 88 Ga. App. 368, 77 S.E.2d 33 (1953); Taylor v. Jenkins County, 116 Ga. App. 718, 158 S.E.2d 322 (1967); Sumter County v. Pritchett, 125 Ga. App. 222, 186 S.E.2d 798 (1971); Lowndes County v. Dasher, 229 Ga. 289, 191 S.E.2d 82 (1972); Stein v. Maddox, 234 Ga. 164, 215 S.E.2d 231 (1975); Sellers v. Home Furnishing Co., 235 Ga. 831, 222 S.E.2d 34 (1976); Guhl v. Tuggle, 242 Ga. 412, 249 S.E.2d 219 (1978); Housworth v. Glisson, 485 F. Supp. 29 (N.D. Ga. 1978); Georgia Insurers Insolvency Pool v. Elbert County, 258 Ga. 317, 368 S.E.2d 500 (1988); Thompson v. Carter, 905 F. Supp. 1073 (M.D. Ga. 1995); Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

Body Corporate

1. General Consideration

This paragraph is self-executing. Arnett v. Board of Comm’rs, 75 Ga. 782 (1885) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

For definition of a county, see Hammond v. Clark, 136 Ga. 313, 71 S.E. 479, 36 L.R.A. (n.s.) 77 (1911).

Board of education is not a corporate body. Mattox v. Board of Educ., 148 Ga. 577, 97 S.E. 532, 5 A.L.R. 568 (1918); Smith v. Board of Educ., 153 Ga. 758, 113 S.E. 147 (1922).

2. Powers

Counties can exercise only such powers as are conferred on them by law, and a county can exercise no powers except such as are expressly given or necessarily implied from express grant of other powers. DeKalb County v. Atlanta Gas Light Co., 228 Ga. 512, 186 S.E.2d 732 (1972).

This section confers no power on a

Body Corporate (Cont'd)
2. Powers (Cont'd)

county to contest the validity of a constitutional amendment. *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479, 36 L.R.A. (n.s.) 77 (1911) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Under this paragraph and Ga. Const. 1976, Art. IX, Sec. IV, Para. II (see Ga. Const. 1983, Art. IX, Sec. II, Para. III), there is nothing illegal or unconstitutional nor is it an abuse of discretion for a governing body of a county to seek advice and recommendations from various department heads, advisory committees, and the general public prior to taking official action. *Lindsey v. Guhl*, 237 Ga. 567, 229 S.E.2d 354 (1976) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Right of a county to levy a tax must be clear. *Bowers v. Hanks*, 152 Ga. 659, 111 S.E. 38 (1922).

Liquor permits. — Section of DeKalb County Code requiring all employees of an establishment holding a license for consumption of beer or wine, except busboys, cooks, and dishwashers, to have permits was not unconstitutional and did not exceed the county's powers of home rule. *Kariuki v. DeKalb County*, 253 Ga. 713, 324 S.E.2d 450 (1985), overruled on other grounds, *Russell v. City of E. Point*, 261 Ga. 213, 403 S.E.2d 50 (1991).

3. Liability

Acts of board of education. — A county acts through its officers and agents. In matters pertaining to education, it acts through its board of education. When the board of education acts upon matters lawfully within its jurisdiction, it is the county acting through its corporate authority, and a county is not liable to suit for any cause of action unless made so by statute. But when the board of education, through its members, acts beyond the scope of its lawful jurisdiction and commits an actionable wrong, the act so committed is not "county action," and in such a case a suit may be maintained in the courts of this state against the wrongdoers. *Duffee v. Jones*, 208 Ga. 639, 68 S.E.2d 699 (1952).

Liability of county to suit generally.

— This paragraph subjects the counties of this state to suit, but not to suits upon all causes of action. It does not make them generally liable to suits, like individuals or as municipal corporations. Being political subdivisions of the state, they cannot be sued unless made subject to suit expressly or by necessary implication. *Decatur County v. Praytor, Howton & Wood Contracting Co.*, 163 Ga. 929, 137 S.E. 247 (1927) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

County liability based on Constitution or statute. — The constitutional provision that a county is a body corporate and the statutory provision that a county, as a body corporate, may be sued in any court, do not authorize a suit against a county for damages where the county is not made liable for such damages by the Constitution or by statute. *Revels v. Tift County*, 235 Ga. 333, 219 S.E.2d 445 (1975).

County is not liable on an implied contract. *Smith v. Baker County*, 142 Ga. 168, 82 S.E. 557 (1914); *Decatur County v. Roberts*, 159 Ga. 528, 126 S.E. 460 (1925).

Requirements to enjoin county board action. — In order to enjoin a county board's action in selecting a solid waste disposal site, plaintiffs are required to show an abuse of discretion or a constitutional violation. *Lindsey v. Guhl*, 237 Ga. 567, 229 S.E.2d 354 (1976).

4. Actions

Suit must name county as corporate body to proceed against county with suit. — Where a suit is brought against the board of county commissioners alleging that the building of a certain road has injured the plaintiff, the suit is intended as one against the county, and where the petition does not name as a defendant the county as a corporate body but instead only names the board of commissioners, who are its agents, the petition cannot be amended and must be dismissed. *Merritt v. Dixon*, 222 Ga. 432, 150 S.E.2d 644 (1966).

An action must be brought in name of the county. *Smith v. Fuller*, 135 Ga. 271, 69 S.E. 177, 1912A Ann. Cas. 70

(1910); *Henry v. Means*, 137 Ga. 153, 72 S.E. 1021 (1911).

Injunction against county governing officials proper. — Though suits by and against a county are properly brought in the name of the county, an injunction may be sought in a court of equity in an action which is brought against the governing officials of the county. *Olley Valley Estates, Inc. v. Fussell*, 232 Ga. 779, 208 S.E.2d 801 (1974).

Legislature can designate the ordinary (now judge of probate court) as the county official to whom bond of a sole commissioner should be made payable, and can provide that the ordinary should sue on the bond in the event of default. Ordinarily, the sole commissioner would be the person who would institute suits in the name of the county, but this is not such a case. This is not a suit by the county, but is one by the ordinary for the use of the county. The bond was a contract between the ordinary, and the sole commissioner and the surety. *McRae v. Sears*, 183 Ga. 133, 187 S.E. 664 (1936).

County can bring action to collect delinquent payments due county facility. — Where county had the legislative authority, by implication, to maintain a hospital for the benefit of paupers and incidentally make charges for the use thereof by persons able to pay in order to help bear the expenses of maintaining said hospital and in accord with a plain and single rule of natural right and justice, such county could bring an action for said charges; such suit was properly brought in the name of the county. *Oliver v. Hall County Mem. Hosp.*, 62 Ga. App. 95, 8 S.E.2d 138 (1940).

County Government

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. IX, Sec. I, Para. I and antecedent provisions, which provided that the General Assembly could create tribunals and officers for the transaction of county matters subject to uniformity throughout the state, are included in the annotations for this paragraph.

Ga. L. 1919 p. 288, § 147 (see now O.C.G.A. § 20-2-101) is not violative of

this paragraph. *Olliff v. Hendrix*, 172 Ga. 497, 158 S.E. 11 (1931) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

This paragraph was not violated when term of clerk of city court shortened. *Collins v. Russell*, 107 Ga. 423, 33 S.E. 444 (1899) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Creation of County Commissioners of Ware County did not violate this paragraph. *Crawley v. State*, 150 Ga. 86, 102 S.E. 898 (1920); *Smith v. Duggan*, 153 Ga. 463, 112 S.E. 458 (1922); *Rhodes v. Jernigan*, 155 Ga. 523, 117 S.E. 432 (1923), overruled on other grounds, *Lucas v. Woodward*, 240 Ga. 770, 243 S.E.2d 28 (1978) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Former Code 1933, Ch. 23-25, making treasurer ex-officio officer of commission did not violate this paragraph. *McFarlin v. Board of Drainage Comm'rs*, 153 Ga. 766, 113 S.E. 447 (1922) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

For an invalid Act appointing a county treasurer for an unexpired term, see *McCants v. Layfield*, 149 Ga. 231, 99 S.E. 877 (1919).

This paragraph and Ga. Const. 1976, Art. IX, Sec. I, Para. VII (see Ga. Const. 1983, Art. IX, Sec. I, Para. I) must be construed together. They confer upon the General Assembly power to create boards of commissioners with such powers as the General Assembly may grant, without regard to uniformity in the powers conferred; and the constitutional prohibition under Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. IV, Para. IV), which declares that no special law shall be enacted in any case for which provision has been made by an existing general law, is not violated by the creation of such boards. *Sanders v. Wilkinson County*, 69 Ga. App. 676, 26 S.E.2d 467 (1943); *Bowen v. Lewis*, 201 Ga. 487, 40 S.E.2d 80 (1946); *Robert v. Steed*, 207 Ga. 41, 60 S.E.2d 134 (1950) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), regarding special laws, has been construed together with Ga.

County Government (Cont'd)

Const. 1976, Art. IX, Sec. I, Para. VII (see Ga. Const. 1983, Art. IX, Sec. I, Para. I), and this paragraph, to impose little restriction on the General Assembly in creating and defining duties of county commissioners by special Act. The General Assembly has the power to pass separate and distinct laws creating county commissioners for every county in Georgia; and the provisions of general laws enacted by the legislature do not apply to such officers, unless made so by the special laws creating them. *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Constitutional requirement of uniformity is not applicable to law relating to the powers and duties of county commissioners. *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966).

Legislation enacted by General Assembly with respect to creation of tribunals or offices for transaction of county matters must be uniform throughout the state. Such tribunals or offices must be of the same name, jurisdiction, and remedies. *Toole v. Anderson*, 177 Ga. 814, 171 S.E. 714 (1933).

Different political subdivisions and processes. — There is nothing that prohibits a state from creating different kinds of political subdivisions and providing a different process for selecting and removing officials in those subdivisions. *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975).

General Assembly has power to pass separate and distinct laws creating county commissioners for every county in Georgia; and the provisions of general laws enacted by the legislature do not apply to such officers, unless made so by the special laws creating them. *Humthlett v. Reeves*, 211 Ga. 210, 85 S.E.2d 25 (1954).

Effect of joint construction of this paragraph and Ga. Const. 1976, Art. I, Sec. II, Para. VII (Ga. Const. 1983, Art. III, Sec. VI, Para. IV). — There is no general law in this state regulating the creating of county commissioners and fix-

ing their jurisdiction, powers, and duties, but all such Acts are special laws; and construing together Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), and this paragraph, as they must be construed, there is no limitation or restriction upon the General Assembly in the creation of such commissioners, and in fixing their jurisdiction, powers, and duties. *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Different construction sometimes warranted. — There is good reason to construe the provision found in this paragraph as being separate and distinct in its requirements from the provisions of Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), prohibiting the passing of special laws where there was already an existing general law. *Toole v. Anderson*, 177 Ga. 814, 171 S.E. 714 (1933) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

The provisions of this paragraph are more nearly akin to those in Ga. Const. 1976, Art. VI, Sec. II, Para. I (see Ga. Const. 1983, Art. VI, Sec. VI, Para. I), than Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *Toole v. Anderson*, 177 Ga. 814, 171 S.E. 714 (1933) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Setting compensation for county officers. — This paragraph allows nonuniformity when the legislature fixes compensation of county treasurers. *McCall v. Wilkins*, 145 Ga. 342, 89 S.E. 219 (1916); *Clayton County v. Worsham*, 239 Ga. 135, 236 S.E.2d 80 (1977) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

The General Assembly is not governed by Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV) in fixing the compensation of tax commissioners. *Clayton County v. Worsham*, 239 Ga. 135, 236 S.E.2d 80 (1977).

This paragraph applies to a grand jury inasmuch as it is a tribunal created for transacting county business and considering county matters. *Bussell v. Youngblood*, 239 Ga. 553, 238 S.E.2d 89 (1977) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Special laws for discharging county employees. — Even though a general law provides a manner for discharging county police by county commissioners, a special law relating to the subject is valid. *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966).

County administrator has authority, previously vested in county commissioners, to hire and fire. *Spell v. Blalock*, 243 Ga. 459, 254 S.E.2d 842 (1979).

General Assembly may confer upon county commissioner power and authority to contract for a cadastral survey, and if commissioner may contract for such a survey under the authority of the General Assembly, the same authority may provide a method whereby revenue will be provided to pay any reasonable cost thereof. *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952).

Diversity in operation between counties. — The general rule is that laws of a general nature shall have uniform operation throughout the state; however, the Constitution made an exception as to county commissioners, which sanctions the utmost diversity consistent with the needs of the particular county that may require them. *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952).

Rationale for constitutionality of §§ 48-5-297, 48-5-299, and 48-5-306. — Former Code 1933, §§ 92-6911 and 92-6913 (see now O.C.G.A. §§ 48-5-297, 48-5-299, and 48-5-306), providing for a cadastral survey in certain counties, would not have been unconstitutional, illegal, and void, as contended, even had such Acts named a certain county rather than having fixed a classification based on population, since the purpose of such Acts was to confer upon the proper governing authority of counties falling within the classification fixed additional powers and duties. *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952).

Local law violated Constitution. — An Act which created the office of chief tax assessor and the board of tax assessors review in the City of Augusta and Richmond County was not authorized by Ga. L. 1956, pp. 453-456, a local amendment to this paragraph, and was in violation of

Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *Dobson v. Brown*, 225 Ga. 73, 166 S.E.2d 22 (1969) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

School board members. — Term limitations of Telfair County Tenure Law, 1963 Ga. Laws 705, do not apply to school board members because the Tenure Law amends Ga. Const. 1983, Art. IX and not Ga. Const. 1983, Art. VIII; thus, a member who was serving a third consecutive term was not subject to the Tenure Law. *Dyal v. Pope*, 283 Ga. 463, 660 S.E.2d 725 (2008).

Right to bring suit. — Contention that it was right of ordinary (now judge of probate court), rather than board of county commissioners, to bring suit to recover money allegedly paid illegally to sheriff was without merit. *Sanders v. Wilkinson County*, 69 Ga. App. 676, 26 S.E.2d 467 (1943).

County Commissioners

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. IX, Sec. I, Para. VII and antecedent provisions, which provided that the General Assembly had the power to create and define the duties of county commissioners, are included in the annotations for this paragraph.

This paragraph should be construed in connection with Ga. Const. 1976, Art. IX, Sec. I, Para. VI (see Ga. Const. 1983, Art. IX, Sec. I, Para. I). *Sanders v. Wilkinson County*, 69 Ga. App. 676, 26 S.E.2d 467 (1943) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

This paragraph confers upon the General Assembly the power to create boards of commissioners with such powers as the General Assembly may grant, without regard to uniformity in the powers conferred; and that the constitutional prohibition under Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), which declares that no special law shall be enacted in any case for which provision has been made by an existing general law, is not violated by the creation of such boards. *Robert v. Steed*, 207 Ga. 41, 60 S.E.2d 134 (1950) (see Ga. Const. 1983,

County Commissioners (Cont'd)

Art. IX, Sec. I, Para. I).

Restrictions on General Assembly in defining county commissioner's role. — This constitutional power to create commissioners and define their duties, does not serve in anyway or manner to abrogate the inhibition against delegation of legislative authority. By analogy, the General Assembly may be constitutionally authorized to set up and create various state boards, departments, bureaus and the like, but this authority standing alone will not permit the General Assembly to delegate its legislative authority to such lawfully constituted authorities. *Bibb County v. Garrett*, 204 Ga. 817, 51 S.E.2d 658 (1949) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), regarding special laws, has been construed together with this paragraph and Ga. Const. 1976, Art. IX, Sec. I, Para. VI, to impose little restriction on the General Assembly in creating and defining the duties of county commissioners by special Act. The General Assembly has the power to pass separate and distinct laws creating county commissioners for every county in Georgia; and the provisions of general laws enacted by the legislature do not apply to such officers, unless made so by the special laws creating them. *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975) (decided under Ga. Const. 1976, Art. IX, Sec. I, Para. I; see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Granting administrative power to regulate and control. — The prohibition against delegation of legislative powers does not preclude the General Assembly from vesting in some other authority administrative power to regulate and control. *Bibb County v. Garrett*, 204 Ga. 817, 51 S.E.2d 658 (1949).

Purpose of Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV) is to ordain the uniform operation throughout the state of all general laws; but the Constitution made an exception as to county commissioners in this paragraph, which sanctions utmost diversity consis-

tent with needs of the particular county that "may require them." *Bradford v. Hammond*, 179 Ga. 40, 175 S.E. 18 (1934).

This paragraph and § 36-1-4 subject to qualification by special Act. — Under Ga. Const. 1976, Art. IX, Sec. I, Para. VI, this paragraph, and former Code 1933, §§ 23-1713 and 23-1714 (see now O.C.G.A. § 36-1-14), so far as they refer to county commissioners, are subject to qualification by special Acts, and the special Acts need not be uniform. *Moore v. Whaley*, 189 Ga. 647, 7 S.E.2d 394 (1940) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Instance of section being unconstitutional as special law unwarranted. — Act relating to the board of county commissioners of a named county, which provided that county commissioners should not "purchase directly or indirectly materials, livestock, supplies or other articles for any department of the county, from himself or from any copartnership in which he may be interested directly or indirectly, nor from any person directly or indirectly, in his employ in any capacity whatsoever," that if on prescribed investigation any commissioner was found guilty of having violated such provisions the commissioner should be removed from office by written order of the judge or ordinary (now judge of probate court), trying such charges, was not unconstitutional on the ground that it was a special law enacted in a case for which provision had been made by an existing general law, to-wit former Code 1933, §§ 23-1713 and 23-1714 (see now O.C.G.A. § 36-1-14), relating to purchases in behalf of counties by county commissioners and removal for violation of the inhibition therein declared. *Robitzsch v. State*, 189 Ga. 637, 7 S.E.2d 387 (1940).

This provision was contained in the Constitution of 1877 and the Constitution of 1868, as well as that of 1945. *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Legislature has power to pass separate and distinct Acts for any counties which require county commissioners, and does not require these Acts to be uniform in operation. *Bradford v.*

Hammond, 179 Ga. 40, 175 S.E. 18 (1934); Hutchins v. Candler, 209 Ga. 415, 73 S.E.2d 191 (1952).

Uniform law not required. — This paragraph and Ga. Const. 1976, Art. IX, Sec. I, Para. VI, do not require passage of a general uniform law defining the duties of county commissioners. Pulaski County v. Pollock, 83 Ga. 270, 9 S.E. 1065 (1889); Sayer v. Brown, 119 Ga. 539, 46 S.E. 649 (1904); Deason v. DeKalb County, 222 Ga. 63, 148 S.E.2d 414 (1966) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Different grants of power. — The General Assembly may grant to and define powers of county board of commissioners that are different from and contrary to a general statutory grant of powers to county governing authorities. SCA Servs. of Ga., Inc. v. Fulton County, 238 Ga. 154, 231 S.E.2d 774 (1977).

Intimation to contrary regarding granting of power in Conley v. Poole, 67 Ga. 254 (1884) was obiter. — Smith v. Duggan, 153 Ga. 463, 112 S.E. 458 (1922); Rhodes v. Jernigan, 155 Ga. 523, 117 S.E. 432 (1923), overruled on other grounds, 240 Ga. 770, 243 S.E.2d 28 (1978).

It has been said that there is no limit to the power of the General Assembly to define the powers of the county board of commissioners. Decatur County v. Roberts, 159 Ga. 528, 126 S.E. 460 (1925); Bowen v. Lewis, 201 Ga. 487, 40 S.E.2d 80 (1946); Hutchins v. Candler, 209 Ga. 415, 73 S.E.2d 191 (1952).

In defining the power, other provisions of the state Constitution must not be violated. Board of Comm'rs v. Mayor of Americus, 141 Ga. 542, 81 S.E. 435 (1914).

Method of laying out public roads in a county prescribed by former Code 1933, Ch. 95-2 (see now O.C.G.A. Ch. 4, T. 32) was passed by virtue of this paragraph. Commissioners of Decatur County v. Curry, 154 Ga. 378, 114 S.E. 341 (1922) (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Commissioners legally authorized to exercise municipal powers. Churchill v. Walker, 68 Ga. 681 (1882).

Contracts. — An implied power is conferred by a statute granting jurisdiction to

county authorities to contract in regard to the details. Wright v. Floyd County, 1 Ga. App. 582, 58 S.E. 72 (1907).

Contract with a citizen to investigate unreturned taxable property is void. Decatur County v. Roberts, 159 Ga. 528, 126 S.E. 460, answer conformed to, 33 Ga. App. 437, 126 S.E. 557 (1925).

Act creating board of county commissioners not infringement on power of probate court judge. — Since the General Assembly has constitutional authority to create a board of county commissioners, and since the ordinary (now judge of probate court) is given jurisdiction over county matters only when such a board has not been created, a contention that an Act creating such a board unconstitutionally infringes upon and restricts power and authority of an ordinary, a duly elected, qualified, commissioned and acting county official during the official's term of office is without merit. Bleckley v. Vickers, 225 Ga. 593, 170 S.E.2d 695 (1969).

Ordinary (now judge of probate court) sits for county purposes only in those counties where jurisdiction over county matters and county affairs has not been granted by legislative Act to a county commissioner or board of county commissioners. Bleckley v. Vickers, 225 Ga. 593, 170 S.E.2d 695 (1969).

Power to prescribe powers includes power to limit. — The authority of the General Assembly to prescribe powers of the ordinary (now judge of probate court) over county affairs necessarily includes authority to increase or diminish such powers. Bleckley v. Vickers, 225 Ga. 593, 170 S.E.2d 695 (1969).

Mode of choosing county officer's legislature's discretion. — There is no limit on this power. Nor does the Constitution point out how these officers shall be chosen. It leaves the whole matter to the discretion of the legislature. In other words, the people have not seen fit to restrict themselves to the mode of the choice of such officers. Bleckley v. Vickers, 225 Ga. 593, 170 S.E.2d 695 (1969).

General Assembly may confer upon county commissioner power and authority to contract for a cadastral survey, and if the commissioner may con-

County Commissioners (Cont'd)

tract for such a survey under the authority of the General Assembly, the same authority may provide a method whereby revenue will be provided to pay any reasonable cost thereof. *Hutchins v. Candler*, 209 Ga. 415, 73 S.E.2d 191 (1952).

Specificity of amending Act suffi-

cient for validation. — The description of an Act to be amended as an Act to amend an Act creating a board of county commissioners for a specific county, so as to provide for commissioner districts, etc., unmistakably identifies the law to be amended, reveals the legislative intent, and is valid. *Stembridge v. Newton*, 213 Ga. 304, 99 S.E.2d 133 (1957).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

BODY CORPORATE

COUNTY GOVERNMENT

COUNTY COMMISSIONERS

Body Corporate

County has no right, in the absence of special or local legislation granting such right, to operate an ambulance service. 1965-66 Op. Att'y Gen. No. 66-176.

Municipal corporations engaging in traditional private business. — In absence of special circumstances, it is not within the constitutional power of the legislature to authorize a municipal corporation (county) to engage in a business which can be and ordinarily is carried on by private enterprise merely for the purpose of obtaining an income or deriving a profit therefrom, but it should be allowed to go into business only on the theory that thereby the public welfare will be subserved. 1965-66 Op. Att'y Gen. No. 66-176 (decided under former §§ 2-5801, 2-6201 and 2-6501).

County Government

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. IX, Sec. I, Para. VI and antecedent provisions, which provided that the General Assembly could create tribunals and officers for county matters subject to uniformity throughout the state, are included in the annotations for this paragraph.

Distinction between constitutional provisions in invalidation of special laws. — A "special" law is invalidated by the second clause of Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983,

Art. III, Sec. VI, Para. IV) only where a general law covering the subject already exists, while the first clause of Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), Ga. Const. 1976, Art. IX, Sec. I, Para. I (see Ga. Const. 1983, Art. IX, Sec. I, Paras. I, II) and this paragraph, invalidate any special legislation, even where general laws dealing with their respective subject matters exist. 1954-56 Op. Att'y Gen. p. 375 (decided under Ga. Const. 1976, Art. IX, Sec. I, Para. I; see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Mingling of county police and sheriff's department. — When county police department is established and law enforcement functions of sheriff are transferred to such department, the sheriff or the sheriff's deputies may not become members of the police department so as to exercise the police power. 1970 Op. Att'y Gen. No. U70-28.

County Commissioners

Editor's notes. — In light of the similarity of the provisions, opinions under former Ga. Const. 1976, Art. IX, Sec. I, Para. VII and antecedent provisions, which provided that the General Assembly had the power to create and define the duties of county commissioners, are included in the annotations for this paragraph.

Uniformity not required. — This paragraph authorizes the General Assembly to provide for boards of commissioners

for counties and defines their duties with no requirement of uniformity, so the General Assembly can grant to and define powers of the county board of commissioners different from and contrary to a general statutory grant of powers to county governing authorities since Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV) does not apply to statutes defining the powers of a county governing authority. 1978 Op. Att’y Gen. No. U78-11 (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Payment of taxes not required for political candidates. — Construing Ga. Const. 1976, Art. III, Sec. V, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), Ga. Const. 1976, Art. IX, Sec. I, Para. VIII (see Ga. Const. 1983, Art. IX, Sec. I,

Para. III), and this paragraph, the payment of taxes is not required of any candidate for a state office except that members of the General Assembly may not be seated if in default for taxes; whether candidates for county offices are eligible to run where they are behind with payment of taxes depends upon the office and the legislative Acts relating to that office or officer. 1954-56 Op. Att’y Gen. p. 311 (see Ga. Const. 1983, Art. IX, Sec. I, Para. I).

Grants of power to counties and municipalities strictly construed. — Counties and municipal corporations can only exercise such powers as are conferred by law, and grants of such powers must be strictly construed. 1980 Op. Att’y Gen. No. U80-25.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 2, 4, 8.

C.J.S. — 20 C.J.S., Counties, § 1 et seq.

ALR. — Power of municipalities or other political subdivisions to engage in a joint project or enterprise, 123 ALR 997.

Paragraph II. Number of counties limited; county boundaries and county sites; county consolidation.

(a) There shall not be more than 159 counties in this state.

(b) The metes and bounds of the several counties and the county sites shall remain as prescribed by law on June 30, 1983, unless changed under the operation of a general law.

(c) The General Assembly may provide by law for the consolidation of two or more counties into one or the division of a county and the merger of portions thereof into other counties under such terms and conditions as it may prescribe; but no such consolidation, division, or merger shall become effective unless approved by a majority of the qualified voters voting thereon in each of the counties proposed to be consolidated, divided, or merged.

1976 Constitution. — Art. IX, Sec. I, Paras. I-V, XI.

Cross references. — Enumeration of counties, § 36-1-1. Changing county boundaries, § 36-3-1. Boundary line dis-

putes, § 36-3-20. Change of county site, § 36-4-1 et seq. Creation, dissolution, merger, or consolidation of municipalities, § 36-35-2.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

NEW COUNTIES

BOUNDARY CHANGES

PROCEDURE

CONSOLIDATION, MERGER, DIVISION

General Consideration

Cited in Houston County ex rel. Board of Educ. v. Peach County, 171 Ga. 316, 155 S.E. 469 (1930); South v. Peters, 89 F. Supp. 672 (N.D. Ga. 1950).

New Counties

New counties occupy same position as old counties. Fordham v. Sikes, 141 Ga. 469, 81 S.E. 208 (1914).

Facts insufficient to void Act creating new county. — The facts that: (1) county line not fixed according to agreement of citizens; or (2) election of county officers by Act was void; or (3) that change of county line affected school districts were not sufficient to declare an Act creating a new county void. Clements v. Powell, 155 Ga. 278, 116 S.E. 624 (1923).

Act creating county valid. Moore v. Smith, 140 Ga. 854, 79 S.E. 1116 (1913); Fordham v. Sikes, 141 Ga. 469, 81 S.E. 208 (1914).

Boundary Changes

Act to change county lines cannot result in leaving a county without a county site. County of DeKalb v. City of Atlanta, 132 Ga. 727, 65 S.E. 72 (1909).

Valid change of county line. — This paragraph was not violated by former Ga. L. 1909, p. 152, permitting change of county lines within the limits of incorporated towns and cities. Manson v. City of College Park, 131 Ga. 429, 62 S.E. 278 (1908) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Ga. L. 1911, p. 183, authorizing change of county lines between contiguous counties of a certain population, was void. Worth County v. Crisp County, 139 Ga. 117, 76 S.E. 747 (1912).

Valid Acts changing county lines, see County of DeKalb v. City of Atlanta,

132 Ga. 727, 65 S.E. 72 (1909); Aultman v. Hodge, 147 Ga. 626, 95 S.E. 297 (1918).

Procedure

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. IX, Sec. I, Para. V and antecedent provisions, which provided that no county site could be changed or removed except upon two-thirds vote of the county electorate and majority vote of the General Assembly, are included in the annotations for this paragraph.

Purpose of paragraph and sections. — This paragraph, and former Civil Code 1910, §§ 468-471 (see now O.C.G.A. §§ 36-3-1 through 36-3-4), enacted in pursuance thereof, were designated to prevent the transfer of a few acres, or residences from one county to another by legislative Act. Aultman v. Hodge, 147 Ga. 626, 95 S.E. 297 (1918); Aultman v. Hodge, 150 Ga. 370, 104 S.E. 1 (1920) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Does not apply to administrative facilities. — This paragraph relates to change or removal from such site of the courthouse, courts, and the places of transacting official business of the county, but not to administrative facilities such as jails. Jackson v. Gasses, 230 Ga. 712, 198 S.E.2d 657 (1973) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Amount of land to be transferred is within the discretion of the officers, subject to the limitations to this paragraph. Aultman v. Hodge, 147 Ga. 626, 95 S.E. 297 (1918) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Work of changing county lines is political or legislative rather than judicial in nature. Aultman v. Hodge, 147 Ga. 626, 95 S.E. 297 (1918).

Paragraph violated. — This paragraph was violated by an Act which pro-

vided that the assent of two-thirds of the qualified voters of the county shall be necessary to authorize the removal of a county site. *Wells v. Ragsdale*, 102 Ga. 53, 29 S.E. 165 (1897) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Paragraph not violated. — Ga. L. 1923, p. 218, which removed the site of Camden County, did not violate this paragraph. *Bachlott v. Buie*, 158 Ga. 705, 124 S.E. 339 (1924); *Clements v. Bostwick*, 158 Ga. 906, 124 S.E. 719 (1924) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Ga. L. 1923, p. 216, which provided for removal of a named county site from one town to another one, did not violate this paragraph. *Orr v. James*, 159 Ga. 237, 125 S.E. 468 (1924) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Presumption arises that the election favored a change before the Act was passed. *Cutcher v. Crawford*, 105 Ga. 180, 31 S.E. 139 (1898); *Barrett v. Ashmore*, 137 Ga. 545, 73 S.E. 825 (1912); *Vornberg v. Dunn*, 143 Ga. 111, 84 S.E. 370 (1915).

County board of commissioners is authorized to locate administrative offices and facilities outside county seat. *Brewster v. Houston County*, 235 Ga. 68, 218 S.E.2d 748 (1975).

There is no statutory prohibition against the sheriff maintaining offices in the county outside of the county site so long as the sheriff complies with the statute which requires the sheriff to maintain an office in the county site. *Brewster v. Houston County*, 235 Ga. 68, 218 S.E.2d 748 (1975).

Deliberation and voting on any issue must be conducted in the county site and citizens of the county must be afforded an opportunity to be heard at the county site as to any issue of county business. *Brewster v. Houston County*, 235 Ga. 68, 218 S.E.2d 748 (1975).

Consolidation, Merger, Division

Editor's notes. — Some of the cases appearing under this heading were decided under the 1976 Constitution (Art. IX, Sec. I, Para. XI) and antecedent provisions, which set out the procedure for

consolidation, merger, or division of counties.

Voting requirements for merger. — This paragraph of the Constitution provides that any county may be merged with a contiguous county by a two-thirds (now majority) vote of qualified electors of the merged county, voting at an election held for that purpose; it does not require that voters of a county in which another county is merged should ratify the act of merger. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Provisions of the Constitution of this state must be construed together and as a whole; and must be so construed as not to render one provision void because of another provision; in construing Ga. Const. 1976, Art. VI, Sec. XVI, Para. I (see Ga. Const. 1983, Art. VI, Sec. I, Para. VII), and this paragraph, their meaning is that the legislature cannot abolish constitutional courts and constitutional officers where the purpose of the Act is to accomplish this alone; but, where the Constitution grants to the legislature the power to merge contiguous counties, which is done in conformity to the power, and where the merging Act has the incidental effect of superseding certain courts existing in the merged county by those of the county into which the merged county is absorbed, and of abolishing certain offices held under general provisions of the Constitution in the county absorbed, such merger Act is not unconstitutional and void because it is in conflict with the provision of the Constitution inhibiting the abolition of constitutional courts and officers. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931) (see Ga. Const. 1983, Art. IX, Sec. I, Para. II).

Merger of counties effective notwithstanding incidental effect of superseding, constitutional courts. — It is the duty of the court to construe the constitutional provision providing for the merger of counties as conferring, by necessary implication, upon the legislature the power of enacting legislation for the merging of contiguous counties, although the incidental effect of such Acts may be to

**Consolidation, Merger,
Division (Cont'd)**

supersede constitutional courts and abolish constitutional officers existing in the

counties merged at the dates when the merger Acts become effective. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931).

OPINIONS OF THE ATTORNEY GENERAL

Meetings of boards of county commissioners must be held at the county site. 1983 Op. Att'y Gen. No. U83-47.

Altering boundaries of insolvent counties. — The General Assembly may

not alter boundaries of insolvent counties without approval of a majority of the voters in the counties affected. 1986 Op. Att'y Gen. No. U86-3.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 160 et seq.

Paragraph III. County officers; election; term; compensation.

(a) The clerk of the superior court, judge of the probate court, sheriff, tax receiver, tax collector, and tax commissioner, where such office has replaced the tax receiver and tax collector, shall be elected by the qualified voters of their respective counties for terms of four years and shall have such qualifications, powers, and duties as provided by general law.

(b) County officers listed in subparagraph (a) of this Paragraph may be on a fee basis, salary basis, or fee basis supplemented by salary, in such manner as may be directed by law. Minimum compensation for said county officers may be established by the General Assembly by general law. Such minimum compensation may be supplemented by local law or, if such authority is delegated by local law, by action of the county governing authority.

(c) The General Assembly may consolidate the offices of tax receiver and tax collector into the office of tax commissioner.

1976 Constitution. — Art. IX, Sec. I, Paras. VIII-X.

Cross references. — Qualifications of candidates for county offices generally, § 21-2-6. Effective dates of general Acts providing increases in compensation to officers listed in Paragraph, § 1-3-4.1.

Law reviews. — For article discussing trend to abolish fee system for compensa-

tion of public officials in Georgia and court resistance manifested in rigid interpretation of notice requirements, see 9 Mercer L. Rev. 231 (1958). For article on historical interpretation and validity of statutes pertaining to Georgia county commissioners, see 15 Mercer L. Rev. 258 (1963). For article, "The Selection and Tenure of Judges," see 2 Ga. St. B.J. 281 (1966). For

annual survey of local government law, see 35 Mercer L. Rev. 233 (1983). For article, “Georgia Local Government Offi-

cials and the Grand Jury,” see 26 Ga. St. B.J. 50 (1989).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

COUNTY OFFICERS

1. IN GENERAL
2. COMPENSATION
3. QUALIFICATIONS AND REQUIREMENTS

REMOVAL FOR MALPRACTICE

General Consideration

Legislature cannot legislate out of office any constitutional officer if purpose of the Act is to accomplish this alone; but, where the power is granted to the legislature by the Constitution to legislate upon any specific subject matter, and in strict conformity to the power the legislature passes an Act, the incidental effect of which is to abolish certain officeholders, such Act does not violate the general constitutional principle that the legislature cannot abolish constitutional offices. *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931).

Inherent authority of state official. — A duly elected, constitutional officer must have the inherent authority to implement certain public safety policies. One such public safety policy is the random drug screening of personnel who are authorized to carry weapons. The state has a compelling reason for randomly drug testing law enforcement employees because drug use by them undermines public confidence in the integrity of law enforcement and poses a danger to fellow employees, prison inmates, and the public at large. *Mayo v. Fulton County*, 220 Ga. App. 825, 470 S.E.2d 258 (1996).

Cited in *Stewart v. Anderson*, 140 Ga. 31, 78 S.E. 457 (1913); *Culbreth v. Cannady*, 168 Ga. 444, 148 S.E. 102 (1929); *Overton v. Gandy*, 170 Ga. 562, 153 S.E. 520 (1930); *McGill v. Simmons*, 172 Ga. 127, 157 S.E. 273 (1931); *McBrien v. Starkweather*, 43 Ga. App. 818, 160 S.E. 548 (1931); *Gay v. Laurens County*, 213 Ga. 518, 100 S.E.2d 271 (1957); *Best v. State*, 109 Ga. App. 553, 136 S.E.2d 496

(1964); *Gruber v. Fulton County*, 111 Ga. App. 71, 140 S.E.2d 552 (1965); *Daniel v. Yow*, 226 Ga. 544, 176 S.E.2d 67 (1970); *Pitts v. Cates*, 536 F.2d 56 (5th Cir. 1976); *Barbour v. Democratic Executive Comm.*, 246 Ga. 193, 269 S.E.2d 433 (1980); *In re Irvin*, 171 Ga. App. 794, 321 S.E.2d 119 (1984); *Clark v. State*, 255 Ga. 370, 338 S.E.2d 269 (1986); *Hart v. Madden*, 256 Ga. 497, 349 S.E.2d 737 (1986); *Thompson v. Carter*, 905 F. Supp. 1073 (M.D. Ga. 1995); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

County Officers

1. In General

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. IX, Sec. I, Para. VIII and antecedent provisions, which used the phrase “county officers” without setting out specific examples, are included in the annotations for this paragraph.

This paragraph defines a county officer. *Andrews v. Butts County*, 29 Ga. App. 302, 114 S.E. 912 (1922) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

This paragraph refers only to such county offices as were in existence at the time of its adoption, and does not apply to offices thereafter created by statute. *Marshall v. Walker*, 183 Ga. 44, 187 S.E. 81 (1936) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Members of board of county tax assessors are not county officers within this paragraph. *Barnes v. Watson*, 148 Ga. 822, 98 S.E. 500 (1919) (see Ga.

County Officers (Cont'd)**1. In General (Cont'd)**

Const. 1983, Art. IX, Sec. I, Para. III).

Office of county commissioner is a county office governed by constitutional provisions of this paragraph.

Lucas v. Woodward, 240 Ga. 770, 243 S.E.2d 28 (1978) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

An incumbent in office as a member of the board of county commissioners as provided for in Ga. L. 1929, p. 568, is a county officer. Sweat v. Barnhill, 171 Ga. 294, 155 S.E. 18 (1930).

An incumbent in office as ordinary (now judge of probate court) is a county officer within the meaning of this paragraph. Lee v. Byrd, 169 Ga. 622, 151 S.E. 28 (1929) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Office of county school superintendent is a constitutional office. — Thus, the superintendent is to be elected by the voters of the superintendent's district, the superintendent's district being the county of the superintendent's residence exclusive of any independent school system in existence in such county. Kemp v. Mitchell County Democratic Executive Comm., 216 Ga. 276, 116 S.E.2d 321 (1960).

Deputy sheriffs are not "county officers" within the meaning of this paragraph. Employees Retirement Sys. v. Lewis, 109 Ga. App. 476, 136 S.E.2d 518 (1964), overruled on other grounds, Lucas v. Woodward, 240 Ga. 770, 243 S.E.2d 28 (1978) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Sheriff is a county officer. — Sheriff, pursuant to the state constitution, was a county officer and was not an employee of the county commission; however, as a county officer, the sheriff's budget and accounts were subject to the authority of the county commission, which could cut the sheriff's budget, but the trial court erred in granting the sheriff's petition for writ of mandamus and injunctive relief after concluding that the county commission's adopted budget that delineated specific functions within the sheriff's department improperly dictated to the sheriff how to operate the sheriff's office, as the real issue was whether the budget it ad-

opted reasonably and adequately allowed the sheriff to perform the sheriff's duties. Bd. of Comm'rs v. Saba, 278 Ga. 176, 598 S.E.2d 437 (2004).

Trial court's determination that a county sheriff was not also a State of Georgia employee for workers compensation purposes under O.C.G.A. § 34-9-11(a), the exclusive remedy provision, was proper, as sheriffs were only authorized to act within their county, they were defined as county officers under Ga. Const. 1983, Art. IX, Sec. I, Para. III, and sheriffs' salaries were subject to change. Freeman v. Barnes, 282 Ga. App. 895, 640 S.E.2d 611 (2006).

The Georgia Tort Claims Act did not apply to a wrongful death suit brought against a county, a sheriff, and a deputy; under Ga. Const. 1983, Art. IX, Sec. I, Para. III(a), sheriffs are county officers and O.C.G.A. § 50-21-22(5) excludes counties from the Act, and moreover the county paid the salaries and employee benefits of the sheriff and the sheriff's employees and funded the sheriff's department. Nichols v. Prather, 286 Ga. App. 889, 650 S.E.2d 380 (2007), cert. denied, 2007 Ga. LEXIS 766 (Ga. 2007).

Trial court properly denied a sheriff's motion to dismiss the negligence suit brought against the sheriff and eight other employees of the sheriff's department arising from the death of a court reporter as the sheriff was an elected official and was not a county employee; therefore, the exclusive remedy provision of the Workers' Compensation Act, O.C.G.A. § 34-9-11(a), did not bar the suit. Freeman v. Brandau, 292 Ga. App. 300, 664 S.E.2d 299 (2008).

County sheriff's office was not a proper defendant in plaintiff's injury action because the sheriff's office was not an entity capable of being sued under Fed. R. Civ. P. 17 in that the sheriff was a constitutionally created office under both Ga. Const. 1983, Art. IX, Sec. I, Para. III(a), and Fla. Const. Art. 8, Sec. 1, and employees acted in the name of the sheriff and not as an employee of the sheriff's office under O.C.G.A. § 15-16-23 and Fla. Stat. § 30.07. Harris v. Lawson, No. 7:08-CV-70 (HL), 2008 U.S. Dist. LEXIS 78808 (M.D. Ga. Aug. 27, 2008).

Trial court did not err in dismissing a sheriff's deputy's widow's claims against the sheriff and the deputy's fellow deputies on the basis that the Worker's Compensation Act, O.C.G.A. § 34-9-1 et seq., provided her exclusive remedy under O.C.G.A. § 34-9-11(a). The sheriff was the deputy's "employer" under Ga. Const. 1983, Art. IX, Sec. I, Para. III(a), and O.C.G.A. § 34-9-1(3). *Teasley v. Freeman*, 305 Ga. App. 1, 699 S.E.2d 39 (2010).

Sheriff has no authority over commissions generated by use of county jail. — County sheriff was not entitled to keep commissions received from a company that provided telephone services to county jail inmates as revenue generated using county property or facilities—such as the jail—was itself county property and therefore subject to county authority under O.C.G.A. § 36-5-22.1. Although a sheriff could collect certain fees, such as fees for attending court, O.C.G.A. § 15-16-21 provided that such fees had to be turned over to the county's treasurer or fiscal officer. *Lawson v. Lincoln County*, 292 Ga. App. 527, 664 S.E.2d 900 (2008), cert. denied, 2008 Ga. LEXIS 899 (Ga. 2008).

Pursuant to O.C.G.A. § 45-2-2, a deputy sheriff could not serve as a school board member for the same county. *Black v. Catoosa County Sch. Dist.*, 213 Ga. App. 534, 445 S.E.2d 340 (1994).

Emphasis of the Constitution dealing with membership of newly created county offices is upon election, and appointments to fill such offices are authorized only when there is a vacancy in an existing office. *Lance v. Stepp*, 232 Ga. 675, 208 S.E.2d 559 (1974).

To be termed and classified as a county officer within the provisions of this paragraph, a person must be: (1) elected by qualified voters of the county; (2) hold office for four years; (3) be a resident of the county for two years; and (4) be a qualified voter. *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949); *Employees Retirement Sys. v. Lewis*, 109 Ga. App. 476, 136 S.E.2d 518 (1964), overruled on other grounds, *Lucas v. Woodward*, 240 Ga. 770, 243 S.E.2d 28 (1978) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Office of school superintendent. — Although a county school superintendent is a "county officer" for several purposes, the office of school superintendent is not always a county office. *Bradfield v. Wells*, 262 Ga. 198, 415 S.E.2d 638 (1992).

A local constitutional amendment which prohibits "county officers" from succeeding themselves after two successive terms in office does not govern the qualifications or eligibility for the office of superintendent of the Telfair County School District. *Bradfield v. Wells*, 262 Ga. 198, 415 S.E.2d 638 (1992).

Authority of officers over expenditures. — Since county commissioners approved a budget for the office of the superior court clerk that included a miscellaneous line item for a specified amount of money for certain years, the item had already been budgeted to the clerk by the commission in the exercise of its authority over the clerk's budget; thus, the decision of how to spend this money fell solely to the clerk in the exercise of the clerk's duties, and not to the commission. *Griffies v. Coweta County*, 272 Ga. 506, 530 S.E.2d 718 (2000).

Tax commissioner's personnel decisions not state functions. — Madison County Tax Commissioner was not acting as an arm of the state for purposes of the eleventh amendment to the United States Constitution when making the decision to terminate an employee; although the Tax Commissioner was an elected state constitutional officer pursuant to Ga. Const. 1983, Art. IX, Sec. I, Para. III, and the Tax Commissioner's Office was not a division of Madison County or its governing authority pursuant to Ga. Const. 1983, Art. IX, Sec. II, Para. I, since the Tax Commissioner's duties included both state functions and county functions to be performed within Madison County and, with regard to personnel administration, the state distinguished between employees of the county and employees of elected county officials, Ga. Const. 1983, Art. IX, Sec. II, Para. I(c)(1), and so the Tax Commissioner, and not the county, defined certain work regulations for the Tax Commissioner's employees, a fact that did not transform the Tax Commissioner's administration of personnel into a state func-

County Officers (Cont'd)**1. In General** (Cont'd)

tion, however, because, although state law provided the Tax Commissioner with the authority to manage office personnel, the state exercised little control over the use of that authority. *Epps v. Watson*, No. 3:05-CV-68(CDL), 2006 U.S. Dist. LEXIS 33318 (M.D. Ga. May 25, 2006), *aff'd*, 492 F.3d 1240 (11th Cir. 2007).

As for funding, O.C.G.A. § 48-5-183 provided that the county, not the state, funded the Tax Commissioner's office expenses, including personnel expenses, and gave the Tax Commissioner the authority to set employee salaries, limited to the budget provided by the county; based on these considerations, the court found that the Madison County Tax Commissioner did not wear a "state hat" when making personnel decisions for the Tax Commissioner's office. *Epps v. Watson*, No. 3:05-CV-68(CDL), 2006 U.S. Dist. LEXIS 33318 (M.D. Ga. May 25, 2006), *aff'd*, 492 F.3d 1240 (11th Cir. 2007).

Tax Commissioner's Office separate entity from county. — Plaintiff could not dispute that the Tax Commissioner's Office (TCO) was a separate entity from Madison County. Plaintiff did not submit evidence sufficient for a reasonable jury to conclude that plaintiff was an employee of the county, not the TCO. *Epps v. Watson*, No. 3:05-CV-68 (CDL), 2008 U.S. Dist. LEXIS 87814 (M.D. Ga. Oct. 30, 2008).

2. Compensation

There is no conflict between subsection (b) of Ga. Const. 1983, Art. IX, Sec. I, Para. III and O.C.G.A. § 40-2-33(c)(2) which simply constitutes a statutory exception to those fees which otherwise may comprise the compensation paid to a county tax commissioner. *Weldon v. Board of Comm'rs*, 212 Ga. App. 885, 443 S.E.2d 513 (1994).

A salary is salary and nothing more, but compensation may be in part salary and in part fees or commissions, all of which is consistent with this constitutional provision. *Bruce v. County of Troup*, 92 Ga. App. 786, 90 S.E.2d 60 (1955), *disapproved sub nom. Laurens*

County v. Keen, 214 Ga. 32, 102 S.E.2d 697 (1958).

Modification of requirement of uniformity by allowing different salaries for county officers. — The provision, "County officers may be on a fee basis, salary basis, or fee basis supplemented by salary, in such manner as may be directed by law," which was not contained in the Constitution of 1877, could have no other purpose than to modify the requirement as to uniformity of laws to the extent of allowing the General Assembly to fix different salaries for officers in the counties of this state. *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949).

Georgia Laws, 1958, p. 2362, abolishing the fee system and placing county sheriff on a salary, is not violative of Ga. Const. 1976, Art. III, Sec. VIII, Para. IV (no comparable provision in Ga. Const. 1983), since that provision of the Constitution refers only to salaries set forth in the Constitution, and does not refer to county officers, who, under this paragraph of the Constitution "may be on a fee basis, salary basis, or fee basis supplemented by salary, in such manner as may be directed by law," which may be changed by the General Assembly to apply to county officers then in commission. *Barnett v. Boling*, 214 Ga. 401, 105 S.E.2d 312 (1958). (decided under Ga. Const. 1976, Art. III, Sec. VIII, Para. IV; see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Grand jury initially authorized to recommend county officers' salaries. — It was the intention of the framers of the Constitution to authorize fiscal authorities of counties to increase or diminish salary of all county officers, at any time on recommendation of two successive grand juries, whenever the circumstances required such change, and to authorize such change without respect to their terms of office. *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949).

Prior to the amendments to the Constitution adopted in 1945, county officers' salaries were subject to change in the discretion of the General Assembly, and it was the intent of the amendments to the Constitution, adopted in 1945 — since they did not require a referendum of the people of the locality to

change compensation of county officers, and because the amendment of 1945 stated that the compensation of county officers may be fixed as may be directed by law — that the compensation of county officers would be left solely to the discretion of legislative control and enactment without restriction, except that they would be placed on a fee basis, salary basis, or fee basis supplemented by salary as deemed proper by the General Assembly. *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949).

General Assembly intended for compensation of county officers to be fixed from time to time by legislative enactment as circumstances might in its discretion require. *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949).

Counties responsible for salaries or fee of county officers. — As such county officer, a person is not an executive officer of the state as specifically named in Ga. Const. 1976, Art. V, Sec. III, Para. II (see Ga. Const. 1983, Art. V, Sec. III, Para. III). While county officers have been referred to as constitutional officers, nevertheless, they are not “elective officers” within the meaning of the Constitution of 1945 where it is declared that no change in salary “shall affect the officers then in commission.” This is true for reason that the Constitution merely prescribes manner of election of county officers and the term of office, and then requires that county offices shall be uniform in name throughout the state. The compensation of county officers is not provided for in the Constitution, and the state makes no contribution thereto. The county officers are paid solely and exclusively from funds out of the treasury of the county. *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949).

Counties are not subject to grand jury recommendation. — The General Assembly, while recognizing desirability of providing for either increasing or diminishing salary of county officers without regard to their terms of office, deemed it wise not to subject compensation of such officers to recommendation of grand juries, and instead took upon itself right to prescribe compensation for county officers when it declared in its recommendation, which was ratified by the people of this

state, that “county officers may be on a fee basis, salary basis, or fee basis supplemented by salary, in such manner as may be directed by law.” *Houlihan v. Saussy*, 206 Ga. 1, 55 S.E.2d 557 (1949).

Calhoun County probate judge’s compensation. — Pursuant to constitutional authority, the General Assembly enacted a special law placing the probate judge of Calhoun County on a salary. This law, Georgia Laws 1971, p. 2914, provides that the probate judge of Calhoun County shall collect “all fees ... formerly allowed as compensation in any capacity in his office ..., and pay the same into the county treasury ...,” but fees collected by a probate judge for services rendered as a local custodian of vital records cannot be said to be fees collected “in his office” as probate judge. *Porter v. Calhoun County*, 250 Ga. 566, 300 S.E.2d 143 (1983).

Supplementation of compensation for Madison County officials. — An act of the General Assembly in 1965 (Ga. Laws 1965, 2667 et seq.) creating the board of commissioners of roads and revenues of Madison County, and giving the board “complete power, authority, and control relative to county matters,” constituted a legislative delegation to the county commission of the power to supplement the minimum compensation of the four elected county officials by paying from county funds premiums on group health and life insurance. *Hart v. Madden*, 256 Ga. 497, 349 S.E.2d 737 (1986).

3. Qualifications and Requirements

Editor’s notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. IX, Sec. I, Para. VIII and antecedent provisions, which provided that a person was eligible to be a county officer only if the person was a qualified voter and resident of the county for two years, are included in the annotations for this paragraph.

Pardoned felon may be barred from running for office of sheriff. — Paragraph authorizes General Assembly to prohibit convicted felon from running for office of sheriff even if the felon obtained a full pardon. *Georgia Peace Officer Stds. & Training Council v. Mullis*, 248 Ga. 67, 281 S.E.2d 569 (1981) (decided under Ga.

County Officers (Cont'd)**3. Qualifications and****Requirements (Cont'd)**

Const. 1976, Art. IX, Sec. I, Para. IX; see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Constitutional prescription in area preempts General Assembly action. — Where the Constitution has prescribed the qualifications which allow and prevent eligibility to a public office, the General Assembly cannot by statute add to or take from those conditions of eligibility. *Lucas v. Woodward*, 240 Ga. 770, 243 S.E.2d 28 (1978); *Griggers v. Moye*, 246 Ga. 578, 272 S.E.2d 262 (1980).

Residency requirement. — Both this paragraph and paragraph (7) of former Code 1933, § 89-101 (see now O.C.G.A. § 45-2-1) require that candidates reside in the county for two years immediately preceding election to county office. *Griggers v. Moye*, 246 Ga. 578, 272 S.E.2d 262 (1980) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

County attorney is not a county elected official, but rather is a county employee, so the residency requirement of O.C.G.A. § 45-2-1(1) does not apply to the county attorney under Ga. Const. 1983, Art. IX, Sec. I, Para. III and O.C.G.A. § 45-2-5; a county attorney is entitled to sovereign immunity as a county employee. *Wallace v. Greene County*, 274 Ga. App. 776, 618 S.E.2d 642 (2005).

This constitutional provision is reasonable and not a denial of equal protection under U.S. Const., amend. 14. *Griggers v. Moye*, 246 Ga. 578, 272 S.E.2d 262 (1980) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

It is a necessary requirement that a person be a qualified voter before a person is eligible to be a county officer. — A commissioner of roads and revenues (now county commissioner), is a county officer. *Hulgan v. Thornton*, 205 Ga. 753, 55 S.E.2d 115 (1949).

Qualified voter. — An ordinary (now judge of probate court), being a county officer, within meaning of requirement for holding office, is not eligible to office unless the officer is a "qualified voter." *Lee v. Byrd*, 169 Ga. 622, 151 S.E. 28 (1929); *Cloud v. Maxey*, 195 Ga. 90, 23 S.E.2d 668 (1942).

Nonpayment of taxes renders person ineligible for county office. — A person who, at the time of election or appointment to a county office, has not paid that person's taxes as provided by the Constitution, is not a qualified voter and is not eligible to that office. *Sweat v. Barnhill*, 171 Ga. 294, 155 S.E. 18 (1930).

Removal For Malpractice

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. IX, Sec. I, Para. VIII and antecedent provisions, which provided for removal of county officers upon conviction for malpractice in office, are included in the annotations for this paragraph.

Removal provision of this paragraph is mandatory rather than limiting. — It specifies that malpractice in office requires automatic removal of the officeholder. It does not otherwise deal with removal and does not prohibit the General Assembly from enacting otherwise valid removal statutes. *Smith v. Abercrombie*, 235 Ga. 741, 221 S.E.2d 802 (1975) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Malpractice provision of this paragraph is not deficient for vagueness and is self-executing. *Beauchamp v. Smith*, 250 Ga. 16, 295 S.E.2d 97 (1982) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Malpractice is not condition precedent to removal. — Conviction in a criminal prosecution against county officer for malpractice in office is not a condition precedent to the officer's removal from office. A different ruling would render the removal provision of the Constitution meaningless since malpractice in office by the officer is not a penal offense. *Cole v. Holland*, 219 Ga. 227, 132 S.E.2d 657 (1963).

Procedure for removal of county officials applicable to local education board. — Where a local amendment to the Constitution provided a county that, "elections for members of the board of education shall be held and conducted in the same manner as elections for other county officials are held," there is a disclosed legislative intent to provide for re-

removal from office of members of the board and replacement by the procedure stated in this paragraph, which applies to county officials in general, and not by the procedure stated in former O.C.G.A. § 20-2-53 and Ga. Const. 1976, Art. VIII, Sec. V, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II), which apply to boards of education specifically. *Thigpen v. State*, 229 Ga. 820, 194 S.E.2d 423 (1972) (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Ineligibility for office ab initio curable by constitutional amendment. — Although a person may be ineligible to hold public office at the time of election, if the person is nevertheless elected and inducted into office, and while holding the office the person’s ineligibility is removed by constitutional amendment, the courts will not thereafter remove the person solely on account of the person’s ineligibil-

ity which existed at the time of the person’s election. *Cooper v. Lewis*, 177 Ga. 229, 170 S.E. 68 (1933).

Applicability of other statutes regarding removal. — The provision of this paragraph regarding removal of county officers for malpractice in office does not preempt O.C.G.A. § 36-1-14, which prohibits use of county funds by county commissioners for purchases of goods or property in which they have an interest. *Palmer v. Wilkins*, 163 Ga. App. 104, 294 S.E.2d 355 (1982).

Fact that there now exists a number of specific statutes authorizing removal for malpractice in office, one or more of which may cover facts of case, does not demand conclusion that such statutes are in exclusion of this general constitutional provision. *Beauchamp v. Smith*, 250 Ga. 16, 295 S.E.2d 97 (1982).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

COUNTY OFFICERS
QUALIFICATIONS
COMPENSATION

County Officers

In a technical sense, the term “county officers” includes only “county officers” referred to in this paragraph, i.e., those who are elected by the qualified voters of their respective counties and hold office for four years. 1958-59 Op. Att’y Gen. p. 146 (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Definition of county officer expanded. — The definition of “county officer”, which ordinarily, would mean the clerk of superior court, judge of the probate court, sheriff, tax receiver, tax collector, or tax commissioner, has been expanded by case law. 1986 Op. Att’y. Gen. No. U86-2.

Member of a municipal or county planning commission would be a “public officer.” 1969 Op. Att’y Gen. No. 69-488.

County boards of education county offices. — County boards of education, even though appointive and created by statute prior to and existent at the time of

adoption of the Constitution of 1877 have consistently been held by the appellate courts to be county offices. 1962 Op. Att’y Gen. p. 58.

Members of a county board of education are subject to the two-year residence requirements of this paragraph. 1976 Op. Att’y Gen. No. 76-85 (decided under former § 2-7901; see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

A sheriff is a constitutional county officer as contemplated by this paragraph. 1968 Op. Att’y Gen. No. 68-36 (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Authority over chief deputy sheriff. — The Baldwin County Board of Commissioners would not have the authority to set a mandatory retirement age for the chief deputy of the Baldwin County sheriff’s department or to otherwise discharge the deputy from employment. 1983 Op. Att’y Gen. No. U83-76 (but see O.C.G.A. § 36-1-20).

Historically, judges serving in the state judicial system have not been considered county officers under this

County Officers (Cont'd)

paragraph or former Code 1933, § 89-101 (see now O.C.G.A. § 45-2-1). 1978 Op. Att'y Gen. No. U78-8 (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

County attorney not county officer. — The courts of this state would hold that a county attorney, although being a "public officer," did not hold a "county office" within the meaning of former Code 1933, § 92-6902 (see now O.C.G.A. § 48-5-292) and that a member of a county board of tax assessors would not be ineligible simultaneously to occupy the position of county attorney. 1969 Op. Att'y Gen. No. 69-454.

Tax assessor cannot at the same time hold office of county commissioner. 1962 Op. Att'y Gen. p. 62.

Office of county treasurer can only be abolished by an Act of the General Assembly and such an Act would have the effect of abolishing this office as of the date so specified in the Act. 1965-66 Op. Att'y Gen. No. 65-94.

Election to fill county offices. — The 1986 November general election, in which there will be an election to fill the offices of judge of Superior Court, judge of Magistrate Court, and members of county board of education, will be an election to fill county offices. 1986 Op. Att'y. Gen. No. U86-2.

Probate judge may not employ an attorney to prosecute criminal cases in probate court. 1999 Op. Att'y Gen. No. U99-6.

Qualifications

Payment of taxes. — Construing Ga. Const. 1976, Art. III, Sec. V, Para. VII (see Ga. Const. 1983, Art. III, Sec. II, Para. IV), this paragraph, and Ga. Const. 1976, Art. IX, Sec. I, Para. VII (see Ga. Const. 1983, Art. IX, Sec. I, Para. I), payment of taxes is not required of any candidate for a state office except that members of the General Assembly may not be seated if in default for taxes; whether candidates for county offices are eligible to run where they are behind with payment of taxes depends upon the office and the legislative Acts relating to that office or officer. 1954-56 Op. Att'y Gen. p. 311 (see Ga. Const. 1983,

Art. IX, Sec. I, Para. III).

Must be qualified voter. — To be eligible to hold office of judge of probate court there must not only be full compliance with constitutional and statutory residency requirements but also the person must meet the requirements of a qualified voter. 1967 Op. Att'y Gen. No. 67-368.

Evidence sufficient proof of intent to maintain original domicile. — Where an individual formally maintained the individual's home in one county and exhibited all other attributes of domicile in that county, subsequently moved to a second county to accept employment in that county and utilized on-premises living quarters furnished to that individual in connection with the individual's employment in that second county, where that individual retained the individual's home in the first county, continued to pay ad valorem taxes, purchase tags for the individual's automobile, and consequently pay ad valorem tax thereon, maintained the individual's voter registration, and voted in the first county, and further professes that the individual has continuously maintained an intent not to change the individual's domicile from the first county and the individual has repeatedly publicly avowed this intent, the trier of fact would unquestionably be authorized, and in the absence of any contrary evidence would probably be compelled, as a matter of law, to determine that the individual has been successful in preserving the first county as the individual's domicile for purposes of offering for election to the office of sheriff of that county. 1976 Op. Att'y Gen. No. U76-5.

Residency requirements for candidates for board of commissioners. — The provisions of the local Act establishing a requirement that candidates for the Board of Commissioners of Clay County be residents of the commissioner districts from which they are seeking election for a period of at least five years immediately preceding the date of the election is unenforceable as being a local Act in derogation of general law. 1984 Op. Att'y Gen. No. U84-31.

Compensation

This paragraph clearly places within General Assembly the author-

ity to provide compensation of county officers as the General Assembly may provide within the constitutional limitations. 1960-61 Op. Att’y Gen. p. 64 (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

It is the intent of this paragraph to permit the legislature to place officials of any particular county on any basis of compensation which the legislature so desires. 1948-49 Op. Att’y Gen. p. 455 (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

In order to carry this paragraph into effect, it would be necessary to pass a local or special bill for such purpose. 1948-49 Op. Att’y Gen. p. 37.

Local legislation can be used to supplement fees of the ordinary (now judge of probate court), and sheriff of a particular county by salary. 1952-53 Op. Att’y Gen. p. 24.

Bill to change compensation of county officers from fee to salary basis would not be repugnant to this paragraph and would be subject to at-

tack only if change affected officers then in commission. 1948-49 Op. Att’y Gen. p. 455 (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Salary of an elective county officer may not be changed during term of office, but fees provided for an elective county officer may be changed or supplemented with a salary during the officer’s term. 1945-47 Op. Att’y Gen. p. 66 (see Ga. Const. 1983, Art. IX, Sec. I, Para. III).

Salary supplementation for employees paid on a fee basis. — County commissioners, in the absence of statute, may not supplement with a salary the compensation of county officers who are on a fee basis. 1945-47 Op. Att’y Gen. p. 67.

Salary of a sheriff may be supplemented by the General Assembly through local law or by the board of commissioners when the board has been delegated that authority through local law enacted by the General Assembly. 1997 Op. Att’y Gen. No. U97-19.

RESEARCH REFERENCES

C.J.S. — 20 C.J.S., Counties, § 124 et seq.

ALR. — Time as of which eligibility or

ineligibility to office is to be determined, 143 ALR 1026.

Paragraph IV. Civil service systems.

The General Assembly may by general law authorize the establishment by county governing authorities of civil service systems covering county employees or covering county employees and employees of the elected county officers.

1976 Constitution. — There was no similar provision in the 1976 Constitution.

Cross references. — Civil service systems for county employees, § 36-1-21.

JUDICIAL DECISIONS

Sheriff’s office under personnel system. — County personnel system was not void as against public policy to the extent it attempts to restrain the sheriff’s power to appoint and discharge the sheriff’s employees. *Wayne County v. Herrin*, 210 Ga. App. 747, 437 S.E.2d 793 (1993).

Termination of employee. — Employee who was hired by a county solicitor general under O.C.G.A. § 15-18-71 was not an employee of the county, and the solicitor general did not bring the employee into the county’s civil service system under O.C.G.A. § 36-1-21(b). There-

fore, the employee lacked a protected property interest in the job and could be terminated without cause and without a hearing. *Thomas v. Lee*, 286 Ga. 860, 691 S.E.2d 845 (2010).

SECTION II.

HOME RULE FOR COUNTIES AND MUNICIPALITIES

Paragraph	Paragraph
I. Home rule for counties.	VIII. Limitation on the taxing power and contributions of counties, municipalities, and political subdivisions.
II. Home rule for municipalities.	
III. Supplementary powers.	
IV. Planning and zoning.	
V. Eminent domain.	IX. Immunity of counties, municipalities, and school districts.
VI. Special districts.	
VII. Community redevelopment.	

Law reviews. — For annual survey article discussing local government law, see 51 Mercer L. Rev. 397 (1999).

Paragraph I. Home rule for counties.

(a) The governing authority of each county shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution or any local law applicable thereto. Any such local law shall remain in force and effect until amended or repealed as provided in subparagraph (b). This, however, shall not restrict the authority of the General Assembly by general law to further define this power or to broaden, limit, or otherwise regulate the exercise thereof. The General Assembly shall not pass any local law to repeal, modify, or supersede any action taken by a county governing authority under this section except as authorized under subparagraph (c) hereof.

(b) Except as provided in subparagraph (c), a county may, as an incident of its home rule power, amend or repeal the local acts applicable to its governing authority by following either of the procedures hereinafter set forth:

(1) Such local acts may be amended or repealed by a resolution or ordinance duly adopted at two regular consecutive meetings of the county governing authority not less than seven nor more than 60 days apart. A notice containing a synopsis of the proposed amendment or repeal shall be published in the official county organ once a week for three weeks within a period of 60 days immediately preceding its final adoption. Such notice shall state that a copy of the

proposed amendment or repeal is on file in the office of the clerk of the superior court of the county for the purpose of examination and inspection by the public. The clerk of the superior court shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. No amendment or repeal hereunder shall be valid to change or repeal an amendment adopted pursuant to a referendum as provided in (2) of this subparagraph or to change or repeal a local act of the General Assembly ratified in a referendum by the electors of such county unless at least 12 months have elapsed after such referendum. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

(2) Amendments to or repeals of such local acts or ordinances, resolutions, or regulations adopted pursuant to subparagraph (a) hereof may be initiated by a petition filed with the judge of the probate court of the county containing, in cases of counties with a population of 5,000 or less, the signatures of at least 25 percent of the electors registered to vote in the last general election; in cases of counties with a population of more than 5,000 but not more than 50,000, at least 20 percent of the electors registered to vote in the last general election; and, in cases of a county with a population of more than 50,000, at least 10 percent of the electors registered to vote in the last general election, which petition shall specifically set forth the exact language of the proposed amendment or repeal. The judge of the probate court shall determine the validity of such petition within 60 days of its being filed with the judge of the probate court. In the event the judge of the probate court determines that such petition is valid, it shall be his duty to issue the call for an election for the purpose of submitting such amendment or repeal to the registered electors of the county for their approval or rejection. Such call shall be issued not less than ten nor more than 60 days after the date of the filing of the petition. He shall set the date of such election for a day not less than 60 nor more than 90 days after the date of such filing. The judge of the probate court shall cause a notice of the date of said election to be published in the official organ of the county once a week for three weeks immediately preceding such date. Said notice shall also contain a synopsis of the proposed amendment or repeal and shall state that a copy thereof is on file in the office of the judge of the probate court of the county for the purpose of examination and inspection by the public. The judge of the probate court shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. If more than one-half of the votes cast on such question are for approval of the amendment or repeal, it shall become of full force and effect; otherwise, it shall be void and of no force and effect. The expense of such election shall be borne by the county, and it shall be

the duty of the judge of the probate court to hold and conduct such election. Such election shall be held under the same laws and rules and regulations as govern special elections, except as otherwise provided herein. It shall be the duty of the judge of the probate court to canvass the returns and declare and certify the result of the election. It shall be his further duty to certify the result thereof to the Secretary of State in accordance with the provisions of subparagraph (g) of this Paragraph. A referendum on any such amendment or repeal shall not be held more often than once each year. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

In the event that the judge of the probate court determines that such petition was not valid, he shall cause to be published in explicit detail the reasons why such petition is not valid; provided, however, that, in any proceeding in which the validity of the petition is at issue, the tribunal considering such issue shall not be limited by the reasons assigned. Such publication shall be in the official organ of the county in the week immediately following the date on which such petition is declared to be not valid.

(c) The power granted to counties in subparagraphs (a) and (b) above shall not be construed to extend to the following matters or any other matters which the General Assembly by general law has preempted or may hereafter preempt, but such matters shall be the subject of general law or the subject of local acts of the General Assembly to the extent that the enactment of such local acts is otherwise permitted under this Constitution:

(1) Action affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority.

(2) Action affecting the composition, form, procedure for election or appointment, compensation, and expenses and allowances in the nature of compensation of the county governing authority.

(3) Action defining any criminal offense or providing for criminal punishment.

(4) Action adopting any form of taxation beyond that authorized by law or by this Constitution.

(5) Action extending the power of regulation over any business activity regulated by the Georgia Public Service Commission beyond that authorized by local or general law or by this Constitution.

(6) Action affecting the exercise of the power of eminent domain.

(7) Action affecting any court or the personnel thereof.

(8) Action affecting any public school system.

(d) The power granted in subparagraphs (a) and (b) of this Paragraph shall not include the power to take any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power.

(e) Nothing in subparagraphs (a), (b), (c), or (d) shall affect the provisions of subparagraph (f) of this Paragraph.

(f) The governing authority of each county is authorized to fix the salary, compensation, and expenses of those employed by such governing authority and to establish and maintain retirement or pension systems, insurance, workers' compensation, and hospitalization benefits for said employees.

(g) No amendment or revision of any local act made pursuant to subparagraph (b) of this section shall become effective until a copy of such amendment or revision, a copy of the required notice of publication, and an affidavit of a duly authorized representative of the newspaper in which such notice was published to the effect that said notice has been published as provided in said subparagraph has been filed with the Secretary of State. The Secretary of State shall provide for the publication and distribution of all such amendments and revisions at least annually.

1976 Constitution. — Art. IX, Sec. II, Paras. I-III.

Cross references. — Advertisement of local laws enacted by General Assembly, Ga. Const. 1983, Art. III, Sec. V, Para. IX. Home rule by municipalities, Ga. Const. 1983, Art. IX, Sec. II, Para. II; Ch. 34, T. 36; and Ch. 35, T. 36. Compensation for county officers, Ga. Const. 1983, Art. IX, Sec. I, Para. III. Power of counties to enact building, electrical, and other codes, Ch. 13, T. 36. Public hearings before enacting county codes, § 36-13-8.

Law reviews. — For article discussing the constitutional provisions authorizing municipal home rule prior to the adoption of the 1976 Constitution, see 4 Ga. St. B.J. 317 (1968). For article discussing the evolution of municipal annexation law in Georgia in light of *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 178 S.E.2d 868 (1970), see 5 Ga. L. Rev. 499 (1971). For article, "Home Rule: Its Impact on Georgia Local Government Law,"

see 8 Ga. St. B.J. 277 (1972). For article discussing disadvantages of zoning for land use planning, see 10 Ga. L. Rev. 53 (1975). For article discussing limitations on municipalities "home rule" powers, see 12 Ga. L. Rev. 805 (1978). For article surveying recent legislative and judicial developments in zoning, planning and environmental law, see 31 Mercer L. Rev. 89 (1979). For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979). For survey article on local government law, see 34 Mercer L. Rev. 225 (1982). For article, "The United States Supreme Court as Home Rule Wrecker," see 34 Mercer L. Rev. 363 (1982). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007). For article, "Researching Georgia Law," see 34 Ga. St. U.L. Rev. 741 (2015).

For note, "Regulation of Artificial Lakes and Recreational Subdivisions in Georgia," recommending methods for future regulation, see 8 Ga. St. B.J. 580 (1972).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TAXES AND BUSINESS LICENSES

ZONING LAWS

LOCATION OF COUNTY OFFICES

EMPLOYEES

EXCEPTIONS TO COUNTY POWERS

General Consideration

Constitutionality. — O.C.G.A. § 36-5-22, which permits a county board of commissioners to create the office of county manager, is constitutional. *Gray v. Dixon*, 249 Ga. 159, 289 S.E.2d 237 (1982).

When section applicable. — Provisions of this section apply only when county attempts to amend or repeal local Acts applicable to its governing authority. *Local 189 Int'l Union of Police Ass'ns v. Barrett*, 524 F. Supp. 760 (N.D. Ga. 1981) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Powers of county commissioners are strictly limited by law, and they can do nothing except under authority of law. *Mobley v. Polk County*, 242 Ga. 798, 251 S.E.2d 538 (1979).

Neither the counties of this state nor their officers can do any act, make any contract, nor incur any liability not authorized by some legislative Act applicable thereto. *Mobley v. Polk County*, 242 Ga. 798, 251 S.E.2d 538 (1979).

County governing authority only has the powers given to it by the legislature. *McCray v. Cobb County*, 251 Ga. 24, 302 S.E.2d 563 (1983).

If there is reasonable doubt of existence of a particular power of a county, the doubt is to be resolved in the negative. *Mobley v. Polk County*, 242 Ga. 798, 251 S.E.2d 538 (1979).

Transfer of chairperson's power to county board constitutional. — The Constitution did not prevent the county board from passing resolutions which effectively transferred much of the power of the county chairperson to the county board. *Krieger v. Walton County Bd. of Comm'rs*, 269 Ga. 678, 506 S.E.2d 366 (1998).

County governing authority powers. — Any attempt by the board of com-

missioners to confer "executive powers" on the office of county manager would be an "action affecting the ... form ... of the county governing authority" in violation of subsection (c)(2) of this paragraph. *Gray v. Dixon*, 249 Ga. 159, 289 S.E.2d 237 (1982) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

An ordinance creating the office of county manager which tracked the language of O.C.G.A. § 36-5-22 and which vested in that office certain administrative functions, and did not attempt to confer the executive powers reserved for the chairman, was consistent with the county's home rule authority and did not violate Ga. Const. 1983, Art. IX, Sec. II, Para. I. *Krieger v. Walton County Bd. of Comm'rs*, 271 Ga. 791, 524 S.E.2d 461 (1999).

County's method of counting abstentions. — A county's method of not counting abstentions by county commissioners, and therefore not considering abstentions either affirmative or negative votes, was within the county's authority; as a result, a citizen challenging the method of counting votes was not entitled to declaratory relief. *Merry v. Williams*, 281 Ga. 571, 642 S.E.2d 46 (2007).

Fee for utility use of rights of way. — County was not entitled to extract from power company a tax, franchise fee, rental fee, or other charge in return for permission to use county's road rights of way outside of municipalities for erection, maintenance, and use of power transmission lines. *DeKalb County v. Georgia Power Co.*, 249 Ga. 704, 292 S.E.2d 709 (1982).

County cannot prohibit electric lines. — Pursuant to O.C.G.A. § 46-3-201(b)(9), the electric corporation, which had to condemn property in order to effectuate its project, did not have to dem-

onstrate to the county the necessity or the appropriateness of its proposed project; thus, the county ordinance prohibiting the electric lines for three years was unconstitutional. *Rabun County v. Ga. Transmission Corp.*, 276 Ga. 81, 575 S.E.2d 474 (2003).

Home rule ordinances enacted in compliance with this paragraph would supersede specified provisions of a local Act. *Guhl v. Williams*, 237 Ga. 586, 229 S.E.2d 382 (1976) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Cannot interfere with provisions of general law. — The “home rule” provision of this paragraph explicitly disallows any attempt by a local governing authority to change or to interfere with operation of provisions of general law. *Commissioners of Wayne County v. Smith*, 240 Ga. 540, 242 S.E.2d 47 (1978) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

The Constitution limits legislative action by the board of commissioners to matters for which no provision has been made by general law. — Furthermore, the “home rule” powers of the board of commissioners do not extend to any matters which the General Assembly by general law has preempted. *Commissioners of Wayne County v. Smith*, 240 Ga. 540, 242 S.E.2d 47 (1978).

Section 31-7-72. — The language of former Code 1933, § 88-1802 (see now O.C.G.A. § 31-7-72), providing for appointment of members of the boards of hospital authorities, was not subject to change by exercise of the home rule powers contained in this paragraph. *Commissioners of Wayne County v. Smith*, 240 Ga. 540, 242 S.E.2d 47 (1978) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Proof of facts needed to show county created public authority not extension of county. — Where an act of a political subdivision of the state creates a public facilities authority with provisions which shows that the authority shall be separate from the county governing authority in membership, powers, and duties, and that revenue bonds of the authority shall bear a notation that they are not a debt of the county nor has the county any obligation whatever for the authority, then the authority is not an extension of

the county, and the act creating the authority is not a “local Act ... applicable to the county’s governing authority ...” which may be amended by the county commissioners under this paragraph. *Wood v. Gwinnett County*, 243 Ga. 833, 257 S.E.2d 258 (1979) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

County business must be conducted at county site. — Deliberation and voting on any issue must be conducted at county site and citizens of the county must be afforded an opportunity to be heard at the county site on any issue of county business. *Brewster v. Houston County*, 235 Ga. 68, 218 S.E.2d 748 (1975).

Contracts for distribution of public records. — A contract between a county and a company to allow the company to obtain copies of certain public indices and records and make them available for a fee is not invalid under subparagraph (c)(7) of Ga. Const. 1983, Art. IX, Sec. II, Para. I because it is not an act of legislation and because it does not affect the manner in which the clerk of the county court performs the clerk’s duties. *Price v. Fulton County Comm’n*, 170 Ga. App. 736, 318 S.E.2d 153 (1984).

Act may require that judges of courts of limited jurisdiction must devote minimum time to official duties to be entitled to be paid for those duties. *McCray v. Cobb County*, 251 Ga. 24, 302 S.E.2d 563 (1983).

Minority business enterprise program. — Home rule charter did not authorize county to enact a 1982 minority business enterprise program where provision had been made by general law for the letting of public works contracts and the program conflicted with that general law. *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir.), cert. denied, 500 U.S. 959, 111 S. Ct. 2274, 114 L. Ed. 2d 725, 501 U.S. 1252, 111 S. Ct. 2893, 115 L. Ed. 2d 1057 (1991).

Employment of counsel. — A county governing authority has the implicit power to employ counsel for county officers. *Stephenson v. Board of Comm’rs*, 261 Ga. 399, 405 S.E.2d 488 (1991).

County governing authority’s employment of counsel to represent a superior court clerk did not violate subparagraphs

General Consideration (Cont'd)

(c)(1) and (c)(7) of Ga. Const. 1983, Art. IX, Sec. II, Para. I. *Stephenson v. Board of Comm'rs*, 261 Ga. 399, 405 S.E.2d 488 (1991).

Sheriff is not county policymaker for purposes of county's liability under 42 U.S.C. § 1983; Georgia's Constitution created the sheriff's office as a separate constitutionally protected entity independent from the county. *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003).

Redistricting legislation for the counties. — In Georgia, the General Assembly is the only legislative body with the power to enact redistricting legislation for the counties; therefore, where the General Assembly failed to enact reapportionment legislation for a certain county, although it was entitled to consideration as an expression of county policy, a reapportionment plan proposed by a county was not a legislatively enacted plan requiring deferential treatment and the district court was required to fashion a reapportionment plan. *Bodker v. Taylor*, 2002 U.S. Dist. LEXIS 27447 (N.D. Ga. June 5, 2002).

Ordinance covering payment of garbage collection fees. — The state constitution, statutes, and case law permit a county to enact an ordinance making property owners responsible for the payment of garbage collection fees for their rental property. *Board of Comm'rs v. Guthrie*, 273 Ga. 1, 537 S.E.2d 329 (2000).

Ordinance constitutional. — Trial court erred in declaring Miller County, Ga., Ordinance No. 10-01, § 2 unconstitutional because the ordinance did not violate Ga. Const. 1983, Art. IX, Sec. II, Para. I(c)(2) by affecting the composition or form of the Board of Commissioners of Miller County but conferred only administrative, rather than executive, authority on the chair of the Board's finance committee; pursuant to Ga. Const. 1983, Art. IX, Sec. II, Para. I(b), the county had authority, as an incident of the county's home rule power, to amend Ga. L. 1983, p. 4594, § 14. *Bd. of Comm'rs v. Callan*, 290 Ga. 327, 720 S.E.2d 608 (2012).

Trial court erred in declaring Miller County, Ga., Ordinance No. 10-01, § 3 unconstitutional because the ordinance did not constitute an action affecting the elective office of commissioner in violation of Ga. Const. 1983, Art. IX, Sec. II, Para. I(c)(1); section 3 did not, by itself, negatively impact on the ability of the commissioners to carry out the commissioners' duties, but instead, § 3 gave the Commissioners of Miller County an additional option, similar to that given by general law to many other county governing authorities, for purchasing goods, property, or services. *Bd. of Comm'rs v. Callan*, 290 Ga. 327, 720 S.E.2d 608 (2012).

It could not be said that a county's method of providing solid waste collection services by contracting with private solid waste collection companies, and paying for those services through the property tax bill procedure, was unreasonable, arbitrary, or capricious; it had real and substantial relation to the provision of those services, and the county's solid waste ordinance was valid. *Mesteller v. Gwinnett County*, 292 Ga. 675, 740 S.E.2d 605 (2013).

Legislation bodies governed by establishment clause for evaluating legislative prayer. — Under Ga. Const. 1983, Art. IX, Sec. II, Para. I, a county commission and a county planning commission are legislative bodies governed by the U.S. Supreme Court's Marsh standard for evaluating legislative prayer under the establishment clause of the First Amendment to the U.S. Constitution. *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008).

Cited in *Richmond County v. Pierce*, 234 Ga. 274, 215 S.E.2d 665 (1975); *Chanin v. Bibb County*, 234 Ga. 282, 216 S.E.2d 250 (1975); *Dozier v. Norris*, 241 Ga. 230, 244 S.E.2d 853 (1978); *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981); *Local 189 Int'l Union of Police Ass'ns v. Barrett*, 524 F. Supp. 760 (N.D. Ga. 1981); *Mullis Tree Serv. v. Bibb County*, 828 F. Supp. 53 (M.D. Ga. 1993); *Malcom v. Newton County*, 244 Ga. App. 464, 535 S.E.2d 824 (2000); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

Taxes and Business Licenses

Counties and municipalities may appropriate and expend for public purposes connected with administration of local government. — Under Constitution and state statutes, both county governments and municipalities may levy taxes for public purposes connected with administration of county and city governments; as a corollary to this principle, it follows that counties and municipalities may appropriate and expend money for such public purpose. *Peacock v. Georgia Mun. Ass'n*, 247 Ga. 740, 279 S.E.2d 434 (1981).

Permit fees allocated to education prohibition. — This provision does not give a county authority to impose a tax or charge in addition to all charges currently imposed for building permits where those funds are allocated directly to the board of education. *DeKalb County v. Brown Bldrs. Co.*, 227 Ga. 777, 183 S.E.2d 367 (1971) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Instead of granting authority, this paragraph specifically denies authority to impose taxes and declares that such authority must be found elsewhere in the laws or the Constitution. *Richmond County Bus. Ass'n v. Richmond County*, 224 Ga. 854, 165 S.E.2d 293 (1968) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Ordinance imposing tax void. — A trial court does not err in granting an injunction against implementation of an ordinance which purports to impose regulatory license fees, but which, in fact, imposes taxes and is null and void for lack of statutory or constitutional authority. *Richmond County v. Richmond County Bus. Ass'n*, 225 Ga. 568, 170 S.E.2d 246 (1969).

One criteria for a licensing ordinance is that it have a primarily regulatory intention. *Richmond County v. Richmond County Bus. Ass'n*, 225 Ga. 568, 170 S.E.2d 246 (1969).

Municipal bylaws and ordinances undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether they are a lawful exercise of police power, or whether, under the guise of enforcing police regulation,

there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business or use and enjoy property. *Borough of Atlanta v. Kirk*, 175 Ga. 395, 165 S.E. 69 (1932).

Ordinance levying occupation tax must have statutory authority. — Because levying of an occupation or business tax, although called a license fee for regulatory purposes under the police power, is a tax within the purview of subsection (c)(4) of this paragraph, the enactment of an ordinance for this purpose must be preceded and authorized by statutory or constitutional authority. *Richmond County v. Richmond County Bus. Ass'n*, 225 Ga. 568, 170 S.E.2d 246 (1969) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Court should not void ordinance on whim. — If the facts and evidence before the municipal body at time of passing the ordinance would authorize the exercise by that body of discretion in passing or refusing to pass the ordinance, then a court should not declare the ordinance unreasonable, arbitrary, and void merely because the court should take the view that it would be best for the public that the ordinance should not be enforced. *Borough of Atlanta v. Kirk*, 175 Ga. 395, 165 S.E. 69 (1932).

Reasonable necessity required for regulating business. — Regulation of a lawful business is dependent upon some reasonable necessity for protection of public health, safety, morality, or other phase of the general welfare. *Richmond County v. Richmond County Bus. Ass'n*, 225 Ga. 568, 170 S.E.2d 246 (1969).

Liquor permits. — Section of DeKalb County Code requiring all employees of an establishment holding a license for consumption of beer or wine, except busboys, cooks, and dishwashers, to have permits was not unconstitutional and did not exceed the county's powers of home rule. *Kariuki v. DeKalb County*, 253 Ga. 713, 324 S.E.2d 450 (1985), overruled on other grounds, *Russell v. City of E. Point*, 261 Ga. 213, 403 S.E.2d 50 (1991).

Zoning Laws

General Assembly has no authority to grant a county the authority to enact zoning and planning laws ex-

Zoning Laws (Cont'd)

cept by constitutional provision. Johnston v. Hicks, 225 Ga. 576, 170 S.E.2d 410 (1969).

Power over zoning granted to county authorities. — The authority to amend or repeal existing planning and zoning laws or to enact new planning and zoning laws with respect to unincorporated areas has been granted to the county authorities. Johnston v. Hicks, 225 Ga. 576, 170 S.E.2d 410 (1969).

This paragraph does not enlarge or diminish the power of a county to zone as set forth in the Constitution. It merely eliminates the necessity for prior authorization by the General Assembly to use the power conferred by the Constitution for counties to zone. Gifford-Hill & Co. v. Harrison, 229 Ga. 260, 191 S.E.2d 85 (1972) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Legislature no longer has authority to enact local laws concerning planning and zoning for unincorporated areas. Johnston v. Hicks, 225 Ga. 576, 170 S.E.2d 410 (1969).

Instance of unauthorized exercise of power. — The General Assembly had no authority in 1968 to pass an amendment to the 1956 zoning and planning Act for an unincorporated area in DeKalb County, and its attempt to amend the 1956 local Act with Ga. L. 1968, p. 3406 was wholly beyond its power and without legal effect. Johnston v. Hicks, 225 Ga. 576, 170 S.E.2d 410 (1969).

Zoning Procedures Law. — The Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq., preempted the provisions in a city charter for the purposes of the adoption and amendment of zoning ordinances. Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000).

Location of County Offices

Locating offices outside of county seat. — Administrative facilities and services such as jails, correctional camps, health clinics, hospitals, public housing and the like can be located outside the county seat. Jackson v. Gasses, 230 Ga. 712, 198 S.E.2d 657 (1973).

County board of commissioners is au-

thorized to locate administrative offices and facilities outside county seat. Brewster v. Houston County, 235 Ga. 68, 218 S.E.2d 748 (1975).

County board of commissioners is granted authority to enact ordinances pertaining to civil service boards affecting that county, rather than the General Assembly. Forbes v. Lovett, 227 Ga. 772, 183 S.E.2d 371 (1971).

Sheriff's offices. — There is no statutory prohibition against sheriff maintaining offices in county outside of county site so long as the sheriff complies with the statute which requires the sheriff to maintain an office in the county site. Brewster v. Houston County, 235 Ga. 68, 218 S.E.2d 748 (1975).

Employees

Board of county commissioners is granted authority to enact ordinances pertaining to civil service boards affecting that county, rather than the General Assembly. Forbes v. Lovett, 227 Ga. 772, 183 S.E.2d 371 (1971).

Defendant county manager did not have final authority over decisions that resulted in termination of a plaintiff's employment with the county, as such authority rested with the board of commissioners under Georgia's home rule provisions. Lightsey v. Miles, 2005 U.S. Dist. LEXIS 15735 (S.D. Ga. July 26, 2005).

Paragraph divested General Assembly of authority to enact county retirement system. — This paragraph vested sole authority over compensation, retirement, and other benefits of employees of county governing authorities, in the county governing authorities, and thus divested the General Assembly for authority to enact a retirement Act for a county. Richmond County v. Pierce, 234 Ga. 274, 215 S.E.2d 665 (1975).

Court clerk not subject to county merit system. — A county merit board can take no action affecting the clerk of the superior court and the clerk's employees unless the clerk of the superior court has asked that the clerk's office be subject to the merit system and the county has provided for such coverage through an

appropriate resolution or ordinance. *Gwinnett County v. Yates*, 265 Ga. 504, 458 S.E.2d 791 (1995).

The clerk of the Superior Court of Gwinnett County is not subject to the Gwinnett County Merit System. *Gwinnett County v. Yates*, 265 Ga. 504, 458 S.E.2d 791 (1995).

Tax commissioner's personnel decisions not state functions. — Madison County Tax Commissioner was not acting as an arm of the state for purposes of the eleventh amendment to the United States Constitution when making the decision to terminate an employee; although the Tax Commissioner was an elected state constitutional officer pursuant to Ga. Const. 1983, Art. IX, Sec. I, Para. III, and the Tax Commissioner's Office was not a division of Madison County or its governing authority pursuant to Ga. Const. 1983, Art. IX, Sec. II, Para. I, since the Tax Commissioner's duties included both state functions and county functions to be performed within Madison County and, with regard to personnel administration, the state distinguished between employees of the county and employees of elected county officials, Ga. Const. 1983, Art. IX, Sec. II, Para. I(c)(1), and so the Tax Commissioner, and not the county, defined certain work regulations for the Tax Commissioner's employees, a fact that did not transform the Tax Commissioner's administration of personnel into a state function, however, because, although state law provided the Tax Commissioner with the authority to manage office personnel, the state exercised little control over the use of that authority. *Epps v. Watson*, No. 3:05-CV-68(CDL), 2006 U.S. Dist. LEXIS 33318 (M.D. Ga. May 25, 2006), *aff'd*, 492 F.3d 1240 (11th Cir. 2007).

As for funding, O.C.G.A. § 48-5-183 provided that the county, not the state, funded the Tax Commissioner's office expenses, including personnel expenses, and gave the Tax Commissioner the authority to set employee salaries, limited to the budget provided by the county; based on these considerations, the court found that the Madison County Tax Commissioner

did not wear a "state hat" when making personnel decisions for the Tax Commissioner's office. *Epps v. Watson*, No. 3:05-CV-68(CDL), 2006 U.S. Dist. LEXIS 33318 (M.D. Ga. May 25, 2006), *aff'd*, 492 F.3d 1240 (11th Cir. 2007).

Plaintiff could not dispute that the Tax Commissioner's Office (TCO) was a separate entity from Madison County. Plaintiff did not submit evidence sufficient for a reasonable jury to conclude that plaintiff was an employee of the county, not the TCO. *Epps v. Watson*, No. 3:05-CV-68 (CDL), 2008 U.S. Dist. LEXIS 87814 (M.D. Ga. Oct. 30, 2008).

Exceptions to County Powers

Deputy sheriffs are personnel of the sheriff as contemplated by subsection (c) (1) of this paragraph. *Warren v. Walton*, 231 Ga. 495, 202 S.E.2d 405 (1973) (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

County commissioners not empowered to fix salaries of sheriff and deputies. — This paragraph, which authorizes the governing authority of each county "to fix the salary, compensation and expenses of those employed by such governing authority," does not empower the county commissioners to fix the salaries and expenses of the sheriff and the sheriff's deputies without other legislation empowering the commissioners to employ the sheriff and deputies. *Warren v. Walton*, 231 Ga. 495, 202 S.E.2d 405 (1973).

County could not infringe on utility's eminent domain power. — Forsyth County, Ga., Unified Development Code §§ 21-6.1 and 21-6.5 were defective because they required a utility to successfully comply with the ordinance's procedures, and authorized the county to deny "any or all" portions of an application; as such, they were unconstitutional infringements on the utility's legislatively-delegated power of eminent domain. *Forsyth County v. Ga. Transmission Corp.*, 280 Ga. 664, 632 S.E.2d 101 (2006).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERALLY
EMPLOYEES

Generally

Services which counties may provide individually or jointly subject to this paragraph. — Georgia Const. 1976, Art. IX, Sec. IV, Para. II (see Ga. Const. 1983, Art. IX, Sec. II, Para. III) was intended to supplement and enumerate services which counties and municipalities may provide, and to permit them to combine to provide the services, but the ordinances which counties may enact to provide these services are subject to the general terms and restrictions of this paragraph, including the prohibition against the enactment of criminal sanctions by counties. 1974 Op. Att'y Gen. No. U74-96 (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Charter consolidating governments of a city and a county should set out the desired powers of the consolidated government in an enumerated and specific manner. 1969 Op. Att'y Gen. No. 69-413.

County cannot impose a tax upon retail sales of beer. 1970 Op. Att'y Gen. No. U70-6.

Federal funds for housing. — A county may, in certain circumstances, apply to the federal government for funds to be used for urban redevelopment and for public housing within the county. 1975 Op. Att'y Gen. No. U75-35.

Governing authority of an affected municipality or county has authority to control boxing events in its jurisdiction. 1970 Op. Att'y Gen. No. 70-167.

Commissioners of a county can pass a resolution on the subject of dogs running unattended and which apparently are unowned. 1968 Op. Att'y Gen. No. 68-151.

This paragraph prohibits passing of an ordinance which provides criminal punishment for operating a business without a license; with no authority to enforce any ordinances enacted with criminal sanctions, a county could not

effectively enforce the regulations of business establishments which it desires to control. 1967 Op. Att'y Gen. No. 67-295 (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

By general law, the General Assembly has preempted the field of county business licenses so that the counties may not provide for the issuance of such licenses under the home rule amendment. 1967 Op. Att'y Gen. 67-295.

County precluded from creating new probation system without legislative authority. — Subsection (c) of Ga. Const. 1983, Art. IX, Sec. II, Para. I would appear to preclude a county from taking any action to create a new system of probation, private or otherwise, without specific legislative authority. 1989 Op. Att'y Gen. No. U89-8.

There is no general authority for counties to enact criminal ordinances. 1983 Op. Att'y Gen. No. U83-15.

Amendment of zoning restrictions. — Under the home rule power of a county, electors may petition the probate judge to hold an election to amend zoning resolutions passed by the governing authority. 1984 Op. Att'y Gen. No. 84-2.

Creation of county fire districts. — County fire districts can be created only by action of the General Assembly or by action of the county governing authority and may not be established by petition and referendum pursuant to the home rule provisions of the Constitution. 1985 Op. Att'y Gen. No. 85-54.

Qualifications of persons signing petitions. — Persons signing a petition pursuant to the provisions of this Article must be persons who are currently registered to vote in the county and who were registered to vote in the county during the last general election. 1984 Op. Att'y Gen. No. 84-40.

Petitions in Murray County under the home rule provisions of the constitution should be filed with the judge of the probate court, rather than with the board

of elections. 1988 Op. Att'y Gen. No. U88-15.

Traffic control ordinances. — Counties may enact ordinances regarding enforcement of traffic control devices by the use of cameras. 2000 Op. Att'y Gen. No. U00-12.

Employees

Required stipulation for participation by county in retirement annuity for employees. — A county can participate in a retirement annuity for its employees contracted through an insurance company with the understanding that payments for public school teachers and personnel, their dependents and survivors, shall be paid from education funds. 1969 Op. Att'y Gen. No. 69-474; 1975 Op. Att'y Gen. No. U75-37.

County cannot establish retirement plan for elected officials. — A county board of commissioners may not, by ordinance, resolution, or regulation, institute a retirement or pension program for the elected officials of that county; such a program must, under the Georgia Constitution, be created by local or general Act of the General Assembly. 1975 Op. Att'y Gen. No. U75-40.

County authorization of insurance and retirement benefits unauthorized. — An authorization by county commissioners of retirement and insurance benefits for elected officials without specific authorization of the General Assembly would not be legal. 1974 Op. Att'y Gen. No. U74-77.

General act required to establish retirement program for elected offi-

cial. — Under this paragraph, a county's retirement plan cannot constitutionally apply to employees of the county sheriff, nor to other employees of elected county officers who are not subject to the jurisdiction of the board of commissioners; retirement plans or programs for these employees may only be instituted by general or local Act of the General Assembly. 1975 Op. Att'y Gen. No. U75-37 (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Where compensation of deputy sheriff is fixed by a local Act, the county commissioners have no authority to increase it. 1970 Op. Att'y Gen. No. U70-64.

The governing authority may increase salary of personnel employed by it, but not the personnel of any other county elective office. 1969 Op. Att'y Gen. No. 69-68 (decided under Ga. Const. 1945, Art. XV, Sec. II, Para. I(c)(1) and Art. XV, Sec. II, Para. II).

Clerks are court personnel, as shown by their inclusion in former Code 1933 (see now O.C.G.A. Title 15), and are included under this paragraph. 1977 Op. Att'y Gen. No. U77-4 (see Ga. Const. 1983, Art. IX, Sec. II, Para. I).

Under home rule, the salary of a clerk of the county commissioners may be raised. 1970 Op. Att'y Gen. No. U70-143 (decided under Ga. Const. 1945, Art. XV, Sec. II, Para. I (c)(1) and Art. XV, Sec. II, Para. II).

County employees who work for elected officials may be included in county pension plans without the need for general or local legislation enacted by the General Assembly. 1988 Op. Att'y Gen. No. U88-8.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 109 et seq.

C.J.S. — 20 C.J.S., Counties, § 70 et seq.

ALR. — Right of county or municipal authorities temporarily to loan or transfer money from one fund or department to another, 70 ALR 431.

Statutes relating to establishment or administration of parks, as encroachment

on right of local self-government, 88 ALR 228.

Inclusion in single initiative or referendum petition of proposed constitutional or statutory enactments covering different and distinct subjects, 90 ALR 572.

Power of Legislature to raise the constitutional minimum of favorable votes imposed upon adoption of special proposition submitted to voters, 91 ALR 1021.

Retroactive effect of zoning regulation,

in absence of saving clause, on pending application for building permit, 50 ALR3d 596.

Validity, construction, and application

of zoning ordinance relating to operation of junkyard or scrap metal processing plant, 50 ALR3d 837.

Paragraph II. Home rule for municipalities.

The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly.

1976 Constitution. — Art. IX, Sec. III, Para. I.

Cross references. — Force of law of local Acts, Ga. Const. 1983, Art. III, Sec. VI, Para. IV, and §§ 36-34-8 and 36-35-7. Self-government by municipalities generally, Ch. 34, T. 36, and Ch. 35, T. 36.

Law reviews. — For article analyzing alternative means of implementing home rule legislation and advocating home rule for municipalities in light of numerous attempts to pass such legislation in Georgia, prior to repeal of municipal Home Rule Law of 1951 (Ga. L. 1951, p. 116) and adoption of the municipal Home Rule Act of 1965 (Ch. 35, T. 36), see 8 Mercer L. Rev. 337 (1957). For article tracing the history of municipal annexation, and the General Assembly's role therein, see 2 Ga. L. Rev. 35 (1967). For article, "The Municipal Home Rule Act of 1965 (Ch. 35, T. 36)," see 3 Ga. St. B.J. 333 (1967). For article discussing constitutional provisions authorizing municipal home rule prior to the adoption of the 1976 Georgia Constitution, see 4 Ga. St. B.J. 317 (1968). For article discussing the evolution of municipal annexation law in Georgia in light of *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 178 S.E.2d 868 (1970), see 5 Ga. L. Rev. 499 (1971). For article, "Home Rule: Its Impact on Georgia Local

Government Law," see 8 Ga. St. B.J. 277 (1972). For article discussing the "void-from-inception" doctrine as applied to statutory law in Georgia, see 8 Ga. L. Rev. 101 (1973). For article, "Discretion in Georgia Local Government Law," see 8 Ga. L. Rev. 614 (1974). For article, "Selected Oddities in Georgia Municipal Law," see 9 Ga. L. Rev. 783 (1975). For article discussing limitations on municipalities "home rule" powers, see 12 Ga. L. Rev. 805 (1978). For article surveying recent legislative and judicial developments in zoning, planning, and environmental law, see 31 Mercer L. Rev. 89 (1979). For survey article on environment, natural resources, and land use, see 34 Mercer L. Rev. 145 (1982). For article, "The United States Supreme Court as Home Rule Wrecker," see 34 Mercer L. Rev. 363 (1982). For annual survey article on local government law, see 50 Mercer L. Rev. 263 (1998).

For note discussing home rule in Georgia under 1947 Home Rule Act (now Ch. 35, T. 36), see 1 Mercer L. Rev. 280 (1950). For note on the validity of population statutes in Georgia, see 2 Ga. St. B.J. 533 (1966).

For comment on *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E.2d 723 (1953), see 16 Ga. B.J. 343 (1954).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SELF-GOVERNMENT

1. IN GENERAL
2. DELEGATION OF LEGISLATIVE POWERS
3. MUNICIPALITIES

General Consideration

Uniform Beer Tax Act (Ga. L. 1974, p. 1447) was not violative of this paragraph. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976).

This paragraph gave General Assembly authority to delegate. — As the Constitution stood, before it contained this paragraph, all legislative power reposed in the General Assembly, and could not constitutionally be delegated by the General Assembly. *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E.2d 723 (1953).

Under this paragraph and Ga. L. 1973, p. 778, § 3 (see now O.C.G.A. § 36-35-6), cities do not have power to adopt entirely new charters changing their form of government, so that a new charter created by the state legislature by a special law does not contravene Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV), which forbids the state legislature from adopting a special law covering subject matter dealt with by existing general law. *Jackson v. Inman*, 232 Ga. 566, 207 S.E.2d 475 (1974) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Cited in *Barge v. Camp*, 209 Ga. 38, 70 S.E.2d 360 (1952); *Cook v. Sikes*, 210 Ga. 722, 82 S.E.2d 641 (1954); *Gordon v. Green*, 228 Ga. 505, 186 S.E.2d 719 (1972); *Thigpen v. State*, 229 Ga. 820, 194 S.E.2d 423 (1972); *Bruck v. City of Temple*, 240 Ga. 411, 240 S.E.2d 876 (1977); *Lucas v. Woodward*, 240 Ga. 770, 243 S.E.2d 28 (1978); *City of Mt. View v. Clayton County*, 242 Ga. 163, 249 S.E.2d 541 (1978); *City of Brookhaven v. City of Chamblee*, 329 Ga. App. 346, 765 S.E.2d 33 (2014).

Self-Government

1. In General

Phrase “self-government” in this paragraph is not an expression of limitation confining delegation of legislative powers to strictly intramural affairs. *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 178 S.E.2d 868 (1970), commented on in 5 Ga. L. Rev. 499 (1971) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Local decision on local affairs is “self-government.” *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 178 S.E.2d 868 (1970), commented on in 5 Ga. L. Rev. 499 (1971).

State-imposed tax for local purposes violates no municipality’s right to govern itself even if it denies the municipality discretion to determine whether a tax on malt beverages is necessary to provide for the public need of its citizens. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976).

Annexation comes within purview of this constitutional paragraph and the purview of “self-government” as expressed therein. *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 178 S.E.2d 868 (1970), commented on in discussing the evolution of municipal annexation law in Georgia, see 5 Ga. L. Rev. 499 (1971) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

2. Delegation of Legislative Powers

Express provision for performance impliedly prohibits different performance. — A constitutional provision which expressly prescribes the manner of doing a particular thing is exclusive in that regard and impliedly prohibits performance in a substantially different manner. However, this paragraph does not come within this principle so as to impliedly restrict the General Assembly in directing local taxation because this paragraph is permissive, and because it relates to the delegation of power and not to the exercise of power. *Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973), commented on in 16 Ga. B.J. 343 (1954) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

This paragraph is not in derogation of legislative power and it does not conflict with it. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Legislative power of the General Assembly is in no way impaired by this paragraph. — The legislative power of the General Assembly is in no way impaired by this paragraph and municipalities can receive and retain only such legislative power as that body determines from time to time they should exercise.

Self-Government (Cont'd)**2. Delegation of Legislative****Powers (Cont'd)**

Plantation Pipe Line Co. v. City of Bremen, 227 Ga. 1, 178 S.E.2d 868 (1970), commented on in 5 Ga. L. Rev. 499 (1971) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Municipalities can receive and retain only such legislative power of the General Assembly as that body determines from time to time they should exercise. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976).

This paragraph does not grant legislative powers to municipalities directly and independently of the General Assembly. It authorizes the General Assembly to delegate its legislative powers to municipalities. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Paragraph authorizes delegation of power. — This paragraph does not function as a limitation on the power of the legislature but rather grants to the General Assembly additional authority “to delegate its power so that matters pertaining to municipalities upon which, prior to the ratification of this paragraph, it was necessary for the General Assembly to act, may be dealt with without the necessity of action by the General Assembly.” *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

3. Municipalities

Reason for unconstitutionality of prior municipal Home Rule Law. — The attempt to confer legislative authority by Ga. L. 1951, p. 116, as amended by Ga. L. 1952, p. 46 (see now O.C.G.A. Ch. 35, T. 36) was unconstitutional and void because it was not embraced in enactments by the General Assembly of uniform systems of government. *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E.2d 723 (1953), commented on in 16 Ga. B.J. 343 (1954).

This paragraph unquestionably authorizes the General Assembly to delegate legislative power to municipalities by embodying initiative, referendum, and recall in some of the

systems of government which this paragraph directs the legislature to provide. *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E.2d 723 (1953), commented on in 16 Ga. B.J. 343 (1954) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Delegation of power does not prohibit legislative action. — Fact that General Assembly may have delegated to municipalities certain authority pursuant to this paragraph does not raise constitutional bar prohibiting General Assembly from legislating directly in the same area at a later date. *State v. Golia*, 235 Ga. 791, 222 S.E.2d 27 (1976) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Uniformity in municipal charters not required. — Since the language of this paragraph does not provide a uniformity requirement for new municipal charters, the General Assembly is constitutionally free to exercise its reserved legislative power on a nonuniform basis when it enacts a new charter for a municipality. *Jackson v. Inman*, 232 Ga. 566, 207 S.E.2d 475 (1974) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Method of delegating power by General Assembly. — The only procedure by which power to legislate — and this includes extending corporate limits of municipalities — can be delegated by the General Assembly under this paragraph is by incorporating such delegated power in systems of government enacted by the General Assembly. Systems of government and municipal charters are synonymous. Each confer and define powers and provide for machinery to operate the government. *Phillips v. City of Atlanta*, 210 Ga. 72, 77 S.E.2d 723 (1953), commented on in 16 Ga. B.J. 343 (1954) (see Ga. Const. 1983, Art. IX, Sec. II, Para. II).

Requiring wrecker services to accept checks and credit cards. — A city code section which makes it unlawful for a wrecker service to refuse to accept checks and major credit cards is constitutional, and is not ultra vires the home rule powers conferred by O.C.G.A. § 36-35-6(a). *Upton v. City of Atlanta*, 260 Ga. 250, 392 S.E.2d 244 (1990).

City ordinance increasing pension plan contribution rate. — Trial court properly granted the city defendants sum-

mary judgment on the city employees' claims of breach of contract and unconstitutional impairment of contract regarding an ordinance increasing their pension plan contribution rate because the Georgia General Assembly expressly contem-

plated that a municipal corporation's provision for employee retirement or pension benefits would be subject to being supplemented by local law. *Borders v. City of Atlanta*, 298 Ga. 188, 779 S.E.2d 279 (2015).

OPINIONS OF THE ATTORNEY GENERAL

Constitutional provisions pertaining to home rule are permissive in nature, and require affirmative enabling legislation. 1954-56 Op. Att'y Gen. p. 488.

Appellate courts recognize county boards of education as county offices. — County boards of education, even though appointive and created by statute prior to and existing at the time of adoption of the Constitution of 1877, have consistently been held by the appellate courts to be county offices. 1962 Op. Att'y Gen. p. 58.

City may establish a personnel department and a merit board without necessity of special Acts of the General Assembly. 1969 Op. Att'y Gen. No. 69-310.

County application for federal housing funds. — A county may, in certain circumstances, apply to the federal

government for funds to be used for urban redevelopment and for public housing within the county. 1975 Op. Att'y Gen. No. U75-35.

Cooperative financial endeavor between city and county legal. — Assuming that a city possesses legal authority to borrow funds via a 20-year loan for purpose of constructing a library building, it would be legal for city and county to enter into the proposed agreement whereunder the building would be leased to the county for the term of the loan at an annual rental sufficient to meet loan payments; it would also be legal for the county to levy taxes for the purpose of making the rental payments. 1967 Op. Att'y Gen. No. 67-120.

Municipal contributions to day care center. — Unless a provision in the city charter allows such an expenditure, a city may not contribute to a day care center. 1984 Op. Att'y Gen. No. U84-14.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, *Municipal Corporations, Counties, and Other Political Subdivisions*, § 163 et seq.

C.J.S. — 62 C.J.S., *Municipal Corporations*, § 1 et seq.

ALR. — Proposition submitted to people with reference to erection or purchase of plant or other public utility as single or double proposition, 5 ALR 538.

Liability of town or municipality for libel or slander, 9 ALR 351.

What are "public utilities" within constitutional or statutory provisions relating to purchase, construction, or repair of same by municipal corporation, 9 ALR 1033; 35 ALR 592.

Power to forbid or restrict repair of wooden building within fire limits, 26 ALR 1219; 56 ALR 878.

Power of municipal corporation to submit to arbitration, 40 ALR 1370.

Validity of municipal regulation requiring vehicles for hire to make use of "taxi-cab stands," 55 ALR 1132.

Constitutionality of city manager or commission form of municipal government, 67 ALR 737.

Right of county or municipal authorities temporarily to loan or transfer money from one fund or department to another, 70 ALR 431.

Referendum of general legislative act to people in absence of constitutional requirement in that regard, 76 ALR 1053.

Power of municipality to make expenditures for advertising or other forms of publicity, 79 ALR 466.

Statutes relating to establishment or administration of parks, as encroachment on right of local self-government, 88 ALR 228.

Power of legislature to raise constitu-

tional minimum of favorable votes imposed upon adoption of special proposition submitted to voters, 91 ALR 1021.

Matters pertaining to police department as within exclusive control of municipalities under home-rule charters, 105 ALR 259.

Power of municipality to classify for purposes of taxation as affected by classification made by state or its failure to classify, 110 ALR 1203.

Construction and application of constitutional or statutory provisions expressly

excepting certain laws from referendum, 146 ALR 284; 100 ALR2d 314.

Doctrine of de facto existence or powers of municipal corporation as applicable to amendment or revision of charter, 7 ALR2d 1407.

What land is contiguous or adjacent to municipality so as to be subject to annexation, 49 ALR3d 589.

Standing of municipal corporation or other governmental body to attack zoning of land lying outside its borders, 49 ALR3d 1126.

Paragraph III. Supplementary powers.

(a) In addition to and supplementary of all powers possessed by or conferred upon any county, municipality, or any combination thereof, any county, municipality, or any combination thereof may exercise the following powers and provide the following services:

- (1) Police and fire protection.
- (2) Garbage and solid waste collection and disposal.
- (3) Public health facilities and services, including hospitals, ambulance and emergency rescue services, and animal control.
- (4) Street and road construction and maintenance, including curbs, sidewalks, street lights, and devices to control the flow of traffic on streets and roads constructed by counties and municipalities or any combination thereof.
- (5) Parks, recreational areas, programs, and facilities.
- (6) Storm water and sewage collection and disposal systems.
- (7) Development, storage, treatment, purification, and distribution of water.
- (8) Public housing.
- (9) Public transportation.
- (10) Libraries, archives, and arts and sciences programs and facilities.
- (11) Terminal and dock facilities and parking facilities.
- (12) Codes, including building, housing, plumbing, and electrical codes.
- (13) Air quality control.
- (14) The power to maintain and modify heretofore existing retirement or pension systems, including such systems heretofore created

by general laws of local application by population classification, and to continue in effect or modify other benefits heretofore provided as a part of or in addition to such retirement or pension systems and the power to create and maintain retirement or pension systems for any elected or appointed public officers and employees whose compensation is paid in whole or in part from county or municipal funds and for the beneficiaries of such officers and employees.

(b) Unless otherwise provided by law,

(1) No county may exercise any of the powers listed in subparagraph (a) of this Paragraph or provide any service listed therein inside the boundaries of any municipality or any other county except by contract with the municipality or county affected; and

(2) No municipality may exercise any of the powers listed in subparagraph (a) of this Paragraph or provide any service listed therein outside its own boundaries except by contract with the county or municipality affected.

(c) Nothing contained within this Paragraph shall operate to prohibit the General Assembly from enacting general laws relative to the subject matters listed in subparagraph (a) of this Paragraph or to prohibit the General Assembly by general law from regulating, restricting, or limiting the exercise of the powers listed therein; but it may not withdraw any such powers.

(d) Except as otherwise provided in subparagraph (b) of this Paragraph, the General Assembly shall act upon the subject matters listed in subparagraph (a) of this Paragraph only by general law.

1976 Constitution. — Art. IX, Sec. IV, Para. II.

Cross references. — Home rule powers of municipalities generally, Ch. 34, T. 36, and Ch. 35, T. 36. Garbage disposal services provided by counties, § 36-1-16. County police, Ch. 8, T. 36. County building, electrical, and other codes, § 36-13-1. Municipal street construction, § 36-39-2. Local taxing powers, §§ 48-5-220, 48-5-350, 48-5-356, 48-5-400, 48-7-141, 48-8-82, 48-13-5, and 48-13-51.

Law reviews. — For article, "Recommendations Regarding Control of Outdoor Advertising Along the Interstate Highway System in Georgia," see 14 Mercer L. Rev. 308 (1963). For article, "'Home Rule': Its Impact on Georgia Local Government Law," see 8 Ga. St. B.J. 277 (1972). For article, "Discretion in Georgia Local Government Law," see 8 Ga. L. Rev. 614 (1974). For article analyzing the changing

relationship between state and local governments in Georgia in light of this paragraph, see 9 Ga. L. Rev. 757 (1975). For article discussing effect of *City of Atlanta v. Myers*, 240 Ga. 261, 240 S.E.2d 60 (1977), on limits of municipal government autonomy, see 12 Ga. L. Rev. 805 (1978). For article surveying Georgia cases dealing with environment, natural resources, and land use from June 1977 through May 1978, see 30 Mercer L. Rev. 75 (1978). For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979). For article surveying Georgia cases of local government law from June 1979 through May 1980, see 32 Mercer L. Rev. 137 (1980). For article, "The County Spending Power: An Abbreviated Audit of the Account," see 16 Ga. L. Rev. 599 (1982). For article, "The United States Supreme Court as Home Rule

Wrecker,” see 34 Mercer L. Rev. 363 (1982). For article, “Antitrust,” see 44 Mercer L. Rev. 1047 (1993). For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005). For annual survey of local government law, see 58 Mercer L. Rev. 267 (2006).

For note, “Regulation and Ownership of the Marshlands: The Georgia Marshlands Act (Part 4, Art. 4, Ch. 5, T. 12),” see 5 Ga. L. Rev. 563 (1971). For note, “Regulation of Artificial Lakes and Recreational Subdivisions in Georgia,” recommending methods for future regulation, see 8 Ga.

St. B.J. 580 (1972). For note, “The Legal Nature of Public Purpose Authorities: Governmental, Private, or Neither,” see 8 Ga. L. Rev. 680 (1974). For note discussing Georgia’s Sunshine Law (Ch. 14, T. 50) requiring meetings by state and local governmental authorities to be open to the public, see 10 Ga. St. B.J. 598 (1974). For note, “Restrictive Covenants: A Need For Reappraisal of the Limitations Period,” see 17 Ga. St. B.J. 137 (1981).

For comment on *Tuggle v. Manning*, 224 Ga. 29, 159 S.E.2d 703 (1968), see 5 Ga. St. B.J. 367 (1969).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

POLICE AND FIRE PROTECTION

GARBAGE AND SOLID WASTE DISPOSAL

WATER SUPPLY

TAXATION

LIBRARIES

PARKS

PUBLIC HOUSING

PUBLIC TRANSPORTATION

General Consideration

Municipalities and counties have authority to levy taxes to carry out powers granted. — Counties and municipalities are given authority to enact reasonable ordinances and to contract and combine with each other to effectuate and carry out extensive supplementary powers granted; as a corollary, it is necessary that municipalities and counties have authority to levy taxes to carry out powers given. *Peacock v. Georgia Mun. Ass’n*, 247 Ga. 740, 279 S.E.2d 434 (1981).

City met active municipality requirements despite services contract with county. — City’s contract with county under which the county provided law enforcement, street construction and maintenance, solid waste collection, and recreational services in consideration of the county’s receipt of sales taxes was valid and showed that the city met the requirements of an active municipality. *Sherrer v. City of Pulaski*, 228 Ga. App. 78, 491 S.E.2d 129 (1997).

Counties and municipalities may appropriate and expend for public

purposes connected with administration of local government. — Under Constitution and state statutes, both county governments and municipalities may levy taxes for public purposes connected with administration of county and city governments; as a corollary to this principle, it follows that counties and municipalities may appropriate and expend money for such public purpose. *Peacock v. Georgia Mun. Ass’n*, 247 Ga. 740, 279 S.E.2d 434 (1981).

Ambiguity as to whether local amendment to paragraph creates exemption from taxation is construed against taxpayer or, stated otherwise, exemption from taxation must be created expressly and distinctly and will not arise by implication. *DeKalb County v. City of Decatur*, 247 Ga. 695, 279 S.E.2d 427 (1981).

Differential tax rollback void. — This paragraph did not authorize differential tax rollback mandated by subsections (i) and (j) of Ga. L. 1978, p. 1695 (see now O.C.G.A. § 48-8-91); thus, differential rollback was void. *Martin v. Ellis*, 242 Ga.

340, 249 S.E.2d 23 (1978) (see Ga. Const. 1983, Art. IX, Sec. II, Para. III).

Constitutionality of Metropolitan River Protection Act. — The Metropolitan River Protection Act, Ga. L. 1978, p. 128 (see now O.C.G.A. § 12-5-440 et seq.), does not constitute zoning within the definition set out in the Georgia Constitution, but instead falls within the reserved powers of the state to act, along with the local governing authorities, with regard to the water system, as is set out in the purpose of the Act, and is, therefore, constitutional. *Pope v. City of Atlanta*, 240 Ga. 177, 240 S.E.2d 241 (1977), cert. denied, 440 U.S. 936, 99 S. Ct. 1281, 59 L. Ed. 2d 494 (1979).

Not illegal for county governing body to seek outside advice before officially acting. — Under Ga. Const. 1976, Art. IX, Sec. I, Para. I (see Ga. Const. 1983, Art. IX, Sec. I, Para. I), and this paragraph there is nothing illegal or unconstitutional nor is it an abuse of discretion for a governing body of a county to seek advice and recommendations from various department heads, advisory committees, and the general public prior to taking official action. *Lindsey v. Guhl*, 237 Ga. 567, 229 S.E.2d 354 (1976) (see Ga. Const. 1983, Art. IX, Sec. II, Para. III).

Political subdivisions. — This paragraph of the state Constitution specifically categorizes counties and municipalities as “political subdivisions” for purposes of achieving self-government. *King v. State*, 246 Ga. 386, 271 S.E.2d 630 (1980) (see Ga. Const. 1983, Art. IX, Sec. II, Para. III).

General Assembly still empowered to create and dissolve municipal corporations. — This paragraph provides uniformity of certain powers of municipalities, not autonomy. The General Assembly may not remove these powers in a random fashion. However, this paragraph does not operate to abolish the General Assembly’s plenary power to create and dissolve municipal corporations. *City of Mt. View v. Clayton County*, 242 Ga. 163, 249 S.E.2d 541 (1978), appeal dismissed, 440 U.S. 902, 99 S. Ct. 1205, 59 L. Ed. 2d 450 (1979) (see Ga. Const. 1983, Art. IX, Sec. II, Para. III).

Annexation ordinances are not void because they violate this para-

graph, which prohibits cities and counties from providing water and sewer service inside each other’s service areas except by contract with each other. *City of Cartersville v. Bartow County School Dist.*, 145 Ga. App. 129, 243 S.E.2d 293 (1978) (see Ga. Const. 1983, Art. IX, Sec. II, Para. III).

Construction of annexation resolution. — Where a service district covering unincorporated areas is created under this paragraph, and a portion is subsequently annexed to the city, the resolution should not be construed according to the intent of the drafters, but should be construed against duplication of services and double taxation and in favor of municipal annexation, unless the contrary clearly appears. *Cobb County v. Allen*, 236 Ga. 910, 226 S.E.2d 57 (1976).

City’s authority to regulate county’s building projects within city limits. — A county government is exempt from all municipal regulation of construction projects undertaken by the county with respect to county-owned property located within the city and used for governmental purposes, but they are subject to other municipal regulations as indicated by the Georgia General Assembly such as fire safety standards, O.C.G.A. § 25-2-12, or compliance with the Erosion and Sedimentation Act, O.C.G.A. § 12-7-1 et seq. *City of Decatur v. DeKalb County*, 256 Ga. App. 46, 567 S.E.2d 376 (2002).

County was required to maintain easements it owned within a city; no contract required. — County, as owner of easements over cemetery property in the City of Sandy Springs even after the city was incorporated, was required to maintain and repair a dam and ponds that the county built on the easements for so long as the county retained ownership of the easements. Ga. Const. 1983, Art. IX, Sec. II, Para. III, requiring an intergovernmental contract before a county could perform services in a city, did not apply because the county owned the easements. *Fulton County v. City of Sandy Springs*, 295 Ga. 16, 757 S.E.2d 123 (2014).

Instance of payment by county not unconstitutional. — Where a resolution of the General Assembly directing county authorities to reimburse a surety on the

General Consideration (Cont'd)

sum paid by the surety on the criminal recognizance under Ga. Const. 1976, Art. III, Sec. VIII, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI) and where the surety's principal had been apprehended and placed in the custody of the proper officers and the principal had been punished as prescribed by law, such resolution is not violative of Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI) which forbids the General Assembly to grant any donation or gratuity in favor of any firm, person, or association, nor is such a resolution in violation of this paragraph. *Stewart v. Davis*, 175 Ga. 545, 165 S.E. 598 (1932) (decided under Ga. Const. 1877, Art. VII, Sec. VI, Para. II; see Ga. Const. 1983, Art. IX, Sec. II, Para. III).

Employment of counsel. — A county governing authority has the implicit power to employ counsel for county officers. *Stephenson v. Board of Comm'rs*, 261 Ga. 399, 405 S.E.2d 488 (1991).

Immunity from federal antitrust liability. — A city's anticompetitive operation of a waterworks is protected from federal antitrust liability by the state action immunity doctrine under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), and its progeny. *McCallum v. City of Athens*, 976 F.2d 649 (11th Cir. 1992).

Zoning. — Ga. Const. 1983, Art. IX, Sec. II, Para. III does not constitute authorization for a municipality to exercise any zoning powers. *Century Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 677 S.E.2d 106 (2009).

Ordinance restricting waste disposal services upheld. — Georgia trial court erred by denying injunctive relief to a county and its chosen waste disposal company wherein it sought to prohibit an unauthorized waste company from providing services in the county against an ordinance because the ordinance served a legitimate public purpose by providing a comprehensive solid waste management plan as it was required to do under O.C.G.A. § 12-8-31.1. *Advanced Disposal Servs. Middle Ga., LLC v. Deep S. Sanitation, LLC*, 296 Ga. 103, 765 S.E.2d 364 (Sept. 22, 2014).

City ordinance increasing pension plan contribution rate. — Trial court properly granted the city defendants summary judgment on the city employees' claims of breach of contract and unconstitutional impairment of contract regarding an ordinance increasing their pension plan contribution rate because the Georgia General Assembly expressly contemplated that a municipal corporation's provision for employee retirement or pension benefits would be subject to being supplemented by local law. *Borders v. City of Atlanta*, 298 Ga. 188, 779 S.E.2d 279 (2015).

Cited in *Howden v. Mayor of Savannah*, 172 Ga. 833, 159 S.E. 401 (1931); *Wofford Oil Co. v. David*, 181 Ga. 639, 183 S.E. 808 (1935); *Commissioners of Glynn County v. Cate*, 183 Ga. 111, 187 S.E. 636 (1936); *Enzor v. Askew*, 191 Ga. 576, 13 S.E.2d 374 (1941); *Snow v. Johnston*, 197 Ga. 146, 28 S.E.2d 270 (1943); *Flynn v. State*, 88 Ga. App. 52, 76 S.E.2d 38 (1953); *Fletcher v. Daniels*, 211 Ga. 403, 86 S.E.2d 232 (1955); *Toomey v. Norwood Realty Co.*, 211 Ga. 814, 89 S.E.2d 265 (1955); *Hunter v. City of Atlanta*, 212 Ga. 179, 91 S.E.2d 338 (1956); *Prince v. Thompson*, 215 Ga. 860, 113 S.E.2d 772 (1960); *Horras v. Williams*, 219 Ga. 115, 132 S.E.2d 68 (1963); *Cota v. Northside Hosp. Ass'n*, 221 Ga. 110, 143 S.E.2d 167 (1965); *McLennan v. Aldredge*, 223 Ga. 879, 159 S.E.2d 682 (1968); *Flanigen v. Preferred Dev. Corp.*, 226 Ga. 267, 174 S.E.2d 425 (1970); *DeKalb County v. Chapel Hill, Inc.*, 232 Ga. 238, 205 S.E.2d 864 (1974); *House v. James*, 232 Ga. 443, 207 S.E.2d 201 (1974); *Barrett v. Hamby*, 235 Ga. 262, 219 S.E.2d 399 (1975); *Thompson v. Hornsby*, 235 Ga. 561, 221 S.E.2d 192 (1975); *Martin Marietta Corp. v. Macon-Bibb County Planning & Zoning Comm'n*, 235 Ga. 689, 221 S.E.2d 401 (1975); *City of Atlanta v. Myers*, 240 Ga. 261, 240 S.E.2d 60 (1977); *Brown v. Housing Auth.*, 240 Ga. 647, 242 S.E.2d 143 (1978); *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978); *Martin v. Ellis*, 242 Ga. 340, 249 S.E.2d 23 (1978); *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979); *Board of Comm'rs v. Cooper*, 245 Ga. 251, 264 S.E.2d 193 (1980); *Cox Enters., Inc. v. Carroll City/County Hosp. Auth.*, 247 Ga.

39, 273 S.E.2d 841 (1981); *In re Board of Twiggs County Comm'rs*, 249 Ga. 642, 292 S.E.2d 673 (1982); *Terrell County v. Albany/Dougherty Hosp. Auth.*, 256 Ga. 627, 352 S.E.2d 378 (1987); *AMBAC Indem. Corp. v. Akridge*, 262 Ga. 773, 425 S.E.2d 637 (1993); *Malcom v. Newton County*, 244 Ga. App. 464, 535 S.E.2d 824 (2000); *City of Atlanta v. Heard*, 252 Ga. App. 179, 555 S.E.2d 849 (2001).

Police and Fire Protection

This paragraph not construable to prevent use of city property for necessary governmental purpose. — This paragraph will not be given a construction which will prevent the city from erecting a fire station, which is a necessary governmental use of property, in any area of the city, though it may be zoned for other and different uses; to construe them so as to prevent the city's use of any property for a necessary governmental purpose would offend that provision of the Constitution which declares that the right of eminent domain shall not be abridged. *Mayor of Savannah v. Collins*, 211 Ga. 191, 84 S.E.2d 454 (1954).

Counties are authorized to do whatever necessary to carry out the goal of providing fire protection. *Georgia Ass'n of Am. Inst. of Architects v. Gwinnett County*, 238 Ga. 277, 233 S.E.2d 142 (1977).

Counties are authorized to enter contracts to provide fire protection, even though that particular contractual power is not expressly conferred. *Smith v. Board of Comm'rs of Rds. & Revenues*, 244 Ga. 133, 259 S.E.2d 74 (1979).

Use of purchased property for necessary governmental property valid. — Since a municipality unquestionably has the right to condemn private property for a necessary governmental use, though it may be located in an area which has been zoned for other and different uses, it necessarily follows that it may likewise use property for a necessary governmental use which it has acquired previously by purchase. *Mayor of Savannah v. Collins*, 211 Ga. 191, 84 S.E.2d 454 (1954).

This paragraph authorizes a county to decide to provide its citizens with fire protection services,

and then to implement that decision; in implementing that decision, counties are "authorized to do whatever [is] necessary to carry out this goal." *Smith v. Board of Comm'rs of Rds. & Revenues*, 244 Ga. 133, 259 S.E.2d 74 (1979) (see Ga. Const. 1983, Art. IX, Sec. II, Para. III).

Implied authority and discretion to handle details. — Because where "jurisdiction over a subject matter is conferred upon county authorities ..., the further power to contract in regard to that subject matter is to be implied; ..." a part of this implicit power is the authority to use discretion as to the details of such contracts, subject only to the limitations imposed by the statutes or public policy of the state. *Smith v. Board of Comm'rs of Rds. & Revenues*, 244 Ga. 133, 259 S.E.2d 74 (1979).

Court cannot decide whether the governing authority made the correct decision, but only whether it was a lawful one; the discretion to choose among lawful means is given by law to the local government, not to the court. *Smith v. Board of Comm'rs of Rds. & Revenues*, 244 Ga. 133, 259 S.E.2d 74 (1979).

Providing full-time, paid fire personnel constitutional. — A proposed municipal charter amendment which would require provision of fire protection and that such fire protection be provided by a city fire department, with full-time, paid personnel employed by the city, does not violate Ga. Const. 1983, Art. IX, Sec. II, Para. III. *Sadler v. Nijem*, 251 Ga. 375, 306 S.E.2d 257 (1983).

Jurisdiction of peace officers was restricted but an exception to the general rule was allowed for police officers to arrest persons for traffic offenses in other jurisdictions. *State v. Heredia*, 252 Ga. App. 89, 555 S.E.2d 91 (2001).

Authority to arrest for traffic violations. — A Henry County police officer was authorized to stop the defendant in Spalding County after an off-duty Henry County police officer reported seeing the defendant's vehicle weaving in and out of the defendant's lane and nearly hitting an abandoned vehicle. Under O.C.G.A. §§ 17-4-23 and 40-13-30, county police officers were authorized to arrest persons for traffic offenses in other jurisdictions.

Police and Fire Protection (Cont'd)

Weldon v. State, 291 Ga. App. 309, 661 S.E.2d 672 (2008).

No authority to arrest outside of territorial jurisdiction. — Arrest warrants issued by a Georgia court did not insulate a payee or a county deputy from liability under 42 U.S.C. § 1983 for causing a businesswoman who had given the payee postdated checks for merchandise to be arrested on bad check charges because the warrants were executed in Florida, outside the issuing court's territorial jurisdiction as set forth in Ga. Const. 1983, Art. IX, Sec. II, Para. III(b). *Brown v. Camden County*, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Authority to arrest outside of jurisdiction. — Trial court did not err in granting police officers summary judgment in a citizen's action alleging false imprisonment, assault and battery, and intentional infliction of emotional distress in connection with the defendant's arrest because the arrest was lawful under O.C.G.A. § 17-4-20 since obstruction occurred in the officers' presence; even if the officers did not have probable cause to arrest the defendant, the officers had the authority and discretion to arrest outside the officers' jurisdiction for offenses committed in the officers' presence and, therefore, the officers' immunity could not be defeated by the officers' decision to arrest outside of the officers' jurisdiction. *Taylor v. Waldo*, 309 Ga. App. 108, 709 S.E.2d 278 (2011).

Garbage and Solid Waste Disposal

County's sanitary landfill and fee schedules are authorized under this paragraph. *City of Covington v. Newton County*, 243 Ga. 476, 254 S.E.2d 855 (1979) (see Ga. Const. 1983, Art. IX, Sec. II, Para. III).

Must demonstrate abuse of discretion or constitutional violation. — In order to enjoin a county board's action in selecting a solid waste disposal site, plaintiffs are required to show an abuse of discretion or a constitutional violation. *Lindsey v. Guhl*, 237 Ga. 567, 229 S.E.2d 354 (1976).

County ordinance requiring a fence and buffer space around all open storage and junkyard businesses is constitutional. *Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465, 254 S.E.2d 846 (1979).

County contract with private solid waste collection companies. — In choosing the option of contracting with private solid waste collection companies, a county was, through that method, providing solid waste collection services to county property owners within the meaning of O.C.G.A. § 12-8-39.3(a); the fact that the individuals performing that service were not county employees, but employees of private contractors, was of no moment, insofar as it related to a property owner's constitutional challenge to the county's solid waste ordinance. *Mesteller v. Gwinnett County*, 292 Ga. 675, 740 S.E.2d 605 (2013).

Ordinance covering payment of garbage collection fees. — The state constitution, statutes, and case law permit a county to enact an ordinance making property owners responsible for the payment of garbage collection fees for their rental property. *Board of Comm'rs v. Guthrie*, 273 Ga. 1, 537 S.E.2d 329 (2000).

Regulations must be reasonable and means must relate to objective. — The Constitution requires that regulations not be unreasonable, arbitrary, or capricious, and that means adopted regulations must have some real and substantial relation to the object to be attained. *Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465, 254 S.E.2d 846 (1979).

State cannot authorize violation of commerce clause. — A state cannot authorize activity which violates the commerce clause; thus, if the Georgia statute enabling authorities to enter agreements for exclusive rights with respect to solid waste disposal is interpreted to exclude competition from the solid waste disposal market, then it would conflict with the commerce clause, and, accordingly, conduct of authorities pursuant to the statute would not be entitled to state action immunity. *Pine Ridge Recycling, Inc. v. Butts County*, 855 F. Supp. 1264 (M.D. Ga. 1994).

Water Supply

Authority to supply water. — Ga. Const. 1983, Art. IX, Sec. II, Para. III did not require a contract between Coweta County and the City of Newnan's Water, Sewerage and Light Commission in order for the commission to supply water in the county because such authority is provided by local law. *Coweta County v. City of Newnan*, 253 Ga. 457, 320 S.E.2d 747 (1984).

Installation of competing water system by county. — A county that installs a competing water system is not required to compensate a private water system owner for property loss of its business with customers under the taking clause of Ga. Const. 1983, Art. I, Sec. III, Para. I when the owner has neither an exclusive franchise to supply water nor a non-compete agreement with the county. *Amos Plumbing & Elec. Co. v. Bennett*, 261 Ga. 810, 411 S.E.2d 490 (1992).

Local laws. — A local amendment to Art. VII, Sec. IV, Para. II of the 1945 Georgia Constitution, authorizing a county to levy a tax for water and sewerage purposes, was not repealed by ratification of a later amendment giving counties direct authority to create special taxing districts for water and sewerage services, and to tax for those services only within the special district. *Copeland v. State*, 268 Ga. 375, 490 S.E.2d 68 (1997).

Power to exercise the right of eminent domain outside the city limits to establish a city sewer system under the Revenue Bond Law, O.C.G.A. § 36-82-62, and the requirement under Ga. Const. 1983, Art. IX, Sec. II, Para. III(b)(2) that the city must have a contract with the county to provide sewer services to county residents are not mutually exclusive. *Kelley v. City of Griffin*, 257 Ga. 407, 359 S.E.2d 644 (1987).

Storm water utility charges. — Trial court properly concluded that a storm water utility charge which Columbia County (Georgia) imposed on property owners was not an invalid tax and that the county's method of apportioning costs of storm water services was not arbitrary. *McLeod v. Columbia County*, 278 Ga. 242, 599 S.E.2d 152 (2004).

City subject to antitrust restraints in providing water services. — The Georgia legislation, Ga. Const. 1983, Art. IX, Sec. II, Para. III, and O.C.G.A. § 36-34-5, contemplates that political subdivisions, in their provision of water services, will contract amongst themselves to divide markets in the provision of waters and that such political subdivisions may establish and maintain monopolies in this area, but even a lawful monopolist may be subject to antitrust restraint when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization. *Wall v. City of Athens*, 663 F. Supp. 747 (M.D. Ga. 1987), *aff'd sub nom., McCallum v. Athens*, 976 F.2d 649 (11th Cir. 1992).

Grant of extra-territorial powers of eminent domain. — Ga. Const. 1983, Art. IX, Sec. II, Para. III(b)(1) did not apply when a governmental entity was given a specific, extraterritorial power by general or local law; therefore, because O.C.G.A. § 36-82-62 explicitly granted Henry County Water and Sewerage Authority extra-territorial powers of eminent domain, the authority was not required to obtain Butts County's agreement before instituting a condemnation action. *Ware v. Henry County Water & Sewerage Auth.*, 258 Ga. App. 778, 575 S.E.2d 654 (2002).

Taxation

There is no constitutional requirement that local option sales tax revenues be used for educational purposes. *Salem v. Tattnall County*, 250 Ga. 881, 302 S.E.2d 99 (1983).

Use of local option sales tax proceeds. — Where a county creates a special service tax district which consists of the unincorporated area of the county, and it levies a special service district tax on property located therein, it may use its proceeds from the local option sales tax (O.C.G.A. § 48-8-80 et seq.) to reduce the millage rate of the general maintenance and operation tax which is levied countywide (i.e., is levied on property located in municipalities in the county and in the unincorporated area) and not just to reduce the millage rate in the special service tax district. *Nielubowicz v.*

Taxation (Cont'd)

Chatham County, 252 Ga. 330, 312 S.E.2d 802 (1984).

2010 amendment to the Local Option Sales Tax Act, O.C.G.A. § 48-8-89(d)(4), violates separation of powers doctrine. — To the extent the 2010 amendment to the Local Option Sales Tax Act (LOST), O.C.G.A. § 48-8-89(d)(4), permits judicial resolution of the issue of whether LOST should be renewed and the governing bodies of the special district should be required to levy and collect the tax, the amendment violates the separation of powers doctrine of Ga. Const. 1983, Art. I, Sec. II, Para. III. *Turner County v. City of Ashburn*, 293 Ga. 739, 749 S.E.2d 685 (2013).

Special district for health services proper. — County Board of Commissioners was authorized to create the special taxation district for the purpose of providing health services, as Ga. Const. 1983, Art. IX, Sec. II, Para. VI allowed the special districts, and Ga. Const. 1983, Art. IX, Sec. II, Para. III allowed the county to provide public health services. *Greene County Bd. of Comm'rs v. Higdon*, 277 Ga. App. 350, 626 S.E.2d 541 (2006).

Libraries

Agreement purporting to transfer control of library system from city to county is invalid where there is a failure to include the library's trustees as parties pursuant to former O.C.G.A. § 20-5-40, which statutory requirement was not superseded and nullified by Ga. Const. 1945, Art. XI, Sec. III, Para. I (see Ga. Const. 1983, Art. IX, Sec. II, Para. III). *Dougherty County v. Burt*, 168 Ga. App. 166, 308 S.E.2d 395 (1983).

Parks

County may condemn private property for public purpose of creating recreational park. *Williams Bros. Lumber Co. v. Gwinnett County*, 258 Ga. 243, 368 S.E.2d 310 (1988).

Public Housing

No city housing authority may exercise public housing powers or provide public housing services outside its boundaries except by contract with city or county affected, unless otherwise provided by any local or special law. *Brown v. Housing Auth.*, 240 Ga. 647, 242 S.E.2d 143 (1978).

Public Transportation

Statute limiting the use of tax revenue is one means of regulating power of local governments to provide transportation services. *City of Atlanta v. Metropolitan Atlanta Rapid Transit Auth.*, 636 F.2d 1084 (5th Cir. 1981).

Airport facility. — Even though, under a contract between the county and an airport authority for use by the county of an expanded airport facility, the consideration to be paid by the county was not expressed in terms of a definite dollar amount, it was not an unconstitutional "new debt". The contract was a valid intergovernmental contract and the consideration represented the authority's lawful "revenue pledged to the payment of" the bonds. *Clayton County Airport Auth. v. State*, 265 Ga. 24, 453 S.E.2d 8 (1995).

Contract between the county and the airport authority, which managed the airport, qualified as an enforceable intergovernmental agreement (IGA) that did not violate the Debt Clause in the Georgia Constitution because the IGA was between appropriate governmental entities; its term did not exceed 50 years; the agreement related to both the provision of services and the joint use of facilities as the airport authority agreed to manage and maintain the expanded taxiway, and the county, in return, agreed to provide funding and manage the debt required to be incurred to complete the expansion; and the agreement dealt with services and facilities about which the county had the authority to enter contracts. *Avery v. State of Ga.*, 295 Ga. 630, 761 S.E.2d 56 (2014).

OPINIONS OF THE ATTORNEY GENERAL

Amendment intended to enumerate services county and municipality may provide. — The constitutional amendment set forth in this paragraph was intended to supplement and enumerate services which counties and municipalities may provide, and to permit them to combine to provide the services, but the ordinances which counties may enact to provide these services are subject to the general terms and restrictions of Ga. Const. 1976, Art. IX, Sec. II, Para. I (see Ga. Const. 1983, Art. IX, Sec. I, Para. I), including the prohibition against the enactment of criminal sanctions by counties. 1974 Op. Att’y Gen. No. U74-96.

General Assembly has authority to regulate, restrict, or limit exercise of these powers by general law. 1980 Op. Att’y Gen. No. 80-102.

Municipality cannot expend municipal funds for “straw vote” on issue of local importance absent local law authorizing such referendum. 1981 Op. Att’y Gen. No. 81-72.

Funding of “straw vote” prohibited. — The expenditure of public funds for a county wide “straw vote” or public opinion referendum, absent some statutory or constitutional premise, is prohibited. 1990 Op. Att’y Gen. No. U90-20.

Assessing fee for services to Board of Regents. — While a municipality cannot “tax” the Board of Regents of the University System of Georgia on its property or operations, this does not preclude the municipality from charging a fee for optional services furnished to the Board of Regents or its various educational institutions. 1979 Op. Att’y Gen. No. 79-75.

Municipalities are not prohibited by Georgia’s Constitution or laws from enacting ordinances regarding enforcement of traffic control devices by the use of cameras. 2000 Op. Att’y Gen. No. U2000-7.

Municipality may legally place parking meters within its limits on streets which are a part of the State Highway System. 1952-53 Op. Att’y Gen. p. 261.

County is fully authorized to use county equipment and to expend

county funds in maintenance of watershed improvement structures where such projects are in furtherance of the county’s authorization to conserve natural resources, serves a flood prevention need, and provides additional public benefits. 1975 Op. Att’y Gen. No. 75-29.

Building codes. — The General Assembly can lawfully mandate a particular code or codes from which local governments wishing to adopt and enforce building codes must choose. 1989 Op. Att’y Gen. No. 89-7.

Local governments choosing to have a building code can be required to enforce the state code. 1989 Op. Att’y Gen. No. 89-7.

Evacuation for protecting lives and property is exercise of government’s inherent “police powers.” 1983 Op. Att’y Gen. No. 83-60.

Fire ordinances for day care centers. — The authority of local governments to enact fire ordinances for day care centers is preempted by former O.C.G.A. § 49-5-14 which gives the Board of Human Resources authority to adopt fire safety codes for day care centers. 1984 Op. Att’y Gen. No. 84-9.

Municipal contributions to day care center. — Unless a provision in the city charter allows such an expenditure, a city may not contribute to a day care center. 1984 Op. Att’y Gen. No. U84-14.

Local regulation of air pollutants. — While local governments are not preempted from regulating in the area of air quality control, any ordinance in this area which contradicts or detracts from the Georgia Air Quality Act, O.C.G.A. § 12-9-1 et seq., would be unconstitutional and void. 1986 Op. Att’y Gen. No. U86-22.

Municipal home rule power not violated by World Congress Center’s regulations. — O.C.G.A. § 10-9-14, empowering the Geo. L. Smith II Georgia World Congress Center Authority to regulate activities on the sidewalks and streets immediately adjacent to the World Congress Center’s projects during an event period, does not violate the City of

Atlanta's home rule power under the Georgia constitution and O.C.G.A. § 36-35-3(a). 1994 Op. Att'y Gen. No. U94-4.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 163 et seq., 369 et seq., 381, 495 et seq. 83 Am. Jur. 2d, Zoning and Planning, § 8 et seq.

C.J.S. — 62 C.J.S., Municipal Corporations, § 143 et seq.

ALR. — Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of establishing or maintaining highways, 2 ALR 746; 123 ALR 1462.

What are "public utilities" within constitutional or statutory provisions relating to purchase, construction, or repair of same by municipal corporation, 9 ALR 1033; 35 ALR 592.

Validity of building regulation requiring areas or open spaces for light and air, 9 ALR 1040; 59 ALR 518.

Validity of statutory or municipal regulation as to garbage, 15 ALR 287; 72 ALR 520; 135 ALR 1305.

Statutory or municipal regulation of removal of ashes or other rubbish, 15 ALR 309.

Liability of one maintaining electric wire over or near highway for injury due to breaking of wire by fall of tree or limb, 19 ALR 801.

Power to forbid or restrict repair of wooden building within fire limits, 26 ALR 1219; 56 ALR 878.

Power of state to exact fee or require license for taking water from stream, 29 ALR 1478.

Use of public funds or exercise of taxing power to promote patriotism, 30 ALR 1035.

Applicability of municipal building regulation to state or county buildings, 31 ALR 450.

Validity of municipal ordinance prohibiting or regulating keeping of live stock, 32 ALR 1372; 40 ALR 566.

Validity of regulations as to plumbers and plumbing, 36 ALR 1342; 22 ALR2d 816.

Power of municipal corporation to purchase or charter a boat or barge, 39 ALR 1332; 63 ALR 388.

Revocability of municipal building permit or license, 40 ALR 928.

Population as basis of classification or discrimination in legislation respecting water companies, 45 ALR 1170.

Constitutionality of statute or ordinance denying right of property owners to defeat a proposed street improvement by protest, 52 ALR 883.

Duty of public utility to duplicate service, 52 ALR 1111.

Extension of police power of municipal corporation beyond territorial limits, 55 ALR 1182; 14 ALR2d 103.

Power to forbid or restrict repair of wooden building within fire limits, 56 ALR 878.

Rights in respect of street number of street name, 57 ALR 461; 98 ALR 1213.

Liability of municipality where sewer originally of ample size has become inadequate by growth or development of territory, 70 ALR 1347.

Validity of automobile parking ordinances or regulations, 72 ALR 229; 108 ALR 1152; 130 ALR 316.

Power of municipality as to billboards and outdoor advertising, 72 ALR 465.

Validity of statutory or municipal regulations as to garbage, 72 ALR 520; 135 ALR 1305.

Constitutionality and construction of statutes and ordinances for protection of municipal water supply, 72 ALR 673.

Establishment of grade as jurisdictional requisite of improvement of street at expense of property benefited, 79 ALR 1317.

Imposition of wharfage or dockage fees, by state or municipality, as tonnage duty, 80 ALR 388.

Validity of public regulations as to garages, 84 ALR 1147.

At what stage does a statute or ordinance pass beyond the power of legislative body to reconsider or recall, 96 ALR 1309.

Municipal regulation of electricians and the installation of electrical work, 96 ALR 1506.

Implied power of municipality to operate nursery, quarry, gravel pit, etc., for

production of material needed for carrying out powers expressly conferred upon it, 104 ALR 1342.

Power of state to require changes in buildings previously erected in order to comply with new requirements and standards for protection of health and safety, 109 ALR 1117.

Power of municipality to classify for purposes of taxation as affected by classification made by state or its failure to classify, 110 ALR 1203.

Power of exclusion or regulation of vehicles in parks or park boulevards, 121 ALR 566.

Validity of regulations excluding or restricting automobile traffic in certain streets, 121 ALR 573.

Municipal ordinance relating to persons engaged in specified occupations or professions as applicable to officials or employees of state or political subdivision other than the municipality, 123 ALR 1383.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of establishing or maintaining highway, 123 ALR 1462.

Municipal license as affecting municipality's exercise of police power adversely to licensee, 124 ALR 523.

Validity of automobile parking ordinances or regulations, 130 ALR 316.

Use of streets or parks for religious purposes, 133 ALR 1402.

Validity of statutory or municipal regulations as to garbage, 135 ALR 1305.

Validity of building regulations as against objection of indefiniteness, 140 ALR 1210.

Waters: right of municipality, as riparian owner, to use of water for public supply, 141 ALR 639.

Validity, construction, and application of statute or ordinance which precludes recovery of rent in case of occupancy of building which does not conform to building and health regulations, or where certificate of conformity has not been issued, 144 ALR 259.

Validity, construction, and application of municipal ordinances relating to loading or unloading passengers by interurban buses on streets, 144 ALR 1119.

Auditorium or stadium as public purpose for which public funds may be ex-

pendent or taxing power exercised, 173 ALR 415.

Validity of municipal ordinance imposing requirements on outside producers of milk to be sold in city, 14 ALR2d 103.

Validity, construction, and effect of statute, ordinance, or other measure involving chemical treatment of public water supply, 43 ALR2d 453.

Validity of prohibition or regulation of bathing, swimming, boating, fishing, or the like, to protect public water supply, 56 ALR2d 790.

Municipal power as to billboards and outdoor advertising, 58 ALR2d 1314.

Liability of state, municipality, or public agency for vehicle accident occurring because of accumulation of water on street or highway, 61 ALR2d 425.

Power of municipality to sell, lease, or mortgage public utility plant or interest therein, 61 ALR2d 595.

Permissible use of funds from parking meters, 83 ALR2d 625.

Pledging parking-meter revenues as unlawful relinquishment of governmental power, 83 ALR2d 649.

Regulation and licensing of private garbage or rubbish removal services, 83 ALR2d 799.

Prohibiting or regulating removal or exploitation of oil and gas, minerals, soil, or other natural products within municipal limits, 10 ALR3d 1226.

Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose, 14 ALR3d 896.

Power of municipal corporation to submit to arbitration, 20 ALR3d 569.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

Liability of municipality or other governmental unit for failure to provide police protection, 46 ALR3d 1084.

Air pollution control: validity of legislation permitting administrative agency to fix permissible standards of pollutant emission, 48 ALR3d 326.

Validity of regulations restricting size of free standing advertising signs, 56 ALR3d 1207.

Right of municipality to refuse services

provided by it to resident for failure of resident to pay for other unrelated services, 60 ALR3d 714.

Validity and construction of regulation by municipal corporation fixing sewer-use rates, 61 ALR3d 1236.

Validity and construction of statute or ordinance prohibiting commercial exhibition of malformed or disfigured persons, 62 ALR3d 1237.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute, 81 ALR3d 1258.

Validity of municipality's ban on con-

struction until public facilities comply with specific standards, 92 ALR3d 1073.

Validity of ordinance restricting number of unrelated persons who can live together in residential zone, 12 ALR4th 238.

Parking facility proprietor's liability for criminal attack on patron, 49 ALR4th 1257.

Validity of local regulation of hazardous waste, 67 ALR4th 822.

Liability for injury or death from collision with guy wire, 8 ALR5th 177.

Retaliatory eviction of tenant for reporting landlord's violation of law, 23 ALR5th 140.

Paragraph IV. Planning and zoning.

The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power.

1976 Constitution. — Art. IX, Sec. IV, Para. II.

Cross references. — Minimum procedures for exercise of zoning power, T. 36, Chs. 66, 67.

Law reviews. — For article, "Hazardous Waste Issues in Real Estate Transactions," see 38 Mercer L. Rev. 581 (1987). For article, "Judicial Review of Georgia Zoning: Cyclones and Doldrums in the Windmills of the Mind," see 2 Ga. St. U.L. Rev. 97 (1986). For article, "Financing Affordable Housing in Georgia: The Possibility of a Dedicated Revenue Source," see 13 Ga. St. U.L. Rev. 363 (1996).

For note, "Constitutional Barriers to Statewide Land Use Regulation in Georgia: Do They Still Exist?," see 3 Ga. St. U.L. Rev. 249 (1987). For note on using inclusionary zoning techniques to promote affordable housing, see 44 Emory L.J. 359 (1995).

For comment, "Judicial Review of Zoning Ordinances in Georgia: The Court's Role in Land Use Planning," see 41 Mercer L. Rev. 1469 (1990). For comment, "Hamlets: Expanding the Fair Share Doctrine Under Strict Home Rule Constitutions," see 49 Emory L.J. 255 (2000).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- BY MUNICIPALITIES AND COUNTIES
- JUDICIARY'S ROLE
- DUE PROCESS AND EQUAL PROTECTION
- REZONING

General Consideration

Municipal governments, not courts, have power to rezone property. Jack-

son v. Goodman, 247 Ga. 683, 279 S.E.2d 438 (1981).

Zoning Act of 1927. — Power to zone, rezone, and make changes for use was

clearly conferred upon cities by §§ 4 and 5 of the Zoning Act of 1927, Ga. L. 1927, p. 929, and such power is unquestionably in harmony with this paragraph. *Brown v. City of Brunswick*, 210 Ga. 738, 83 S.E.2d 12 (1954) (see Ga. Const. 1983, Art. IX, Sec. II, Para. IV).

Zoning Procedures Law. — The Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq., preempted the provisions in a city charter for the purposes of the adoption and amendment of zoning ordinances. *Little v. City of Lawrenceville*, 272 Ga. 340, 528 S.E.2d 515 (2000).

Power to zone unquestionable. — The power and necessity for state legislatures and municipal governments to impose restrictions through zoning laws and ordinances is no longer subject to question. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Authority to create and restrict use of geographical zones. — A county governing authority can create geographical areas within the boundaries of a county which are called zones; the governing authority can declare that the land in a zone can be used only for specified purposes or uses and that all other specified purposes or uses of the land in that zone are prohibited. *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974).

Extent of authority to zone or district. — The authority to zone or district as conferred under this paragraph is limited to creation or establishment of zones or districts in the first instance, and contains no authority either express or implied to thereafter make any exception with respect to the status of the particular district as already zoned, by amending or repealing in whole or in part the zoning ordinance enacted in accordance with the authority delegated by statute. The statutory authority given to a particular class of counties as differs from that granted various other counties and that given municipalities where the statute specifically authorized the governing body either through the creation of a board of zoning appeals, or other similar body, to make

changes and exceptions, or to amend or modify the classifications of areas already zoned; and in so doing a well defined procedure is established to effect such ends. *Barton v. Hardin*, 204 Ga. 108, 48 S.E.2d 882 (1948) (see Ga. Const. 1983, Art. IX, Sec. II, Para. IV).

Authority to control building's particular use not authorized by this paragraph. — Georgia Laws 1939, p. 245 which, under authority of the amendment to the Constitution of 1877 proposed by Ga. L. 1937, p. 1135, ratified by the people on June 8, 1937, and applicable to Richmond County, and substantially similar to this paragraph, authorizes the county authorities to adopt zoning ordinances for stated purposes, does not grant authority to control the use to which a particular building may be devoted, and an ordinance which sought to prohibit the operation of a grocery store in zoned territory was in that respect ultra vires and invalid when tested by the Act of 1939. *Lanier v. Richmond County*, 203 Ga. 39, 45 S.E.2d 415 (1947) (see Ga. Const. 1983, Art. IX, Sec. II, Para. IV).

Rule governing county response to court declaration of unconstitutionality of zoning regulations. — Once the zoning regulations applicable to a particular tract of land have been declared unconstitutional and void by the judiciary, before the judiciary can require further mandatory action, the governing authority must be given a reasonable time for the rezoning of the tract to a use classification that is constitutional. But if the governing authority does not accomplish this purpose within a reasonable time after the current zoning has been declared unconstitutional and void, then the judiciary, as a last resort toward obtaining compliance with its judgment, may declare such tract unzoned and free from all municipal or county zoning restrictions. *City of Atlanta v. McLennan*, 237 Ga. 25, 226 S.E.2d 732 (1976).

Trial court's declaration that property was "unzoned and free from all Cobb County Zoning restrictions" was a perilous condition to inflict upon adjoining landowners, since it might cause them severe inconvenience or irreparable harm. A safer alternative would be the trial court's

General Consideration (Cont'd)

use of its power to order the local zoning authority to rezone the property to a classification that is constitutional. *Cobb County v. Wilson*, 259 Ga. 685, 386 S.E.2d 128 (1989).

Moratorium on zoning permits impermissible. — That a county may have been given increased authority to zone under the 1983 Constitution does not enable it to defeat property owners by a moratorium placed on permits, after the property owners applied for a permit, made substantial expenditures, and received assurances from zoning officials. *Cannon v. Clayton County*, 255 Ga. 63, 335 S.E.2d 294 (1985).

Rezoning may not infringe on vested property rights. — Even if a county's zoning power has been broadened by the enactment of Ga. Const. 1983, Art. IX, Sec. II, Para. IV, the county may not use its zoning power to defeat the vested property interest of a property owner to use the owner's land as zoned. *Cannon v. Clayton County*, 255 Ga. 63, 335 S.E.2d 294 (1985).

Nonprofit corporation is not immune from local zoning regulations even if the corporation is performing services which are governmental in nature, at least in the absence of clear legislative intent that such immunity be extended. *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n*, 252 Ga. 484, 314 S.E.2d 218, appeal dismissed, 469 U.S. 802, 105 S. Ct. 57, 83 L. Ed. 2d 8 (1984).

Former "Steinberg Act," former O.C.G.A. § 36-67-1 et seq., providing for zoning proposal review procedures in urbanized counties, did not unconstitutionally bind the local government in any way nor infringe on the local government's ability to exercise the power of zoning. *Northridge Community Ass'n v. Fulton County*, 257 Ga. 722, 363 S.E.2d 251 (1988).

Cited in *Chambers v. City of Atlanta Bd. of Zoning Adjustment*, 255 Ga. 538, 340 S.E.2d 922 (1986); *Cobb County Bd. of Comm'rs v. Poss*, 257 Ga. 393, 359 S.E.2d 900 (1987); *Kingsley v. Fla. Rock Indus., Inc.*, 259 Ga. App. 207, 575 S.E.2d 921 (2002).

By Municipalities and Counties

General Assembly has power to grant to municipalities and counties authority to pass zoning and planning laws. *Birdsey v. Wesleyan College*, 211 Ga. 583, 87 S.E.2d 378 (1955).

Direct authority has been granted to the counties to enact planning and zoning laws for unincorporated areas. *Johnston v. Hicks*, 225 Ga. 576, 170 S.E.2d 410 (1969).

Legislature no longer has authority to enact local laws concerning planning and zoning for unincorporated areas. *Johnston v. Hicks*, 225 Ga. 576, 170 S.E.2d 410 (1969).

County authorities control zoning. — Authority to amend or repeal existing planning and zoning laws or to enact new planning and zoning laws with respect to unincorporated areas has been granted to the county authorities. *Johnston v. Hicks*, 225 Ga. 576, 170 S.E.2d 410 (1969).

The General Assembly has no authority to grant a county the authority to enact zoning and planning laws except by constitutional provision. *Johnston v. Hicks*, 225 Ga. 576, 170 S.E.2d 410 (1969).

Legislature not empowered to zone property. — Georgia Laws 1953, p. 2788, eliminating from jurisdiction of a county planning board certain property and providing that this property be zoned for cemetery purposes, was unconstitutional under provision declaring that the legislature has authority to delegate to counties and municipalities the right to zone property. Neither under this provision of the Constitution, nor under any other provision of the Constitution or laws, has the legislature itself the right to zone property. *Herrod v. O'Beirne*, 210 Ga. 476, 80 S.E.2d 684 (1954).

The legislature has power to pass outdoor advertising zoning laws. — The 1983 Constitution carried forward power held exclusively in the counties and municipalities from Paragraph II of Section VIII of Article IV of the Georgia Constitution of 1976, (see Ga. Const. 1983, Art. X, Sec. 11, Paras. VI, IV, VI, and VII); the Outdoor Advertising Act does not conflict with Ga. Const. 1983, Art. IX, Sec. II, Para. IV. *Patrick v. Head*, 262 Ga. 654,

424 S.E.2d 615 (1993).

Zoning regulations enacted by a municipality pursuant to constitutional and legislative authority are valid and cannot be held unconstitutional on contention that constitutional authority to zone conflicts with other provisions of the Constitution, or upon the contention that rights guaranteed by the Constitution are denied as a result of the zoning regulations. *Palmer v. Tomlinson*, 217 Ga. 399, 122 S.E.2d 578 (1961).

Under the Constitution of this state, a city has broad authority as to zoning. *Galfas v. Ailor*, 81 Ga. App. 13, 57 S.E.2d 834 (1950).

This paragraph is a broad grant of direct constitutional authority to counties to enact zoning ordinances. *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974) (see Ga. Const. 1983, Art. IX, Sec. II, Para. IV).

Only authorities empowered by the Constitution to zone can zone, and the legislature is powerless to provide otherwise. *Hunt v. McCollum*, 214 Ga. 809, 108 S.E.2d 275 (1959).

Legislature was authorized to grant to the governing authorities of named cities "authority to pass zoning and planning laws whereby such cities may be zoned or districted for various uses and other or different uses prohibited therein, and regulating the use for which said zones or districts may be set apart, and regulating the plans for development and improvement of real estate therein." *Brown v. City of Brunswick*, 210 Ga. 738, 83 S.E.2d 12 (1954).

Restriction on state power. — Ga. L. 1957, p. 420, § 10, as amended, requiring submission of zoning ordinance amendments to a municipal planning commission, was inconsistent with the provisions of Ga. Const. 1976, Art. IX, Sec. IV, Para. II (see Ga. Const. 1983, Art. IX, Sec. II, Paras. III, IV, VI, and VII), prohibiting the General Assembly from restricting the power of a municipality to plan and zone; and that statutory provision was properly omitted from the O.C.G.A. by the codifiers. *Warshaw v. City of Atlanta*, 250 Ga. 535, 299 S.E.2d 552 (1983).

Due process not violated. — The state Constitution contains both a due

process clause and a zoning provision. They must be construed together. Accordingly, it can no longer be held that a zoning statute, which authorizes a city embraced within it to pass a zoning and planning ordinance, is per se unconstitutional and void because it deprives the owner of real estate and property without due process of law since this paragraph supersedes the decisions of the Supreme Court which declared zoning statutes unconstitutional and void because they denied due process of law to the owners of real estate embraced in zoning districts. *Schofield v. Bishop*, 192 Ga. 732, 16 S.E.2d 714 (1941) (see Ga. Const. 1983, Art. IX, Sec. II, Para. IV).

A zoning statute is not per se unconstitutional and void because it deprives the owner of the owner's property without due process of law. *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974).

Zoning ordinance must not infringe constitutional guaranties by invading personal or property rights unnecessarily or unreasonably; and if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of the owner's property by precluding all uses, or the only use to which it is reasonably adapted, an attack upon the validity of the regulation, as applied to the particular property involved, will be sustained. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

A zoning statute or ordinance should not be declared unconstitutional unless its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. The exercise of police power in this regard must be upheld if any state of facts either known or which could be reasonably assumed affords support for it. *106 Forsyth Corp. v. Bishop*, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Civil rights do not authorize operating business in violation of ordinance. — Civil rights do not authorize operation of a business within a municipality in violation of an ordinance enacted

By Municipalities and Counties (Cont'd)

under police power and for welfare of the community. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Motion picture theaters, like filling stations and whiskey stores, are not immune from regulation under the police power. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Where restraint is relatively minor and the public interest to be protected is substantial, the regulation will be upheld. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 969 (1975).

Right to disseminate motion pictures is not absolute. — It does not mean that any motion picture can be distributed at any time, at any place, and under any circumstances. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Regulation affecting only one business party valid. — Fact that only one party operating a business is affected by a regulation designed to localize operation of such business in a certain district does not show arbitrary and unreasonable or unjust discrimination in violation of organic rights. 106 Forsyth Corp. v. Bishop, 362 F. Supp. 1389 (M.D. Ga. 1972), aff'd, 482 F.2d 280 (5th Cir. 1973), cert. denied, 422 U.S. 1044, 95 S. Ct. 2660, 45 L. Ed. 2d 696 (1975).

Circumstances under which zoning ordinances have been held invalid, as applied to certain specific property, fall into three general classes: (1) where a small parcel of property is zoned for residential purposes, when it is entirely surrounded by commercial or business enterprises; (2) where property zoned for residential use is entirely unsuited for

residential purposes; or (3) where the purpose of the ordinance is not to protect the public health, safety, morals, or general welfare. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Zoning laws sustainable. — Unless regulations enacted by a local governing body are so unreasonable and extravagant that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not exceed the limits of the police power of the governing body to enact the regulations. *Kirkpatrick v. Candler*, 205 Ga. 449, 53 S.E.2d 889 (1949).

There is no violation of due process by a zoning ordinance that eliminates use of the property in any of the permissible ways. *Riddle v. Waller*, 127 Ga. App. 399, 193 S.E.2d 895 (1972).

Validity of a city zoning ordinance depends upon facts existing at time validity is questioned, and confiscatory character of the ordinance can be proven by conditions then existing. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Valid ordinance may result in confiscation of particular properties. — Because a zoning ordinance may in general be valid, and yet, as to a particular state of facts involving a particular parcel of real estate, be so arbitrary and unreasonable as to result in confiscation, thereby justifying the interposition of a court of equity to restrain its enforcement. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Requirements for enforcement of zoning ordinances. — Zoning ordinances must not only be nondiscriminatory and reasonable but also must be applied in a nondiscriminatory and reasonable manner in order to be enforceable. Whether an ordinance is uniformly enforced by the authorities is a question of fact. *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974).

Effect of changed conditions and uses of adjacent property since passage of zoning ordinance. — Evidence as to change of condition and circumstances since passage of ordinance zoning defendants' property for residential and agricultural purposes because of uses of

property adjacent to or near defendants' property, was sufficient to warrant conclusion that to apply the provisions of the ordinance to the property of the defendants would render such ordinance arbitrary and unreasonable. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Owner bears burden of proof of arbitrariness and unreasonableness of ordinance. — Where it is claimed that a zoning ordinance is unreasonable as to a particular tract of property, or that a change of conditions has rendered the ordinance unreasonable when applied to the particular property, the burden is on the owner of such property to produce sufficient evidence from which the court can make findings of fact and law such as would justify a holding as a matter of law that the ordinance is arbitrary and unreasonable; there must be a showing of an abuse of discretion on the part of the zoning authority, and that there has been an unreasonable and unwarranted exercise of the police power. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955).

Ultra vires act by legislature invalidates subsequent enactments by commission. — In 1943 and 1949 the governing authority of a county was the commissioner of roads and revenues (now county commissioners); the legislature exceeded its authority under this paragraph when it created a planning commission with authority to enact zoning laws and regulations for a county, and therefore the commission was wholly without any power to promulgate an ordinance zoning the defendants' property for any purpose. *Humthlett v. Reeves*, 212 Ga. 8, 90 S.E.2d 14 (1955) (see Ga. Const. 1983, Art. IX, § II, Para. IV).

Burden is on applicant. — The burden is on the applicant to show that practical difficulties or undue hardship to the owner requires the allowance of the variance. *International Funeral Servs., Inc. v. DeKalb County*, 244 Ga. 707, 261 S.E.2d 625 (1979).

Delegation of discretion in zoning matters is unconstitutional. — The "governing authority," under this provision, strictly refers to such city or county board as has the authority to exercise general and not limited powers. Delegation of legislative discretion in zoning matters would thus prove to be an unconstitutional act. *Button Gwinnett Landfill, Inc. v. Gwinnett County*, 256 Ga. 818, 353 S.E.2d 328 (1987).

Authority to grant special exceptions is constitutional. — A county commission delegates no legislative power to the zoning board of appeals where the zoning board of appeals simply determines whether an applicant's property strictly complies with the conditions that the governing authority has specified and if the property complies, the special exception is granted, but if the property does not, the exception is denied. *Button Gwinnett Landfill, Inc. v. Gwinnett County*, 256 Ga. 818, 353 S.E.2d 328 (1987).

A board of zoning adjustment's power to decide special exceptions was not in contravention of Ga. Const. 1983, Art. IX, Sec. II, Para. IV. The board's discretion was tightly controlled by an ordinance, which dictated whether or not the board could grant the special exception. If the property complied with the conditions set out by the governing authority, the special exception was to be granted, but if it did not comply, the special exception was not to be granted. *LaFave v. City of Atlanta*, 258 Ga. 631, 373 S.E.2d 212 (1988).

No zoning power over property outside town's territorial limits. — With regard to the landowners' declaratory judgment, mandamus, and injunctive relief suit seeking damages against a town and its officials alleging the unconstitutionality and invalidity of an overlay zoning district, the trial court erred by denying the landowners' motion for partial summary judgment with regard to the landowners' claim that the town did not have any legal authority to impose the requirements of the overlay zoning ordinance for right-of-way improvements on the state route abutting the property since the property at issue was outside the territorial boundaries of the town, therefore, the requirements of the overlay zoning ordinance were invalid as to the property since the town had no zoning authority over the same. *Century Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 677 S.E.2d 106 (2009).

By Municipalities and Counties (Cont'd)

City's authority to regulate county's building projects within city limits. — A county government is exempt from all municipal regulation of construction projects undertaken by the county with respect to county-owned property located within the city and used for governmental purposes, but that they are subject to other municipal regulations as indicated by the Georgia legislature such as fire safety standards, O.C.G.A. § 25-2-12, or compliance with the Erosion and Sedimentation Act, O.C.G.A. § 12-7-1 et seq. *City of Decatur v. DeKalb County*, 256 Ga. App. 46, 567 S.E.2d 376 (2002).

Owner had to be in compliance with then existing sign ordinance. — Property owner did not have a vested right to erect a sign because it had not been erected in accordance with zoning regulations in force when the owner applied for the permit; accordingly, the owner's failure to comply with the permit rendered the owner outside of the scope of protection afforded by Ga. Const. 1983, Art. IX, Sec. II, Para. IV. Although the Outdoor Advertising Control Act, O.C.G.A. § 32-6-70, also afforded protections, such protection was again not applicable to the property owner because the owner had not erected the owner's sign in compliance with the legal requirements of the existing ordinances; accordingly, the owner had no property rights in the sign. *DeKalb County v. DRS Invs., Inc.*, 260 Ga. App. 225, 581 S.E.2d 573 (2003).

Permitting for signs. — Void county sign ordinance could not be used as the basis for the denial of sign companies' applications for permits to construct billboards, and the invalidity of the ordinance resulted in there being no valid restriction on the construction of billboards in the county. Accordingly, the sign companies obtained vested rights in the issuance of the permits which the companies sought and the constitutional authority of cities that were subsequently formed to plan and zone within the cities' jurisdictions was not violated. *Fulton County v. Action Outdoor Adver., JV, LLC*, 289 Ga. 347, 711 S.E.2d 682 (2011).

Judiciary's Role

Passage of an ordinance is a legislative act, and no change can be made in such an ordinance except by passage of another, qualifying, repealing, or modifying its terms. *Alewine v. City Council*, 505 F. Supp. 880 (S.D. Ga. 1981), aff'd in part and reversed in part, 699 F.2d 1060 (11th Cir. 1983), cert. denied, 470 U.S. 1027, 105 S. Ct. 1391, 84 L. Ed. 2d 781 (1985).

Claim alleging violation of a right created by city ordinance is cognizable as a cause of action under state law. *Alewine v. City Council*, 505 F. Supp. 880 (S.D. Ga. 1981), aff'd in part and reversed in part, 699 F.2d 1060 (11th Cir. 1983), cert. denied, 470 U.S. 1027, 105 S. Ct. 1391, 84 L. Ed. 2d 781 (1985).

Judicial restraint required. — Because judicial restraint in the zoning area is implicitly required by this paragraph, the judiciary, only as a last resort, should declare a tract of land free from zoning regulations that are imposed and that may be only imposed by local governing authorities. *City of Atlanta v. McLennan*, 237 Ga. 25, 226 S.E.2d 732 (1976) (see Ga. Const. 1983, Art. IX, Sec. II, Para. IV).

Municipal ordinance based on a general power in a charter of a city must be reasonable. *Schofield v. Bishop*, 192 Ga. 732, 16 S.E.2d 714 (1941).

Ordinance may be unreasonable or arbitrary, and if it is unreasonable or arbitrary, it will be declared void and unenforceable. *Schofield v. Bishop*, 192 Ga. 732, 16 S.E.2d 714 (1941).

Reasonableness or unreasonableness of a city zoning and planning ordinance is a question of law for the court to decide, unless it depends on the existence of particular facts which are disputed, when it may become in part a question for a jury. *Schofield v. Bishop*, 192 Ga. 732, 16 S.E.2d 714 (1941).

Local government in best position to decide needs of own community. — A county or municipality or any combination thereof ordinarily should be in a better position to understand the needs of their own communities; and where once these public bodies are given power to put restraint on the use of property in populous areas, courts will not interfere with the exercise of it unless it appears that the

rights of a citizen have been violated. It is not the business of the courts to regulate these governing bodies as to matters within their discretion. *Schofield v. Bishop*, 192 Ga. 732, 16 S.E.2d 714 (1941).

Legislature and city council best qualified to determine need for regulation. — State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than courts to determine the necessity, character, and degree of regulation required; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable. *Schofield v. Bishop*, 192 Ga. 732, 16 S.E.2d 714 (1941).

Once the decision is made that the governing body possesses the power to zone and restrict use of property, then the acts of such body in exercise of such power will not be disturbed by the courts unless they are clearly arbitrary and unreasonable. *Schofield v. Bishop*, 192 Ga. 732, 16 S.E.2d 714 (1941); *Matthews v. Fayette County*, 233 Ga. 220, 210 S.E.2d 758 (1974).

Limitations of power of city council are not to be measured by the more extensive powers of the state legislature. *Schofield v. Bishop*, 192 Ga. 732, 16 S.E.2d 714 (1941).

Trial court is authorized to review a variance decision to determine whether a board or county exceeded its authority, abused its discretion, or acted arbitrarily or capriciously with regard to an applicant's constitutional rights. *International Funeral Servs., Inc. v. DeKalb County*, 244 Ga. 707, 261 S.E.2d 625 (1979).

Due Process and Equal Protection

Party must have due and legal notice of the hearing on the matter of rezoning before the county governing authority, the body which can rezone land and thereby deprive a party of property rights. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Lack of notice did not violate constitutional rights. — Defective notice or

lack of notice of preliminary hearing before the planning commission was not violative of procedural due process or equal protection. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Notice by publication of a rezoning hearing is proper and adequate insofar as the requirements of procedural due process and equal protection are concerned. *F.P. Plaza, Inc. v. Waite*, 230 Ga. 161, 196 S.E.2d 141, cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Rezoning

Authority to rezone necessary implication authority to zone. — The authority of the General Assembly to grant to the governing authorities of any county authority to pass zoning and planning laws whereby such counties may be zoned or districted for various uses, and other or different uses prohibited therein, and to regulate the use for which said zones or districts may be set apart and to regulate the plans for development and improvement of real estate therein, necessarily includes the authority of the General Assembly to grant to the county authorities the right to rezone property which had already been zoned. *Kirkpatrick v. Candler*, 205 Ga. 449, 53 S.E.2d 889 (1949).

Power to zone contained in the Constitution of 1945, and authority granted to specific cities by the amendment of 1948, fully authorize rezoning of property, and such rezoning does not violate the due process clause of the Constitution. *Birdsey v. Wesleyan College*, 211 Ga. 583, 87 S.E.2d 378 (1955).

Rezoning legislation presumed valid. — Where the governing authority rezones property, the authority need not enter findings and conclusions justifying the rezoning decision because it is acting in a legislative capacity. Like other legislative action, rezoning legislation, when duly adopted, is presumed to be valid until the contestant shows otherwise. *Hall Paving Co. v. Hall County*, 237 Ga. 14, 226 S.E.2d 728 (1976).

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Former Code 1933, Chapter 69-8 and Chapter 69-12. — The provision of this paragraph prohibiting the legislature's enactment of any further legislation concerning planning and zoning apparently invalidates former Code 1933, Chapter 69-8 and Chapter 69-12 since they clearly regulate the zoning and planning power of cities and counties by establishing uniform procedural mechanisms for implementation of that power. However, the invalidation of these chapters does not rescind all those city and county ordinances that have been enacted pursuant to these chapters; they will remain effective until the city or county expressly changes them. 1977 Op. Att'y Gen. No. 77-5. (see Ga. Const. 1983, Art. IX, Sec. II, Para. IV).

City or county can now adopt whatever system it desires for planning and zoning, so long as that system is not arbitrary — i.e., so long as it meets minimal due process standards. 1977 Op. Att'y Gen. No. 77-5.

Necessity for enabling Act. — This provision authorizing zoning and planning laws for municipalities is not self-executing and the General Assembly must pass an enabling Act authorizing officials of the municipality to pass zoning and planning laws. 1945-47 Op. Att'y Gen. p. 416.

Zoning powers are vested. — Zoning powers of county government are constitutionally vested and cannot be limited, restricted or interfered with by any legislative enactment, general or local, of the General Assembly; however, insofar as municipal government is concerned the zoning powers which they have been authorized by the General Assembly to exercise can be withdrawn by the General Assembly, although in such event these zoning powers are not capable of being placed elsewhere by the General Assembly, and can be subjected to such limitations and procedural requisites as the General Assembly may reasonably think proper. 1974 Op. Att'y Gen. No. U74-9.

"Local" constitutional amendments. — A "local" constitutional amend-

ment may repeal or change, or authorize the General Assembly by local Act to repeal or change, a planning or zoning ordinance adopted by local governmental authority. 1974 Op. Att'y Gen. No. U74-9 (decided under former § 2-1923).

General Assembly cannot require a municipality to engage in zoning activities if it does not want to; however, the General Assembly does have power to prescribe the procedure a municipality must follow if the municipality chooses to exercise its zoning powers. 1974 Op. Att'y Gen. No. U74-9.

Governmental body authorized to exercise zoning powers. — The only governmental bodies which may be authorized to exercise zoning powers are governing authorities of the municipalities and counties of this state. 1974 Op. Att'y Gen. No. U74-9.

Extent of governing authorities powers. — The governing authorities of each municipality and each county in the state may adopt by ordinance or resolution the general law zoning and planning statutes and form separate or joint city-county zoning and planning commissions without the necessity of the General Assembly enacting additional local legislation. 1957 Op. Att'y Gen. p. 342.

Procedure constituting area planning commissions. — If the county governing authorities and the governing authorities of the county seat of each of the counties involved adopted resolutions and ordinances to effectuate the same, the resulting area planning commission would be legally constituted. 1963-65 Op. Att'y Gen. p. 670 (decided under former Code 1933, § 2-1923).

Municipal building ordinance is ultra vires insofar as it affects the state because a municipality is a creature of the state and possesses only such power as the state may delegate to it; the presumption would be that the state in authorizing a municipality to enforce zoning and inspection ordinances did not intend to include state property in such inspections. 1958-59 Op. Att'y Gen. p. 219.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 25C Am. Jur. Pleading and Practice Forms, Zoning and Planning, § 2.

ALR. — Validity of regulations as to plumbers and plumbing, 36 ALR 1342; 22 ALR2d 816.

Rights in respect of street number or street name, 57 ALR 461; 98 ALR 1213.

To what uses may park property be devoted, 63 ALR 484; 144 ALR 486.

Validity of safety zone ordinance, 79 ALR 1328.

Zoning: creation by statute or ordinance of restricted residence districts from which business buildings or multiple residences are excluded, 117 ALR 1117.

Power of municipalities or other political subdivisions to engage in a joint project or enterprise, 123 ALR 997.

Validity, construction, and application of statutes, and regulations adopted thereunder, regarding county planning or zoning, or planning or zoning in territory outside municipal limits, 131 ALR 1055.

Construction or improvement of sewers as a local or district improvement within provisions authorizing or requiring special assessments or other specified means of defraying expense, 134 ALR 895.

Rezoning or amendment of zoning regulations as affecting persons who have purchased or improved property in reliance upon original regulations, 138 ALR 500.

Building restrictions, by covenant or condition in deed or by zoning regulation, as applied to religious groups, 148 ALR 367.

Validity of zoning law as affected by limitation of area zoned (partial or "piece-meal" zoning), 165 ALR 823.

Restrictions on location of undertaking establishment, 165 ALR 1112.

Establishment or extension of sewer as a public use or purpose for which power of eminent domain may be exercised, 169 ALR 576.

Permissible activities under zoning laws permitting greenhouses and nurseries, 40 ALR2d 1459.

Spot zoning, 51 ALR2d 263.

Attack on validity of zoning statute,

ordinance, or regulation on ground of improper delegation of authority to board or officer, 58 ALR2d 1083.

Zoning regulations as affecting churches, 74 ALR2d 377; 62 ALR3d 197.

Validity and construction of zoning regulations requiring garage or parking space, 74 ALR2d 418.

Exclusiveness of method prescribed by statute or ordinance for enforcement of special assessment for public improvement or service, 88 ALR2d 1250.

Validity of front setback provisions in zoning ordinance or regulation, 93 ALR2d 1223.

Construction of front setback provisions in zoning ordinance or regulation, 93 ALR2d 1244.

Zoning as a factor in determination of damages in eminent domain, 9 ALR3d 291.

Aesthetic objectives or considerations as affecting validity of zoning ordinance, 21 ALR3d 1222.

Meaning of the term "hotel" as used in zoning ordinances, 28 ALR3d 1240.

Validity and construction of "zoning with compensation" regulation, 41 ALR3d 636.

Validity and application of zoning regulations relating to mobile home or trailer parks, 42 ALR3d 598.

Exclusionary zoning, 48 ALR3d 1210.

Buffer provision in zoning ordinance as applicable to abutting land in adjoining municipality, 48 ALR3d 1303.

Retroactive effect of zoning regulation, in absence of saving clause, on pending application for building permit, 50 ALR3d 596.

Validity, construction, and application of zoning ordinance relating to operation of junkyard or scrap metal processing plant, 50 ALR3d 837.

Zoning: Right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by difficulties unrelated to governmental activity, 56 ALR3d 14.

Applicability of zoning regulations to waste disposal facilities of state or local governmental entities, 59 ALR3d 1244.

What constitutes "church," "religious

use,” or the like within zoning ordinance, 62 ALR3d 197.

Validity and construction of zoning ordinance requiring developer to devote specified part of development to low and moderate income housing, 62 ALR3d 880.

Adoption of zoning ordinance or amendment thereto through initiative process, 72 ALR3d 991.

Adoption of zoning ordinance or amendment thereto as subject of referendum, 72 ALR3d 1030.

Zoning regulations as applied to private and parochial schools below the college level, 74 ALR3d 14.

Zoning regulations as applied to public elementary and high schools, 74 ALR3d 136.

Validity of zoning for senior citizen communities, 83 ALR3d 1084.

Zoning regulations as applied to homes or housing for the elderly, 83 ALR3d 1103.

Applicability of zoning regulation to nongovernmental lessee of government owned property, 84 ALR3d 1187.

Construction and application of zoning regulations in connection with funeral homes, 92 ALR3d 328.

Validity of zoning ordinances prohibiting or regulating outside storage of house trailers, motor homes, campers, vans, and the like, in residential neighborhoods, 95 ALR3d 378.

Zoning regulations in relation to cemeteries, 96 ALR3d 921.

Validity of statutory classifications based on population — zoning, building, and land use statutes, 98 ALR3d 679.

Zoning regulations prohibiting or limiting fences, hedges, or walls, 1 ALR4th 373.

Enforcement of zoning regulation as affected by other violations, 4 ALR4th 462.

Validity of ordinances restricting location of “adult entertainment” or sex-oriented business, 10 ALR4th 524; 10 ALR5th 538.

Validity of ordinance restricting number of unrelated persons who can live together in residential zone, 12 ALR4th 238.

Validity of zoning or building regulations restricting mobile homes or trailers

to established mobile home or trailer parks, 17 ALR4th 106.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents, 18 ALR4th 568.

Local use zoning of wetlands or flood plain as taking without compensation, 19 ALR4th 756.

Applicability and application of zoning regulations to single residences employed for group living of mentally retarded persons, 32 ALR4th 1018.

Zoning: what constitutes “incidental” or “accessory” use of property zoned, and primarily used, for residential purposes, 54 ALR4th 1034.

Zoning: what constitutes “incidental” or “accessory” use of property zoned, and primarily used, for business or commercial purposes, 60 ALR4th 907.

Addition of another activity to existing nonconforming use as violation of zoning ordinance, 61 ALR4th 724.

Change in volume, intensity, or means of performing nonconforming use as violation of zoning ordinance, 61 ALR4th 806.

Change in type of activity of nonconforming use as violation of zoning ordinance, 61 ALR4th 902.

Alteration, extension, reconstruction, or repair of nonconforming structure or structure devoted to nonconforming use as violation of zoning ordinance, 63 ALR4th 275.

Zoning regulation of intoxicating liquor as pre-empted by state law, 65 ALR4th 555.

Zoning: residential off-street parking requirements, 71 ALR4th 529.

Validity and construction of zoning laws setting minimum requirements for floorspace or cubic footage inside residence, 87 ALR4th 294.

Activities in preparation for building as establishing valid nonconforming use or vested right to engage in construction for intended use, 38 ALR5th 737.

Applicability of zoning regulations to governmental projects or activities, 53 ALR5th 1.

Paragraph V. Eminent domain.

The governing authority of each county and of each municipality may exercise the power of eminent domain for any public purpose subject to any limitations on the exercise of such power as may be provided by general law. Notwithstanding the provisions of any local amendment to the Constitution continued in effect pursuant to Article XI, Section I, Paragraph IV or any existing general law, each exercise of eminent domain by a nonelected housing or development authority shall be first approved by the elected governing authority of the county or municipality within which the property is located. (Ga. Const. 1983, Art. 9, § 2, Para. 5; Ga. L. 2006, p. 1111, § 2/HR 1306.)

1976 Constitution. — Art. IX, Sec. V, Para. IV.

Cross references. — Due process requirements, Ga. Const. 1983, Art. I, Sec. I, Para. I. Requirement of just compensation for deprivation of property, Ga. Const. 1983, Art. I, Sec. III, Para. I, and § 22-1-5. Exercise of power of eminent domain for airports, § 6-3-22. Exercise of power for school purposes, § 20-2-521. Exercise of power for watershed projects, § 22-3-100. Exercise of power for road systems, § 32-4-42.

Editor's notes. — The constitutional amendment (Ga. L. 2006, p. 1111, § 2) which substituted the present provisions for the prior provisions which read: "The governing authority of each county and of each municipality may exercise the power of eminent domain for any public purpose." was approved by a majority of the qualified voters voting at the general election held on November 7, 2006.

Law reviews. — For article, "Condemning Local Government Condemnation," see 39 Mercer L. Rev. 11 (1987).

JUDICIAL DECISIONS

Extraterritorial exercise of right of eminent domain. — Where the condemning authority seeks to exercise the power of eminent domain within the territorial limits of another governing body, a restriction has been held to apply. The extraterritorial exercise of the right of eminent domain as an "implied" power is authorized only if it is "reasonably necessary" to a condemnor's successful completion of an undertaking initiated pursuant to its express grant of authority over a subject matter within its jurisdiction. *Dougherty County v. Burt*, 168 Ga. App. 166, 308 S.E.2d 395 (1983).

County may condemn private property for public purpose of creating recreational park. *Williams Bros. Lumber Co. v. Gwinnett County*, 258 Ga. 243, 368 S.E.2d 310 (1988).

City has power of eminent domain for drainage and flood control and does not have to institute condemnation proceedings or compensate property own-

ers as a prerequisite to entering land to conduct a preliminary survey. *Walker v. City of Warner Robins*, 262 Ga. 551, 422 S.E.2d 555 (1992).

Pre-condemnation survey and appraisal. — In a declaratory judgment action by a city seeking access to property in order to conduct a pre-condemnation survey and appraisal, the necessity for the contemplated taking was not a proper subject of inquiry and the trial court did not err in refusing to consider the issue. *Aponte v. City of Columbus*, 246 Ga. App. 646, 540 S.E.2d 617 (2000).

County was authorized to exercise its right of eminent domain in connection with the expansion of a detention center because the county had jurisdiction over the maintenance of jails in the county under O.C.G.A. § 36-9-5(a), the operation of a jail constituted a public purpose pursuant to Ga. Const. 1983, Art. IX, Sec. II, Para. V, and the property owner did not identify any general law

limiting the right of the county to exercise its power of eminent domain; the condemnation of the owner's property was "reasonably necessary" to maintain the jail system within the county because concerns regarding security, costs, and duplication of effort were cited in support of expanding the facility, and strong evidence was presented that the expansion posed a viable and logical solution. *Brunswick Landing, LLC v. Glynn County*, 301 Ga. App. 288, 687 S.E.2d 271 (2009), cert. denied, No. S10C0558, 2010 Ga. LEXIS 246 (Ga. 2010).

Cited in *Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99 (N.D. Ga. 1975); *Earth Mgt., Inc. v. Heard County*, 248 Ga. 442, 283 S.E.2d 455 (1981).

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County or municipal governing authority may establish special service districts under this paragraph; Ga. Const. 1976, Art. IX, Sec. V, Para. III (see Ga. Const. 1983, Art. IX, Sec. II, Para. VI)

creates an independent districting mechanism and does not limit constitutional authority of cities and counties. 1980 Op. Att'y Gen. No. U80-45. (see Ga. Const. 1983, Art. IX, Sec. II, Para. V).

RESEARCH REFERENCES

Am. Jur. 2d. — 26 Am. Jur. 2d, Eminent Domain, §§ 1 et seq., 21 et seq.

ALR. — Right to condemn property in excess of needs for a particular public purpose, 6 ALR3d 297.

Power of eminent domain as between state and subdivision or agency thereof, or as between different subdivisions or agencies themselves, 35 ALR3d 1293.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 ALR4th 631.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 ALR4th 674.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property, 62 ALR4th 1183.

Paragraph VI. Special districts.

As hereinafter provided in this Paragraph, special districts may be created for the provision of local government services within such districts; and fees, assessments, and taxes may be levied and collected within such districts to pay, wholly or partially, the cost of providing such services therein and to construct and maintain facilities therefor. Such special districts may be created and fees, assessments, or taxes may be levied and collected therein by any one or more of the following methods:

(a) By general law which directly creates the districts.

(b) By general law which requires the creation of districts under conditions specified by such general law.

(c) By municipal or county ordinance or resolution, except that no such ordinance or resolution may supersede a law enacted by the General Assembly pursuant to subparagraphs (a) or (b) of this Paragraph.

1976 Constitution. — Art. IX, Sec. IV, Para. II; Art. IX, Sec. V, Para. III.

Cross references. — Creating special districts, § 48-8-81.

JUDICIAL DECISIONS

Authorization of this paragraph contemplated creation of special districts for providing services, not special districts for taxing same services at different rates. *Martin v. Ellis*, 242 Ga. 340, 249 S.E.2d 23 (1978) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VI).

Special districts may be created for the provision of local government services within special districts; and fees, assessments, and taxes may be levied and collected within such district to pay, wholly or partially, the cost of providing such services therein and to construct and maintain facilities therefor. The special district clause of the constitution limits the expenditure of revenue derived from the special district tax to the provision of local governmental services within the special district. *Wells v. City of Baldwin*, 275 Ga. 228, 565 S.E.2d 439 (2002).

This paragraph contemplates a link between service provided and method of financing service; therefore, charges and fees are to be made for such services in the abstract. Similarly, the exercise of the power to tax and assess is specifically tied to the purpose of providing such services. Accordingly, it is proper to levy a tax within a part of a city or county to pay for special service provided to that part and not to the remainder of the city or county. However, it is not proper simply to decide that property owners in one part of a city or county will pay more than their fair share for services provided equally throughout the taxing jurisdiction. *Martin v. Ellis*, 242 Ga. 340, 249 S.E.2d 23 (1978) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VI).

Statute creating special districts for the purpose of implementing a hotel/motel tax did not violate Ga. Const. 1983, Art. IX, Sec. II, Para. VI.

Youngblood v. State, 259 Ga. 864, 388 S.E.2d 671 (1990).

Roll back of millage rate for county residents unauthorized. — City ordinance violated the Joint County and Municipal Sales and Use Tax Act, O.C.G.A. § 48-8-66 et seq., by authorizing the city to use its pro rata share of revenue generated by another county's local option sales tax (LOST) to roll back the millage rate for county residents. *Wells v. City of Baldwin*, 275 Ga. 228, 565 S.E.2d 439 (2002).

Homestead Option Sales Tax. — The Homestead Option Sales Tax (HOST), O.C.G.A. § 48-8-100 et seq., implements a district tax under the "special district" provision of Ga. Const. 1983, Art. IX, Sec. II, Para. VI; intergovernmental contracts which are authorized under Ga. Const. 1983, Art. IX, Sec. III, Para. I cannot be limited by HOST. *City of Decatur v. DeKalb County*, 277 Ga. 292, 589 S.E.2d 561 (2003).

Court of Appeals erred in finding that the Homestead Option Sales Tax Act (HOST), O.C.G.A. § 48-8-100 et seq., did not allow a county to disburse funds to various cities in order to facilitate the capital outlay requirement under O.C.G.A. § 48-8-104(c)(2)(A), as HOST was implemented under the "special district" provision of Ga. Const. 1983, Art. IX, Sec. II, Para. VI, and as it was not a "county tax," it was subject to such an arrangement; however, the intergovernmental agreement between the county and cities had to be authorized under Ga. Const. 1983, Art. IX, Sec. III, Para. I in order to be valid. *City of Decatur v. DeKalb County*, 277 Ga. 292, 589 S.E.2d 561 (2003).

Ga. L. 2007, p. 598, § 1 et seq., which amended the Homestead Option Sales

and Use Tax (HOST) Act, O.C.G.A. § 48-8-100 et seq., did not change the purpose of the HOST approved by county voters when it provided for the distribution of HOST proceeds to the governing authority of each qualified municipality located in the special district; the tax for which it sought voter approval was within the special district within the county, and that was because the HOST was not a “county tax” but a district tax levied to provide for services within that special district pursuant to the authority granted by Ga. Const. 1983, Art. IX, Sec. II, Para. VI. *DeKalb County v. Perdue*, 286 Ga. 793, 692 S.E.2d 331 (2010).

Trial court did not err by holding that Ga. L. 2007, p. 598, § 1 et seq., which amended the Homestead Option Sales and Use Tax (HOST) Act, O.C.G.A. § 48-8-100 et seq., did not violate Ga. Const. 1983, Art. IX, Sec. II, Para. VI, because although a tax levied and collected within a special district pursuant to Para. VI could only be used for the cost of providing services within that district, Para. VI did not require that the entity levying the special district tax be the same one providing the services within the district, such that funds emanating from the HOST could be used for services in that part of the county that was within the corporate borders of the qualified municipality only when the county and the city jointly so agreed; the Paragraph contains no language identifying any particular entity as the exclusive provider of local government services. *DeKalb County v. Perdue*, 286 Ga. 793, 692 S.E.2d 331 (2010).

2010 amendment to the Local Option Sales Tax Act, O.C.G.A.

§ 48-8-89(d)(4), violates separation of powers doctrine. — To the extent the 2010 amendment to the Local Option Sales Tax Act (LOST), O.C.G.A. § 48-8-89(d)(4), permits judicial resolution of the issue of whether LOST should be renewed and the governing bodies of the special district should be required to levy and collect the tax, the amendment violates the separation of powers doctrine of Ga. Const. 1983, Art. I, Sec. II, Para. III. *Turner County v. City of Ashburn*, 293 Ga. 739, 749 S.E.2d 685 (2013).

Special district for health services. — County Board of Commissioners was authorized to create the special taxation district for the purpose of providing health services, as Ga. Const. 1983, Art. IX, Sec. II, Para. VI allowed the special districts, and Ga. Const. 1983, Art. IX, Sec. II, Para. III allowed the county to provide public health services. *Greene County Bd. of Comm’rs v. Higdon*, 277 Ga. App. 350, 626 S.E.2d 541 (2006).

Concurrent authority of general assembly and counties. — O.C.G.A. § 36-31-12(b) did not violate the Georgia Constitution by encroaching on a county’s exclusive authority, derived from a local constitutional amendment (Ga.1972, p. 1482, § 1), over the collection and expenditure of revenues collected within its special taxing and spending district; the amendment granted concurrent authority to the county and the general assembly over these matters. *Fulton County v. Perdue*, 280 Ga. 807, 631 S.E.2d 362 (2006).

Cited in *Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99 (N.D. Ga. 1975); *Jones v. Douglas County*, 262 Ga. 317, 418 S.E.2d 19 (1992).

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This paragraph creates an independent districting mechanism and does not limit the constitutional authority of cities and counties. 1980 Op. Att’y Gen. No. U80-45. (see Ga. Const. 1983, Art. IX, Sec. II, Para. VI).

County may establish a special tax district for fire protection without assent of a majority of qualified voters of such district. 1975 Op. Att’y Gen. No. U75-55.

County tax district cannot be established for making improvements in the district. 1970 Op. Att’y Gen. No. U70-5.

Special taxation district for paving streets may be created. 1978 Op. Att’y Gen. No. U78-9.

Principal on revenue anticipation bonds may not be paid out of a county’s general revenues or with revenue sharing funds. 1975 Op. Att’y Gen. No.

U75-98.

County water system can, if proper ordinances are in effect, be operated using general revenues of the county and, at least in part, the operating expenses may be paid with federal revenue sharing funds. 1975 Op. Att'y Gen. No. U75-98.

Creation of county fire districts. —

County fire districts can be created only by action of the General Assembly or by action of the county governing authority and may not be established by petition and referendum pursuant to the home rule provisions of the Constitution. 1985 Op. Att'y Gen. No. 85-54.

Paragraph VII. Community redevelopment.

(a) Each condemnation of privately held property for redevelopment purposes must be approved by vote of the elected governing authority of the city within which the property is located, if any, or otherwise by the governing authority of the county within which the property is located. The power of eminent domain shall not be used for redevelopment purposes by any entity, except for public use, as defined by general law.

(a.1) The General Assembly may authorize any county, municipality, or housing authority to undertake and carry out community redevelopment.

(b) The General Assembly is also authorized to grant to counties or municipalities for redevelopment purposes and in connection with redevelopment programs, as such purposes and programs are defined by general law, the power to issue tax allocation bonds, as defined by such law, and the power to incur other obligations, without either such bonds or obligations constituting debt within the meaning of Section V of this article, and the power to enter into contracts for any period not exceeding 30 years with private persons, firms, corporations, and business entities. Such general law may authorize the use of county, municipal, and school tax funds, or any combination thereof, to fund such redevelopment purposes and programs, including the payment of debt service on tax allocation bonds, notwithstanding Section VI of Article VIII or any other provision of this Constitution and regardless of whether any county, municipality, or local board of education approved the use of such tax funds for such purposes and programs before January 1, 2009. No county, municipal, or school tax funds may be used for such purposes and programs without the approval by resolution of the applicable governing body of the county, municipality, or local board of education. No school tax funds may be used for such purposes and programs except as authorized by general law after January 1, 2009; provided, however, that any school tax funds pledged for the repayment of tax allocation bonds which have been judicially validated pursuant to general law shall continue to be used for such purposes and programs. Notwithstanding the grant of these powers pursuant to general law, no county or municipality may exercise these powers unless so authorized

by local law and unless such powers are exercised in conformity with those terms and conditions for such exercise as established by that local law. The provisions of any such local law shall conform to those requirements established by general law regarding such powers. No such local law, or any amendment thereto, shall become effective unless approved in a referendum by a majority of the qualified voters voting thereon in the county or municipality directly affected by that local law.

(c) The General Assembly is authorized to provide by general law for the creation of enterprise zones by counties or municipalities, or both. Such law may provide for exemptions, credits, or reductions of any tax or taxes levied within such zones by the state, a county, a municipality, or any combination thereof. Such exemptions shall be available only to such persons, firms, or corporations which create job opportunities within the enterprise zone for unemployed, low, and moderate income persons in accordance with the standards set forth in such general law. Such general law shall further define enterprise zones so as to limit such tax exemptions, credits, or reductions to persons and geographic areas which are determined to be underdeveloped as evidenced by the unemployment rate and the average personal income in the area when compared to the remainder of the state. The General Assembly may by general law further define areas qualified for creation of enterprise zones and may provide for all matters relative to the creation, approval, and termination of such zones.

(d) The existence in a community of real property which is maintained in a blighted condition increases the burdens of state and local government by increasing the need for governmental services, including but not limited to social services, public safety services, and code enforcement services. Rehabilitation of blighted property decreases the need for such governmental services. In recognition of such service needs and in order to encourage community redevelopment, the counties and municipalities of this state are authorized to establish community redevelopment tax incentive programs as authorized in this subparagraph. A community redevelopment tax incentive program shall be established by ordinance of the county or municipality. Any such program and ordinance shall include the following elements:

(1) The ordinance shall specify ascertainable standards which shall be applied in determining whether property is maintained in a blighted condition. The ordinance shall provide that property shall not be subject to official identification as maintained in a blighted condition and shall not be subject to increased taxation if the property is a dwelling house which is being used as the primary residence of one or more persons; and

(2) The ordinance shall establish a procedure for the official identification of real property in the county or municipality which is

maintained in a blighted condition. Such procedure shall include notice to the property owner and the opportunity for a hearing with respect to such determination.

(3) The ordinance shall specify an increased rate of ad valorem taxation to be applied to property which has been officially identified as maintained in a blighted condition. Such increase in the rate of taxation shall be accomplished through application of a factor to the millage rate applied to the property, so that such property shall be taxed at a higher millage rate than the millage rate generally applied in the county or municipality, or otherwise as may be provided by general law.

(4) The ordinance may, but shall not be required to, segregate revenues arising from any increased rate of ad valorem taxation and provide for use of such revenues only for community redevelopment purposes;

(5) The ordinance shall specify ascertainable standards for rehabilitation through remedial actions or redevelopment with which the owner of property may comply in order to have the property removed from identification as maintained in a blighted condition. As used herein, the term "blighted condition" shall include, at a minimum, property that constitutes endangerment to public health or safety;

(6) The ordinance shall specify a decreased rate of ad valorem taxation to be applied for a specified period of time after the county or municipality has accepted a plan submitted by the owner for remedial action or redevelopment of the blighted property and the owner is in compliance with the terms of the plan. Such decrease in the rate of taxation shall be accomplished through application of a factor to the millage rate applied to the property, so that such property shall be taxed at a lower millage rate than the millage rate generally applied in the county or municipality, or otherwise as may be provided by general law.

(7) The ordinance may contain such other matters as are consistent with the intent and provisions of this subparagraph and general law.

Variations in rate of taxation as authorized under this subparagraph shall be a permissible variation in the uniformity of taxation otherwise required. The increase or decrease in rate of taxation accomplished through a change in the otherwise applicable millage rate shall affect only the general millage rate for county or municipal maintenance and operations. A county and one or more municipalities in the county may, but shall not be required to, establish a joint community redevelopment tax incentive program through the adoption of concurrent ordinances. No Act of the General Assembly shall be required for counties and

municipalities to establish community redevelopment tax incentive programs. However, the General Assembly may by general law regulate, restrict, or limit the powers granted to counties and municipalities under this subparagraph. (Ga. Const. 1983, Art. 9, Sec. 2, Para. 7; Ga. L. 1984, p. 1709, § 1/HR 444; Ga. L. 1996, p. 1666, § 1/SR 64; Ga. L. 2002, p. 1497, § 1/HR 391; Ga. L. 2006, p. 1111, § 1/HR 1306; Ga. L. 2008, p. 1211, § 1/SR 996.)

1976 Constitution. — Art. IX, Sec. IV, Paras. II, IV.

Cross references. — Urban redevelopment powers of municipalities, § 36-61-8.

Editor's notes. — The constitutional amendment (Ga. L. 1984, p. 1709, § 1) which substituted “voters voting thereon in” for “voter of” in the last sentence of subparagraph (b) was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

The constitutional amendment (Ga. L. 1996, p. 1666, § 1), which added subparagraph (c), was approved by a majority of the qualified voters voting at the general election held on November 5, 1996.

The constitutional amendment (Ga. L. 2002, p. 1497, § 1), which revised this Paragraph to provide that counties and municipalities may establish community redevelopment tax incentive programs under which increased taxation shall apply to properties maintained in a blighted condition and decreased taxation shall apply for a time to formerly blighted property which has been rehabilitated, was approved by a majority of the voters voting in the general election held November 5, 2002.

The constitutional amendment (Ga. L. 2006, p. 1111, § 1) which substituted the present provisions of subparagraph (a) for the former provisions which read: “The General Assembly may authorize any county, municipality, or housing authority to undertake and carry out community redevelopment, which may include the sale or other disposition of property acquired by eminent domain to private enterprise for private uses.” and which substituted “The” for “In addition to the authority granted by subparagraph (a) of this Paragraph, the” at the beginning of the first sentence in subparagraph (b), was approved by a majority of the qualified voters voting at the general election held on November 7, 2006.

The constitutional amendment (Ga. L. 2008, p. 1211, § 1), which added subparagraph (a.1); and, in subparagraph (b), inserted “also” near the beginning of the first sentence, and added the present second, third, and fourth sentences, was ratified at the general election held on November 4, 2008.

Law reviews. — For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981).

JUDICIAL DECISIONS

Authorization and constitutional-ity of Ch. 61, T. 36. — Chapter 61, T. 36, is expressly authorized by the Constitution as amended, and the acts proposed to be taken thereunder, and in conformity therewith, are not unconstitutional for any reason assigned. *Bailey v. Housing Auth.*, 214 Ga. 790, 107 S.E.2d 812 (1959).

Taking of private property for public purpose. — By this paragraph and Ch. 61, T. 36, the people of this state have declared that the taking of private property may be permitted for a “public pur-

pose,” and that powers of taxation and eminent domain may be exercised and public funds expended in furtherance thereof, and by that the courts are bound. *Bailey v. Housing Auth.*, 214 Ga. 790, 107 S.E.2d 812 (1959) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VII).

Forest land not construable as slum or housing project. — The terms “slum” and “housing project” cannot be construed to include property of the condemnee sought to be taken, since such property is forest land, and to construe the terms

“slum area” and “housing project,” to include this property would be contrary to this paragraph. *Howard v. Housing Auth.*, 220 Ga. 640, 140 S.E.2d 880 (1965) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VII).

Terms “blighted areas” and “redevelopment project” as defined in O.C.G.A. § 8-4-3 cannot be construed to include forest land, and to construe such terms as applying to the property is contrary to this paragraph. *Howard v. Housing Auth.*, 220 Ga. 640, 140 S.E.2d 880 (1965) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VII).

Public use not necessary before sale. — Private property may be acquired for the purpose of selling it to private persons without being put to a public use prior to the sale. *Nations v. Downtown Dev. Auth.*, 255 Ga. 324, 338 S.E.2d 240 (1985).

Use of local school taxes for redevelopment. — School system, development authority, and others were properly granted summary judgment in a suit challenging the allocation of school taxes because 2008 amendments to Ga. Const. 1983, Art. IX, Sec. II, Para. VII(b) and O.C.G.A. § 36-44-9(g), governing tax allocation districts, changed the law and retroactively allowed use of local school taxes for general redevelopment purposes. *Sherman v. Atlanta Indep. Sch. Sys.*, 293 Ga. 268, 744 S.E.2d 26 (2013).

Cited in *Miller v. Head*, 186 Ga. 694, 198 S.E. 680 (1938); *Allen v. City Council*, 215 Ga. 778, 113 S.E.2d 621 (1960); *Freedman v. Housing Auth.*, 108 Ga. App. 418, 136 S.E.2d 544 (1963); *Martin v. City of Atlanta*, 155 Ga. App. 628, 271 S.E.2d 882 (1980).

OPINIONS OF THE ATTORNEY GENERAL

Federal funds for housing. — A county may, in certain circumstances, apply to the federal government for funds to

be used for urban redevelopment and for public housing within the county. 1975 Op. Att’y Gen. No. U75-35.

RESEARCH REFERENCES

ALR. — Constitutionality, construction, and application of statutes or governmental projects for improvement of housing conditions (slum clearance), 130 ALR 1069; 172 ALR 966.

Liability, for torts of public housing authority, 61 ALR2d 1246.

Paragraph VIII. Limitation on the taxing power and contributions of counties, municipalities, and political subdivisions.

The General Assembly shall not authorize any county, municipality, or other political subdivision of this state, through taxation, contribution, or otherwise, to appropriate money for or to lend its credit to any person or to any nonpublic corporation or association except for purely charitable purposes.

1976 Constitution. — Art. IX, Sec. IV, Para. III.

Cross references. — Approved investment securities, § 36-80-3.

Law reviews. — For article, “Cities

and Towns in Georgia: A Distinction With a Difference?,” see 14 Mercer L. Rev. 385 (1963). For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mer-

cer L. Rev. 155 (1979). For article, "Workers' Compensation in Georgia Municipal Law," see 15 Ga. L. Rev. 57 (1980). For

survey article on local government law, see 34 Mercer L. Rev. 225 (1982).

JUDICIAL DECISIONS

Worker's compensation law (see now O.C.G.A. Ch. 9, T. 34), insofar as it applies to municipal corporations, is **not unconstitutional** as authorizing municipal corporations to appropriate money for an association for noncharitable purposes in violation of this paragraph. *City of Atlanta v. Pickens*, 176 Ga. 833, 169 S.E. 99 (1933) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Insofar as it imposes liability without fault upon employers, and includes municipal corporations within the classification of employers, the worker's compensation law (see now O.C.G.A. Ch. 9, T. 34) is not in conflict with this paragraph. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Worker's compensation law (see now O.C.G.A. Ch. 9, Title 34), is **not unconstitutional** because it requires an appropriation of money for an injured employee without consideration, and is not for any charitable purpose. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932).

O.C.G.A. § 34-9-121. — Former Code 1933, § 114-602 (see now O.C.G.A. § 34-9-121) was not in violation of this paragraph because it required a municipality to appropriate and donate money to a corporation to insure the municipality against loss caused by injury, and also required that a municipal corporation become a stockholder in a mutual insurance association, and to lend its credit to the municipal corporation or insurance association. *City of Macon v. Benson*, 175 Ga. 502, 166 S.E. 26 (1932) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Ga. L. 1975, p. 107 (see now O.C.G.A. Art. 3, Ch. 3, T. 46) is **not a violation of this paragraph** since the authority is not a county, municipal corporation, or political subdivision of this state. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Municipality contracting to lease land to corporation provided lessee supply medical and surgical treatment to city's indigents not unconstitutional. — A contract between a municipality and another corporation for a lease, for a term of 35 years, of land owned by the municipality, in consideration of care of the poor of the city by the lessee to the extent of supplying specified medical and surgical treatment in a clinic or hospital existing on such land, is not unlawful as violating any of the provisions of the Constitution. *Aven v. Steiner Cancer Hosp.*, 189 Ga. 126, 5 S.E.2d 356 (1939).

Road contract valid. — Contract between State Highway Board (now State Transportation Board) and county commissioners for grading of portion of a state-aid road lying within county is not unconstitutional upon the ground that it involves a loan of the credit of the county to the State Highway Board in violation of this paragraph. *Spain v. Hall County*, 175 Ga. 600, 165 S.E. 612 (1932) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Allowing use of certain properties as partial consideration for promise to provide fire protection is not deemed credit. *Smith v. Board of Comm'rs of Rds. & Revenues*, 244 Ga. 133, 259 S.E.2d 74 (1979).

Contract between county and airport authority valid. — Trial court did not err by rejecting the claim that the bond issuance violated the Lending Clause of the Georgia Constitution because the bond resolution and the intergovernmental agreement between the county and the airport authority required the county to extend the county's credit for the county's own purposes, namely the benefit of the taxiway expansion, and the agreement between the airport authority and a commercial aviation company did not alter that as, under that agreement, the commercial aviation company was, at best, extending the company's credit to the county. *Avery v. State of Ga.*, 295 Ga. 630, 761 S.E.2d 56 (2014).

Intergovernmental Agreement did not violate the lending clause because the county was not paying, with appropriated funds or credit, for anything to be owned by the baseball parties, the stadium and stadium site would be owned by the Cobb-Marietta Coliseum and Exhibit Hall Authority, with the baseball team paying license fees to the Authority, for at least 30 years, at which time the bonds would be fully redeemed. *Savage v. State of Ga.*, 297 Ga. 627, 774 S.E.2d 624 (2015).

Article 2, Ch. 3, T. 8, payment provision not unconstitutional. — The provision of Ga. L. 1937, p. 697 (see now O.C.G.A. Art. 2, Ch. 3, T. 8), which provides that the city shall, out of any money in its treasury not otherwise appropriated, appropriate to the authority an amount of money necessary to cover the administrative expense and overhead during the first year, and Act further declaring that said money so appropriated shall be paid as a donation, is not violative of this paragraph which, among other things, provides that the General Assembly shall not authorize any municipality to appropriate money to any corporation except for purely charitable purposes. *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Instance of city ordinance unconstitutional due to unconscionable result. — If a city ordinance can be taken and construed as meaning that the owner of any improved or vacant premises of whatever character and size, within the limits of the city, becomes instantly liable for injuries to third persons on account of and from the moment any trash, banana peeling, ice, snow, or what not falls upon the abutting sidewalk, without fault or knowledge on the part of such owner, it would manifestly be a rule so harsh and unconscionable as would render such municipal ordinance unconstitutional and void as violative of Ga. Const. 1976, Art. I, Sec. I, Para. I (see Ga. Const. 1983, Art. I, Sec. I, Para. I). *Ellis v. Southern Grocery Stores, Inc.*, 46 Ga. App. 254, 167 S.E. 324 (1933).

Use of county funds to procure passage, defeat, or influence vote approval of constitutional amendment

not authorized. — The authority of county governments to expend public funds is enumerated in Ga. Const. 1976, Art. IX, Sec. V, Para. II (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II). Expenditure of county funds to procure passage or defeat of constitutional amendments is not specifically permitted. Further, the Supreme Court has decided that an advertising campaign to influence vote approval of a constitutional amendment is not authorized as a facet of administration of county government. *McKinney v. Brown*, 242 Ga. 456, 249 S.E.2d 247 (1978).

Purpose of this paragraph is to prevent extravagant outlays, making resort to taxing power necessary. *Mayor of Athens v. Camak*, 75 Ga. 429 (1885) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Compensating citizens who have paid money over to a corporation falls within purview of this paragraph. *Town of Adel v. Woodall*, 122 Ga. 535, 50 S.E. 481 (1905) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Contract to secure a right of way for a railroad falls within the purview of this paragraph. *Covington & M.R.R. v. Mayor of Athens*, 85 Ga. 367, 11 S.E. 663 (1890) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

This paragraph does not forbid assignment by a contractor of a future city debt. *Mayor of Albany v. Cameron & Barkley Co.*, 121 Ga. 794, 49 S.E. 798 (1905) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Extension of territorial limits of a city is not prohibited by this paragraph. *White v. City of Atlanta*, 134 Ga. 532, 68 S.E. 103 (1910) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Costs of street improvements may be assessed in installments. *City of Valdosta v. Harris*, 156 Ga. 490, 119 S.E. 625 (1923).

Unless there is something in the charter of a municipal corporation which forbids building school houses, the city may do so. *Mayor of Cartersville v. Baker*, 73 Ga. 686 (1884).

Power of city to purchase right of way. — A city has the right, under this provision, to expand its funds for purpose of purchasing rights of way within city

limits for the State Highway Department (now Department of Transportation), if the purpose of the project is for improvement of the streets of the city, and thereby to procure work done on its street without any expense to it except in providing for the rights of way; it is immaterial whether the title to the rights of way is taken in the name of the city or in the State Highway Department. *Jackson v. City of Rome*, 182 Ga. 848, 187 S.E. 386 (1936) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Local tax for water and sewage valid. — A local amendment to Art. VII, Sec. IV, Para. II of the 1945 Georgia Constitution, authorizing a county to levy a tax for water and sewerage purposes, was valid despite any conflict with the provision prohibiting gratuities on the part of counties. *Copeland v. State*, 268 Ga. 375, 490 S.E.2d 68 (1997).

Hospital authority is not a “county, municipal corporation or political division of this state.” *Bradfield v. Hospital Auth.*, 226 Ga. 575, 176 S.E.2d 92 (1970).

Garbage collection contract valid. — There was no merit in a resident’s arguments that the provision in a contract in which a county agreed to reimburse a private enterprise for a percentage of uncollected fees for garbage collection services prior to the county’s recovery of those fees from residents by means provided by O.C.G.A. § 12-8-39.3 violated Ga. Const. 1983, Art. IX, Sec. II, Para. VIII, prohibiting legislation to authorize any county to lend its credit to any person or nonpublic corporation. *Strykr v. Long County Bd. of Comm’rs*, 277 Ga. 624, 593 S.E.2d 348 (2004).

Consideration paid to private contractors for solid waste collection services proper. — Because a county was authorized to provide solid waste collection services, and to enter into contracts with private parties to do so, paying consideration to the contractors for that service before the associated fees were collected did not violate Ga. Const. 1983, Art. IX, Sec. II, Para. VIII. *Mesteller v. Gwinnett County*, 292 Ga. 675, 740 S.E.2d 605 (2013).

Allocation of a portion of the fines and forfeitures collected in this state

to the Peace Officers’ Annuity and Benefit Fund is not an appropriation in violation of this paragraph. *Cole v. Foster*, 207 Ga. 416, 61 S.E.2d 814 (1950) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Use of taxing power to pay rents under intergovernmental contract valid. — City’s pledge of its taxing power to make up any deficit in the rents it is obligated to pay under a valid intergovernmental contract is permissible under the intergovernmental contracts clause and does not violate Ga. Const. 1983, Art. IX, Sec. II, Para. VIII. *Nations v. Downtown Dev. Auth.*, 256 Ga. 158, 345 S.E.2d 581 (1986).

Bond guarantee by city-lessor violates paragraph. — Lease provision whereby a city-lessor agreed to guarantee the bond payments of a development authority-lessee did not come within the intergovernmental contracts clause in Ga. Const. 1983, Art. IX, Sec. III, Para. I and, therefore, was barred by Ga. Const. 1983, Art. IX, Sec. II, Para. VIII. *Nations v. Downtown Dev. Auth.*, 255 Ga. 324, 338 S.E.2d 240 (1985).

Local laws not violative of this paragraph are Section 7 of Ga. L. 1920, pp. 741, 744, which provides for issuing executions to enforce assessments for paving sidewalks against abutting lots or owners thereof in the city of Bainbridge, the levy of such executions, and sales thereunder, as in cases of sales for city taxes, does not violate this paragraph. *Bower v. City of Bainbridge*, 168 Ga. 616, 148 S.E. 517 (1929) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Ga. L. 1901, p. 620 does not violate this paragraph. — Since under the provisions of Ga. L. 1901, p. 620, creating a dispensary neither the city of Rome nor the county of Floyd can incur any debt or liability, hence the law does not violate this paragraph or Ga. Const. 1976, Art. I, Sec. II, Para. VII (see Ga. Const. 1983, Art. III, Sec. VI, Para. IV). *Chamlee v. Davis*, 115 Ga. 266, 41 S.E. 691 (1902).

Ga. L. 1913, p. 145, to create a municipal court for the city of Atlanta, did not violate this paragraph. *McWilliams v. Smith*, 142 Ga. 209, 82 S.E. 569 (1914) (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Cited in *Burns v. Decatur County*, 178 Ga. 275, 173 S.E. 127 (1934); *McGinty v. Keith*, 182 Ga. 869, 187 S.E. 79 (1936); *West v. Trotzier*, 185 Ga. 794, 196 S.E. 902 (1938); *Miller v. Head*, 186 Ga. 694, 198 S.E. 680 (1938); *McCook v. Long*, 193 Ga. 299, 18 S.E.2d 488 (1942); *DeJarnette v.*

Hospital Auth., 195 Ga. 189, 23 S.E.2d 716 (1942); *Cole v. Foster*, 207 Ga. 416, 61 S.E.2d 814 (1950); *McCallum v. Moore*, 215 Ga. 705, 113 S.E.2d 202 (1960); *Henson v. Georgia Indus. Realty Co.*, 220 Ga. 857, 142 S.E.2d 219 (1965).

OPINIONS OF THE ATTORNEY GENERAL

Paragraph implicitly empowers General Assembly to authorize county to appropriate money for institution for purely charitable purposes. 1980 Op. Att'y Gen. No. U80-43 (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Paragraph cannot be construed as self-executing authorization to counties and municipal corporations to make contributions, or to form corporations for purely charitable purposes. Rather, this section permits the General Assembly to authorize counties and municipal corporations to take such action. 1980 Op. Att'y Gen. No. U80-25 (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

General Assembly may not authorize a municipal corporation to provide a group insurance plan to its employees free of charge, as such would be an illegal use of public revenue. 1954-56 Op. Att'y Gen. p. 496.

County hospital authority, established and operated pursuant to Ga. L. 1964, p. 499 (see now O.C.G.A. Art. 4, Ch. 7, T. 31), would come within the definition of an operation for "purely charitable purposes." 1968 Op. Att'y Gen. No. 68-280.

Public fall-out shelters on private property. — Municipal bond money cannot be legally spent on improvement or conversion of existing building located on private property for construction of public fall-out shelters. 1962 Op. Att'y Gen. p. 332.

City has no authority to appropri-

ate public moneys to its Chamber of Commerce. 1967 Op. Att'y Gen. No. 67-32.

County may not, absent legislative authority, make a contribution to an entity organized for purely charitable purposes. 1977 Op. Att'y Gen. No. U77-24.

Donation prohibited, but joint venture permitted. — While a county may not legally donate funds to assist a city in constructing a swimming pool, the county and city may jointly provide, establish, maintain, and conduct such a system. 1952-53 Op. Att'y Gen. p. 289.

Ga. L. 1960, p. 289, § 1 (see now O.C.G.A. § 33-14-67), membership in mutuals, cannot be construed to alter or change restrictions imposed by this paragraph. 1960-61 Op. Att'y Gen. p. 383. (see Ga. Const. 1983, Art. IX, Sec. II, Para. VIII).

Actions rendering private ambulance service noncharitable. — A private ambulance service which collects fees from its patients in addition to a monthly subsidy it receives and makes the resulting profits available for distribution as income or personal gain to its owners is not "a charitable purpose" under the requirements of the Georgia Constitution. 1967 Op. Att'y Gen. No. 67-434.

Municipal contributions to day care center. — Unless a provision in the city charter allows such an expenditure, a city may not contribute to a day care center. 1984 Op. Att'y Gen. No. U84-14.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 517 et seq.

ALR. — Constitutionality of statutory

provisions as to political corporations or divisions which shall bear cost of establishing or maintaining highways, 2 ALR 746; 123 ALR 1462.

Power of municipality to extend aid to improvement district organized within its own limits, 50 ALR 1208.

Income as "property" within constitutional limitation on taxation, 70 ALR 468; 97 ALR 1488.

Debts incurred for school purposes as part of municipal indebtedness, for purposes of debt limitation, 111 ALR 544.

Donations, by state or municipal subdivision, to community chest or other non-governmental charity, 142 ALR 1076.

Constitutional or statutory provisions prohibiting municipalities or other subdivisions of the state from subscribing to, or acquiring stock of, private corporation, 152 ALR 495.

Meaning of term "assessment" or "assessed valuation" when used as basis of tax or debt limit, 156 ALR 594.

Constitutional prohibition of municipal corporation lending its credit or making donation as applicable to sale or leasing of its property, 161 ALR 518.

Paragraph IX. Immunity of counties, municipalities, and school districts.

The General Assembly may waive the immunity of counties, municipalities, and school districts by law.

1976 Constitution. — Art. IX, Sec. VI, Para. II.

Cross references. — Motor vehicle accident insurance generally, Ch. 34, T. 33. Extent of waiver of sovereign immunity for municipal corporations, § 36-33-1. Sovereign immunity and waiver thereof; claims against the state and its departments, agencies, officers, and employees, Ga. Const. 1983, Art. I, Sec. II, Para. IX.

Law reviews. — For article discussing necessity of liability insurance for Georgia counties and municipalities, and constitu-

tional authority of the units to provide such insurance, see 25 Ga. B.J. 35 (1962). For annual survey of local government law, see 38 Mercer L. Rev. 289 (1986). For article, "Georgia Local Government Tort Liability: the 'Crisis' Conundrum," see 2 Ga. St. U.L. Rev. 19 (1986). For article, "The Fall and Rise of Official Immunity," see 25 Ga. St. B.J. 93 (1988). For article, "Local Government Tort Liability: the Summer of '92," see 9 Ga. St. U.L. Rev. 405 (1993).

JUDICIAL DECISIONS

Constitutionality of statutory scheme for waiver of immunity by state and counties. — The statutory scheme under which plaintiffs having tort claims against the state have the benefit of the broad waiver of sovereign immunity afforded by the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., which does not extend to counties, whereas a county's waiver of immunity is allowed only to the extent of insurance purchased for negligence arising from the use of a motor vehicle, results in unequal treatment; however, it does not violate due process or equal protection. *Woodard v. Laurens County*, 265 Ga. 404, 456 S.E.2d 581 (1995).

Municipal corporation is without authority to waive its immunity from

liability for damages arising out of exercise of governmental functions. *Boone v. City of Columbus*, 87 Ga. App. 701, 75 S.E.2d 338 (1953).

No conflict between statute of limitations and this paragraph. — There is no conflict between statute of limitation applicable to insurance suits against municipalities and constitutional and statutory provisions relating to waiver of immunity. *Cobb v. Board of Comm'rs of Rds. & Revenue*, 151 Ga. App. 472, 260 S.E.2d 496 (1979).

Statute of limitation of action not inconsistent with this paragraph. — Former Code 1933, § 23-1602 (see now O.C.G.A. § 36-11-1), providing that "[a]ll claims against counties must be presented within 12 months after they accrue or

become payable, or the same are barred," is not inconsistent with this paragraph. *Cobb v. Board of Comm'rs of Rds. & Revenue*, 151 Ga. App. 472, 260 S.E.2d 496 (1979) (see Ga. Const. 1983, Art. IX, Sec. II, Para. IX).

Construction of duplicative constitutional grants of sovereign immunity. — Since the authority to waive the sovereign immunity of the state, and concomitantly that of the counties of the state, is given to the General Assembly by Ga. Const. 1983, Art. I, Sec. II, Para. IX, it was not necessary for the people to give an identical authority of waiver to the General Assembly by Ga. Const. 1983, Art. IX, Sec. II, Para. IX. However, this duplicative grant does not render the two provisions inconsistent and does not indicate an intent that the Article I provision would not reserve sovereign immunity to counties. *Toombs County v. O'Neal*, 254 Ga. 390, 330 S.E.2d 95 (1985).

The 1991 amendment of Ga. Const. 1983, Art. I, Sec. II, Para. IX, extending sovereign immunity to all state departments and agencies regardless of any insurance, did not divest the General Assembly of authority under Ga. Const. 1983, Art. IX, Sec. II, Para. IX to waive the immunity of counties based on motor vehicle liability insurance; therefore, the amendment did not abrogate the provisions of O.C.G.A. § 33-24-51 and a county's governmental immunity was waived to the extent of liability insurance purchased. *Daniels v. Decatur County*, 212 Ga. App. 378, 441 S.E.2d 790 (1994).

Application to counties. — In a negligence action against a county, the county's motion for summary judgment was granted on the basis of Ga. Const. 1983, Art. IX, Sec. II, Para. IX and Ga. Const. 1983, Art. I, Sec. II, Para. IX (waiver of sovereign immunity to the extent of liability insurance coverage) not applying to counties. *Bliss v. Cobb County*, 599 F. Supp. 233 (N.D. Ga. 1984).

Employee was not entitled to damages arising out of a violation of O.C.G.A. § 9-11-65(b) in obtaining a temporary restraining order (TRO) against the employee as the county had sovereign immunity and the county manager and the county attorney had sovereign immunity

in their official capacities; the county manager and the county attorney had official immunity in their individual capacities as obtaining the TRO was a discretionary action that they undertook to protect the public and workplace safety after they were advised of the employee's actions. Even though the attorney acted negligently in obtaining the TRO, the attorney did not act with actual malice. *Wallace v. Greene County*, 274 Ga. App. 776, 618 S.E.2d 642 (2005).

Recreational Property Act did not waive official immunities. — Although finding that official immunity shielded a county employee from liability for injuries suffered by a child when that child fell from a swing on county property that the employee previously inspected, and that sovereign immunity shielded the county, the trial court nonetheless erred in concluding that the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., waived these immunities, as: (1) implied waivers of governmental immunity were not to be favored; (2) the employee was entitled to official or qualified immunity, which could not be waived; and (3) even assuming a partial waiver of sovereign and official immunity through enactment of the Act, no evidence was presented that the employee acted wilfully and the defect complained about by the child's mother was apparent to those using the property. *Norton v. Cobb*, 284 Ga. App. 303, 643 S.E.2d 803 (2007), cert. denied, 2007 Ga. LEXIS 634 (Ga. 2007).

Application to city. — Trial court properly granted summary judgment to a city on a parent's negligence claim against the city stemming from a child's serious automobile accident at a known dangerous intersection that was inappropriately signaled because the city was immune from suit as the issue of whether to install a traffic signal at the intersection was a discretionary act, entitling the city to sovereign immunity; further, a successful tax referendum to fund a new traffic light did not create a duty to install a traffic light at the intersection before completing other projects. *Riggins v. City of St. Marys*, 264 Ga. App. 95, 589 S.E.2d 691 (2003).

In a tort action for personal injuries and property damage arising from an auto

collision filed against a city and its police officer, the trial court erred in granting a city summary judgment, as: (1) O.C.G.A. § 40-6-6(d)(2) did not apply; and (2) the city waived its sovereign immunity to the extent that it purchased liability coverage to cover the officer's actions in operating that officer's police car. But, the trial court properly granted summary judgment to the officer, given that the officer was engaged in a discretionary function of responding to an emergency situation at the time the accident at issue occurred. *Weaver v. City of Statesboro*, 288 Ga. App. 32, 653 S.E.2d 765 (2007), cert. denied, 2008 Ga. LEXIS 221 (Ga. 2008).

Surety sued a city for money had and received stemming from the forfeiture of a cash bond; however, this claim was properly dismissed as Ga. Const. 1983, Art. IX, Sec. II, Para. IX conferred sovereign immunity on the city. *Watts v. City of Dillard*, 294 Ga. App. 861, 670 S.E.2d 442 (2008).

Court of appeals correctly determined that no statute required that a city's agreement with the Georgia Interlocal Risk Management Agency (GIRMA) had to meet the uninsured and underinsured motorist coverage requirements that an insurance policy issued by an insurer had to meet pursuant to O.C.G.A. § 33-7-11 because the General Assembly explicitly declared that GIRMA was not an insurer; GIRMA and its liability coverage contracts, and the requirements imposed thereon by statute, exist solely in the context of sovereign immunity, and the statutory waiver thereof. *Godfrey v. Ga. Interlocal Risk Mgmt. Agency*, 290 Ga. 211, 719 S.E.2d 412 (2011).

City was not entitled to sovereign immunity because the city's "Public Officials Errors and Omissions" insurance policy covered the wrongful termination claims brought by city employees; therefore, consistent with O.C.G.A. § 36-33-1(a), the city was deemed to have waived sovereign immunity to the extent of the limits of the city's insurance policy covering those claims. *Owens v. City of Greenville*, 290 Ga. 557, 722 S.E.2d 755 (2012).

Trial court erred in not granting a city's motion to dismiss the negligence claims against the city because the city was ex-

ercising a governmental function when the city demolished an abandoned house claimed a nuisance; therefore, the city was entitled to sovereign immunity on those claims. *City of Atlanta v. Durham*, 324 Ga. App. 563, 751 S.E.2d 172 (2013).

In a correction officer's negligence suit against the city alleging a failure to inspect the inmate transport bus and to maintain the brake lines, the trial court erred in denying the city's motion for summary judgment because sovereign immunity was not waived, and because, without any evidence that the city failed to follow a specific rule, procedure, or law, or that it otherwise deviated from some clear standard for performing its inspection of the bus and its brake lines, the city's act in inspecting the brake lines was a discretionary one. *City of Milledgeville v. Primus*, 325 Ga. App. 553, 753 S.E.2d 146 (2013).

City liability for police officer's actions. — When officers arrested a decedent who died shortly after the arrest, a city which employed one of the officers could not be held liable because: (1) the city was immune from claims involving police work unless the city waived that immunity; and (2) it was not shown that the city waived immunity. *Hoyt v. Bacon County*, No. 509-026, 2011 U.S. Dist. LEXIS 7330 (S.D. Ga. Jan. 26, 2011).

City immune for action of issuing a business license. — Suit by parents against a city alleging that the city negligently issued a day care business license to a day care, which had left their child in a hot car, resulting in the child's death, was barred by sovereign immunity because the issuance of a license was a government function. *Calloway v. City of Warner Robins*, 783 S.E.2d 175, No. A15A2081, 2016 Ga. App. LEXIS 154 (2016).

Applicability to diversity actions. — In a diversity action against a Georgia city arising out of an accident in South Carolina involving a city garbage truck, even though the city would not be entitled to sovereign immunity under South Carolina law, immunity enjoyed by the city under Georgia law would be extended as a matter of comity. *Davis v. City of Augusta*, 942 F. Supp. 577 (S.D. Ga. 1996).

School officials sued in their official capacity or for acting in areas where they were vested with discretion will not be liable unless they acted wilfully, wantonly, or outside the scope of their authority; otherwise, their actions are protected by the doctrine of governmental immunity. *McClendon v. Norwood*, 179 Ga. App. 176, 346 S.E.2d 1 (1986).

Immunity if acts done within scope of authority and without wilfulness, fraud, malice or corruption. — Under sovereign immunity principles, a public officer or employee acting within the scope of his or her authority and engaged in discretionary as opposed to ministerial functions is entitled to immunity from suit, provided the acts complained of are done within the scope of the officer's authority and without wilfulness, fraud, malice, or corruption. *Hendon v. DeKalb County*, 203 Ga. App. 750, 417 S.E.2d 705, cert. denied, 203 Ga. App. 906, 417 S.E.2d 705 (1992).

Appellate court erred by affirming a trial court's denial of a city's motion to dismiss an inmate's complaint because the care of inmates in the custody of a municipal corporation is a governmental function for which sovereign immunity has not been waived; therefore, the in-

mate was precluded from pursuing negligence claims. *City of Atlanta v. Mitcham*, 296 Ga. 576, 769 S.E.2d 320 (2015).

Care of inmates. — Georgia Supreme Court finds that the care of inmates in the custody of a municipal corporation is a governmental function for which sovereign immunity has not been waived. *City of Atlanta v. Mitcham*, 296 Ga. 576, 769 S.E.2d 320 (2015).

Nuisance exception. — Trial court properly denied a city's motion to dismiss based on sovereign immunity because the landowners asserted that the damage from the city's drainage system amounted to an unlawful taking of their property for which sovereign immunity has been waived. *City of Greensboro v. Rowland*, 334 Ga. App. 148, 778 S.E.2d 409 (2015), cert. denied, 2016 Ga. LEXIS 154 (Ga. 2016).

Cited in *Commissioners of Rds. & Revenues v. Davis*, 213 Ga. 792, 102 S.E.2d 180 (1958); *Lee v. Petty*, 133 Ga. App. 201, 210 S.E.2d 383 (1974); *Pate v. Turner County*, 162 Ga. App. 463, 291 S.E.2d 400 (1982); *Peeples v. City of Atlanta*, 189 Ga. App. 888, 377 S.E.2d 889 (1989); *Payne v. Blackwell*, 259 Ga. 483, 384 S.E.2d 393 (1989); *Hartley v. Agnes Scott College*, 295 Ga. 458, 759 S.E.2d 857 (2014).

OPINIONS OF THE ATTORNEY GENERAL

If a county has purchased liability insurance, then the county is liable to the extent of its insurance coverage. 1969 Op. Att'y Gen. No. 69-131.

County is not liable for negligent acts of its servants. 1969 Op. Att'y Gen. No. 69-131.

RESEARCH REFERENCES

ALR. — Power of municipal corporation to take out liability insurance, 33 ALR 717.

Liability of county for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary functions, 101 ALR 1166; 16 ALR2d 1079.

Use of municipal automobile as a corporate or as a governmental function, 110 ALR 1117; 156 ALR 714.

Tortious breach of contract as within consent to suit against United States or state on contract, 1 ALR2d 864.

Liability of county for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary function, 16 ALR2d 1079.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability, 68 ALR2d 1437.

What is "motor vehicle" or the like within statute waiving governmental immunity as to operation of such vehicles, 77 ALR2d 945.

Liability of governmental unit or its officers for injury to innocent occupant of

moving vehicle, or for damage to such vehicle, as result of police chase, 4 ALR4th 865.

Liability of governmental officer or entity for failure to warn or notify of release of potentially dangerous individual from custody, 12 ALR4th 722.

Failure to restrain drunk driver as ground of liability of state or local government unit or officer, 48 ALR4th 320.

Governmental tort liability as to highway median barriers, 58 ALR4th 559.

Governmental tort liability for injury to roller skater allegedly caused by sidewalk or street defects, 58 ALR4th 1197.

Liability of school authorities for hiring

or retaining incompetent or otherwise unsuitable teacher, 60 ALR4th 260.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody, 60 ALR4th 942.

State and local government liability for injury or death of bicyclist due to defect or obstruction in public bicycle path, 68 ALR4th 204.

Governmental liability for negligence in licensing, regulating, or supervising private day-care home in which child is injured, 68 ALR4th 266.

Municipal liability for negligent fire inspection and subsequent enforcement, 69 ALR4th 739.

SECTION III.

INTERGOVERNMENTAL RELATIONS

Paragraph

- I. Intergovernmental contracts.
- II. Local government reorganization.

Law reviews. — For article, "Local Government Litigation: Some Pivotal Principles," see 55 Mercer L. Rev. 1 (2003).

Paragraph I. Intergovernmental contracts.

(a) The state, or any institution, department, or other agency thereof, and any county, municipality, school district, or other political subdivision of the state may contract for any period not exceeding 50 years with each other or with any other public agency, public corporation, or public authority for joint services, for the provision of services, or for the joint or separate use of facilities or equipment; but such contracts must deal with activities, services, or facilities which the contracting parties are authorized by law to undertake or provide. By way of specific instance and not limitation, a mutual undertaking by a local government entity to borrow and an undertaking by the state or a state authority to lend funds from and to one another for water or sewerage facilities or systems or for regional or multijurisdictional solid waste recycling or solid waste facilities or systems pursuant to law shall be a provision for services and an activity within the meaning of this Paragraph.

(b) Subject to such limitations as may be provided by general law, any county, municipality, or political subdivision thereof may, in connection with any contracts authorized in this Paragraph, convey any existing facilities or equipment to the state or to any public agency, public corporation, or public authority.

(c) Any county, municipality, or any combination thereof, may contract with any public agency, public corporation, or public authority for the care, maintenance, and hospitalization of its indigent sick and may as a part of such contract agree to pay for the cost of acquisition, construction, modernization, or repairs of necessary land, buildings, and facilities by such public agency, public corporation, or public authority and provide for the payment of such services and the cost to such public agency, public corporation, or public authority of acquisition, construction, modernization, or repair of land, buildings, and facilities from revenues realized by such county, municipality, or any combination thereof from any taxes authorized by this Constitution or revenues derived from any other source. (Ga. Const. 1983, Art. 9, § 3, Para. 1; Ga. L. 1986, p. 1612, § 3/HR 363; Ga. L. 1992, p. 3329, § 4/HR 732.)

1976 Constitution. — Art. IX, Sec. IV, Para. II; Art. IX, Sec. VI, Para. I.

Cross references. — Public works contracts, Ch. 10, T. 36, and Ch. 84, T. 36. Contracts between counties and municipalities for enforcement of building, electrical, and other codes, § 36-13-4. Municipal contracts for general health, §§ 36-34-3 and 36-34-4.

Editor's notes. — The constitutional amendment (Ga. L. 1986, p. 1612, § 3) which added the present last sentence of subparagraph (a) was approved by a majority of the qualified voters voting at the general election on November 4, 1986.

The constitutional amendment (Ga. L. 1992, p. 3329, § 4) which revised subparagraph (a) to add provisions as to regional or multi-jurisdictional solid waste recycling or solid waste facilities or systems was approved by a majority of the qualified voters voting at the general election held on November 3, 1992.

Law reviews. — For article, "Discretion in Georgia Local Government Law," see 8 Ga. L. Rev. 614 (1974). For annual survey of local government law, see 58 Mercer L. Rev. 267 (2006). For article surveying developments in Georgia local government law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 187 (1981). For annual survey of local government law, see 38 Mercer L. Rev. 289 (1986). For article, "Children, Poverty and State Constitutions," see 38 Emory L.J. 577 (1989). For annual survey of local government law, see 56 Mercer L. Rev. 351 (2004). For annual survey on local government law, see 64 Mercer L. Rev. 213 (2012).

For note, "The Legal Nature of Public Purpose Authorities: Governmental, Private, or Neither," see 8 Ga. L. Rev. 680 (1974).

JUDICIAL DECISIONS

This paragraph and Ga. Const. 1983, Art. VII, Sec. IV, Para. I being in pari materia must be construed together. — Georgia Const. 1976, Art. VII, Sec. III, Para. I (see Ga. Const. 1983, Art.

VII, Sec. IV, Para. I), and subparagraph (a) of this paragraph were each in the Constitution of 1945 when it was adopted. They deal with the same subject matter, namely, finance, taxation, and public debt.

They are of equal dignity and to give full force and effect to the will of the people, as thus expressed, they must be construed together, being in *pari materia*. The latter lifts out of the former any inhibition against the creation of a debt insofar as the creation of a debt is authorized by the latter clause. Any other construction would render one of them meaningless and the Supreme Court will not ascribe to the people an intention to adopt a Constitution containing inconsistent provisions. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Authority to contract necessarily confers power to pay for use of contracted facilities. — By this paragraph, and in addition to other contracts which may be constitutionally made pursuant thereto, the people authorized the state and state institutions — which includes, of course, the State Highway Department (now Department of Transportation) — to contract for a period not exceeding 50 years with an authority then or thereafter created for the use of its facilities or services, but the power to so contract was limited to such activities and transactions as the state or a state institution is by law authorized to undertake. The power to so contract for the use of such facilities or services as thus conferred carries with it, by necessary implication, authority to pay for the use of such facilities or services during the contract period. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Department of Transportation authorized to rent bridge facilities from Georgia Highway Authority. — When so construed, authority is found in the Constitution for those provisions of Art. 1, Ch. 10, T. 32, which authorize the State Highway Department (now Department of Transportation) to expend appropriated tax funds for renting bridge facilities from the State Bridge Building Authority (now Georgia Highway Authority) for state highway uses. *McLucas v. State Bridge Bldg. Auth.*, 210 Ga. 1, 77 S.E.2d 531 (1953).

Proper interpretation and construction of this paragraph. — This

provision of the Constitution does not empower the legislature to authorize the state and its institutions and subdivisions to enter into any and every contract which they might in their discretion deem advisable. It simply means that the state and its agencies and subdivisions may contract with each other with reference to facilities and services theretofore authorized by the Constitution. This provision does not supersede all other provisions of the Constitution with reference to the limitations on and powers of the state, its agencies and subdivisions and authorize them to undertake to maintain and provide additional facilities and services which are prohibited under other provisions of the Constitution, except to undertake to contract with reference to facilities and services authorized by other provisions of the Constitution. *Mulkey v. Quillian*, 213 Ga. 507, 100 S.E.2d 268 (1957) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Purpose of this paragraph was to authorize counties and municipalities to create an organization which could carry out and make more workable the duty which the state owed to its indigent sick; and therefore the court should construe it most liberally. *DeJarnette v. Hospital Auth.*, 195 Ga. 189, 23 S.E.2d 716 (1942) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Parties. — This paragraph relates to and deals only with contracts and conveyances which are authorized between parties who are empowered to contract with each other for services which one of the contracting parties is authorized to render for the other. *McKelvey v. Logan*, 220 Ga. 197, 137 S.E.2d 651 (1964) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Limited applicability of clause. — This clause has reference only to corporations and authorities created by the state of Georgia, and does not include any public authorities created by another state or country. *State v. Blasingame*, 212 Ga. 222, 91 S.E.2d 341 (1956).

General term “any” given restricted construction. — Although the general term “any” is employed, it is given a restricted construction that excludes corporations of foreign states and countries.

This clause contemplates performance within this state of services that are essentially governmental and therefore constitutes the exercise of the powers of the sovereign. *State v. Blasingame*, 212 Ga. 222, 91 S.E.2d 341 (1956).

Constitutional amendment prevails over previous constitutional provision when conflict arises. — If a constitutional amendment duly adopted dealing with the establishment of area schools necessarily conflicts with some previous provision, the amendment, being the last expression of the sovereign will of the people, will prevail as an implied modification pro tanto of the former provision. *Cason v. State*, 217 Ga. 339, 122 S.E.2d 232 (1961).

Constitutional amendment on area schools germane to constitutional provisions. — A constitutional amendment, adopted by the voters in a general election, that deals with only one subject matter, the establishment of area schools, which under the amendment can be established only by contract between counties, or municipalities, or a county and a municipality, or combination thereof, is germane to the provisions of the Constitution, pertaining to the contractual powers of counties and municipalities, and does not violate the Constitution. *Cason v. State*, 217 Ga. 339, 122 S.E.2d 232 (1961).

Contract between county and cities. — Court of Appeals erred in finding that the Homestead Option Sales Tax Act (HOST), O.C.G.A. § 48-8-100 et seq., did not allow a county to disburse funds to various cities in order to facilitate the capital outlay requirement under O.C.G.A. § 48-8-104(c)(2)(A), as HOST was implemented under the “special district” provision of Ga. Const. 1983, Art. IX, Sec. II, Para. VI, and as it was not a “county tax,” it was subject to such an arrangement; however, the intergovernmental agreement between the county and cities had to be authorized under Ga. Const. 1983, Art. IX, Sec. III, Para. I in order to be valid. *City of Decatur v. DeKalb County*, 277 Ga. 292, 589 S.E.2d 561 (2003).

Intermediate appellate court erred in holding that because an agreement between a county and cities did not pertain

to the provision of services for purposes of the Intergovernmental Contracts Clause, Ga. Const. 1983, Art. IX, Sec. III, Para. 1(a), but was a tax-sharing agreement, it was constitutionally invalid. The court lacked appellate jurisdiction to construe the meaning of “services” as used in the Intergovernmental Contracts Clause, because that term had not previously been construed by the Georgia Supreme Court. *DeKalb County v. City of Decatur*, 297 Ga. App. 322, 677 S.E.2d 391 (2009).

Trial court did not err in granting a county summary judgment in cities’ action for breach of an intergovernmental agreement (IGA) the parties entered into pursuant to the Homestead Option Sales and Use Tax Act (HOST), O.C.G.A. § 48-8-100 et seq., because the IGA was not a valid intergovernmental contract under the Intergovernmental Contracts Clause of the Georgia Constitution, Ga. Const. 1983, Art. IX, Sec. III, Para. I(a), since the focus and clear purpose of the IGA was to provide a formula for the distribution of the HOST revenues, and the IGA could not be deemed an agreement for the provision of authorized “services”; the IGA was an agreement about how to divide and distribute HOST revenues between the county and the cities, with the cities agreeing to expend the monies disbursed solely for capital outlay projects to be located within the geographical boundaries of the county and to be owned, operated, or both either by the county, one or more cities or any combination thereof, and the fact that the IGA required the cities to expend the tax proceeds in accordance with the mandates of the Homestead Option Sales and Use Tax Act, O.C.G.A. § 48-8-102, did not transform it into either a contract for services or one for the use of facilities. *City of Decatur v. Dekalb County*, 289 Ga. 612, 713 S.E.2d 846 (2011).

Contracts between counties. — Although this paragraph does not expressly authorize a county board of education to enter into a contract with a county board of education of another county, contracts made by a county board of education are corporate actions of the county. Therefore, this constitutional authority given to counties includes county boards of educa-

tion. *Walker v. McKenzie*, 209 Ga. 653, 74 S.E.2d 870, later appeal, 210 Ga. 189, 78 S.E.2d 486 (1953) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Counties authority to enter rental contracts mechanism for rental agreements by Georgia Education Authority (Schools). — Although the constitutional provision upon which Ga. L. 1949, p. 1009, (see now O.C.G.A. Art. 5, Ch. 3, T. 20), and all proceedings taken thereunder are based does not expressly authorize a county board of education as such to enter rental contracts, it does expressly authorize counties to do so, and, under repeated rulings of the Georgia Supreme Court, such contracts by the county boards of education are the corporate actions of the counties. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952).

Entire plan of securing school buildings under Ga. L. 1949, p. 1009 (see now O.C.G.A. Art. 5, Ch. 3, T. 20) is bottomed upon this paragraph. — There the Constitution plainly and unmistakably empowers the state, state institutions, municipalities, and counties to contract for any period not exceeding 50 years with each other or with any public agency, public corporation, or authority “for the use by such subdivisions or the residents thereof of any facilities or services” of the state, state institution, municipalities, counties, public agency, public corporation, or authority, provided such contract deals with activities which such subdivisions are by law authorized to undertake. Municipalities and counties are empowered in connection with such contracts to convey existing facilities to public agencies, public corporations, or authorities operated by such municipalities, and counties for the benefit of the residents thereof, provided such facilities are to be used by such grantee for the same purposes. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Legislature cannot limit power. — Full power being vested under the Constitution in the county boards of education to make contracts, the legislature has no authority to limit this power. *Walker v. McKenzie*, 209 Ga. 653, 74 S.E.2d 870,

later appeal, 210 Ga. 189, 78 S.E.2d 486 (1953).

Contract between the county and the airport authority, which managed the airport, qualified as an enforceable intergovernmental agreement (IGA) that did not violate the Debt Clause in the Georgia Constitution because the IGA was between appropriate governmental entities; the agreement’s term did not exceed 50 years; the agreement related to both the provision of services and the joint use of facilities as the airport authority agreed to manage and maintain the expanded taxiway, and the county, in return, agreed to provide funding and manage the debt required to be incurred to complete the expansion; and the agreement dealt with services and facilities about which the county had the authority to enter contracts. *Avery v. State of Ga.*, 295 Ga. 630, 761 S.E.2d 56 (2014).

Limitations on indebtedness. — This paragraph does not operate to relax in any degree the existing limitation as to indebtedness, or as to the exclusive manner in which it may be incurred. *DeJarnette v. Hospital Auth.*, 195 Ga. 189, 23 S.E.2d 716 (1942) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Effect of creation and activation of authority before November 8, 1960. — Where a state agency known as an authority was created prior to 1960 and activated to deal with a part of a particular subject matter, amendatory Act of 1961 which merely changed its name and expanded its power to operate upon the whole of the same subject matter did not change the authority’s identity; such authority was properly “created and activated” before November 8, 1960, and came within this provision. *Weeks v. Georgia State Hwy. Auth.*, 217 Ga. 14, 120 S.E.2d 620 (1961).

Office building used and operated as provided in Ga. L. 1973, p. 190, § 1 (see now O.C.G.A. § 31-7-71) is for a public purpose and that section is constitutional. *Petty v. Hospital Auth.*, 233 Ga. 109, 210 S.E.2d 317 (1974).

Contract for sewer project. — After a trial court required two intervenors to post a bond of \$625,000 with regard to their challenge to the public improvement

bond approved by a city's building authority for a sewer project, the trial court properly validated the bond by following all necessary procedural requirements and the bond did not violate Ga. Const. 1983, Art. IX, Sec. V, Para. I(a) since the city's payment for the use of the sewer project was a debt specifically authorized under the constitution pursuant to Ga. Const. 1983, Art. IX, Sec. III, Para. I(a). *Berry v. City of E. Point*, 277 Ga. App. 649, 627 S.E.2d 391 (2006).

Loaning of money to political subdivisions of this state or authorities controlled by them is not a permitted purpose for which public funds may be used under Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I), and, therefore, it is not a facility or service of the state within the meaning of that term in this paragraph. *Mulkey v. Quillian*, 213 Ga. 507, 100 S.E.2d 268 (1957) (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

City contracts with Department of Transportation for building and repairing city streets valid. — The authority of the city of Carrollton under its charter, Ga. L. 1891, p. 474, to build and repair streets within its incorporate limits does not require actual supervision by the mayor and council, but this may be done by contract with the State Highway Department of Georgia (now Department of Transportation) under the provisions of the Constitution. *City of Carrollton v. Walker*, 215 Ga. 505, 111 S.E.2d 79 (1959).

City and county not authorized to operate joint tax receiving or assessing program. — City and county could not close their books prior to April 1 because neither Ga. Const. 1983, Art. IX, Sec. III, Para. I nor provisions of the city charter satisfied the requirement of former subsection (e) of O.C.G.A. § 48-5-18 pertaining to the operation of a joint tax receiving or assessing program. *Board of Tax Assessors v. Tom's Foods, Inc.*, 264 Ga. 309, 444 S.E.2d 771 (1994).

Contract between county and airport authority. — Even though, under a contract between the county and an airport authority for use by the county of an expanded airport facility, the consideration to be paid by the county was not

expressed in terms of a definite dollar amount, it was not an unconstitutional "new debt." The contract was a valid intergovernmental contract and the consideration represented the authority's lawful "revenue pledged to the payment of" the bonds. *Clayton County Airport Auth. v. State*, 265 Ga. 24, 453 S.E.2d 8 (1995).

Contracts with Municipal Electric Authority of Georgia. — The political subdivisions have authority under subparagraph (a) of Ga. Const. 1983, Art. IX, Sec. III, Para. I to enter into contracts with the Municipal Electric Authority of Georgia and to pledge their full faith and credit and levy taxes to meet their contractual obligations pursuant to the law of contracts. *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976).

Where two different proposed changes to a power sales contract between a city and the Municipal Electric Authority of Georgia did not result in the city being contractually bound for more than 50 years, both proposals passed muster under the intergovernmental contracts clause, pursuant to Ga. Const. 1983, Art. IX, Sec. III, Para. I(a). *City of Cartersville v. Mun. Elec. Auth. of Ga.*, 277 Ga. 575, 592 S.E.2d 677 (2004).

Agreement for use of hotel/motel taxes. — Consistent with the Intergovernmental Contracts Clause, Ga. Const. 1983, Art. IX, Sec. III, Para. I (a), a Hotel/Motel Tax Operation and Maintenance Agreement was solely between two governmental entities, a city and the Congress Center Authority; the agreement did not exceed 50 years; the agreement involved the provision of services or the joint or separate use of facilities or equipment; and the agreement dealt with a facility (domed stadium) which the contracting parties were authorized to provide. *Cottrell v. Atlanta Dev. Auth.*, 297 Ga. 1, 770 S.E.2d 616 (2015).

Georgia Hospital Authorities Law, O.C.G.A. Art. 4, Ch. 7, T. 31, is constitutional. *Cheely v. State*, 251 Ga. 685, 309 S.E.2d 128 (1983).

Contracts for provision of water service. — City did not impermissibly cede away its legislative authority to establish water rates by entering into a written contract for a 40-year period

whereby an adjoining county agreed to provide water service to the city at a specified rate. *City of Fayetteville v. Fayette County*, 171 Ga. App. 13, 318 S.E.2d 757 (1984).

Contract for new stadium. — Intergovernmental Agreement was valid under the intergovernmental contracts clause, as it was a contract between political subdivisions, was not for a period exceeding 50 years, the services provided by the Cobb-Marietta Coliseum and Exhibit Hall Authority were proper subjects for such a contract, and the Authority and the county were authorized to provide the stadium, which would provide the citizens recreational benefit and promote tourism and the economy. *Savage v. State of Ga.*, 297 Ga. 627, 774 S.E.2d 624 (2015).

Authorization to contract with “public foreign corporations.” — Section 3 of the 1982 amendment to the County Building Authority Act, which authorized a county building authority to enter into contracts with “public foreign corporations,” meant “public” in the sense of nondomestic corporations whose shares are traded over the counter and not governmental corporations of foreign states and nations and, therefore, does not violate Ga. Const. 1983, Art. IX, Sec. III, Para. I. *Building Auth. v. State*, 253 Ga. 242, 321 S.E.2d 97 (1984).

Taxing power available to pay rent under contract. — City’s pledge of its taxing power to make up any deficit in the rents it is obligated to pay under a valid intergovernmental contract is permissible under the intergovernmental contracts clause and does not violate Ga. Const. 1983, Art. IX, Sec. II, Para. VIII. *Nations v. Downtown Dev. Auth.*, 256 Ga. 158, 345 S.E.2d 581 (1986).

Downtown Development Authorities Law, O.C.G.A. Ch. 42, T. 36, is solely based upon development authorities provision, Ga. Const. 1983, Art. IX, Sec. VI, Para. III, and not Ga. Const. 1983, Art. IX, Sec. III, Para. I. *Odom v. Union City Downtown Dev. Auth.*, 251 Ga. 248, 305 S.E.2d 110 (1983).

Bond guarantee by city-lessor not an intergovernmental contract. — Lease provision whereby a city-lessor agreed to guarantee the bond payments of

a development authority-lessee did not come within the intergovernmental contracts clause in Ga. Const. 1983, Art. IX, Sec. III, Para. I and, therefore, was barred by the debt clause in Ga. Const. 1983, Art. IX, Sec. II, Para. VIII. *Nations v. Downtown Dev. Auth.*, 255 Ga. 324, 338 S.E.2d 240 (1985).

Lease for 50 years, with option to extend, violates paragraph. — Lease which allowed for an initial period of 50 years plus an option to extend the duration of the lease for an additional 25 years was the equivalent of a 75 year contract and therefore exceeded the authority given in Ga. Const. 1983, Art. IX, Sec. III, Para. I. *Nations v. Downtown Dev. Auth.*, 255 Ga. 324, 338 S.E.2d 240 (1985).

“Stadium Funding Agreement” for construction of a domed facility, entered into by a city, a county, and a stadium authority, was authorized by the intergovernmental contracts clause of Ga. Const. 1983, Art. IX, Sec. III, Para. I., and therefore did not violate the special district debt clause of Ga. Const. 1983, Art. IX, Sec. V, Para. II. *Youngblood v. State*, 259 Ga. 864, 388 S.E.2d 671 (1990).

Contracts for industrial park. — Contracts between counties and a joint development authority for the development of trade and industry through the acquisition of an industrial park were valid intergovernmental contracts authorized by Ga. Const. 1983, Art. IX, Sec. III, Para. I. *Hay v. Newton County*, 246 Ga. App. 44, 538 S.E.2d 181 (2000).

Homestead Option Sales Tax. — The Homestead Option Sales Tax (HOST), O.C.G.A. § 48-8-100 et seq., implements a district tax under the “special district” provision of Ga. Const. 1983, Art. IX, Sec. II, Para. VI; intergovernmental contracts which are authorized under Ga. Const. 1983, Art. IX, Sec. III, Para. I cannot be limited by HOST. *City of Decatur v. DeKalb County*, 277 Ga. 292, 589 S.E.2d 561 (2003).

Cited in *Reed v. City of Smyrna*, 201 Ga. 228, 39 S.E.2d 668 (1946); *Barge v. Camp*, 209 Ga. 38, 70 S.E.2d 360 (1952); *Smith v. Hospital Auth.*, 210 Ga. 801, 82 S.E.2d 827 (1954); *State v. Georgia Rural Rds. Auth.*, 211 Ga. 808, 89 S.E.2d 204 (1955); *Tipton v. Speer*, 211 Ga. 886, 89

S.E.2d 633 (1955); *Tippins v. Cobb County Parking Auth.*, 213 Ga. 685, 100 S.E.2d 893 (1957); *Smith v. Maynard*, 214 Ga. 764, 107 S.E.2d 815 (1959); *Smith v. Hayes*, 217 Ga. 94, 121 S.E.2d 113 (1961); *Stephenson v. State*, 219 Ga. 652, 135 S.E.2d 380 (1964); *Richmond County Hosp. Auth. v. McClain*, 112 Ga. App. 209, 144 S.E.2d 565 (1965); *Daughtrey v. State*, 226 Ga. 758, 177 S.E.2d 670 (1970); *Miller*

v. Columbus, 229 Ga. 234, 190 S.E.2d 535 (1972); *Fulton-DeKalb Hosp. Auth. v. Gaither*, 241 Ga. 572, 247 S.E.2d 89 (1978); *Griffin v. Chatham County*, 244 Ga. 628, 261 S.E.2d 570 (1979); *Frazer v. City of Albany*, 245 Ga. 399, 265 S.E.2d 581 (1980); *AMBAC Indem. Corp. v. Akridge*, 262 Ga. 773, 425 S.E.2d 637 (1993); *Reed v. State*, 265 Ga. 458, 458 S.E.2d 113 (1995).

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Paragraph's limited applicability.

— This paragraph applies only to contracts for the use of public facilities and in no way restricts the general contractual powers of the Georgia Ports Authority set out in Ga. L. 1945, p. 464, (see now O.C.G.A. Ch. 2, T. 52). 1960-61 Op. Att'y Gen. p. 8 (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

This paragraph permits public bodies created by the General Assembly to contract for use of public facilities with other public bodies only; it does not give agencies of the state the right to contract with private concerns for the use of public facilities. 1960-61 Op. Att'y Gen. p. 8 (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Indian tribe not public entity. — The Georgia Tribe of Eastern Cherokee Indians is not a "public agency, public corporation, or public authority" as the phrase is used in Ga. Const. 1983, Art. IX, Sec. III, Para. I. 1995 Op. Att'y Gen. No. U95-21.

Environmental loans exempt from debt limitations. — Loans made by the Georgia Environmental Facilities Authority to local governments pursuant to Ga. Const. 1983, Art. IX, Sec. III, Para. I., the Intergovernmental Contracts Clause, are not subject to the debt limitations of Ga. Const. 1983, Art. IX, Sec. V, Para. I. 1994 Op. Att'y Gen. No. 94-6.

Public facilities contracts are not extended to private corporations or associations. 1948-49 Op. Att'y Gen. p. 341.

Transfer of property by city. — City may not transfer real property by deed of gift to a county recreation department for recreational use, but may transfer real

property pursuant to a valid intergovernmental contract. 1995 Op. Att'y Gen. No. U95-12.

Cooperative agreements between counties and municipalities for purchase and use of riot control equipment valid. — All counties and those municipalities having requisite charter authority may enter into cooperative agreements with one another for the purchase and use of equipment to be employed in jointly administered riot control programs. 1969 Op. Att'y Gen. No. 69-141.

Authority to the counties includes county boards of education; the same reasoning would apply to cities including city boards of education. 1958-59 Op. Att'y Gen. p. 116.

This paragraph applies to boards of education and their authority to contract. 1954-56 Op. Att'y Gen. p. 168 (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Limitation on delegation of contractual power. — The constitutional powers to contract in Ga. Const. 1976, Art. VIII, Sec. V, Para. IV (see Ga. Const. 1983, Art. VIII, Sec. V, Para. V), and this paragraph are limited by Ga. Const. 1976, Art. VIII, Sec. V, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II), which states that control and management of county schools shall be confined to the county board of education; the power to exercise judgment and discretion cannot be delegated by a county board of education. 1958-59 Op. Att'y Gen. p. 116 (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

State cannot issue general obligation debt with the contemplation that title to the financed facility will be given to the county, municipality, or school district because of the constitu-

tional limitation on the purposes for which general obligation debt can be issued. 1975 Op. Att'y Gen. No. 75-51.

Financing construction of environmental facilities. — The Georgia Development Authority may enter into contracts with local governments, including local water and sewer authorities, for any period not to exceed 50 years to provide funds to finance the construction of environmental facilities by local governments and for related services. 1985 Op. Att'y Gen. No. 85-29.

The (State) Department of Public Health has authority to contract direct with hospital authorities for construction of hospitals. 1948-49 Op. Att'y Gen. p. 340.

Public health authorities have authority to contract with local hospital authorities for construction of hospitals. 1948-49 Op. Att'y Gen. p. 340.

County's subsidizing hospital authority ambulance service permissible. — An agreement by a county with a hospital authority in the nature of a contract in which the county agrees to subsidize an ambulance service operated by a hospital authority would not violate any of the provisions of the Georgia Constitution and the county would be authorized to pay sums of money to the hospital authority for this service. 1968 Op. Att'y Gen. No. 68-280.

Retirement system for county hospital employees. — A county should not execute a guaranty contract guaranteeing primary obligation of a county hospital authority to contribute to a retirement system for its employees; by appropriate contract with the authority, a county may compute such contributions in arriving at the costs necessary to provide for the continued maintenance and use of the facilities of the authority and this sum can be paid by the county to the county hospital authority under the law of this state. 1969 Op. Att'y Gen. No. 69-211.

Contract with state for work on state property permitted. — The state may contract with county for installation by county of pump and tank on property of a state hospital where facilities are to be used by both. 1945-47 Op. Att'y Gen. p. 284.

Receipt and disbursement of federal funds to private nonprofit hospital associations prohibited. — In view of this paragraph and Ga. Const. 1976, Art. III, Sec. VIII, Para. XII (see Ga. Const. 1983, Art. III, Sec. VI, Para. VI), the State treasurer (now director of the Office of Treasury and Fiscal Services) and the (State) Department of Public Health are without authority to receive and disburse federal funds under the provisions of the Hill-Burton Act (Hospital Survey and Construction Act, 42 U.S.C., § 291 et seq.) to private nonprofit hospital associations or corporations. 1948-49 Op. Att'y Gen. p. 341 (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Restriction on Department of Community Affairs authority to apply for federal grants. — Where the funds are not sought to create a planning service or to provide technical assistance, information or advice in accordance with the purposes of Title II of the Housing and Community Development Act of 1974 (42 U.S.C. § 5301 et seq.), the Bureau (now Department) of Community Affairs does not have the requisite statutory authority to apply for, receive, or administer federal grants under Section 8 housing assistance payments program for existing units established pursuant to the Act. 1976 Op. Att'y Gen. No. 76-15.

State departments and agencies can contract with each other with reference to facilities and services, with limitations that such contracts may not exceed 50 years duration, and that contracts deal only with such activities and transactions as the agencies are authorized by law to undertake. 1982 Op. Att'y Gen. No. 82-9.

Department of Transportation and Department of Human Resources have general constitutional authority to contract with each other for services which deal with activities that they are authorized by law to undertake. 1981 Op. Att'y Gen. No. 81-23.

Department of Transportation contracting with financial backing from State Road and Tollway Authority. — The Department of Transportation may enter into transportation construction contracts with all or a portion of the

financial backing for the contracts coming from a contractual promise from the State Road and Tollway Authority to borrow and provide money to DOT as and when needed to expend on projects that are the subjects of the construction contracts. 2001 Op. Att'y Gen. No. 2001-10.

Contracting permitted between Department of Agriculture and University of Georgia for disease eradication program services to livestock owners. — Georgia Department of Agriculture may contract with Department of Veterinary Medicine at University of Georgia to provide certain veterinary services to livestock owners in conjunction with brucellosis and tuberculosis testing and eradication programs. 1980 Op. Att'y Gen. No. 80-62.

Length of time municipalities permitted to bond by contract. — Municipalities may enter into a valid and binding contract to provide a system of water supply mutual to all for a period not to exceed 50 years; further, municipalities may not bind themselves by any agreement respecting the sewage system or regulation of the rates of water or sewage for a period longer than the life of the council. 1952-53 Op. Att'y Gen. p. 126.

Cities and counties may work through a single joint hospital authority. 1948-49 Op. Att'y Gen. p. 272.

There is no statutory limitation upon the percentage of total investments which a bank may have in bonds of public authorities which are obligations of the state. 1962 Op. Att'y Gen. p. 19.

County cannot make donations to a water and sewerage authority, but it can enter into contracts with such an authority. 1970 Op. Att'y Gen. No. U70-225.

Action of county tax commissioner collecting city taxes not facially illegal. — By contract, a county tax commissioner could add a city's tax notices to the county commissioner's computerized tax cards and collect taxes for the city, and, further, such a contract could be drawn without special legislation; however, while the plan is not facially illegal under the general law, special clarifying legislation is recommended. 1972 Op. Att'y Gen. No. U72-120.

Construction of library building by city for lease to county legal. — Assuming that a city possesses legal authority to borrow funds via a 20-year loan for the purpose of constructing a library building, it would be legal for the city and county to enter into the proposed agreement whereunder the building would be leased to the county for the term of the loan at an annual rental sufficient to meet the loan payments; it would also be legal for the county to levy taxes for the purpose of making the rental payments. 1967 Op. Att'y Gen. No. 67-120.

Valid use of county board of education funds. — The expenditure of public school funds by a county board of education to run sewer lines from its schools to city sewer lines on nearby city streets, and to purchase sewage disposal services from the city, would not violate any constitutional or statutory provision of the state. 1967 Op. Att'y Gen. No. 67-85.

County board of education authorized to construct facility on property of Georgia Education Authority (Schools). — Since a board of education can expend money to construct a facility and then convey that facility to a public authority, a county board of education is constitutionally authorized to expend funds on a facility that will be located on property owned by the Georgia Education Authority (Schools) since the legal and practical effect is no different; the specific authority in any particular situation will be governed by any local law that might exist. 1975 Op. Att'y Gen. No. 75-51.

County and municipal school system may provide by contract for continued operation of school by and for county school system. 1967 Op. Att'y Gen. No. 67-7.

Agreements between counties and school districts for lease of property. — Counties and school districts have authority under O.C.G.A. §§ 20-2-520 and 36-9-3(c) to enter into intergovernmental contracts in which the county leases real property to the school board for use as a site for a public school or other educational purpose. 1998 Op. Att'y Gen. No. 98-13.

Permissible for county board of education to contract with independent

school system for educating certain county school children. — Under Ga. Const. 1976, Art. VIII, Sec. V, Para. IV (see Ga. Const. 1983, Art. VIII, Sec. V, Para. V), a county board of education can contract to pay county school funds to an independent school system in consideration for the latter educating certain school children of the former; this authority would include all the funds necessary to educate these children including capital outlay, i.e., funds for school buildings and additions thereto of the independent school district. 1958-59 Op. Att’y Gen. p. 116.

Contract with out-of-state school system void. — The general school laws of Georgia do not authorize local boards of education to enter into contracts with out-of-state school systems for the education of pupils residing in this state. 1974 Op. Att’y Gen. No. 74-98.

Transfer of school buildings following annexation. — In the absence of an express intent on part of the legislature to the contrary, or, in absence of an agreement to the contrary on the part of interested parties, annexation of property containing buildings and school facilities of a county school system by a municipality having an independent school system results in a transfer of the ownership and control of such building and facilities to the municipal school system; however, it would be possible for such school buildings and facilities to continue to be operated or owned by the county school system either where the legislature so provides in the annexation legislation, or, where the interested parties, i.e., the county and municipal school systems, so agree. 1967 Op. Att’y Gen. No. 67-7.

Unit of the university system may enter into contract with a county or city for paving of a small area on campus, the county or city to perform this service on a fixed cost or reimbursable cost basis. 1965-66 Op. Att’y Gen. No. 65-71.

Contract between Department of Transportation and Jekyll Island State Park Authority for airport improvements legal. — The Department of Transportation by definition is the state; therefore, by virtue of this paragraph, the

Department of Transportation may contract with an authority if the particular authority is otherwise authorized by law to enter into such a contract; the Jekyll Island Authority may contract for airport construction through power granted in subsection (d) of former Code 1933, § 43-606 (see now O.C.G.A. § 12-3-235(5)); therefore, the Department of Transportation may legally enter into an airport contract with the Jekyll Island State Park Authority covering improvements to the Jekyll Island Airport. 1971 Op. Att’y Gen. No. 71-195 (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

State Board of Corrections may contract with a county to furnish water to prison camp. 1957 Op. Att’y Gen. p. 239.

While power to contract is not conferred upon Economic Development Council by Ch. 8, T. 10, contracts with other state agencies with respect to payroll, procurement, budgeting, and accounting are authorized by virtue of this paragraph; therefore, such council may enter into a contract with another department whereby that department will perform payroll, procurement, budgeting, and accounting functions for the council. 1978 Op. Att’y Gen. No. 78-23 (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

County participating in watershed project. — A county participating in a watershed project could pay the cost of condemning necessary easements and land rights upon entry into an appropriate contract or agreement with the participating Soil and Water Conservation District. 1967 Op. Att’y Gen. No. 67-108.

Collection of child support. — In the absence of express authority empowering the Department of Offender Rehabilitation (now Department of Corrections) to collect child support recovery unit money, a contractual agreement between the Department of Human Resources and the Department of Offender Rehabilitation (now Department of Corrections) regarding a proposed arrangement between these agencies for such collections would not meet the requirements of this provision pertaining to contracts between state agencies that the contracts deal “with such activities and transactions as such

subdivisions are by law authorized to undertake." 1982 Op. Att'y Gen. No. 82-99 (see Ga. Const. 1983, Art. IX, Sec. III, Para. I).

Loans by Department of Natural Resources and Georgia Environmental Facilities Authority. — Loans by the Department of Natural Resources pursuant to O.C.G.A. § 12-5-38.1 and loans by the Georgia Environmental Facilities Authority pursuant to O.C.G.A. § 50-23-1 et seq. do not cause a city or county to incur debt in accordance with Ga. Const. 1983, Art. IX, Sec. V, Para. I. The constitutional underpinning of these programs is in the intergovernmental contract clause, Ga. Const. 1983, Art. IX, Sec. III, Para. I(a). Thus, the procedural requirements in O.C.G.A. § 48-8-111 for submitting a debt question are not triggered where proceeds derived from the sales tax are to be applied to repayment of the loans by Department of Natural Resources or the Georgia Environmental Facilities Authority. 1990 Op. Att'y Gen. No. U90-7.

Authority of Georgia Environmental Facilities Authority and city of Atlanta regarding loans. — The Georgia Environmental Facilities Authority is statutorily empowered to make the administrative and policy determinations requiring the city of Atlanta to pledge its full faith and credit as security for a loan from the Authority, there are no constitutional prohibitions upon the city pledging its full faith and credit for such a loan, and a referendum is not required prior to the city making the pledge. 2004 Op. Att'y Gen. No. 2004-8.

Intergovernmental agreements for probation services are legal in instances in which the contracting parties are authorized by law to provide probation services. Also, when providing probation services for a judicial circuit, a probation entity must be authorized to provide the service and must enter into separate agreements with the court of each county that composes that judicial circuit. 2012 Op. Att'y Gen. No. 12-7.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 423 et seq., 487.

C.J.S. — 20 C.J.S., Counties, § 173 et seq. 63 C.J.S., Municipal Corporations, § 1167 et seq. 81A C.J.S., States, § 285 et seq.

ALR. — Validity of contract intended or tending to influence location of county seat or public building, 13 ALR 734.

Power of municipal corporation to provide hospital, 25 ALR 612.

Liability of municipal corporation upon implied contract for use of property which is received under an invalid contract, 42 ALR 632.

Power of board to appoint officer or

make contract extending beyond its own term, 70 ALR 794; 149 ALR 336.

Right of municipality or other political subdivision to enforce against other party contract which was in excess of former's power, or which did not comply with the conditions of its power in that regard, 122 ALR 1370.

Power of municipality to fix specific scale of wages or hours for employees of contractors or subcontractors for municipal contracts, 129 ALR 763.

Subsequent exhaustion of funds as affecting contract validly entered into by political subdivision under constitutional provision limiting indebtedness to revenues for current year, 159 ALR 1261.

Paragraph II. Local government reorganization.

(a) The General Assembly may provide by law for any matters necessary or convenient to authorize the consolidation of the governmental and corporate powers and functions vested in municipalities with the governmental and corporate powers and functions vested in a county or counties in which such municipalities are located; provided, however, that no such consolidation shall become effective unless

separately approved by a majority of the qualified voters of the county or each of the counties and of the municipality or each of the municipalities located within such county or counties containing at least 10 percent of the population of the county in which located voting thereon in such manner as may be prescribed in such law. Such law may provide procedures and requirements for the establishment of charter commissions to draft proposed charters for the consolidated government, and the General Assembly is expressly authorized to delegate its powers to such charter commissions for such purposes so that the governmental consolidation proposed by a charter commission may become effective without the necessity of further action by the General Assembly; or such law may require that the recommendation of any such charter commission be implemented by a subsequent local law.

(b) The General Assembly may provide by general law for alternatives other than governmental consolidation as authorized in subparagraph (a) above for the reorganization of county and municipal governments, including, but not limited to, procedures to establish a single governing body as the governing authority of a county and a municipality or municipalities located within such county or for the redistribution of powers between a county and a municipality or municipalities located within the county. Such law may require the form of governmental reorganization authorized by such law to be approved by the qualified voters directly affected thereby voting in such manner as may be required in such law.

(c) Nothing in this Paragraph shall be construed to limit the authority of the General Assembly to repeal municipal charters without a referendum.

1976 Constitution. — Art. IX, Sec. IV, Para. I.

Cross references. — Merger of municipal government with county, T. 36, Ch. 68.

Law reviews. — For article, “The

County Spending Power: An Abbreviated Audit of the Account,” see 16 Ga. L. Rev. 599 (1982). For annual survey of local government law, see 58 Mercer L. Rev. 267 (2006).

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A county governing authority can create geographical areas within boundaries of a county which are called zones; the governing authority can declare that the land in a zone can be used only for specified purposes or uses and that all other specified purposes or uses of the land in that zone are prohibited; and only after the uses that are permitted on the land in a zone have been declared may reasonable regulations reg-

ulating those permitted uses be applied and enforced by the governing authority. *Gifford-Hill & Co. v. Harrison*, 229 Ga. 260, 191 S.E.2d 85 (1972).

Effect of rezoning renders land nonconforming use. — The owner of land, or one in contractual relationship with the owner, has a right to be issued authorization to use the land for the purpose for which it is zoned at the time the owner makes an application for such au-

thorization; the governing authority can thereafter rezone the land to prohibit a use previously permitted, and by such rezoning the previous use thereby becomes a nonconforming use which under the rezoning can be required to terminate within a reasonable time; but a governing authority cannot deny or postpone authorization for a permitted use with a view toward rezoning said land in the future so as to prohibit by rezoning a use that was

permitted at the time the application was either denied or postponed. *Gifford-Hill & Co. v. Harrison*, 229 Ga. 260, 191 S.E.2d 85 (1972).

Cited in *Barge v. Camp*, 209 Ga. 38, 70 S.E.2d 360 (1952); *Hart v. Columbus*, 125 Ga. App. 625, 188 S.E.2d 422 (1972); *City of Columbus v. Rudd*, 229 Ga. 568, 193 S.E.2d 11 (1972); *City of Atlanta v. Metropolitan Atlanta Rapid Transit Auth.*, 506 F. Supp. 883 (N.D. Ga. 1980).

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New political entity. — The political subdivision resulting from this paragraph is neither a city nor a county in a strict sense, but is a new type of political entity. 1971 Op. Att'y Gen. No. U71-35 (see Ga. Const. 1983, Art. IX, Sec. III, Para. II).

Consolidation requires a referendum. — The General Assembly cannot consolidate the governments of a municipality and county without a referendum of the people affected. 1970 Op. Att'y Gen. No. U70-137.

Cities located in more than one county may be consolidated with a county government; however, in the absence of a change in county lines or some additional general legislation to provide for consolidating governments of a city and more than one county, the city would have to give up some of its territory. 1998 Op. Att'y Gen. No. U98-10.

General discussion of consolidated city-county government of Columbus, Georgia. 1971 Op. Att'y Gen. No. 71-169.

Implementation of subparagraph (a). — Subparagraph (a) of Ga. Const. 1983, Art. IX, Sec. III, Para. II may be implemented by either general or local law, but a local law may not alter or vary the qualifications, duties, or responsibilities of constitutional county officers. 1984 Op. Att'y Gen. No. U84-1.

Consolidation where local constitutional amendment exists. — Where there is a local constitutional amendment governing consolidation, subsequent consolidation could take place under either the general constitutional authorization or the local constitutional amendment, if not otherwise limited. 1984 Op. Att'y Gen. No. U84-1.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 74, 75.

C.J.S. — 62 C.J.S., Municipal Corporations, §§ 88 et seq., 238.

ALR. — Delegation of matter of building regulations to private individuals or associations, 2 ALR 882.

What are "public utilities" within constitutional or statutory provisions relating to purchase, construction, or repair of same by municipal corporation, 9 ALR 1033; 35 ALR 592.

Extension of police power of municipal corporation beyond territorial limits, 55 ALR 1182; 14 ALR2d 103.

Power of municipality to make expenditures for advertising or other forms of publicity, 79 ALR 466.

Acceptance by municipality of street improvement as binding on property owners as regards contractor's performance of his obligations, 79 ALR 1107.

Damages resulting from temporary conditions incident to a public improvement as a taking or damaging within constitutional provisions, 98 ALR 956.

Constitutionality of statutory plan for financing or refinancing smaller political units by larger political unit, 106 ALR 608.

Payment of attorneys' services in de-

fending action brought against officials individually as within power or obligation of public body, 130 ALR 736.

Validity of municipal ordinance imposing requirements on outside producers of milk to be sold in city, 14 ALR2d 103.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking, 23 ALR4th 674.

SECTION IV.

TAXATION POWER OF COUNTY AND MUNICIPAL GOVERNMENTS

Paragraph

- I. Power of taxation.
- II. Power of expenditure.
- III. Purposes of taxation; allocation of taxes.

Paragraph

- IV. Tax allocation; regional facilities.

Law reviews. — For article, “Local Government Litigation: Some Pivotal Principles,” see 55 Mercer L. Rev. 1 (2003).

Paragraph I. Power of taxation.

(a) Except as otherwise provided in this Paragraph, the governing authority of any county, municipality, or combination thereof may exercise the power of taxation as authorized by this Constitution or by general law.

(b) In the absence of a general law:

(1) County governing authorities may be authorized by local law to levy and collect business and occupational license taxes and license fees only in the unincorporated areas of the counties. The General Assembly may provide that the revenues raised by such tax or fee be spent for the provision of services only in the unincorporated areas of the county.

(2) Municipal governing authorities may be authorized by local law to levy and collect taxes and fees in the corporate limits of the municipalities.

(c) The General Assembly may provide by law for the taxation of insurance companies on the basis of gross direct premiums received from insurance policies within the unincorporated areas of counties. The tax authorized herein may be imposed by the state or by counties or by the state for county purposes as may be provided by law. The General Assembly may further provide by law for the reduction, only upon taxable property within the unincorporated areas of counties, of

the ad valorem tax millage rate for county or county school district purposes or for the reduction of such ad valorem tax millage rate for both such purposes in connection with imposing or authorizing the imposition of the tax authorized herein or in connection with providing for the distribution of the proceeds derived from the tax authorized herein.

1976 Constitution. — Art. VII, Sec. I, Para. III; Art. IX, Sec. V, Paras. I, II.

Cross references. — Taxing powers remaining under General Assembly control, Ga. Const. 1983, Art. VII, Sec. I, Para. I. County taxing powers generally, § 48-5-220. School taxes, § 48-5-400. County sales and use tax, § 48-8-82. Excise taxes, § 48-13-51.

Law reviews. — For article surveying important legal principles of municipal and county government purchasing and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965). For article surveying judicial decisions affecting Georgia's state

and local taxation laws, decided under prior public revenue code, Code 1933, Title 92, see 31 Mercer L. Rev. 217 (1979). For article, "The County Spending Power: An Abbreviated Audit of the Account," see 16 Ga. L. Rev. 599 (1982).

For note discussing Georgia's local option sales tax, Code 1933, § 92-3447a.1 (Art. 2, Ch. 8, T. 48), see 31 Mercer L. Rev. 313 (1979).

For comment on Commissioners of Rds. & Revenue v. Davis, 213 Ga. 792, 102 S.E.2d 180 (1958), see 20 Ga. B.J. 540 (1958).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PUBLIC PURPOSES COUNTIES EMPOWERED TO TAX FOR

- 1. GENERAL CONSIDERATION
- 2. COUNTY GOVERNMENT ADMINISTRATION EXPENSES
- 3. ACQUISITION OF PUBLIC BUILDINGS AND BRIDGES
- 4. ROADS
- 5. SUPPORT OF PAUPERS

INVALID PURPOSES OF COUNTY TAXES

General Consideration

Editor's notes. — In light of the similarities of the provisions, decisions under former Ga. Const. 1976, Art. IX, Sec. V, Paras. I and II and antecedent provisions, which set forth specific purposes for which taxation by counties and municipalities was authorized, are included in the annotations for this paragraph.

Purpose of paragraph. — This paragraph was designed by the members of the constitutional convention to limit legislative power to authorize indiscriminate levies of taxes and prevent indebtedness, except as provided by Ga. Const. 1976, Art. IX, Sec. VII, Para. I (see Ga. Const. 1983, Art. IX, Sec. V, Para. I). Butts v. Little, 68 Ga. 272 (1881); Adair v. Ellis, 83

Ga. 464, 10 S.E. 117 (1889) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

There is no limitation upon the taxing power of a county in regard to the amounts to be levied for the authorized purposes by this paragraph. Commissioners of Habersham County v. Porter Mfg. Co., 103 Ga. 613, 30 S.E. 547 (1898) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

Tick Eradication Act (see now O.C.G.A. Part 4, Art. 1, Ch. 4, T. 4) **valid.** Townsend v. Smith, 144 Ga. 792, 87 S.E. 1039 (1916); Rowland v. Morris, 152 Ga. 842, 111 S.E. 389 (1923). See also Avera v. Clyatt, 152 Ga. 280, 109 S.E. 665 (1921).

This paragraph was not violated by Ga. L. 1913, p. 145, establishing the

General Consideration (Cont'd)

Municipal Court of Atlanta. *McWilliams v. Smith*, 142 Ga. 209, 82 S.E. 569 (1914) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

Tax Equalization Law of 1913, § 48-5-311 does not violate this paragraph. *McGregor v. Hogan*, 153 Ga. 473, 112 S.E. 471 (1922), *aff'd*, 263 U.S. 234, 44 S. Ct. 50, 68 L. Ed. 282 (1923) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

Tax for educational purposes is dependent upon approval of voters pursuant to Ga. Const. 1976, Art. VIII, Sec. VII, Para. I (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I). *Richter v. Bacon*, 145 Ga. 408, 89 S.E. 367 (1916).

This paragraph is restriction on power of General Assembly to delegate to county certain rights to levy tax and has no application to a constitutional amendment. *McLennan v. Aldredge*, 223 Ga. 879, 159 S.E.2d 682 (1968) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

This paragraph does not impose any limitation upon power of state to levy taxes. It imposes limitation upon power of legislature to authorize counties to levy taxes. It in no way interferes with the general power of the state to impose taxes. *Wright v. Fulton County*, 169 Ga. 354, 150 S.E. 262 (1929) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

Significance of Art. 4, Ch. 5, T. 3. — Uniform Beer Tax Act, Ga. L. 1974, p. 1447, does not impose a state tax for state purposes, which would invoke Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I) and Ga. Const. 1976, Art. VII, Sec. I, Para. III (see Ga. Const. 1983, Art. VII, Sec. I, Para. III); instead, it imposes a state tax for local purposes, and the counties' adherence to the tests of this paragraph and Ga. Const. 1976, Art. IX, Sec. V, Para. II (see Ga. Const. 1983, Art. IX, Sec. IV) delineating the allowable scope of county purposes of taxation is all that is required. *Chanin v. Bibb County*, 234 Ga. 282, 216 S.E.2d 250 (1975).

Legislature has implied power to provide the machinery for levy and collection of taxes. *Abbott v. Commis-*

sioners of Fulton County, 160 Ga. 657, 129 S.E. 38 (1925).

Georgia Const. 1976, Art. IX, Sec. V, Para. II (see Ga. Const. 1983, Art. IX, Sec. IV) covers same purposes expressed in this paragraph. *Richter v. Bacon*, 145 Ga. 408, 89 S.E. 367 (1916) (decided under Ga. Const. 1976, Art. IX, Sec. V Para. I (see Ga. Const. 1983, Art. IX, Sec. IV)).

For a distinction between taxes and assessments, see *Hayden v. City of Atlanta*, 70 Ga. 817 (1883); *Jones v. Sligh*, 75 Ga. 7 (1885); *Goolsby v. Board of Drainage Comm'rs*, 156 Ga. 213, 119 S.E. 644 (1923).

Coroners. — Fees of coroners are fixed by Ga. Penal Code 1895, § 1112 (see now O.C.G.A. § 45-16-9). *Davis v. County of Bibb*, 116 Ga. 23, 42 S.E. 403 (1902).

General Assembly does not need constitutional authorization to levy a tax or to authorize levy of a tax by a county. *Board of Comm'rs v. Cooper*, 245 Ga. 251, 264 S.E.2d 193 (1980) (But see *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979)).

Local option tax is not per se an impermissible delegation of legislative authority. *Board of Comm'rs v. Cooper*, 245 Ga. 251, 264 S.E.2d 193 (1980).

County power of taxation limited. — A county can only exercise the power of taxation as conferred upon it either directly by the Constitution or by the General Assembly when authorized by the Constitution. If there is any doubt as to the power of the county to tax in a particular instance, it must be resolved in the negative. *Commissioners of Chatham County v. Savannah Elec. & Power Co.*, 215 Ga. 636, 112 S.E.2d 655 (1960).

List of purposes for which the state may tax in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I), and Ga. Const. 1976, Art. VII, Sec. II, Para. IV (see Ga. Const. 1983, Art. VII, Sec. III, Para. III) is the only purposes of taxation the state may validly delegate to its creatures' power to tax. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

Though the purposes listed in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I)

are capable of delegation, the right of the state to tax to grant funds to municipalities is not capable of delegation to counties or to any other subdivision of the state. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

State may not grant to counties the right to tax and to give part of the proceeds to municipalities, and consequently this may not be “such other public purpose[s] as may be authorized by the General Assembly” within the meaning of Ga. Const. 1976, Art. IX, Sec. V, Para. II (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I), or the similar language of this paragraph. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

It can never be a valid county purpose to provide revenue to a municipality because municipalities are not citizens of nor creatures of counties — they are an entirely different form of government. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

Authority to collect occupation tax. — Because a second city provided by local ordinance for the levy, assessment, and collection of an occupation tax on businesses and practitioners operating within that city’s limits, the second city had the general authority to collect such a tax under O.C.G.A. § 48-13-6(b), and only the second city was authorized to levy, assess, and collect an occupation tax from businesses and practitioners at the airport that were located within the second city’s limits to the extent consistent with Ga. Const. 1983, Art. IX, Sec. IV, Para. I, O.C.G.A. § 48-13-6(b), other applicable statutes, and that city’s own charter, ordinances, and regulations; *Atlanta, Ga., Charter*, § 7-105(f) is ineffective to the extent it purports to divest College Park, Georgia of the authority to levy, assess, and collect an occupation tax on those businesses and practitioners operating at the airport and within the city limits of College Park. *City of Atlanta v. City of College Park*, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

Reason General Assembly not prohibited from performing constitutional services differently. — A constitutional provision which expressly

prescribes the manner of doing a particular thing is exclusive in that regard and impliedly prohibits performance in a substantially different manner, however this paragraph does not come within this principle so as to impliedly restrict the General Assembly in directing local taxation because this paragraph is permissive, and because it relates to delegation of power and not to exercise of power. *Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

Action not within state Supreme Court jurisdiction. — The Supreme Court does not have jurisdiction to review a judgment sustaining a demurrer (now motion to dismiss for failure ...) to a petition against a county seeking a judgment, because of personal injuries, nor does the fact that the plaintiff in error excepts to such judgment upon ground that it offends Ga. Const. 1976, Art. I, Sec. II, Para. III (see Ga. Const. 1983, Art. I, Sec. I, Para. II), and this paragraph of the Constitution which confer jurisdiction upon the Supreme Court. *Ayers v. Franklin County*, 199 Ga. 835, 35 S.E.2d 455 (1945) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

County treasurer carries burden of proof of county’s inability to become obligated on debt. — Where a county treasurer in a mandamus suit to compel payment of a warrant issued by the county raises the issue of an attempt, to create a debt as inhibited by the Constitution, on the basis of insufficient funds on hand or inability to levy lawful tax during the year to raise funds for payment of the contract price of the machinery purchased with the warrant, the burden of proof is on the treasurer. *Marion County v. First Nat’l Bank*, 193 Ga. 263, 18 S.E.2d 475 (1942).

Provision of former Rural Roads Authority Act (now Georgia Highway Authority, O.C.G.A. Art. 1, Ch. 10, T. 32) that required county authorities to maintain roads did not violate state constitutional provisions dealing with creation of debts, since counties are granted authority to build and maintain roads and to levy taxes for such purposes. *State v. Georgia Rural Rds. Auth.*, 211 Ga. 808, 89 S.E.2d 204 (1955).

General Consideration (Cont'd)

City not a local authority. — In a declaration suit, a city was properly determined not to be a local authority as that term is used in O.C.G.A. § 48-13-13(5) and, thus, was subject to the levy of occupation taxes by another municipality for the city's proprietary operations at its airport, which was in the other municipality's city limits, because the terms local authority and municipality were not the same under the statute. *City of Atlanta v. City of College Park*, 292 Ga. 741, 741 S.E.2d 147 (2013).

Cited in *Commissioners of Rds. & Revenues v. Martin*, 161 Ga. 220, 130 S.E. 569 (1925); *Bank of Chatsworth v. Hagedorn Constr. Co.*, 162 Ga. 488, 134 S.E. 310 (1926); *McGinnis v. McKinnon*, 165 Ga. 713, 141 S.E. 910 (1928); *Templeman v. Jeffries*, 172 Ga. 895, 159 S.E. 248 (1931); *J.G. McCrory Co. v. Board of Comm'rs of Rds. & Revenues*, 177 Ga. 242, 170 S.E. 18 (1933); *Swoger v. Glynn County*, 179 Ga. 768, 177 S.E. 723 (1934); *Griner v. Board of Comm'rs*, 180 Ga. 619, 180 S.E. 118 (1935); *Howell v. Bankston*, 181 Ga. 59, 181 S.E. 761 (1935); *Mosley v. Garrett*, 182 Ga. 810, 187 S.E. 20 (1936); *Lumpkin County v. Davis*, 185 Ga. 393, 195 S.E. 169 (1938); *Vincent v. MacNeill*, 186 Ga. 427, 198 S.E. 68 (1938); *Miller v. Head*, 186 Ga. 694, 198 S.E. 680 (1938); *McCook v. Long*, 193 Ga. 299, 18 S.E.2d 488 (1942); *DeJarnette v. Hospital Auth.*, 195 Ga. 189, 23 S.E.2d 716 (1942); *MacNeill v. Wood*, 198 Ga. 150, 31 S.E.2d 14 (1944); *Kelley v. Newton County*, 198 Ga. 483, 32 S.E.2d 99 (1944); *Bibb County v. Garrett*, 204 Ga. 817, 51 S.E.2d 658 (1949); *Barge v. Camp*, 209 Ga. 38, 70 S.E.2d 360 (1952); *Troutman v. Aiken*, 213 Ga. 55, 96 S.E.2d 585 (1957); *Commissioners of Rds. & Revenues v. Davis*, 213 Ga. 792, 102 S.E.2d 180 (1958); *Fortson v. Clarke County*, 97 Ga. App. 410, 103 S.E.2d 597 (1958); *Cason v. State*, 217 Ga. 339, 122 S.E.2d 232 (1961); *Jamerson v. Campbell*, 217 Ga. 766, 125 S.E.2d 205 (1962); *Seago v. Richmond County*, 218 Ga. 151, 126 S.E.2d 657 (1962); *Oconee County v. Rowland*, 107 Ga. App. 108, 129 S.E.2d 373 (1962); *Ferguson v. Leggett*, 226 Ga. 333, 174 S.E.2d 913 (1970); *Bradfield v.*

Hospital Auth., 226 Ga. 575, 176 S.E.2d 92 (1970); *Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99 (N.D. Ga. 1975); *Decatur Tax Payers League, Inc. v. Adams*, 236 Ga. 871, 226 S.E.2d 69 (1976); *Martin v. Ellis*, 242 Ga. 340, 249 S.E.2d 23 (1978); *In re Board of Twiggs County Comm'rs*, 249 Ga. 642, 292 S.E.2d 673 (1982).

Public Purposes Counties Empowered to Tax For

1. General Consideration

Editor's notes. — For decisions regarding legislative power to impose occupation taxes, see the annotations under Ga. Const. 1983, Art. VII, Sec. I, Para. III.

Worker's compensation. — Trial court properly determined that a county could not provide workers compensation coverage to Georgia superior court judges, as the judges were not county employees; counties were specifically authorized by Ga. Const. 1983, Art. IX, Sec. IV, Para. I and O.C.G.A. § 48-5-220 to provide workers compensation to "county officials," such as a sheriff, pursuant to O.C.G.A. § 34-9-1, but judges were deemed state employees. *Freeman v. Barnes*, 282 Ga. App. 895, 640 S.E.2d 611 (2006).

2. County Government Administration Expenses

County tax cannot be levied for purpose of raising money to pay pensions to Confederate soldiers, and widows of Confederate soldiers. *Elder v. Collier*, 100 Ga. 342, 28 S.E. 116 (1897); *Verdery v. Walton*, 137 Ga. 213, 73 S.E. 390 (1911); *Clark v. Walton*, 137 Ga. 277, 73 S.E. 392 (1911).

3. Acquisition of Public Buildings and Bridges

Construction of bridges. — This paragraph broadens taxing power which the legislature may confer upon counties sufficiently to embrace all expenses for constructing and maintaining bridges and roads. *Smith v. Floyd County*, 85 Ga. 420, 11 S.E. 850 (1890), distinguishing *Smith v. Wilkes & McDuffie Counties*, 79 Ga. 125, 4 S.E. 20 (1887), and *Monroe County v.*

Flint, 80 Ga. 489, 6 S.E. 173 (1888) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

This paragraph broadens the taxing power of counties to include taxation to pay a judgment for personal injuries caused by unrepaired bridge. Dearing v. Shepherd, 78 Ga. 28 (1886) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

There is no limitation on amount of taxes which may be assessed and collected within the year for building and repairing bridges within counties of this state, excepting the cost of erecting the bridges. Settle v. Howell, 174 Ga. 792, 164 S.E. 189 (1932).

4. Roads

Extent of legislature's powers in building or locating public roads. — This provision does not deny the right of counties to build and maintain public roads, nor is the power of the legislature limited by this or other provisions of the Constitution in the matter of building or locating public roads, or their width or character; but all such matters are left to the wisdom of the legislature and are proper subject matters for legislation. This provision is only a limitation as to the purposes for which taxes may be levied. Swoger v. Glynn County, 179 Ga. 768, 177 S.E. 723 (1934) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

5. Support of Paupers

Legislature is empowered to delegate to counties "the right to levy a tax to support paupers." — In pursuance of such authority, the General Assembly has granted counties the right to levy taxes for support of paupers of the county, the right to provide medical or other care and hospitalization for the indigent sick of the county, and the authority thus conferred is not limited "to personal administration by officers or agents" of the governing authority, but such authority "may, except as otherwise limited by law, enter into contract with a corporation having appropriate charter power, under terms of which the latter corporation will care for the poor in the matter of medical and surgical treatment." Brock v. Chappell, 196 Ga. 567, 27 S.E.2d 38 (1943).

Invalid Purposes of County Taxes

List of purposes for which the state may tax in Ga. Const. 1976, Art. VII, Sec. II, Para. I and Ga. Const. 1976, Art. VII, Sec. II, Para. IV (see Ga. Const. 1983, Art. VII, Sec. III, Para. III) is the only purposes of taxation the state may validly delegate to its creatures power to tax. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979) (decided under Ga. Const. 1976, Art. VII, Sec. II, Para. I; see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

Though the purposes listed in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I) are capable of delegation, the right of the state to tax to grant funds to municipalities is not capable of delegation to counties or to any other subdivision of the state. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979) (decided under Ga. Const. 1976, Art. VII, Sec. II, Para. I; see Ga. Const. 1983, Art. VII, Sec. III, Para. I).

State may not grant to counties the right to tax and to give part of the proceeds to municipalities, and consequently this may not be "such other public purpose[s] as may be authorized by the General Assembly" within the meaning of this paragraph or the similar language of Ga. Const. 1976, Art. IX, Sec. V, Para. I (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I). City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

Purposes for which a county may tax are listed in this paragraph, and Ga. Const. 1976, Art. IX, Sec. V, Para. I (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I), and taxation by counties for the purpose of sharing the resulting revenue with cities does not appear in that list. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

Authority of municipality to collect occupation tax. — First city lacked authority to collect an occupation tax on professional or business activities within a second city's limits because the first city did not identify any constitutional provision or general law that authorized the first city to levy, assess, and collect an occupation tax on businesses and practitioners that were not located in that city's limits, and to the extent an agreement between the cities purported to vest in the

Invalid Purposes of County Taxes (Cont'd)

first city the authority to collect an occupation tax on businesses located within

the second city's limits, the contract was unenforceable; a contract between municipalities, however, is not a general law. *City of Atlanta v. City of College Park*, 311 Ga. App. 62, 715 S.E.2d 158 (2011).

OPINIONS OF THE ATTORNEY GENERAL

No conflict in taxing powers. — There is no conflict between taxing powers of a county as set forth in this paragraph with the authority contained in Ga. Const. 1976, Art. IX, Sec. V, Para. II (see Ga. Const. 1983, Art. IX, Sec. V, Para. III). 1958-59 Op. Att'y Gen. p. 39 (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I).

General Assembly's residuum constitutional powers. — If the General Assembly has the right to delegate power of taxation to political subdivisions, the General Assembly has within its residuum of constitutional powers right to exercise such power for benefit of political subdivisions. 1952-53 Op. Att'y Gen. p. 189.

Legislature not empowered to authorize municipal corporation to engage in ordinarily private enterprise. — In absence of special circumstances, it is not within constitutional power of a legislature to authorize a municipal corporation (county) to engage in a business which can be and ordinarily is carried on by private enterprise for purpose of obtaining an income or deriving a profit therefrom, but it should be allowed to go into business only on the theory that thereby the public welfare will be subserved. 1965-66 Op. Att'y Gen. No. 66-176.

It is proper to levy and collect county school tax without deduction as payment for preparation of a separate school digest. 1965-66 Op. Att'y Gen. No. 65-62.

A county and municipal school system may provide by contract for continued operation of such school by and for the county school system. 1967 Op. Att'y Gen. No. 67-7.

Transfer of county property upon annexation. — In the absence of an express intent on part of the legislature to the contrary, or, in the absence of an agreement to the contrary on the part of

the interested parties, the annexation of property containing buildings and school facilities of a county school system by a municipality having an independent school system results in a transfer of ownership and control of such building and facilities to the municipal school system; however, it would be possible for such school buildings and facilities to continue to be operated or owned by the county school system either where the legislature so provides in the annexation legislation, or, where the interested parties, i.e. the county and municipal school systems, so agree. 1967 Op. Att'y Gen. No. 67-7.

Georgia Regional Hospital at Atlanta is not subject to DeKalb County property taxation because it is owned by the state. 1970 Op. Att'y Gen. No. 70-205.

Cooperative financial endeavor between city and county legal. — Assuming that a city possesses legal authority to borrow funds via a 20-year loan for the purpose of constructing a library building, it would be legal for the city and county to enter into the proposed agreement whereunder the building would be leased to the county for the term of the loan at an annual rental sufficient to meet the loan payments; it would also be legal for the county to levy taxes for the purpose of making the rental payments. 1967 Op. Att'y Gen. No. 67-120.

Tax for vocational trade schools. — Governing authorities of counties or municipalities desiring to establish and maintain area vocational trade schools are authorized to levy a tax for such purposes; the circumstances under which the tax could be levied would be where the participating subdivisions have entered into an agreement for establishment and maintenance of an area vocational trade school. 1967 Op. Att'y Gen. No. 67-153.

Absent any appropriate legislation, a county cannot levy a tax for general

fire protection. 1971 Op. Att'y Gen. No. U71-100.

County cannot impose a tax for industrial development. 1970 Op. Att'y Gen. No. U70-13.

County is not authorized to levy a tax to repair a building used by the

public, but owned by private individuals. 1954-56 Op. Att'y Gen. p. 575.

Imposition of municipal business license fee on businesses operating at State Farmer's Market. 1987 Op. Att'y Gen. No. 87-36.

RESEARCH REFERENCES

Am. Jur. 2d. — 71 Am. Jur. 2d, State and Local Taxation, §§ 58, 67 et seq.

C.J.S. — 20 C.J.S., Counties, § 156.

ALR. — Power to exact license fees or impose a penalty for benefit of private individual or corporation, 13 ALR 828; 19 ALR 205.

Appropriation or raising of public funds for distribution by chamber of commerce, 31 ALR 495.

Authority of county to employ tax ferret, 32 ALR 88.

Scope and effect of express constitutional provisions prohibiting Legislature from imposing taxes for county and corporate purposes, or providing that Legislature may invest power to levy such taxes in the local authorities, 46 ALR 609; 106 ALR 906.

Validity of municipal ordinance requiring indemnity insurance as condition of operating taxicab, 95 ALR 1224.

Limitation of power to tax as limitation of power to incur indebtedness or vice versa, 97 ALR 1103.

Validity of legislative delegation of taxing power to school districts in absence of express constitutional provision authorizing such delegation, 113 ALR 1416.

Validity, construction, and application of license regulations as to masons, plasterers, painters, and paper hangers, 123 ALR 471.

Existing sinking fund as a factor in determining whether indebtedness or proposed indebtedness of municipality or other political subdivision exceeds constitutional or statutory limit, 125 ALR 1393.

Validity of statute or municipal ordinance which provides generally that occupations or businesses for which no specific license tax has been imposed, shall be subject to a license tax of a specified amount or rate, 134 ALR 841.

Power of municipality or other governmental unit to make contract or covenant exempting or releasing property from special assessment, 47 ALR2d 1185.

Paragraph II. Power of expenditure.

The governing authority of any county, municipality, or combination thereof may expend public funds to perform any public service or public function as authorized by this Constitution or by law or to perform any other service or function as authorized by this Constitution or by general law.

1976 Constitution. — Art. IX, Sec. V, Paras. I, II.

Law reviews. — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979). For

annual survey of local government law, see 35 Mercer L. Rev. 233 (1983). For article, "Privatization of Rural Public Hospitals: Implications for Access and Indigent Care," see 47 Mercer L. Rev. 991 (1996).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PUBLIC PURPOSES COUNTIES EMPOWERED TO TAX FOR

1. COUNTY GOVERNMENT ADMINISTRATION EXPENSES
2. ACQUISITION OF PUBLIC BUILDINGS AND BRIDGES
3. EDUCATION
4. ROADS
5. AIRPORTS
6. MASS TRANSIT SYSTEM FACILITIES
7. OPERATION OF COURTS
8. COUNTY LITIGATION
9. MEDICAL CARE AND HOSPITALIZATION FOR INDIGENT SICK

INVALID USES OF COUNTY TAXES

General Consideration

Initially, county officials could not bind the county by the creation of a debt for payment of which it had no power to levy a tax. Thus, county officials were not authorized to purchase vaccine matter for inoculation of persons against smallpox. *Daniel v. Putnam County*, 113 Ga. 570, 38 S.E. 980, 54 L.R.A. 292 (1901).

Equity will grant an injunction if county exceeds taxing ability. *Mitchell v. Lasseter*, 114 Ga. 275, 40 S.E. 287 (1901); *DeVaughn v. Booten*, 146 Ga. 836, 92 S.E. 629 (1917).

Right of county citizens and taxpayers to enjoin unlawful distribution of public funds. — Citizens and taxpayers of counties have such an interest as will authorize them to maintain actions to enjoin the unlawful distribution of public funds of counties or to recover county funds which were allegedly illegally disbursed. *Nelson v. Wainwright*, 224 Ga. 693, 164 S.E.2d 147 (1968).

Mandamus. — Before the writ of mandamus will issue to compel county commissioners to issue their warrant upon county treasurer to pay a debt, it must appear that the debt comes within the classes provided in this paragraph. *Brunson v. Caskie*, 127 Ga. 501, 56 S.E. 621, 9 L.R.A. (n.s.) 1002 (1907); *Barksdale v. Hayes*, 134 Ga. 348, 67 S.E. 852 (1910); *Clark v. Reynolds*, 136 Ga. 817, 72 S.E. 254 (1911); *Daniel v. Hutchinson*, 169 Ga. 492, 150 S.E. 681 (1929) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

All county employers covered by workers' compensation. — Since a county is declared to be an "employer" under Ch. 9, T. 34, and has constitutional authority to raise funds therefor, the conclusion is demanded that all county employees in all counties are covered by workers' compensation. *Rosser v. Meriwether County*, 125 Ga. App. 239, 186 S.E.2d 788 (1971).

Cited in *Harrison v. Rainey*, 227 Ga. 240, 179 S.E.2d 923 (1971); *Inman Park Restoration, Inc. v. Urban Mass Transp. Admin.*, 414 F. Supp. 99 (N.D. Ga. 1975); *Decatur Tax Payers League, Inc. v. Adams*, 236 Ga. 871, 226 S.E.2d 69 (1976); *Ledbetter Bros. v. Floyd County*, 237 Ga. 22, 226 S.E.2d 730 (1976); *Peacock v. Georgia Mun. Ass'n*, 247 Ga. 740, 279 S.E.2d 434 (1981); *Clayton County v. Otis Pruitt Homes, Inc.*, 250 Ga. 505, 299 S.E.2d 721 (1983); *Malcom v. Newton County*, 244 Ga. App. 464, 535 S.E.2d 824 (2000).

Public Purposes Counties
Empowered to Tax For

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. IX, Sec. V, Para. II and antecedent provisions, which set forth specific purposes for which county and municipal expenditures were authorized, are included in the annotations for this paragraph.

1. County Government
Administration Expenses

County authorities have no power to make a contract with a bank, con-

stituting it the fiscal agent of the county, regarding the payments of warrants on the county treasurer. *Lettice v. American Nat'l Bank*, 133 Ga. 874, 67 S.E. 187 (1910).

County not obligated to pay surveyor. — Where suit was brought by a surveyor, who was appointed by the Governor to run a disputed line between two counties under Ga. L. 1908, p. 96 (see now O.C.G.A. Art. 2, Ch. 3, T. 36), to recover from one of such counties one-half of the charge for such survey, there was no error in dismissing the suit on general demurrer (now motion to dismiss). *Robert v. Wilkinson County*, 137 Ga. 601, 73 S.E. 838 (1912); *Smith v. Baker County*, 142 Ga. 168, 82 S.E. 557 (1914).

Costs of publication of annual statement of the county treasurer not valid expense of county. *Howard v. Early County*, 104 Ga. 669, 30 S.E. 880 (1898).

2. Acquisition of Public Buildings and Bridges

Construction of bridges. — This paragraph broadens the taxing power which the legislature may confer upon counties sufficiently to embrace all expenses for constructing and maintaining bridges and roads. *Smith v. Floyd County*, 85 Ga. 420, 11 S.E. 850 (1890) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

Taxation to pay a judgment for personal injuries caused by unrepaired bridge permitted. *Dearing v. Shepherd*, 78 Ga. 28 (1886).

There is no limitation on amount of taxes which may be assessed and collected within the year for building and repairing bridges within counties of this state, excepting the cost of erecting the bridges. *Settle v. Howell*, 174 Ga. 792, 164 S.E. 189 (1932).

3. Education

Supplementing county agents' salaries by counties permissible. — The board of regents, through the college of agriculture, controls the general scope of the agricultural extension work and is empowered to employ and discharge county agents, while the counties may, if they choose to levy the tax therefor, sup-

plement the salaries of the county agents. *Royal Indem. Co. v. Humphries*, 90 Ga. App. 567, 83 S.E.2d 565 (1954).

Payment of salaries with county funds. — County commissioners can expend county funds for limited purpose of paying salary of personnel to aid and assist in administration of county government. *Whatley v. Taylor County*, 224 Ga. 669, 164 S.E.2d 121 (1968).

County commissioners imbued with large discretion in expending money for specified purposes. — While county commissioners cannot expend public money beyond the specified purposes enumerated in the Constitution, large discretion is vested in the county commissioners in the expenditure of public money within the specified purposes enumerated in the Constitution. *Whatley v. Taylor County*, 224 Ga. 669, 164 S.E.2d 121 (1968).

Supreme Court will not interfere with the discretionary action of county commissioners within the sphere of their legally delegated powers, unless such action amounts to an abuse of discretion. *Whatley v. Taylor County*, 224 Ga. 669, 164 S.E.2d 121 (1968).

Payment of retirement benefits to school employees is not an expenditure for an "educational purpose." — Rather, payment of retirement benefits for county school employees from general county funds is authorized by this paragraph and by Ga. Const. 1976, Art. X, Sec. I, Para. I (see Ga. Const. 1983, Art. IX, Sec. II, Para. III), as it represents a separate and distinct public purpose. *Lomax v. McBrayer*, 248 Ga. 753, 286 S.E.2d 35 (1982) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

4. Roads

By implication, counties authorized to develop asphalt production facilities. — Given the general and broad powers of counties authorized by this paragraph and Ga. L. 1973, p. 947, § 1 (see now O.C.G.A. § 32-4-41) to levy taxes and expend funds for the construction and maintenance of roads, it is reasonable to imply authority to develop facilities for production of asphalt for use in the county road system. *Ledbetter Bros. v. Floyd*

Public Purposes Counties Empowered to Tax For (Cont'd)

4. Roads (Cont'd)

County, 237 Ga. 22, 226 S.E.2d 730 (1976) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

5. Airports

Uniform Airport Act is not void as violative of this paragraph of the Constitution. *Swoger v. Glynn County*, 179 Ga. 768, 177 S.E. 723 (1934) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

6. Mass Transit System Facilities

This paragraph does not limit use of tax proceeds to providing "facilities" for a transit system. *Camp v. Metropolitan Atlanta Rapid Transit Auth.*, 229 Ga. 35, 189 S.E.2d 56 (1972) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

7. Operation of Courts

Expenses of Court. — Salaries of judges of the city courts may be properly classed as expenses of court within the meaning of this paragraph. *Clark v. Eve*, 134 Ga. 788, 68 S.E. 598 (1910) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

Salaries of judges of the superior courts cannot be classed as expenses of the court. *Clark v. Hammond*, 134 Ga. 792, 68 S.E. 600 (1910).

Costs of publishing the general presentments of the grand jury are not expenses of court. *Houston County v. Kersh & Wynne*, 82 Ga. 252, 10 S.E. 199 (1899).

A superior court judge cannot appoint and pay a detective, or employ a special officer to detect an escaped prisoner. *Maxwell v. Cumming*, 58 Ga. 384 (1877).

8. County Litigation

Litigation. — The term "litigation" does not include litigation arising out of violations of a prohibitory liquor law. *Koger v. Hunter*, 102 Ga. 76, 29 S.E. 141 (1897).

Litigation does not include engagement of counsel to resist legislative

action. *DeVaughn v. Booten*, 146 Ga. 836, 92 S.E. 629 (1917).

Litigation does not include a proceeding before the state prison commission (now Board of Corrections) for removal of the warden in charge of the convicts in a given county, instituted by a majority of the commissioners of roads and revenues (board of county commissioners) of such county. *Humber v. Dixon*, 147 Ga. 480, 94 S.E. 565 (1917).

Action by public official questioning validity of repealed Voters Registration Act was constitutionally valid litigation payable from county funds.

— Where it was the right and, therefore, the duty of a public official to, in good faith, raise the question as to the validity of the "Voters Registration Act," former Ga. L. 1949, p. 1204 (now Art. 6, Ch. 2, T. 21), the official need not do so at the official's own expense, since it is the county's funds sought to be protected and not the official's own funds. The Constitution, when enumerating the purposes for which counties could levy and collect taxes, used the word "litigation" and that language was intended to cover just such a situation as is here presented. *Richmond County v. Harper*, 206 Ga. 517, 57 S.E.2d 595 (1950).

9. Medical Care and Hospitalization For Indigent Sick

Contract with hospital for indigent sick. — Contract by county with a hospital in the county, to provide a ward for hospitalization and medical treatment of indigent sick, is neither gratuity nor otherwise prohibited unless in violation of statutory limitations on the levy of taxes to support such a contract. *Brock v. Chappell*, 196 Ga. 567, 27 S.E.2d 38 (1943).

Invalid Uses of County Taxes

It can never be a valid county purpose to provide revenue to a municipality because municipalities are not citizens of nor creatures of counties — they are an entirely different form of government. *City Council v. Mangelly*, 243 Ga. 358, 254 S.E.2d 315 (1979).

General Assembly must have express constitutional authorization

for allowing a county to impose a tax for a particular purpose. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

List of purposes for which the state may tax in Ga. Const. 1976, Art. VII, Sec. II, Para. I and Ga. Const. 1976, Art. VII, Sec. II, Para. IV (see Ga. Const. 1983, Art. VII, Sec. III, Para. I and Para. II) is the only purposes of taxation the state may validly delegate to its creatures power to tax. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

Though the purposes listed in Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I) are capable of delegation, the right of the state to tax to grant funds to municipalities is not capable of delegation to counties or to any other subdivision of the state. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979).

State may not grant to counties the right to tax and to give part of the proceeds to municipalities, and consequently this may not be "such other public purpose[s] as may be authorized by the General Assembly" within the meaning of this paragraph or the similar language of Ga. Const. 1976, Art. IX, Sec. V, Para. I

(see Ga. Const. 1983, Art. IX, Sec. IV). City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

Purposes for which a county may tax are listed in this paragraph, and Ga. Const. 1976, Art. IX, Sec. V, Para. I (see Ga. Const. 1983, Art. IX, Sec. IV) and taxation by counties for the purpose of sharing the resulting revenue with cities does not appear in that list. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

Use of county funds to procure passage, defeat, or influence vote approval of constitutional amendment not authorized. — The authority of county governments to expend public funds is enumerated in this paragraph. Expenditure of county funds to procure passage or defeat of constitutional amendments is not specifically permitted. Further, the Supreme Court has decided that an advertising campaign to influence vote approval of a constitutional amendment is not authorized as a facet of administration of county government. McKinney v. Brown, 242 Ga. 456, 249 S.E.2d 247 (1978) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

PUBLIC PURPOSES COUNTIES EMPOWERED TO TAX FOR

1. COUNTY GOVERNMENT ADMINISTRATION EXPENSES
2. CONSTRUCTION OF ROADS
3. PUBLIC HEALTH AND SANITATION PROGRAMS
4. COUNTY AGRICULTURAL AND HOME DEMONSTRATION AGENTS
5. WELFARE BENEFITS
6. CONSERVATION OF NATURAL RESOURCES
7. EMPLOYEES INSURANCE AND OTHER BENEFITS
8. SUPPORT AND MAINTENANCE OF PUBLIC SCHOOLS

INVALID USES OF COUNTY TAXES

General Consideration

No conflict in taxing powers. — There is no conflict between the taxing powers of a county as set forth in Ga. Const. 1976, Art. IX, Sec. V, Para. I (see Ga. Const. 1983, Art. IX, Sec. IV) with the authority contained in this paragraph. 1958-59 Op. Att'y Gen. p. 39. (see Ga.

Const. 1983, Art. IX, Sec. IV, Para. II).

Express powers of a county to levy taxes must be used for prescribed purposes and none other; thus, taxes levied by a county for any one of the enumerated purposes cannot be used for any of the other enumerated purposes. 1958-59 Op. Att'y Gen. p. 125.

General Consideration (Cont'd)

Fourteen purposes listed in this paragraph are exclusive, and any attempt to use county funds except for these purposes would be null and void. 1967 Op. Att'y Gen. No. 67-123. (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

Test of the "public nature" of the expenditure should be judged by the tangible benefits accruing to the county. 1977 Op. Att'y Gen. No. U77-34.

Provision for county fire protection. — This paragraph authorizes the legislature, by a local bill to district the territory of a county for fire protection purposes and to authorize such county to levy a tax upon the taxable property within such district for the purpose of providing and maintaining such fire protection, provided the limits or boundaries of such fire protection district are clearly set forth in the local bill. 1958-59 Op. Att'y Gen. p. 39. (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

Cooperative counties agreement for purchase and use of riot control equipment. — All counties and those municipalities having the requisite charter authority may enter into cooperative agreements with one another for the purchase and use of equipment to be employed in jointly administered riot control programs. 1969 Op. Att'y Gen. No. 69-141.

"Straw vote" or public opinion referendum. — The expenditure of public funds for a county wide "straw vote" or public opinion referendum, absent some statutory or constitutional premise, is prohibited. 1990 Op. Att'y Gen. No. U90-20.

**Public Purposes Counties
Empowered to Tax For**

**1. County Government
Administration Expenses**

Expenditure of tax funds by the county to secure reports, recommendations, plans, or surveys would not violate this paragraph, inasmuch as the information required as a result of the contemplated agreements would be a proper expense incurred in the administration of the county government. 1963-65 Op. Att'y Gen. p. 273.

2. Construction of Roads

Funds for acquisition of right of way. — If a county desires funds for acquisition of a right of way, the first source for this money is from tax moneys collected for this particular purpose; if a county has made no provision in its levy of taxes for acquisition and construction of roads or if all taxes collected pursuant to a levy for this purpose have been expended, then the county must derive its funds from either surplus funds derived from taxes levied for other purposes, if there is a residue, or from funds arising from sources other than taxation. 1969 Op. Att'y Gen. No. 69-231.

Laws of this state do not authorize setting aside of moneys in a "special fund" to purchase a right of way for county roads. 1969 Op. Att'y Gen. No. 69-231.

Use of residue leftover funds raised for specific purpose converted to general funds permissible. — In those cases in which moneys have been raised for a specific purpose and all demands and debts properly chargeable to the particular fund have been paid, a surplus from such fund then becomes a general fund; this residue may be lawfully applied to payments of any legitimate liabilities against the county. 1969 Op. Att'y Gen. No. 69-231.

County may apply funds arising from other sources than taxation to defray expenses for any authorized public purpose; the only exception to this principle is that these funds derived from other sources, such as fees and costs, must not be earmarked by statute to be applied in some other particular direction. 1969 Op. Att'y Gen. No. 69-231.

**3. Public Health and Sanitation
Programs**

Sewerage installation for private nursing by county invalid in absence of legislation. — Insofar as it were a tax supported function, provision by the county of sewerage facilities to a private nursing home would be an invalid exercise of power in the absence of enabling legislation. 1962 Op. Att'y Gen. p. 77.

4. County Agricultural and Home Demonstration Agents

County responsible for expenses and salaries of county home demonstration agents. — Where county taxes are levied under this paragraph and under paragraph (10) of former Code 1933, § 92-3701 (see now O.C.G.A. § 48-5-220), the expenses and salaries of the county and home demonstration agent would be paid by the general governing body of the county, i.e., usually the board of county commissioners (of roads and revenues). 1958-59 Op. Att’y Gen. p. 127 (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

5. Welfare Benefits

Authority for provision of welfare benefits. — The expenditure of funds for coverage of state or local employees of public hospitals and institutions of higher learning by unemployment compensation would be authorized by Ga. Const. 1976, Art. VII, Sec. II, Para. I (see Ga. Const. 1983, Art. VII, Sec. III, Para. I), and subparagraphs (7) and (8) of this paragraph to provide necessary welfare benefits as specified by the General Assembly. 1971 Op. Att’y Gen. No. 71-35 (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

County support of private day care center limited. — Since the Constitution limits county taxation and expenditures to welfare programs as provided by law, and the only welfare provided by law which may include this type of day care services is the Aid to Families with Dependent Children program, there would be no authority for a county to appropriate money for private day care center which is not operated as a service for eligible children. 1975 Op. Att’y Gen. No. U75-1.

6. Conservation of Natural Resources

County is authorized to use county equipment and to expend county funds in maintenance of watershed improvement structures where such projects are in furtherance of the county’s authorization to conserve natural resources, serve a flood prevention need, and provide additional public benefits. 1975 Op. Att’y Gen. No. 75-29.

7. Employees Insurance and Other Benefits

Required stipulation for participation by county in retirement annuity for employees. — A county can participate in a retirement annuity for its employees contracted through an insurance company with the understanding that payments for public school teachers and personnel, their dependents and survivors, shall be paid from education funds. 1969 Op. Att’y Gen. No. 69-474; 1975 Op. Att’y Gen. No. U75-37.

8. Support and Maintenance of Public Schools

Some permissible and nonpermissible uses of school funds. — Neither the State Board of Education nor local boards of education can lawfully use school funds for room and board (other than school lunches) or for medical (including psychiatric) treatment or services beyond such evaluation as is necessary to placement and the determination of the proper educational program for a given child. 1979 Op. Att’y Gen. No. 79-1.

Construction of “for educational purpose.” — The expression “for educational purpose” is to be given the broadest significance; the expression is “... broad enough to cover all things necessary or incidental to the furtherance of education ...,” but the scope of the expression does not extend to any measure that might incidentally prove to be of assistance to a program of education. 1975 Op. Att’y Gen. No. 75-33.

Valid expenditure of school funds by county school board. — The expenditure of public school funds by a county board of education to run sewer lines from its schools to city sewer lines on nearby city streets, and to purchase sewage disposal services from the city, would not violate any constitutional or statutory provision of the State of Georgia. 1967 Op. Att’y Gen. No. 67-85.

It is illegal for a county school board to expend school funds to help defray tax collection expenses of county tax commissioner. 1965-66 Op. Att’y Gen. No. 65-3.

School funds may not legally be used to purchase uniforms for school

Public Purposes Counties Empowered to Tax For (Cont'd)

8. Support and Maintenance of Public Schools (Cont'd)

lunch personnel. 1967 Op. Att'y Gen. No. 67-182.

Use of school funds for private audit of noneducational funds unconstitutional. — The language “books, records, and accounts of the public school system over which any such board has jurisdiction” is broad enough to lead a school board to conclude that it could utilize public school funds to procure a private audit not only of educational funds, but also of all noneducational funds under the board's jurisdiction however, such use would be unconstitutional by this paragraph. 1963-65 Op. Att'y Gen. p. 731 (see Ga. Const. 1983, Art. IX, Sec. IV, Para. II).

Medical services may or may not be for school purposes. — Answering of the question of whether a given expenditure can be said to be an expenditure “for school purposes” is exceedingly difficult and an area as broad as “medical services” is not one which can be said to be either wholly within or wholly without the outer limits of a lawful expenditure “for school purposes.” 1977 Op. Att'y Gen. No. 77-52.

Payment for medical service with school funds. — Some forms of medical service have such direct and substantial relationship to the educational process as to render it unlikely a court would not authorize expenditure of school funds for such service at least where arguably authorized by statute. 1976 Op. Att'y Gen. No. 76-44.

School funds cannot lawfully be expended to provide pupils with full medical care. 1976 Op. Att'y Gen. No. 76-44.

Common school funds can lawfully be used for support of “community school program,” which programs are ordinarily conducted after normal school hours and consist of various activities of an educational nature provided for the general citizenry without violating constitutional prohibitions of the expenditure of school funds for purposes other than “school” or “educational” purposes. 1977

Op. Att'y Gen. No. 77-60.

Local school boards may spend state and local tax funds to maintain debate program; these expenditures may include payment of debate meet registration fees for individuals and schools. 1981 Op. Att'y Gen. No. 81-20.

Room and board for students attending debate meets may be paid with local tax funds. — Individual and school registration fees and costs for student room and board while they are away from home at centrally located debate meets are necessary and incidental to the educational process and may be paid with funds derived from local taxation. 1981 Op. Att'y Gen. No. 81-20.

Expenditure of school funds for construction of public library facilities educational purpose. — In view of the inherent nature of library facilities as a learning tool and the pervasive relationship between educational authorities and library systems on both state and local governmental levels, together with the stated legislative policy that establishment of a public library service is to be part of the provisions for public education in this state, the use of common school funds for construction of public library facilities is an expenditure for educational purposes. 1975 Op. Att'y Gen. No. 75-33.

Reward offered with school funds. — Expenditure of school funds for payment of rewards offered for information concerning damage to and destruction of school property is not an expenditure for educational purposes, and therefore not a lawful use of general school funds. 1974 Op. Att'y Gen. No. 74-122.

School lunch programs. — Neither state nor local school funds may be used to provide lunches for children not enrolled in the public school program. 1974 Op. Att'y Gen. No. 74-155.

No direct provision of law prohibits a local school system from providing school lunches for children not enrolled in the public school program, assuming full reimbursement is made to the school system for expenses incurred in the providing of such service. 1974 Op. Att'y Gen. No. 74-155.

Improper use of school funds. — Expenditures for an annual physical ex-

amination of the School Superintendent, for a faculty banquet, and for payment of insurance premiums for members of a high school football team would be improper objects for the expenditure of common school funds. 1971 Op. Att’y Gen. No. 71-12.

Invalid Uses of County Taxes

County may not lawfully expend county funds to reimburse sheriff’s surety for payments made to satisfy

judgment against sheriff. 1975 Op. Att’y Gen. No. U75-22.

Use of public funds for distribution of electorate sample ballots doubtful. — The ordinary (now judge of probate court) does not have the authority needed to distribute electorate sample ballots prior to the next general election; even if such authority were contained in Ch. 2, T. 21, it is extremely doubtful whether public funds could be used. 1968 Op. Att’y Gen. No. 68-4.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 163 et seq., 386 et seq., 495 et seq. 71 Am. Jur. 2d, State and Local Taxation, § 36 et seq.

C.J.S. — 20 C.J.S., Counties, § 259 et seq.

ALR. — Use of public funds or exercise of taxing power to promote patriotism, 30 ALR 1035.

Validity of privilege or occupation tax on business of severing natural resources from soil, 32 ALR 827; 52 ALR 187; 60 ALR 101; 156 ALR 692.

Encouragement or promotion of industry not in nature of public utility, carried

on by private enterprise, as public purpose for which tax may be imposed or public money appropriated, 112 ALR 571.

Constitutionality and construction of statute which provides for the use of the general funds or credit of the municipality in event of default or delay in payment of, or inability to collect, or insufficiency of, special assessments for local improvements, 135 ALR 1287.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining, or improving stadium for use of professional athletic team, 67 ALR3d 1186.

Paragraph III. Purposes of taxation; allocation of taxes.

No levy need state the particular purposes for which the same was made nor shall any taxes collected be allocated for any particular purpose, unless otherwise provided by this Constitution or by law.

1976 Constitution. — Art. IX, Sec. V, Paras. I, II.

JUDICIAL DECISIONS

General Assembly must have express constitutional authorization for allowing a county to impose a tax for a particular purpose. City Council v. Mangelly, 243 Ga. 358, 254 S.E.2d 315 (1979). But see Board of Comm’rs v. Cooper, 245 Ga. 251, 264 S.E.2d 193 (1980) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. III).

penditure in a particular area of the county is not allocation for “any particular purpose” within the meaning of this paragraph. Richmond County Bus. Ass’n v. Richmond County, 232 Ga. 462, 207 S.E.2d 450 (1974) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. III).

Additional charge for building permits prohibited. — This provision does not give a county authority to impose a tax

Allocation of county revenue for ex-

or charge in addition to all charges currently imposed for building permits where those funds are allocated directly to the board of education. *DeKalb County v. Brown Bldrs. Co.*, 227 Ga. 777, 183 S.E.2d 367 (1971) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. III).

Using tax funds to improve private

corporate property prohibited. — Expenditure of tax funds to build or improve facilities upon the property of a private corporation is not among the enumerated powers of this paragraph. *Nelson v. Wainwright*, 224 Ga. 693, 164 S.E.2d 147 (1968) (see Ga. Const. 1983, Art. IX, Sec. IV, Para. III).

Paragraph IV. Tax allocation; regional facilities.

As used in this Paragraph, the term “regional facilities” means industrial parks, business parks, conference centers, convention centers, airports, athletic facilities, recreation facilities, jails or correctional facilities, or other similar or related economic development parks, centers, or facilities or any combination thereof. Notwithstanding any other provision of this Constitution, a county or municipality is authorized to enter into contracts with: (1) any county which is contiguous to such county or the county in which such municipality is located; (2) any municipality located in such a contiguous county or the same county; or (3) any combination thereof. Any such contract may be for the purpose of allocating the proceeds of ad valorem taxes assessed and collected on real property located in such county or municipality with such other counties or municipalities with which the assessing county or municipality has entered into agreements for the development of one or more regional facilities and the allocation of other revenues generated from such regional facilities. Any such regional facility may be publicly or privately initiated. The allocation of such tax proceeds and other revenues shall be determined by contract between the affected local governments. Such contract shall provide for the manner of development, operation, and management of the regional facility and the sharing of expenses among the contracting local governments and shall specify the percentage of ad valorem taxes and other revenues to be allocated and the method of allocation to each contracting local government. Unless otherwise provided by law, such a regional facility will qualify for the greatest dollar amount of income tax credits which may be provided for by general law for any of the counties or municipalities which have entered into an agreement for the development of the regional facility, regardless of the county or municipality in which the business is physically located. The authority granted to counties and municipalities under this Paragraph shall be subject to any conditions, limitations, and restrictions which may be imposed by general law. (Ga. Const. 1983, Art. 9, § 4, Para. 4; Ga. L. 1994, p. 2025, § 1/SR 203.)

Editor’s notes. — The constitutional amendment (Ga. L. 1994, p. 2025, § 1) authorizing counties and municipalities to

enter into contracts for sharing proceeds of ad valorem taxes assessed and collected on real property located in such counties

or municipalities with certain other neighboring counties and municipal corporations with which the assessing county or municipality has contracted for the purpose of development of regional facili-

ties by such counties or municipalities was approved by a majority of the qualified voters voting at the general election held on November 8, 1994.

SECTION V.

LIMITATION ON LOCAL DEBT

Paragraph

- I. Debt limitations of counties, municipalities, and other political subdivisions.
- II. Special district debt.
- III. Refunding of outstanding indebtedness.

Paragraph

- IV. Exceptions to debt limitations.
- V. Temporary loans authorized.
- VI. Levy of taxes to pay bonds; sinking fund required.
- VII. Validity of prior bond issues.

Paragraph I. Debt limitations of counties, municipalities, and other political subdivisions.

(a) The debt incurred by any county, municipality, or other political subdivision of this state, including debt incurred on behalf of any special district, shall never exceed 10 percent of the assessed value of all taxable property within such county, municipality, or political subdivision; and no such county, municipality, or other political subdivision shall incur any new debt without the assent of a majority of the qualified voters of such county, municipality, or political subdivision voting in an election held for that purpose as provided by law.

(b) Notwithstanding subparagraph (a) of this Paragraph, all local school systems which are authorized by law on June 30, 1983, to incur debt in excess of 10 percent of the assessed value of all taxable property therein shall continue to be authorized to incur such debt.

1976 Constitution. — Art. IX, Sec. VII, Para. I.

Cross references. — Elections to incur or retire bonded debts, § 20-2-430 et seq., § 36-80-10 et seq., and § 36-82-1 et seq. Power to incur or retire public debt, §§ 36-34-6 and 36-80-13. Computing public indebtedness, § 36-82-8.

Editor's notes. — The constitutional amendment proposed in Ga. L. 1987, p. 1598, § 1, which would have added subparagraph (c) authorizing any municipality of the State of Georgia having a population of 400,000 or more to incur an additional \$8 million per annum in bonded indebtedness without the neces-

sity of a referendum, was defeated in the general election on November 8, 1988.

Law reviews. — For article surveying important general legal principles of municipal and county government purchasing and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965). For article discussing financial implications of municipal annexations, see 2 Ga. L. Rev. 35 (1967). For article, "Discretion in Georgia Local Government Law," see 8 Ga. L. Rev. 614 (1974). For article, "Binding Contracts in Georgia Local Government Law: Recent Perspectives," see 11 Ga. St. B.J. 148 (1975). For annual survey of local government law, see 38 Mercer L. Rev. 289

(1986). For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005). For survey article on local government law, see 60 Mercer L. Rev. 263 (2008).

For note discussing restrictions on the

creation of public purpose corporations, see 8 Ga. L. Rev. 680 (1974).

For comment on *Miller v. Head*, 186 Ga. 694, 198 S.E. 680 (1938), see 1 Ga. B.J. 40 (1939).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CREATION OF DEBT

1. IN GENERAL
2. AUTHORITY TO BORROW
3. REGISTERED VOTERS' APPROVAL
4. METHODS OF REPAYMENT
5. LEGALLY VALID DEBT
6. NONDEBTS

General Consideration

This paragraph must be strictly construed. *Berrien County v. Paulk*, 150 Ga. 829, 105 S.E. 491 (1920); *Miles v. State*, 96 Ga. App. 610, 101 S.E.2d 173 (1957) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

This paragraph cannot be eroded by an illegal bond issue. *Mayor of Macon v. Jones*, 122 Ga. 455, 50 S.E. 340 (1905); *Lippitt v. City of Albany*, 131 Ga. 629, 63 S.E. 33 (1908) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

In order for a municipal corporation to issue bonds and incur bonded indebtedness there must be compliance with essential provisions of the law. *State v. Carswell*, 78 Ga. App. 84, 50 S.E.2d 621 (1948).

Local amendment levying tax valid. — A local amendment to Art. VII, Sec. IV, Para. II of the 1945 Georgia Constitution, authorizing a county to levy a tax for water and sewerage purposes, was valid despite any conflict with the debt limitations clause. *Copeland v. State*, 268 Ga. 375, 490 S.E.2d 68 (1997).

Paragraph limits operation of former Civil Code 1910, § 442 (see now O.C.G.A. § 36-82-3), and that section must be construed consistently with this paragraph. *Chapman v. Sumner Consol. Sch. Dist.*, 152 Ga. 450, 109 S.E. 129 (1921); *Cowart v. City of Waycross*, 159 Ga. 589, 126 S.E. 476 (1925) (see Ga.

Const. 1983, Art. IX, Sec. V, Para. I).

This paragraph does not operate as a limitation upon taxing power of a municipality. *Commissioners of Habersham County v. Porter Mfg. Co.*, 103 Ga. 613, 30 S.E. 547 (1898); *City of Waycross v. Tomberlin*, 146 Ga. 504, 91 S.E. 560 (1917) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

This paragraph applies to elections for bonds, and not to elections authorizing levy of an additional educational tax in local school districts under Ga. Const. 1976, Art. VIII, Sec. VII, Para. I (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I). *Crye v. Pearce*, 175 Ga. 85, 165 S.E. 121 (1932) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Purpose of Art. 3, Ch. 82, T. 36. — The Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), is designed to provide for self-liquidating projects and the revenue certificates contemplated are not to be a charge against the general credit of the county or municipality. The liability is to be satisfied only from revenues produced by the undertaking, and under specific terms of the statute the political division will never be required to aid in its retirement with funds derived from any other source, and is in fact prohibited from doing so. The article is not unconstitutional by virtue of violating the constitutional limitation on municipal debts. *Miller v. Head*, 186 Ga. 694, 198 S.E. 680

(1938), commented on in 1 Ga. B.J. 40 (1939).

Debts under Art. 3, Ch. 82, T. 36 not debts of political subdivision. — Revenue anticipation certificates issued under the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), do not subject the political subdivision of this state issuing the same to any pecuniary liability thereon and are therefore not debts against such political subdivision within the meaning of the constitutional provision limiting such indebtedness. *Fort Oglethorpe v. Catoosa County*, 80 Ga. App. 188, 55 S.E.2d 752 (1949).

Debt not regulated by this clause. — County's promise to pay for the stadium project bonds was not a debt regulated by the Georgia Constitution's debt limitation clause as the promise was made as part of a constitutionally valid intergovernmental contract. *Savage v. State of Ga.*, 297 Ga. 627, 774 S.E.2d 624 (2015).

Taxpayers right to injunction. — Taxpayers of the city have such an interest in the municipal funds arising from taxation that they may enjoin the creation of illegal debts by the corporation, or their payment. *Hudson v. Mayor of Marietta*, 64 Ga. 287 (1879), overruled on other grounds, *City Council v. Dawson Waterworks Co.*, 106 Ga. 719, 32 S.E. 916 (1899); *Renfroe v. City of Atlanta*, 140 Ga. 81, 78 S.E. 449, 45 L.R.A. (n.s.) 1173 (1913).

Construction of paragraph's exception clause. — The following words, "except as in this Constitution provided for," lift out of the restrictions and limitations provided in this paragraph the full content of Ga. Const. 1976, Art. IX, Sec. VI, Para. I (see Ga. Const. 1983, Art. IX, Sec. III, Para. I), as the constitutional authorization of debt not prohibited by the limitation and inhibition contained in this paragraph. *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

The County Building Authority Act did not violate Ga. Const. 1976, Art. IX, Sec. VII, Para. I (see Ga. Const. 1983, Art. IX, Sec. V, Para. I) as the Act and agreements entered into pursuant to it, in regard to

the acquisition and construction of certain county buildings, were validated by the intergovernmental contracts provision, Ga. Const. 1983, Art. IX, Sec. III, Para. I. *Building Auth. v. State*, 253 Ga. 242, 321 S.E.2d 97 (1984).

Import of 1927 constitutional amendment. — The constitutional amendment of 1927 is not merely an addition to the "casual deficiency" provision of this paragraph, but it confers upon the counties the right to borrow money in an amount not exceeding the fixed limitation, to be used for any lawful county purpose, and not merely to supply casual deficiencies of revenue. *Atlanta Distrib. Terms., Inc. v. Board of Comm'rs*, 177 Ga. 250, 170 S.E. 52 (1933) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

"Casual deficiency" defined. — The phrase, "casual deficiency" means some unforeseen or unexpected deficiency, or an insufficiency of funds to meet some unforeseen and necessary expense. *Lewis v. Lofley*, 92 Ga. 804, 19 S.E. 57 (1894); *Hall v. County of Greene*, 119 Ga. 253, 46 S.E. 69 (1903); *Williams v. Sumter County*, 21 Ga. App. 716, 94 S.E. 913, cert. denied, 21 Ga. App. 825 (1918); *Citizens Bank v. Rockdale County*, 152 Ga. 711, 111 S.E. 434 (1922); *Atlanta Distrib. Terms., Inc. v. Board of Comm'rs*, 177 Ga. 250, 170 S.E. 52 (1933).

Paragraph not self-executing. — Since this paragraph, concerning the incurring of debts by a municipality is not self-executing, the General Assembly passed an enabling Act, former Code 1933, § 87-201 et seq., putting this provision into operation. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

O.C.G.A. § 36-82-3. — Former Code 1933, § 87-203 (see now O.C.G.A. § 36-82-3), providing for elections to approve issue of bonds must be given effect, subject to change as made by this paragraph in reference to the proportion of qualified voters necessary to authorize a bond issue; and no further enabling Act is necessary. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946).

Former Code 1933, § 87-203 (see now O.C.G.A. § 36-82-3) should be construed

General Consideration (Cont'd)

consistently with this paragraph as to the number of eligible voters required to approve the issuance of bonds. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Contract between county and cities. — Trial court did not err in granting a county summary judgment in cities' action for breach of an intergovernmental agreement (IGA) the parties entered into pursuant to the Homestead Option Sales and Use Tax Act (HOST), O.C.G.A. § 48-8-100 et seq., because the IGA was not a valid intergovernmental contract under the Intergovernmental Contracts Clause of the Georgia Constitution, Ga. Const. 1983, Art. IX, Sec. III, Para. I(a) since the focus and clear purpose of the IGA was to provide a formula for the distribution of the HOST revenues, and the IGA could not be deemed an agreement for the provision of authorized "services"; the IGA was an agreement about how to divide and distribute HOST revenues between the county and the cities, with the cities agreeing to expend the monies disbursed solely for capital outlay projects to be located within the geographical boundaries of the county and to be owned, operated, or both either by the county, one or more cities or any combination thereof, and the fact that the IGA required the cities to expend the tax proceeds in accordance with the mandates of the Homestead Option Sales and Use Tax Act, O.C.G.A. § 48-8-102, did not transform it into either a contract for services or one for the use of facilities. *City of Decatur v. Dekalb County*, 289 Ga. 612, 713 S.E.2d 846 (2011).

Cited in *Mayor of Milledgeville v. Jeanes*, 42 Ga. App. 105, 155 S.E. 218 (1930); *Anchor Duck Mills v. Maddox*, 171 Ga. 495, 156 S.E. 192 (1930); *Sharpe v. Alston Consol. Sch.*, 173 Ga. 345, 160 S.E. 374 (1931); *Smith v. Board of Educ.*, 174 Ga. 735, 164 S.E.2d 41 (1932); *City of Abbeville v. Eureka Fire Hose Mfg. Co.*, 177 Ga. 204, 170 S.E. 23 (1933); *Madronah Sales Co. v. Wilburn*, 180 Ga. 837, 181 S.E. 173 (1935); *Moore v. Howard*, 181 Ga. 605, 183 S.E. 495 (1936);

Dortch v. Southeastern Fair Ass'n, 182 Ga. 633, 186 S.E. 685 (1936); *West v. Trotzler*, 185 Ga. 794, 196 S.E. 902 (1938); *Westbrooks v. Suwanee Consol. School Dist.*, 58 Ga. App. 509, 199 S.E. 240 (1938); *Pierce v. Powell*, 188 Ga. 481, 4 S.E.2d 192 (1939); *Wallace & Tiernan Co. v. Williams*, 192 Ga. 149, 14 S.E.2d 747 (1941); *Lawson v. City of Moultrie*, 194 Ga. 699, 22 S.E.2d 592 (1942); *DeJarnette v. Hospital Auth.*, 195 Ga. 189, 23 S.E.2d 716 (1942); *Lumpkin v. State*, 73 Ga. App. 229, 36 S.E.2d 123 (1945); *Nelms v. Stephens County Sch. Dist.*, 201 Ga. 274, 39 S.E.2d 651 (1946); *Alexander v. Fulton County*, 202 Ga. 42, 41 S.E.2d 423 (1947); *Board of Comm'rs of Rds. & Revenues v. Bond*, 203 Ga. 558, 47 S.E.2d 511 (1948); *Smith v. City Council*, 203 Ga. 511, 47 S.E.2d 582 (1948); *Cook v. Davis*, 178 F.2d 595 (5th Cir. 1949); *City of Atlanta v. Anglin*, 209 Ga. 170, 71 S.E.2d 419 (1952); *Smith v. Hospital Auth.*, 210 Ga. 801, 82 S.E.2d 827 (1954); *Posey v. Dooly County Sch. Dist.*, 215 Ga. 712, 113 S.E.2d 120 (1960); *State v. Chatham County*, 103 Ga. App. 390, 119 S.E.2d 120 (1961); *Cason v. State*, 217 Ga. 339, 122 S.E.2d 232 (1961); *Jamerson v. Campbell*, 217 Ga. 766, 125 S.E.2d 205 (1962); *Barrow v. Jefferson County*, 218 Ga. 681, 130 S.E.2d 129 (1963); *Stephenson v. State*, 219 Ga. 652, 135 S.E.2d 380 (1964); *Hollifield v. Vickers*, 118 Ga. App. 229, 162 S.E.2d 905 (1968); *City of Jonesboro v. Clayton County Water Auth.*, 136 Ga. App. 768, 222 S.E.2d 76 (1975); *Frazer v. City of Albany*, 245 Ga. 399, 265 S.E.2d 581 (1980).

Creation of Debt**1. In General**

State authorities, lawfully created, are not subject to the restrictions of this paragraph and Ga. Const. 1976, Art. IX, Sec. VIII, Para. I (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I). *Thompson v. Municipal Elec. Auth.*, 238 Ga. 19, 231 S.E.2d 720 (1976) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Replication insufficient to prevent liability for debt. — Where it is alleged that an undertaking would violate this paragraph it is not sufficient to reply that

the project will be a self-liquidating one and none of the money borrowed will ever be paid from the public treasury or from taxation. *City of Valdosta v. Singleton*, 197 Ga. 194, 28 S.E.2d 759 (1944).

Instance of nonapplicability of case. — *Lettice v. American Nat'l Bank*, 133 Ga. 874, 67 S.E. 187 (1910) is fundamentally sound, but not applicable to the question of allowing interest on a lawful liquidated demand. *Marion County v. First Nat'l Bank*, 193 Ga. 263, 18 S.E.2d 475 (1942).

Payment of past-due legal indebtedness. — County commissioners may lawfully apply any part of the money borrowed under this paragraph to payment of past-due legal indebtedness of the county represented by outstanding and unpaid warrants issued prior to the year in which the loan is obtained. *Atlanta Distrib. Terms., Inc. v. Board of Comm'rs*, 177 Ga. 250, 170 S.E. 52 (1933) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Donation of county funds to nonpublic organizations prohibited. — When the applicable revenue statutes were construed together with this paragraph and Ga. Const. 1976, Art. VIII, Sec. VI, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Para. VI), it was held that they did not confer power or authority on a county board of commissioners to donate county funds derived from taxation or from other sources to a chamber of commerce, freight bureau, or convention and tourist bureau even if such donations were intended to accomplish a lawful purpose. *Atlanta Chamber of Commerce v. McRae*, 174 Ga. 590, 163 S.E. 701 (1932) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

City's disavowal of cash transaction not countenanced by court. — Direction of verdict against defendant city in a suit by architect and engineer for services rendered where municipality claimed that account sued on was not within its power to enter into, or to create a debt, was proper where there was no indication that the transactions in question were other than cash transactions. *Mayor of Butler v. Duncan*, 56 Ga. App. 539, 193 S.E. 365 (1937).

County must plan its entire school program so as not to overreach con-

stitutionally mandated debt ceiling, but such a requirement does not forbid a contract to accept and teach children from other counties. *Wilson v. Strange*, 235 Ga. 156, 219 S.E.2d 88 (1975).

Cause for declaring election void and illegal. — A bond election in a municipality located in a county where former Code 1933, §§ 34-1914 through 34-1917 (see now O.C.G.A. §§ 21-2-576 through 21-2-579) had been adopted, which election totally disregarded provisions of the Secret Ballot Law, could not be treated as a mere irregularity or noncompliance, but must be held to be cause for declaring the election void and illegal. *State v. Carswell*, 78 Ga. App. 84, 50 S.E.2d 621 (1945).

Debt created against municipality in absence of liability. — Principle that a debt may be created against a municipal corporation even though no liability is placed upon the municipality which may be enforced in the future by the compulsory levy of taxes was applied. *Cartledge v. City Council*, 183 Ga. 414, 188 S.E. 675 (1936).

Contract between the county and the airport authority, which managed the airport, qualified as an enforceable intergovernmental agreement (IGA) that did not violate the Debt Clause in the Georgia Constitution because the IGA was between appropriate governmental entities; the agreement's term did not exceed 50 years; the agreement related to both the provision of services and the joint use of facilities as the airport authority agreed to manage and maintain the expanded taxiway, and the county, in return, agreed to provide funding and manage the debt required to be incurred to complete the expansion; and the agreement dealt with services and facilities about which the county had the authority to enter contracts. *Avery v. State of Ga.*, 295 Ga. 630, 761 S.E.2d 56 (2014).

Expenditures for county pension fund. — County's inclusion of the sheriff in its pension plan with county funds did not create a debt without the consent of the voters in violation of this paragraph. *Malcom v. Newton County*, 244 Ga. App. 464, 535 S.E.2d 824 (2000) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Creation of Debt (Cont'd)**1. In General (Cont'd)**

Contractor's services approved by voters. — Multi-year contract a school district entered into with a contractor was enforceable and constitutionally valid because the contractor's breach of contract complaint alleged that the contractor's services under the contract were for projects that the county's voters had approved in a referendum for Educational Local Option Sales Tax funding. *Greene County Sch. Dist. v. Circle Y Constr., Inc.*, 308 Ga. App. 837, 708 S.E.2d 692 (2011).

2. Authority To Borrow

Borrowing power absolute grant. — The exercise of the borrowing power is not conditioned upon there being a casual deficiency of revenue, but it is an absolute grant of power. *Mayer v. Adams*, 182 Ga. 524, 186 S.E. 420 (1936).

Difference in money owed. — There is a difference between borrowing money to meet present or anticipated current expense, and discharging by tax levy liabilities for necessary past current expense, no matter how the liability arose. *Southern Ry. v. Fulton County*, 170 Ga. 248, 152 S.E. 567 (1930).

3. Registered Voters' Approval

Majority required of actual voters. — When this provision is viewed in the light of its background, it seems perfectly clear that it was intended to require only a majority of those actually voting, and not a majority of all the qualified voters of the county or municipality. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Voters ratification clause interpreted. — The provision that no county, municipality, or division shall incur any new debt except for a temporary loan, "without the assent of a majority of the qualified voters of the county, municipality or other political subdivision voting in an election for that purpose to be held as prescribed by law," requires only that in order to authorize a proposed bond issue, a majority of those actually voting shall

vote in favor thereof. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946).

Result in each case must be determined by a count of the ballots cast, and not by an inquiry as to the number not cast. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946).

Non-voters must abide by will of majority of voters. — The general rule as to popular elections is that those who abstain from exercising the franchise are not regarded in declaring the results. By staying away from the polls, they virtually agree to abide by the will of the majority of those who attend and vote. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946).

Such are the plain words of it, and doubtless that was its true intent and meaning; otherwise, it would have said a majority of all of the qualified voters of such town or city, instead of saying, after a majority of the qualified voters of such town or city voting at an election held for the purpose. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946).

Proper test of the number of persons entitled to vote is the result of the election as determined by the ballot box. The courts will not go outside of that to inquire whether there were other persons entitled to vote who did not do so. *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946).

Necessary determination in response to election fraud. — Under former Code 1933, § 34-3101 (now O.C.G.A. § 21-2-522), providing that no election should be defeated for noncompliance with the requirements of the law, if held at the proper time and place by persons qualified to hold it, unless it was shown that, by such noncompliance, the result was different from what it would have been had there been proper compliance, and where it was not contended that the result of the election would have been different, it was unnecessary to determine whether an unspecified number of persons, whose names did not appear on the voters list for the last general election, were properly or improperly denied the right to vote in an election held for the purpose of authorizing a bond issue

within a county school district. *Pinion v. Walker County Sch. Dist.*, 203 Ga. 99, 45 S.E.2d 405 (1947).

Evidence insufficient to invalidate otherwise valid election. — Where the election is regularly called and regularly held, and the voters freely and voluntarily exercise their right to vote, the election will not be invalidated simply because some of them may have been misled by someone interested in the result of the election. *Burns v. Decatur County*, 178 Ga. 275, 173 S.E. 127 (1934).

Bond election unaffected by allegations. — Where there was submitted to the voters of a county the proposition of “issuing \$500,000 bonds for paving,” and an election properly called for the purpose of voting upon this question resulted in an approval by the voters of the issuance of these bonds, when there was not included in the submission any condition, or any assurance as to how the money should be spent, excepting it should be spent for paving the roads of the county, the people did not condition their support of the bond issue upon any representation contained in the submission, and any aliunde statement by members of the Board of Roads and Revenues (now County Commissioners) in no wise affected the validity of the vote for bonds, nor did the assurances of such board afford any ground of relief against the use of the bonds for the purpose stated in the submission, after the election had carried. *Burns v. Decatur County*, 178 Ga. 275, 173 S.E. 127 (1934).

Effect of contract not sanctioned by voters. — A municipal water supply contract, not sanctioned by popular vote, is operative from year to year so long as neither party renounces or repudiates it. *City Council v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S.E. 907 (1899); *Renfroe v. City of Atlanta*, 140 Ga. 81, 78 S.E. 449, 45 L.R.A. (n.s.) 1173 (1913); *McCrary Co. v. City of Glennville*, 149 Ga. 431, 100 S.E. 362 (1919).

School districts are political divisions of the state, and therefore this paragraph is applicable to bond elections in school districts. There can be no valid state election, or any county or school district election for bonds, without registration. *Terrell v. Forest Park Consol.*

Sch. Dist., 175 Ga. 88, 165 S.E. 122, answer conformed to, *Terrell v. Forest Park Consol. Sch. Dist.*, 45 Ga. App. 713, 165 S.E. 757, and *Yaeger v. Valley Point Consol. Sch. Dist.*, 45 Ga. App. 717, 165 S.E. 759 (1932) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Qualified voters having been ascertained under law, the constitution is mandatory that two-thirds (now majority) of them shall assent. *Kacoonis v. City of Mt. View*, 224 Ga. 151, 160 S.E.2d 364 (1968).

“Registered voter” defined. — A registered voter under this paragraph is one who had been lawfully registered and who has the present right to vote. Persons merely entitled to be registered or those lawfully registered who have been disqualified to vote are not included. *Daniel v. City of Claxton*, 35 Ga. App. 107, 132 S.E. 411 (1926) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Unearned interest is not included. *Epping v. City of Columbus*, 117 Ga. 263, 43 S.E. 803 (1903), overruled on other grounds, *Harrell v. Town of Whigham*, 141 Ga. 322, 80 S.E. 1010 (1914).

Facts rendering contract void from inception. — Where the continued existence of a contract is based upon the continued approval of the public authority making the contract, then such a contract does not clash with constitutional and statutory authority; but where the effect of the contract results in creating a debt, other than to supply casual deficiencies, without the approval of the voters and binds the future governing authorities, the contract is void from its inception. *McElmurray v. Richmond County*, 223 Ga. 47, 153 S.E.2d 427 (1967).

Voters’ approval required for new debt. — Agreement, which arranged a loan from the contractor to the city for funds necessary to construct a road, created a new debt which the city was obligated to repay regardless of whether the city had sufficient impact fees to reimburse the contractor and, thus, the unpaid debt obligation constituted a “new debt” which extended beyond the fiscal year and required voter approval. *Fairgreen Capital, LLC v. City of Canton*, 335 Ga. App. 719, 782 S.E.2d 46 (2016).

Creation of Debt (Cont'd)

4. Methods of Repayment

All presumptions are in favor of the legality and validity of a tax. *Blalock v. Adams*, 154 Ga. 326, 114 S.E. 345 (1922).

Where a note is given for a casual deficiency in expenses, and the county cannot show that the limitation of one-fifth of one percent was exceeded, it is not presumed legally valid. *Citizens Bank v. Rockdale County*, 156 Ga. 500, 119 S.E. 322 (1923).

As to effect of recital in note for debt that laws were complied with, see *Citizens Bank v. Town of Ludowici*, 24 Ga. App. 201, 100 S.E. 229 (1919); *National Park Bank v. City of Marietta*, 29 Ga. App. 29, 113 S.E. 96 (1922).

Municipal contract for property valuation. — Paragraph is not violated by municipal contract for special services in valuing property for taxation. Such contract was held not to constitute a debt within the meaning of the section. *Tietjen v. Mayor of Savannah*, 161 Ga. 125, 129 S.E. 653 (1925) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Illegal diversion of bond money to purpose other than that specified, restrained. *City of Fayetteville v. Huddleston*, 165 Ga. 899, 142 S.E. 280 (1928). See *Mathews v. Darby*, 165 Ga. 509, 141 S.E. 304 (1928).

Issuance of notes in excess of limit. — An issue of notes in excess of the limit allowed by this paragraph is void since the tax digest of the county will show the assessed valuation. The county cannot make recitals which will estop it from denying that the loan is in excess of the limit. *Baker v. Rockdale County*, 161 Ga. 245, 130 S.E. 814 (1925) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Anticipated income to be received by a county from the State Highway Board (now State Transportation Board) is not a tax of the character contemplated by this paragraph. *Taylor v. Lovett*, 184 Ga. 295, 191 S.E. 113 (1937) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

5. Legally Valid Debt

If a debt is legal and legally incurred, and is not paid at time when

it falls due, it remains a legal debt. *Southern Ry. v. Fulton County*, 170 Ga. 248, 152 S.E. 567 (1930).

Debt held created. — Upon a proper construction of the proposed contract, giving due consideration to its substance and looking to the intention of the parties as revealed from the paper in its entirety, the obligations of the city would amount to the creation of a debt within the meaning of this paragraph. *Byars v. City of Griffin*, 168 Ga. 41, 147 S.E. 66 (1929) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Circumstance rendering sale of electric equipment debt of city. — Where the proposed contract contemplates the sale of electric service, and the sale and installation by the company of electrical equipment, the electric service to be paid for monthly and the price of the equipment and installation with interest thereon to be paid monthly by the city giving credit each month on the franchise taxes due by the company, the sale of the equipment and its installation at a time when “the city has no surplus funds with which to pay and has not levied any tax for such purpose” would create a debt by the city within the meaning of this paragraph. *Morton v. City of Waycross*, 173 Ga. 298, 160 S.E. 330 (1931) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Contract between county and airport authority. — Even though, under a contract between the county and an airport authority for use by the county of an expanded airport facility, the consideration to be paid by the county was not expressed in terms of a definite dollar amount, it was not an unconstitutional “new debt”. The contract was a valid intergovernmental contract and the consideration represented the authority’s lawful “revenue pledged to the payment of” the bonds. *Clayton County Airport Auth. v. State*, 265 Ga. 24, 453 S.E.2d 8 (1995).

Contract for construction of municipal lighting plant, payable by series of annual notes creates a debt. *McCrary Co. v. City of Glennville*, 149 Ga. 431, 100 S.E. 362 (1919); *Dobbs v. Brumby*, 150 Ga. 599, 104 S.E. 440 (1920).

Debt created. — A contract by the governing officials of a county to purchase property for the county and to pay there-

for with interest-bearing warrants falling due for several years in the future is a debt within the meaning of this paragraph. *Dancer v. Shingler*, 147 Ga. 82, 92 S.E. 935 (1917) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Debt created by implied promise. — A cash contract for current supplies to carry on a legitimate business of a city may be enforced upon theory of an implied promise. *Town of Whigham v. Gulf Ref. Co.*, 20 Ga. App. 427, 93 S.E. 238 (1917).

O.C.G.A. § 36-60-13, which authorizes municipalities to enter into multiyear lease purchase contracts for the acquisition of goods so long as the contract provides that it shall terminate absolutely and without further obligation at the close of the calendar year unless renewed, is constitutional. *Barkley v. City of Rome*, 259 Ga. 355, 381 S.E.2d 34 (1989).

Short term loan valid. — Short term loan from bank was a valid exercise of the city's temporary borrowing powers under Ga. Const. 1983, Art. XI, Sec. V, Para. V since none of the enumerated limitations on the constitutional authority of a municipality to engage in temporary borrowing precluded the city from executing the tax anticipation note as security for the loan from the bank, and since the city certified in the loan package that loan proceeds would be used to pay its then current expenses. *City of Bremen v. Regions Bank*, 274 Ga. 733, 559 S.E.2d 440 (2002).

Sewer project. — After a trial court required two intervenors to post a bond of \$625,000 with regard to their challenge to the public improvement bond approved by a city's building authority for a sewer project, the trial court properly validated the bond by following all necessary procedural requirements and the bond did not violate Ga. Const. 1983, Art. IX, Sec. V, Para. I(a) since the city's payment for the use of the sewer project was a debt specifically authorized under the constitution pursuant to Ga. Const. 1983, Art. IX, Sec. III, Para. I(a). *Berry v. City of E. Point*, 277 Ga. App. 649, 627 S.E.2d 391 (2006).

6. Nondebts

County treasurer carries burden of proof of county's inability to become obligated on debt. — Where a county

treasurer in a mandamus suit to compel payment of a warrant issued by the county raises the issue of an attempt, to create a debt as inhibited by the Constitution, on the basis of insufficient funds on hand or inability to levy lawful tax during the year to raise funds for payment of the contract price of the machinery purchased with the warrant, the burden of proof is on the treasurer. *Marion County v. First Nat'l Bank*, 193 Ga. 263, 18 S.E.2d 475 (1942).

Legitimate expenses. — An expense may be incurred without creating a debt provided there are sufficient funds in the treasury, or the current tax will produce that amount. *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S.E. 149, 121 Am. St. R. 244, 15 L.R.A. (n.s.) 567 (1907); *Tate v. Elberton*, 136 Ga. 301, 71 S.E. 420 (1911); *City of Jeffersonville v. Cotton States Belting & Supply Co.*, 30 Ga. App. 470, 118 S.E. 442 (1923); *Rawls v. City of Jonesboro*, 212 Ga. 734, 95 S.E.2d 657 (1956).

Nonallegation of dischargeable debt out of taxes for year in which liability incurred results in nonviolation of paragraph. — Where it is not alleged anywhere in the petition that the liability created by the contracts cannot be discharged in full out of taxes which could be lawfully levied and collected by the defendant city during the current year in which the liability was incurred, there is no violation of this paragraph. *Rawls v. City of Jonesboro*, 212 Ga. 734, 95 S.E.2d 657 (1956) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Prohibited debt not created. — No prohibited debt is created if obligation of county can be met during year either by money on hand which can lawfully be used, or by levy of sufficient tax for the purpose, the tax being one which the county itself may levy, calculated to raise a definite sum, and uncertain only in the possible failure to collect. *Austin-Western Rd. Mach. Co. v. Fayette County*, 99 F.2d 565 (5th Cir. 1938).

Money cannot be borrowed on ground that other sources of revenue exist. *Tate v. Elberton*, 136 Ga. 301, 71 S.E. 420 (1911).

Contracting debt with anticipated non-tax revenues prohibited. —

Creation of Debt (Cont'd)**6. Nondebts (Cont'd)**

County officers have no right to contract a debt on the ground that anticipated revenues from sources other than taxation can be used to discharge such indebtedness. *Vincent v. MacNeill*, 186 Ga. 427, 198 S.E. 68 (1938).

Note given for money borrowed in anticipation of taxes is not enforceable against a county. *Farmers' Loan & Trust Co. v. Wilcox County*, 284 F. 856 (S.D. Ga. 1922), *aff'd*, 287 F. 809 (5th Cir.), *cert. denied*, 262 U.S. 755, 43 S. Ct. 703, 67 L. Ed. 1217 (1923).

Incurring debt for construction of public roads. — County commissioners may incur a debt, when too late to levy a tax, for purchase of necessary tools or implements to aid in construction of a public road. *Pennington v. Gammon*, 67 Ga. 456 (1881); *Garrison v. Perkins*, 137 Ga. 744, 74 S.E. 541 (1912).

County authorities have power to install telephones or to cause them to be installed at courthouses, jails, or pauper farms. *Wright v. Floyd County*, 1 Ga. App. 582, 58 S.E. 72 (1907); *Wood v. Vienna Tel. Co.*, 8 Ga. App. 209, 68 S.E. 872 (1910).

County may, without being said to create a debt, contract for materials and machinery for necessary improvement of public roads to be paid for out of the available funds in the hands of the treasurer, or out of the proceeds of taxes that have been, or may be lawfully levied during the year in which the contract is made. *Taylor v. Lovett*, 184 Ga. 295, 191 S.E. 113 (1937).

Former Rural Roads Authority Acts. — Provision of former Rural Roads Authority Act (now Georgia Highway Authority Act, O.C.G.A. Art. 1, Ch. 10, T. 32) that required county authorities to maintain roads did not violate this paragraph dealing with the creation of debts, since counties are granted authority to build and maintain roads and to levy taxes for such purposes. *State v. Georgia Rural Rds. Auth.*, 211 Ga. 808, 89 S.E.2d 204 (1955) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

A contract by city made in pursuance of Ga. L. 1937, p. 697, § 1 (see

now O.C.G.A. Art. 2, Ch. 3, T. 8) does not create a debt within the meaning of this paragraph which prevents a municipality, except under certain conditions, from incurring a debt. *Williamson v. Housing Auth.*, 186 Ga. 673, 199 S.E. 43 (1938) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Contract does not necessarily constitute incurring a debt within the meaning of the debt limitation provision of the Constitution, even if the contract calls for the rendering of service beyond the year in which the contract is made. *Macon Ambulance Serv., Inc. v. Snow Properties, Inc.*, 218 Ga. 262, 127 S.E.2d 598 (1962).

Available proceeds of bond issue at time of contract sufficient to prevent debt. — Where a contract for construction of power dam was within the powers of a county power commission as prescribed in a local constitutional amendment, and at the time of its making the commission had available the entire proceeds of a bond issue authorized for the construction, the contract created no debt against the county in the sense of the Constitution. *Crisp County v. S.J. Grove & Sons Co.*, 73 F.2d 327 (5th Cir. 1934) (decided under Ga. Const., Art. VII, Sec. VII, Para. I of Const. of 1877).

Municipality liable under the common honesty rule. — Where it appears that a municipality was authorized to contract with a power company to furnish water services for the benefit of the municipality, but no valid, express contract was entered into between the parties, although the municipality over a period of years received such services for which it was authorized to contract, the municipality is liable for the reasonable value of such services so received for a period of years, next preceding the filing of the suit, not barred by the statute of limitations. In such event, under what is generally known as "the common honesty rule" the law implies a promise to pay for the reasonable value of the services received. *City of Eastman v. Georgia Power Co.*, 69 Ga. App. 182, 25 S.E.2d 47 (1943).

Municipality liability based on new promise to pay old debt. — Where a city and a power company attempted to

extend a yearly contract for electrical service over a period of years and neither party repudiated the contract, but the power company furnished the electricity for street lighting purposes and the municipality accepted and used the services, the municipality is liable for the value, the contract price, for each year the current was received and used. The execution and delivery of a warrant covering the value of the amount so used over a period of years, while having some elements of accord and satisfaction, was not the creation of a debt prohibited by this paragraph, but a new promise to pay the same old debt. *City of Eastman v. Georgia Power Co.*, 69 Ga. App. 182, 25 S.E.2d 47 (1943) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Assets or indebtedness due a municipality cannot be deducted from its bonded indebtedness and taken into consideration in computing its total bonded indebtedness under this paragraph limiting such bonded indebtedness to 7 percent of the assessed value of the taxable property within the municipality. *Miles v. State*, 96 Ga. App. 610, 101 S.E.2d 173 (1957) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Rule governing total bonded indebtedness of school district. — In computing total bonded indebtedness of a school district for determining whether it exceeds the limitation imposed by this paragraph, outstanding bonded indebtedness cannot be reduced by the amount credited against it in a sinking fund for the purpose of redeeming outstanding bonds, but which has not actually been used for that purpose. *Miles v. State*, 96 Ga. App. 610, 101 S.E.2d 173 (1957).

County-wide school districts as successors to local school districts can incur bonded indebtedness independently. — Upon the merger by the General Assembly of local school districts, in harmony with Ga. Const. 1976, Art. VIII, Sec. V, Para. I (see Ga. Const. 1983, Art. VIII, Sec. V, Para. I) into county-wide school districts, the new county-wide district would likewise constitute a separate political entity and could do so as a unit that which its previous component parts could have done separately, and could therefore incur a bonded indebtedness in-

dependent of any indebtedness for general authorized county purposes. *Pinion v. Walker County Sch. Dist.*, 203 Ga. 99, 45 S.E.2d 405 (1947).

Consolidated county school district is a separate political division of this state such as is authorized to incur a bonded indebtedness up to 7 percent of the assessed valuation of its taxable property, independent of and in addition to any outstanding bonded indebtedness incurred by any of its component former local school districts prior to their merger into a county-wide school district. *Pinion v. Walker County Sch. Dist.*, 203 Ga. 99, 45 S.E.2d 405 (1947).

Construction of percentage of assessed valuation of taxable property ceiling. — While the Constitution does not specifically say so, yet the frequently applied construction of this provision is that each separate political division of the state which has authority to issue bonds is authorized to incur an indebtedness up to 7 percent (10 percent) of the assessed valuation of its taxable property independently of any existing indebtedness of another district and separate municipality or other political body whose territory might be coextensive in whole or in part with that of its own. *Pinion v. Walker County Sch. Dist.*, 203 Ga. 99, 45 S.E.2d 405 (1947).

County-wide school district in computing amount of indebtedness authorized to incur not required to consider former local districts' ceilings. — Since it was not contended that county school district incurred the bonded indebtedness of its former local school districts, and in the absence of specific legal statutory or constitutional provision requiring the new county-wide school district to assume payment of any outstanding bonded indebtedness of its former local school districts, it follows that the county school district was not required to take into account any indebtedness of its former local school districts in computing the amount of indebtedness which it was authorized to incur, and as an independent political entity, it could incur indebtedness independent of and in addition to that outstanding in its former local school districts. *Pinion v. Walker County Sch.*

Creation of Debt (Cont'd)**6. Nondebts (Cont'd)**

Dist., 203 Ga. 99, 45 S.E.2d 405 (1947).

Payment to competing company to cease operation not debt. — Georgia Laws 1906, p. 846 did not authorize the board, after it had built and equipped an electric-light and waterworks plant, to pay \$15,000.00 to a competing company to “quit operating its electric-light plant in the city.” *Brumby v. Board of Lights & Waterworks*, 147 Ga. 592, 95 S.E. 7 (1918).

Payment for city street paving not debt. — Under the allegations of the petition as amended, the city did not create a debt in providing for the payment of the cost of paving the streets in violation of this paragraph. *City Council v. Thomas*, 159 Ga. 435, 126 S.E. 144, 39 A.L.R. 1317 (1924); *Faver v. Mayor of Washington*, 159 Ga. 568, 126 S.E. 464 (1925). See also *Citizens Bank v. Rockdale County*, 152 Ga. 711, 111 S.E. 434 (1922) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Lease purchase agreement to finance new courthouse not a debt. — There is no distinction in O.C.G.A. § 36-60-13 between real and personal property and the strictures on leases for each class of property are the same; similarly, Ga. Const. 1983, Art. IX, Sec. V, Para. I(a), providing for popular vote on the assumption of debt, makes no distinction between the two classes of property. Therefore, a county’s decision to enter a lease purchase agreement with the Association of County Commissioners of Georgia to finance and construct a new courthouse was not a debt requiring a vote under Ga. Const. 1983, Art. IX, Sec. V, Para. I(a) and was in compliance with O.C.G.A. § 36-60-13 because it did not require future county commissioners to renew the contract, it allowed the county to terminate its financial obligations at the end of each calendar year, and it would never require the county to expend more than would be legally available under O.C.G.A. § 36-60-13. *Bauerband v. Jackson County*, 278 Ga. 222, 598 S.E.2d 444 (2004).

Implied debt not raised upon void contract. — When property is received by

a municipality or its commission under a contract which is void and unenforceable, by reason of a violation of this paragraph, the law does not raise an implied undertaking to pay therefor. *Board of Lights & Waterworks v. Niller*, 155 Ga. 296, 116 S.E. 835 (1923); *A.L. Greenburg Iron Co. v. City of Abbeville*, 2 F.2d 559 (5th Cir. 1924). Compare *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S.E. 149, 121 Am. St. R. 244, 15 L.R.A. (n.s.) 567 (1907) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Instance of no debt created by expending county funds. — A county may, without being said to create a debt within the meaning of the Constitution, contract for materials, consisting of machinery, for use in the necessary improvement of a public road, to be paid for out of available funds in the hands of the treasurer, or out of the proceeds of taxes that have been or may be lawfully levied during the year in which the contract is made. *Neal & Son v. Burch*, 173 Ga. 840, 162 S.E. 135 (1931); *Marion County v. First Nat’l Bank*, 193 Ga. 263, 18 S.E.2d 475 (1942).

Interest accruable on county warrant issued to vendor incidental and not debt. — Where purchase price of machinery for necessary improvement of public roads becomes a liquidated demand, as by issuance of a county warrant drawn on the county treasurer by the county commissioners, payable to the vendor for the purchase price, interest which may thereafter lawfully accrue upon the warrant is incidental, and is not to be counted as part of the debt for which the warrant was issued. *Marion County v. First Nat’l Bank*, 193 Ga. 263, 18 S.E.2d 475 (1942).

Southwest Georgia Regional Housing Authority was not a county, municipality, or political division within meaning of this paragraph, and, therefore, its obligations would not be debts of a county, municipality, or political division within the purview of that provision. *Stegall v. Southwest Ga. Regional Hous. Auth.*, 197 Ga. 571, 30 S.E.2d 196 (1944) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Municipality not liable for indebtedness contracted pursuant to Ga. Const. 1983, Art. IX, Sec. VI, Para. I

and Art. 3, Ch. 82, T. 36. — Liability against a municipality arising out of and by virtue of any contract made by such municipality with an engineering company, entered into pursuant to Ga. Const. 1976, Art. IX, Sec. VIII, Para. I (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I) and the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), is not an indebtedness of the municipality which can be paid and satisfied out of the general tax fund or other general funds of the municipality. *City of Royston v. Littrell Eng'g Co.*, 87 Ga. App. 903, 75 S.E.2d 678 (1953).

Municipality not liable under non-existent community improvement district. — Municipality was not liable in a three-party arrangement among itself, a bank, and a land developer for breach of a mere agreement to create a community improvement district where the municipality had never been officially designated by the legislature as its administrative body, and where in any event, no such improvement plan existed. *Circle H Dev., Inc. v. City of Woodstock*, 206 Ga. App. 473, 425 S.E.2d 891 (1992).

This paragraph was not violated by Ga. L. 1905, p. 100, increasing salary of city judge. *Clark v. Eve*, 134 Ga. 788, 68 S.E. 598 (1910) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Former Code 1933, Ch. 23-25, authorizing creation of drainage districts, did not violate this paragraph. *Almand v. Pate*, 143 Ga. 711, 85 S.E. 909 (1915) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Ga. L. 1921, p. 676, extending city limits of Atlanta, did not violate this paragraph. *Davidson v. Town of Kirkwood*, 152 Ga. 357, 110 S.E. 154 (1921) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Ga. L. 1919, p. 821, authorizing issuance of street improvement bonds, did not violate this paragraph. *City of Valdosta v. Harris*, 156 Ga. 490, 119 S.E. 625 (1923); *Walthour v. City of Atlanta*, 157 Ga. 24, 120 S.E. 613 (1925) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Executions for paving assessments valid. — Because under the law the city was authorized to issue executions for

paving assessments due and payable in installments upon installments becoming due and unpaid, and was not authorized or required to issue executions to enforce the collection of such installments before they became in default; and the general statutes relating to dormancy of executions not having application until arrival of the time for issuance of executions on such assessments, and the executions in the instant case having been issued and levied, and the injunction suit brought to restrain their enforcement, within seven years from the arrival of the time for the issuance of such executions, they are not dormant, but are of full force and effect. *Webb v. City of Atlanta*, 186 Ga. 430, 198 S.E. 50 (1938).

Municipality contracting to lease land to corporation provided lessee supply medical and surgical treatment to city's indigents not unconstitutional. — A contract between a municipality and another corporation for a lease, for a term of 35 years, of land owned by the municipality, in consideration of care of the poor of the city by the lessee to the extent of supplying specified medical and surgical treatment in a clinic or hospital existing on such land, is not unlawful as violating any of the provisions of the Constitution. *Aven v. Steiner Cancer Hosp.*, 189 Ga. 126, 5 S.E.2d 356 (1939).

City's multiyear lease purchase contract for equipment did not constitute a "debt" within the meaning of this paragraph and, therefore, did not require voter approval. *Barkley v. City of Rome*, 259 Ga. 355, 381 S.E.2d 34 (1989) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Property owners not due abatement on street improvement contract accepted by city because of defect in repair. — Where repaving is done on city streets, and the city accepts the repaving, and by reason of a "latent" defect the paving becomes broken and cracked, and the contractor repairs the pavement under the contract guaranteeing the pavement for five years, and the city accepts the pavement as repaired, such acceptance, in the absence of fraud, is binding upon the property owners; and the presence of such defects in the paving will not be cause for abatement of the balance of

Creation of Debt (Cont'd)**6. Nondebts** (Cont'd)

the installments of the assessments for the cost of repaving them unpaid, on

ground that the property owners have paid all that the repaving is worth. *Webb v. City of Atlanta*, 186 Ga. 430, 198 S.E. 50 (1938).

OPINIONS OF THE ATTORNEY GENERAL**ANALYSIS**

GENERAL CONSIDERATION

ELECTION REQUIREMENTS

DEBT INCURMENT

General Consideration

This paragraph and Ga. Const. 1976, Art. IX, Sec. VII, Para. III (no comparable 1983 provision) constitute entirely separate methods of incurring debt and even though a political subdivision has incurred debts which have reached the limitation of 10 percent imposed by this paragraph, a political subdivision may still utilize the provisions of Ga. Const. 1976, Art. IX, Sec. VII, Para. III, to incur an additional debt of up to 3 percent of the assessed value of all taxable property located in the political subdivision. 1977 Op. Att'y Gen. No. U77-13 (decided under Ga. Const. 1976, Art. IX, Sec. VII, Para. III) (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

This paragraph has been construed strictly and taxes cannot be levied to pay any claim for any purpose other than the enumerated purposes. 1945-47 Op. Att'y Gen. p. 632 (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Debt limitation provisions fully applicable to school boards. 1969 Op. Att'y Gen. No. 69-160.

Construction of school administration, maintenance, and storage facilities. — Proceeds of general obligation bonds issued under O.C.G.A. §§ 20-2-430 and 20-2-431 may not be used for school administration, maintenance, and storage facilities, but bonds may be issued for such purposes upon compliance by the county school board with the notice and purpose requirements set forth in O.C.G.A. § 36-82-1 et seq. 1998 Op. Att'y Gen. No. 98-12.

"Debt" defined. — Debt, as used in Ga. Const. 1976, Art. VII, Sec. III, Para. I (see

Ga. Const. 1983, Art. VII, Sec. IV, Para. I) and this paragraph, which forms the basis of the restriction upon public debt, means incurring of a fiscal liability not to be discharged by taxes levied within the year in which the liability is undertaken. 1975 Op. Att'y Gen. No. 75-19 (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Revenue anticipation obligations are not subject to debt limitation clause in this paragraph. 1967 Op. Att'y Gen. No. 67-54.

Word "casual" means that which happens by accident or is brought about by an unknown cause; the framers of the Constitution, in using this language, meant some unforeseen or unexpected deficiency, or an insufficiency of funds to meet some unforeseen and necessary expense. 1960-61 Op. Att'y Gen. p. 138 (decided under Ga. Const. 1945, Art. IX, Sec. VII, Para. I).

Creation of pension and retirement plans as prior service obligations of cities and counties is constitutional; a prior obligation of a municipality does or does not constitute a "debt" within the debt limitation placed upon municipalities under this paragraph. 1962 Op. Att'y Gen. p. 355.

Environmental loans exempt from debt limitations. — Loans made by the Georgia Environmental Facilities Authority to local governments pursuant to Ga. Const. 1983, Art. IX, Sec. III, Para. I(a), the Intergovernmental Contracts Clause, are not subject to the debt limitations of Ga. Const. 1983, Art. IX, Sec. V. 1994 Op. Att'y Gen. No. 94-6.

Election Requirements

Chapter 2, T. 21 does not provide for special registration, but rather for gen-

eral registration from which a list is compiled to vote in special elections; therefore, any person who has registered to vote by the close of the fifth day (excluding Sundays or holidays) after the call of a bond election is entitled to vote in that election. 1965-66 Op. Att'y Gen. No. 66-73.

Debts cannot be secured for periods exceeding one year. — A county or other political subdivision may not legally incur ordinary indebtedness, secured or unsecured, for periods exceeding one year, without assent of a majority of the qualified voters of the county or other political subdivision voting in an election for that purpose to be held as prescribed by law. 1969 Op. Att'y Gen. No. 69-160.

School bond election called by a county board of education may be held concurrently with the general election. 1965-66 Op. Att'y Gen. No. 65-9.

Counties and municipalities may incur debts, including bank loans, if approved by a majority of the qualified voters. 1977 Op. Att'y Gen. No. 77-51.

Approval of majority of qualified voters participating in election is required to incur debt, rather than approval of majority of all qualified voters. 1954-56 Op. Att'y Gen. p. 491.

"Special" and "general" registration defined. — The Supreme Court of this state has defined special registration in the following terms: "... A special registration as distinguished from a general registration is one designed for a particular election and which becomes functus officio when the election under which it was held has been had, that is to say, when the registration cannot be used for any other purpose. A general registration is one made up under general rules" 1960-61 Op. Att'y Gen. p. 217.

Debt Incurment

Contract entered into by a political subdivision of the state for longer than one year creates a "debt" subject to the prohibitions and limitations of this paragraph. 1977 Op. Att'y Gen. No. 77-51.

Any contract which obligates a county board of education to make payments for a period of more than one year is prohibited by this para-

graph, any statute to the contrary notwithstanding. 1965-66 Op. Att'y Gen. No. 65-33.

Four year contract created debt. — A city cannot legally enter into a contract with the Superintendent of Schools for a period or term of four years without creating a debt of the municipality in violation of this paragraph; however, a city may enter into a contract with the Superintendent for a period of one year, provided that at the time there is a sufficient sum in the treasury which may be lawfully used to pay the liability incurred, or if a sufficient amount to discharge the liability can be raised by taxation during the current year. 1962 Op. Att'y Gen. p. 186.

Single year lease payable from anticipated income not debt. — A lease agreement for a term of a single year involving nothing more than expenditure of income anticipated during the year from taxes and appropriations would not under this paragraph create a "debt." 1965-66 Op. Att'y Gen. No. 65-33 (see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Rental payments grossly in excess of reasonably considered fair rental value indicative of disguised conditional sale. — A lease agreement whereunder a county school board leases school buses for a single year is not on its face illegal because such agreement also gives the school board three one-year renewal options coupled with a purchase option exercisable at the end of the final renewal period; such an agreement might be subject to attack, however, the yearly "rental payments" are so grossly in excess of what reasonably could be considered to be the "fair rental value" of the buses as to lead to a conclusion that the transaction, while disguised as a lease plus purchase option, is essentially a "conditional sale." 1965-66 Op. Att'y Gen. No. 65-33.

Extending payment beyond fiscal year. — Area Vocational-Technical School Board may not borrow money to be repaid to lender over period of time extending beyond fiscal year in which loan was made. 1975 Op. Att'y Gen. No. 75-19.

City governing authorities cannot obligate city for equipment in an amount in excess of their annual an-

Debt Incurment (Cont'd)

anticipated revenue. 1954-56 Op. Att'y Gen. p. 492.

Inclusion of personal property in assessing value of taxable property. — In computing the assessed value of taxable property for the purpose of determining the amount of bonds a municipal corporation may issue, personal property above the \$300.00 exemption should be included. 1945-47 Op. Att'y Gen. p. 411.

"The assessed value of all the taxable property therein" refers to net digest of county or other political subdivision and not to gross digest minus personal property exemptions. 1967 Op. Att'y Gen. No. 67-54.

Limitations on total debt. — This paragraph through Ga. Const. 1976, Art. IX, Sec. VII, Para. IV (see Ga. Const. 1983, Art. IX, Sec. V, Para. V) create limitations on total debt which may be incurred by any county, and no debt may be incurred which exceeds those limitations. 1977 Op. Att'y Gen. No. U77-12 (decided under Ga. Const. 1976, Art. IX, Sec. VII, Paras. I through IV; see Ga. Const. 1983, Art. IX, Sec. V, Para. I).

Loans by Department of Natural Resources and Georgia Environmental Facilities Authority. — Loans by the

Department of Natural Resources pursuant to O.C.G.A. § 12-5-38.1 and loans by the Georgia Environmental Facilities Authority pursuant to O.C.G.A. § 50-23-1 et seq. do not cause a city or county to incur debt in accordance with Ga. Const. 1983, Art. IX, Sec. V, Para. I. The constitutional underpinning of these programs is in the intergovernmental contract clause, Ga. Const. 1983, Art. IX, Sec. III, Para. I(a). Thus, the procedural requirements in O.C.G.A. § 48-8-111 for submitting a debt question are not triggered where proceeds derived from the sales tax are to be applied to repayment of the loans by the Department of Natural Resources or Georgia Environmental Facilities Authority. 1990 Op. Att'y Gen. No. U90-7.

Authority of Georgia Environmental Facilities Authority and city of Atlanta regarding loans. — The Georgia Environmental Facilities Authority is statutorily empowered to make the administrative and policy determinations requiring the city of Atlanta to pledge its full faith and credit as security for a loan from the Authority, there are no constitutional prohibitions upon the city pledging its full faith and credit for such a loan, and a referendum is not required prior to the city making the pledge. 2004 Op. Att'y Gen. No. 2004-8.

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 522, 541, 567 et seq.

C.J.S. — 20 C.J.S., Counties, § 304 et seq. 64A C.J.S., Municipal Corporations, § 2030 et seq.

ALR. — Obligation for local improvements as within municipal debt limit, 33 ALR 1415.

Application to permanent improvements of constitutional or statutory provision against county or municipality exceeding current revenue, 41 ALR 790.

Power of municipality to mortgage or pledge its property or income therefrom, 71 ALR 828.

Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitu-

tional or statutory limitation of indebtedness, 71 ALR 1318; 145 ALR 1362.

Pledge or appropriation of revenue from utility or other property in payment therefor, as indebtedness within constitutional or statutory limitation of indebtedness of municipality or other political subdivision, 72 ALR 687; 96 ALR 1385; 146 ALR 328.

Power of state or municipality to appropriate funds or incur indebtedness, in excess of poor fund, for relief of distress due to general unemployment or other unusual conditions, 73 ALR 699; 87 ALR 371.

Referendum of general legislative act to people in absence of constitutional requirement in that regard, 76 ALR 1053.

Constitutionality, construction, application, and effect of statute requiring judicial approval before issuance or sale of

municipal or county bonds or obligations, 87 ALR 706; 102 ALR 90.

Obligation to meet which money is appropriated at the time of its creation as an indebtedness within limitation of indebtedness, 92 ALR 1299; 134 ALR 1399.

Constitutional or statutory debt limit as affected by existence of separate political units with identical or overlapping boundaries, 94 ALR 818.

Constitutional or statutory limitation of municipal indebtedness or tax rate for municipal purposes as applied to liability for tort or judgment based on tort, 94 ALR 937.

Allowance to contractor for extras in accordance with provisions of contract made before debt limit was reached, as creation of indebtedness within meaning of debt limit provisions, 96 ALR 397.

Validity of municipal bond issue for purpose of paying employees, 96 ALR 1204.

Pledge or appropriation of revenue from utility or other property in payment therefor as indebtedness within constitutional or statutory limitation of indebtedness of municipality or other political subdivision, 96 ALR 1385; 146 ALR 328; 146 ALR 328.

Funding or refunding obligations as subject to conditions respecting limitation of indebtedness or approval by voters, 97 ALR 442.

Limitation of power to tax as limitation of power to incur indebtedness or vice versa, 97 ALR 1103.

Liability imposed upon municipality or its property by an independent political unit on account of the benefit to the former's property from a local improvement as a debt of the municipality within constitutional debt limit, 98 ALR 749.

Interest on indebtedness of municipality as part of debt within constitutional or statutory debt limitation, 100 ALR 610.

Constitutionality, construction, application, and effect of statute requiring or authorizing judicial or administrative approval before issuance or sale of municipal bonds, 102 ALR 90.

Limitation of municipal indebtedness as affected by combination or merger of two or more municipalities, 103 ALR 154.

Installments payable under continuing service contract as present indebtedness

within organic limitation of municipal indebtedness, 103 ALR 1160.

Municipal debt limit as affected by obligations to municipality, 105 ALR 687.

Power of Legislature to add to or make more onerous the conditions or limitations prescribed by Constitution upon incurring public debts, 106 ALR 231.

Constitutional or statutory provision limiting state or municipal indebtedness or taxation or regulating issuance of bonds as affecting bonds or other obligations authorized but not delivered prior to adoption or effective date of the provision, 109 ALR 961.

Debts incurred for school purposes as part of municipal indebtedness, for purposes of debt limitation, 111 ALR 544.

Aggregate of rent for entire period of lease of property to municipality as present indebtedness for purposes of condition of incurring, or limitation of amount of, municipal debt, 112 ALR 278.

What are "necessary expenses" within exception in constitutional or statutory provision requiring vote of people to authorize contracting of debt by municipality, county, or other political body, or limiting amount of such indebtedness, 113 ALR 1202.

Existing sinking fund as a factor in determining whether indebtedness or proposed indebtedness of municipality or other political subdivision exceeds constitutional or statutory limit, 125 ALR 1393.

Construction and application of constitutional or statutory provision which limits public indebtedness with reference to period of usefulness of purpose or object, 127 ALR 1216.

Constitutionality of statute validating bonds or other obligations of public body in excess of debt limitation, 132 ALR 1388.

Lease of property by municipality or other political subdivision, with option to purchase same, as evasion of constitutional or statutory limitation of indebtedness, 145 ALR 1362.

Pledge or appropriation of revenue from utility or other property in payment therefor, as indebtedness within constitutional or statutory limitation of indebtedness of municipality or other political subdivision, 146 ALR 328.

Meaning of term "assessment" or "as-

sessed valuation" when used as basis of tax or debt limit, 156 ALR 594.

Subsequent exhaustion of funds as affecting contract validly entered into by political subdivision under constitutional provision limiting indebtedness to revenues for current year, 159 ALR 1261.

What constitutes separate and independent political units within the rule permitting separate computation of constitutional debt limit notwithstanding overlapping or identical boundaries, 171 ALR 729.

Right of creditor of public body to full or pro rata payment when fund out of which obligation is payable is insufficient to pay all like obligations of equal dignity, 171 ALR 1033.

Validity, within authorized debt, tax, or voted limit, of bond issue in excess of amount permitted by law, 175 ALR 823.

Validity of municipal bond issue as against owners of property annexation of which to municipality became effective after date of election at which issue was approved by voters, 10 ALR2d 559.

Presumptions and burden of proof as to violation of or compliance with public debt limitation, 16 ALR2d 515.

Inclusion of tax-exempt property in determining value of taxable property for debt limit purposes, 30 ALR2d 903.

Power of legislative body to amend, repeal, or abrogate initiative or referendum measure, or to enact measure defeated on referendum, 33 ALR2d 1118.

Rescission of vote authorizing school district or other municipal bond issue, expenditure, or tax, 68 ALR2d 1041.

Construction and application of constitutional or statutory provisions expressly excepting certain laws from referendum, 100 ALR2d 314.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining, or improving stadium for use of professional athletic team, 67 ALR3d 1186.

Requirement that public contract be awarded on competitive bidding as applicable to contract for public utility, 81 ALR3d 979.

Paragraph II. Special district debt.

Any county, municipality, or political subdivision of this state may incur debt on behalf of any special district created pursuant to Paragraph VI of Section II of this article. Such debt may be incurred on behalf of such special district where the county, municipality, or other political subdivision shall have, at or before the time of incurring such debt, provided for the assessment and collection of an annual tax within the special district sufficient in amount to pay the principal of and interest on such debt within 30 years from the incurrence thereof; and no such county, municipality, or other political subdivision shall incur any debt on behalf of such special district without the assent of a majority of the qualified voters of such special district voting in an election held for that purpose as provided by law. No such county, municipality, or other political subdivision shall incur any debt on behalf of such special district in an amount which, when taken together with all other debt outstanding incurred by such county, municipality, or political subdivision and on behalf of any such special district, exceeds 10 percent of the assessed value of all taxable property within such county, municipality, or political subdivision. The proceeds of the tax collected as provided herein shall be placed in a sinking fund to be held on behalf of such special district and used exclusively to pay off the principal of and interest on such debt thereafter maturing. Such moneys shall be held and kept separate and apart from all other

revenues collected and may be invested and reinvested as provided by law.

1976 Constitution. — There were no similar provisions in the 1976 Constitution.

JUDICIAL DECISIONS

“Stadium Funding Agreement” for construction of a domed facility, entered into by a city, a county, and a stadium authority, was authorized by the intergovernmental contracts clause of Ga. Const. 1983, Art. IX, Sec. III, Para. I, and therefore did not violate the special district debt clause of Ga. Const. 1983, Art. IX, Sec. V, Para. II. *Youngblood v. State*, 259 Ga. 864, 388 S.E.2d 671 (1990).

Paragraph III. Refunding of outstanding indebtedness.

The governing authority of any county, municipality, or other political subdivision of this state may provide for the refunding of outstanding bonded indebtedness without the necessity of a referendum being held therefor, provided that neither the term of the original debt is extended nor the interest rate of the original debt is increased. The principal amount of any debt issued in connection with such refunding may exceed the principal amount being refunded in order to reduce the total principal and interest payment requirements over the remaining term of the original issue. The proceeds of the refunding issue shall be used solely to retire the original debt. The original debt refunded shall not constitute debt within the meaning of Paragraph I of this section; but the refunding issue shall constitute a debt such as will count against the limitation on debt measured by 10 percent of assessed value of taxable property as expressed in Paragraph I of this section.

1976 Constitution. — Art. IX, Sec. VIII, Paras. III, IV.

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Intent. — The intention of the framers of the Constitution was that this paragraph should apply to those instances where the bonds are subject to call, or where the bondholders are willing to surrender these outstanding obligations. 1945-47 Op. Att’y Gen. p. 519 (decided under Ga. Const. 1945, Art. VII, Sec. VII, Para. VI; see Ga. Const. 1983, Art. IX, Sec. V, Para. III).

With reference to issuing of refunding bonds to pay outstanding bond issues of cities and counties, this paragraph may not be construed to require

surrender of outstanding issues which are not subject to call. 1945-47 Op. Att’y Gen. p. 519 (decided under Ga. Const. 1945, Art. VII, Sec. VII, Para. VI; see Ga. Const. 1983, Art. IX, Sec. V, Para. III).

Use of bond proceeds and savings generated by bond refundings. — The Georgia Constitution and Georgia statutes do not provide any latitude to use bond proceeds for additional capital expenditures whether or not they are spent on projects which may have been approved by the voters at the time of the original bond referendum. Accordingly, all

proceeds generated at closing of the refunding issue should be spent on costs of the refunding or used to pay principal, interest, and premiums on the refunded debt. Furthermore, a new tax levy appropriately sized to retire the new refunding bonds should be provided for prior to issu-

ance of the refunding bonds. If any excess proceeds result from the new tax levy, such excess proceeds shall not be available for transfer to capital projects until all refunding bonds are repaid. 1994 Op. Att’y Gen. No. 94-8.

Paragraph IV. Exceptions to debt limitations.

Notwithstanding the debt limitations provided in Paragraph I of this section and without the necessity for a referendum being held therefor, the governing authority of any county, municipality, or other political subdivision of this state may, subject to the conditions and limitations as may be provided by general law:

(1) Accept and use funds granted by and obtain loans from the federal government or any agency thereof pursuant to conditions imposed by federal law.

(2) Incur debt, by way of borrowing from any person, corporation, or association as well as from the state, to pay in whole or in part the cost of property valuation and equalization programs for ad valorem tax purposes.

1976 Constitution. — Art. IX, Sec. VII, Paras. I, V.

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Municipality not liable for indebtedness contracted pursuant to Ga. Const. 1983, Art. IX, Sec. VI, Para. I and Art. 3, Ch. 82, T. 36. — Liability against a municipality arising out of and by virtue of any contract made by such municipality with an engineering company, entered into pursuant to Ga. Const. 1976, Art. IX, Sec. VIII, Para. I (see Ga.

Const. 1983, Art. IX, Sec. VI, Para. I) and the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), is not an indebtedness of the municipality which can be paid and satisfied out of the general tax fund or other general funds of said municipality. *City of Royston v. Littrell Eng’g Co.*, 87 Ga. App. 903, 75 S.E.2d 678 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 534 et seq., 565 et seq.

ALR. — Exception regarding “emer-

gency,” “urgency,” etc., within statute or charter forbidding municipal corporation to expend money or incur indebtedness in absence, or in excess, of appropriation, 111 ALR 703.

Paragraph V. Temporary loans authorized.

The governing authority of any county, municipality, or other political subdivision of this state may incur debt by obtaining temporary loans in

each year to pay expenses. The aggregate amount of all such loans shall not exceed 75 percent of the total gross income from taxes collected in the last preceding year. Such loans shall be payable on or before December 31 of the calendar year in which such loan is made. No such loan may be obtained when there is a loan then unpaid obtained in any prior year. No such county, municipality, or other political subdivision of this state shall incur in any one calendar year an aggregate of such temporary loans or other contracts, notes, warrants, or obligations for current expenses in excess of the total anticipated revenue for such calendar year.

1976 Constitution. — Art. IX, Sec. VII, Paras. I, IV.

Cross references. — Generally, §§ 20-2-390 and 36-80-2.

Editor's notes. — The constitutional amendment (Ga. L. 1988, p. 2108, § 1) which would have revised the Paragraph

to authorize the issuance of temporary loans on behalf of special service districts was defeated at the general election on November 8, 1988.

Law reviews. — For article discussing tax-exempt financing in Georgia, see 18 Ga. St. B.J. 20 (1981).

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Expenditures for county pension fund. — County's inclusion of the sheriff in its pension plan with county funds did not create a temporary loan in violation of

Ga. Const. 1983, Art. IX, Sec. V, Para. V. *Malcom v. Newton County*, 244 Ga. App. 464, 535 S.E.2d 824 (2000).

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This paragraph has reference to temporary loans and such indebtedness does not include bonded indebtedness, as this paragraph provides only for temporary loans and states that all of such loans shall not exceed 75 percentum of the total gross income of such county. 1948-49 Op. Att'y Gen. p. 641 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Under this paragraph, counties do have authority to negotiate temporary loans in order to defray current county expenses. — There are, of course, conditions and limitations placed on such loans; this power to borrow money for county purposes may be exercised by county commissioners. 1954-56 Op. Att'y Gen. p. 69 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Gasoline tax allocation not included in gross income. — In view of the fact that this paragraph provides that the amount of temporary loans may not exceed 75 percent of the total gross income of the county from taxes collected by such

county, the last preceding year, the gasoline tax allocation should not be included in the gross income, as these taxes are collected by the state and not by the county as required by this paragraph, to arrive at the maximum amount of temporary loans that may be procured. 1948-49 Op. Att'y Gen. p. 641 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Debt cannot exceed one year without voter approval. — A county or other political subdivision may not legally incur ordinary indebtedness, secured or unsecured, for periods exceeding one year, without assent of a majority of the qualified voters of the county or other political subdivision voting in an election for that purpose to be held as prescribed by law. 1969 Op. Att'y Gen. No. 69-160.

Payment of insurance premiums with county funds. — Use by county of public funds for payment of group life and hospitalization insurance premiums of its employees violates this paragraph and Ga. Const. 1976, Art. IX, Sec. VIII, Para. I

(see Ga. Const. 1983, Art. IX, Sec. VI, Para. I). 1965-66 Op. Att'y Gen. No. 65-25 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Debt limitation provisions fully applicable to school boards. See 1969 Op. Att'y Gen. No. 69-160.

Contractual employment term limited. — Georgia Const. 1976, Art. VIII, Sec. VII, Para. I (see Ga. Const. 1983, Art. VIII, Sec. VI, Para. I), Ga. Const. 1976, Art. IX, Sec. V, Para. I (see Ga. Const. 1983, Art. IX, Sec. IV, Para. I), and this paragraph impliedly limit term of contractual employment of employees by county boards of education to one school year. 1963-65 Op. Att'y Gen. p. 79 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

This paragraph indirectly affects county boards of education. — Inasmuch as a county board of education is not authorized to levy taxes, this paragraph does not apply to such boards, but this paragraph does apply to counties, and when a county makes a temporary loan for educational purposes this paragraph must be complied with, and therefore, it might be said that this paragraph indirectly affects the county boards of education. 1948-49 Op. Att'y Gen. p. 113 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

State funds as collateral for a loan. — This constitutional limitation on amount which a county board may borrow applies to loans for which state funds are pledged as collateral, and therefore, a county board may not exceed the constitutional limitation when pledging anticipated state funds as collateral for a loan. 1948-49 Op. Att'y Gen. p. 107.

This paragraph limiting amounts county boards may borrow is still in effect. 1948-49 Op. Att'y Gen. p. 105 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Former Code 1933, § 32-921 (see now O.C.G.A. § 20-2-390) was controlled by provisions of this paragraph, restricting amount of debt which may be incurred by a county board of education. 1958-59 Op. Att'y Gen. p. 97 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Referendum required. — A referendum is required before a school board may borrow money for a term longer than 12 calendar months where the loan is to be

repaid from expected sales tax for educational purposes. A school board may, without such referendum, borrow money for a term of one calendar year or less, if certain legal requirements are met. 1997 Op. Att'y Gen. No. 97-30.

Loans limited to total anticipated revenue. — This provision expressly limits aggregate of all temporary loans "and other contracts or obligations for current expenses" to total anticipated revenue of county board of education for the calendar year, and would indicate all contractual obligations of the county board of education such as teacher contracts, etc.; it has reference to revenue from all sources including state funds. 1958-59 Op. Att'y Gen. p. 97 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Anticipated revenues cannot include grants from state. — The provision in this paragraph that the aggregate amount of all temporary loans of a county board of education outstanding at any one time shall not exceed 75 percent of the total gross income of such county board of education from taxes collected by such county means "local county taxes"; it cannot include anticipated revenues from the State Board of Education, which money is merely a grant from the state. 1958-59 Op. Att'y Gen. p. 97 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Borrowing by local school system for school construction projects of less than \$200,000.00 legally permissible. — When allotted funds from the State Board of Education for school construction result in construction projects of less than \$200,000.00, the Georgia Education Authority (Schools) does not directly supervise construction but requires the local school system to construct the project itself and then be reimbursed by the authority; this procedure often makes it necessary for the local school system to borrow a substantial part of the construction costs for a period of nine months to a year; such borrowing is within the legal power of local school systems. 1968 Op. Att'y Gen. No. 68-18.

Rental payments grossly in excess of reasonably considered fair rental value indicative of disguised conditional sale. — A lease agreement

whereunder a county school board leases school buses for a single year is not on its face illegal merely because such agreement also gives the school board three one-year renewal options coupled with a purchase option exercisable at the end of the final renewal period; such an agreement might be subject to attack, however, if the yearly "rental payments" are so grossly in excess of what reasonably could be considered to be the "fair rental value" of the buses as to lead to a conclusion that the transaction, while disguised as a lease plus purchase option, is essentially a "conditional sale." 1965-66 Op. Att'y Gen. No. 65-33.

County hospital authority not subject to this paragraph. — A county hospital authority is neither a county, municipality, political subdivision of the state authorized to levy taxes, or county board of education so as to come within the provisions of this paragraph. 1969 Op. Att'y Gen. No. 69-9 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Tax anticipation notes improper collateral for state deposits. — Tax anticipation notes used to cover temporary loans for expenses to Georgia's cities and counties during the current year would not be proper collateral for state

deposits since tax anticipation notes were not included in former Code 1933, § 100-108 (see now O.C.G.A. § 50-17-59) as proper collateral. 1968 Op. Att'y Gen. No. 68-3.

Homestead realty exception from declared exemption and taxable to pay interest and retire bonded indebtedness. — The language "except to pay interest on and retire bonded indebtedness" as used in this paragraph considered within the context of the provisions of the Constitution exempting homesteads from taxation should be construed as granting an exception from the declared exemption and that the realty classified as a homestead would be subject to taxation to pay interest on and retire bonded indebtedness created after the ratification of the 1945 Constitution. 1945-47 Op. Att'y Gen. p. 560 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

Revenues received under Joint County and Municipal Sales and Use Tax Act (O.C.G.A. § 48-8-80 et seq.) may be included as part of the "total gross income from taxes collected in the last preceding year" for purposes of this Paragraph. 1988 Op. Att'y Gen. No. U88-19 (see Ga. Const. 1983, Art. IX, Sec. V, Para. V).

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, §§ 511 et seq., 534.

ALR. — Liquidation of indebtedness incident to abandoned project for an improvement, the cost of which, if made, would have been assessed against property benefited, 82 ALR 559.

Exception regarding "emergency," "urgency," etc., within statute or charter forbidding municipal corporation to expend

money or incur indebtedness in absence, or in excess, of appropriation, 111 ALR 703.

Rescission of vote authorizing school district or other municipal bond issue, expenditure, or tax, 68 ALR2d 1041.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining, or improving stadium for use of professional athletic team, 67 ALR3d 1186.

Paragraph VI. Levy of taxes to pay bonds; sinking fund required.

Any county, municipality, or other political subdivision of this state shall at or before the time of incurring bonded indebtedness provide for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of said debt within 30 years from the incurring of such bonded indebtedness. The proceeds of this tax,

together with any other moneys collected for this purpose, shall be placed in a sinking fund to be used exclusively for paying the principal of and interest on such bonded debt. Such moneys shall be held and kept separate and apart from all other revenues collected and may be invested and reinvested as provided by law.

1976 Constitution. — Art. IX, Sec. VII, Para. II; Art. IX, Sec. VIII, Para. V.

Cross references. — Levies to pay bonded education debts, § 20-2-435. Establishing sinking funds for moneys collected, §§ 20-2-457 and 36-80-14. Providing for maturity in 40 years for certain debts, § 20-3-154. Investment of funds collected, §§ 36-1-8 and 36-38-1 et seq.

Municipal management of sinking funds, § 36-38-23. Use of sinking fund in computation of public indebtedness, § 36-82-8.

Law reviews. — For article surveying important general legal principles of municipal and county government purchasing and contracting in Georgia, see 16 Mercer L. Rev. 371 (1965).

JUDICIAL DECISIONS

Assessment precedes bond issuance; but this must be done before issuance of the bonds. *Oliver v. City of Elberton*, 124 Ga. 64, 52 S.E. 15 (1905).

Both principal and interest must be provided for. *Smith v. Mayor of Dublin*, 113 Ga. 833, 39 S.E. 327 (1910).

This paragraph is a check on extravagance. *Sheffield v. Chancy*, 138 Ga. 677, 75 S.E. 1112 (1912) (see Ga. Const. 1983, Art. IX, Sec. V, Para. VI).

Interest not collectible until all bonds sold. — An annual tax may be levied, though all of the bonds are not sold, but interest on such bonds should not be collected. *Mitchell County v. Phillips*, 152 Ga. 787, 111 S.E. 374 (1922); *Jones v. Coleman*, 152 Ga. 795, 111 S.E. 377 (1922).

Where an ordinance complies with this paragraph, it is not void because provision is made for payment from other sources. *Epping v. City of Columbus*, 117 Ga. 263, 43 S.E. 803 (1903), overruled on other grounds, *Harrell v. Town of Whigham*, 141 Ga. 322, 80 S.E. 1010 (1914). See also *Sewell v. City of Tallapoosa*, 145 Ga. 19, 88 S.E. 577 (1916) (see Ga. Const. 1983, Art. IX, Sec. V, Para. VI).

Omission of the word “annual” in the ordinance is immaterial. *Thomas v. City of Blakely*, 141 Ga. 488, 81 S.E. 218 (1914).

Paragraph not violated by drainage law, former Code 1933, Ch. 23-25, which authorizes assessments against

property specially benefited by the improvement, and after such assessments to issue bonds payable only from the proceeds of such assessments, does not violate this paragraph. *Almand v. Pate*, 143 Ga. 711, 85 S.E. 909 (1915) (see Ga. Const. 1983, Art. IX, Sec. V, Para. VI).

Installment bonds. — Nothing in this paragraph is inconsistent with the authorization of an issue of bonds in installments and the levy of the tax for the payment of each installment in the year of its issue. *Brady v. City of Atlanta*, 17 F.2d 764 (5th Cir. 1927) (see Ga. Const. 1983, Art. IX, Sec. V, Para. VI).

Presumption not valid. — It cannot be presumed that in issuance of bonds in this case provision for payment of the indebtedness had not been made before the addition of the territory embraced in the specified district. That question was concluded by the judgment of validation. *Towns v. Workmore Pub. Sch. Dist.*, 166 Ga. 393, 142 S.E. 877 (1928).

Proceeds from sale of bonded properties need not be applied to redemption of specific securities. — The fact that the light plant and the city hall were built with the proceeds of bonds sold by the city does not require that the proceeds of the sales of these properties should be applied to the redemption of these securities, these properties being in no way pledged by the city to the payment of these bonds, and the Constitution of this state requiring that the city should, at or

before the time of issuing said bonds, provide for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of any bonded indebtedness within 30 years from the date of the incurring of the debt. *Mathews v. Darby*, 165 Ga. 509, 141 S.E. 304 (1928).

Municipality not liable for indebtedness. — Liability against a municipality arising out of and by virtue of any contract made by such municipality with an engineering company, entered into pursuant to Ga. Const. 1976, Art. IX, Sec. VIII, Para. I (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I), and the Revenue Bond Law, Ga. L. 1937, p. 761, § 1 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), is not an indebtedness of the municipality which can be paid and satisfied out of the general tax fund or other general funds of said municipality. *City of Royston v. Littrell Eng'g Co.*, 87 Ga. App. 903, 75 S.E.2d 678 (1953).

Debts under Art. 3, Ch. 82, T. 36 not debts of political subdivision. — Rev-

enue anticipation certificates issued under the Revenue Bond Law, Ga. L. 1937, p. 761, § 1 (see now O.C.G.A. Art. 3, Ch. 82, T. 36) do not subject the political subdivision of this state issuing the certificates to any pecuniary liability thereon and are therefore not debts against such political subdivision within meaning of the constitutional provision limiting such indebtedness. *Fort Oglethorpe v. Catoosa County*, 80 Ga. App. 188, 55 S.E.2d 753 (1949).

Cited in *Bank of Chatsworth v. Hagedorn Constr. Co.*, 162 Ga. 488, 134 S.E. 310 (1926); *Seaboard Airline Ry. v. Liberty County*, 39 Ga. App. 75, 146 S.E. 771 (1928); *Town of Douglasville v. Mobley*, 169 Ga. 53, 149 S.E. 575 (1929); *Hines v. Etheridge*, 173 Ga. 870, 162 S.E. 113 (1931); *Century Indem. Co. v. Fidelity & Deposit Co.*, 175 Ga. 834, 166 S.E. 235 (1932); *DeJarnette v. Hospital Auth.*, 195 Ga. 189, 23 S.E.2d 716 (1942); *Sheffield v. State Sch. Bldg. Auth.*, 208 Ga. 575, 68 S.E.2d 590 (1952); *Posey v. Dooly County Sch. Dist.*, 215 Ga. 712, 113 S.E.2d 120 (1960).

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Effect of construing this paragraph and § 20-2-438 together. — Construing this paragraph and former Code 1933, § 32-1402 (see now O.C.G.A. § 20-2-438) together, it was the intention of the people in the adoption of the Constitution, and the General Assembly in the adoption of legislation, to provide that funds raised by taxation to pay the principal and interest on bonds should be set aside by the officials of the political division and kept separate from other funds to be used for the sole purpose of paying the indebtedness and none other until the debts against the bond had been fully liquidated, but the Constitution or statutes did not contemplate that after the payment of the debts against such specific fund that the fund could not be legally used for other legitimate purposes for which the authorities could levy a tax. 1945-47 Op. Att'y Gen. p. 163.

Different uses of tax surplus depends on tax designation. — Where tax

is expressly designated as being for retirement of a particular bond issue, any surplus in the sinking fund for that issue may be transferred to the general accounts when the principal and interest of that issue have been fully paid; where, however, a tax is for retirement of multiple issues and put in a joint sinking fund for such multiple issues, it can only be transferred to the general account when all of the issues have been paid off in full. 1967 Op. Att'y Gen. No. 67-447.

Funds raised by bond tax levy may not be used to pay exchange or agent's expenses for handling collections of bonds. 1945-47 Op. Att'y Gen. p. 165.

Upon retirement of school bonds, surplus remaining in debt retirement account becomes a part of the general school fund and is properly transferred to the general fund account. 1965-66 Op. Att'y Gen. No. 65-116.

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 5, 12, 329.

C.J.S. — 20 C.J.S., Counties, §§ 368, 377. 64A C.J.S., Municipal Corporations, § 2276 et seq.

ALR. — Liability of officer for loss of sinking fund through failure of bank, 25 ALR 1358.

Right of creditor of public body to full or pro rata payment when fund out of which obligation is payable is insufficient to pay all like obligations of equal dignity, 90 ALR 717; 171 ALR 1033.

Failure to comply with constitutional or statutory requirement that municipality, or other political subdivision, at or before incurring indebtedness, shall provide a tax for its payment as affecting validity of indebtedness or obligations issued therefor, 90 ALR 1240.

Constitutionality, construction, and application of statute empowering municipal corporation to issue bonds the proceeds of

which shall be invested in municipal securities, 108 ALR 736.

Constitutional provisions against impairment of obligations of contract as applied to sinking funds for retirement of municipal or other public bonds, 115 ALR 220.

Existing sinking fund as a factor in determining whether indebtedness or proposed indebtedness of municipality or other political subdivision exceeds constitutional or statutory limit, 125 ALR 1393.

Rights and liabilities of municipality as to interest earned on improvement assessments or other special funds collected or held by it, 143 ALR 1341.

Right of holder of governmental obligation to complain of reduction of tax rate or basis of assessment for tax purposes, 156 ALR 1264.

Rescission of vote authorizing school district or other municipal bond issue, expenditure, or tax, 68 ALR2d 1041.

Paragraph VII. Validity of prior bond issues.

Any and all bond issues validated and issued prior to June 30, 1983, shall continue to be valid.

1976 Constitution. — There were no similar provisions in the 1976 Constitution.

SECTION VI.

REVENUE BONDS

Paragraph

I. Revenue bonds; general limitations.

II. Revenue bonds; special limitations.

Paragraph

III. Development authorities.

IV. Validation.

V. Validity of prior revenue bond issues.

Paragraph I. Revenue bonds; general limitations.

Any county, municipality, or other political subdivision of this state may issue revenue bonds as provided by general law. The obligation represented by revenue bonds shall be repayable only out of the revenue derived from the project and shall not be deemed to be a debt of the issuing political subdivision. No such issuing political subdivision

shall exercise the power of taxation for the purpose of paying any part of the principal or interest of any such revenue bonds.

1976 Constitution. — Art. IX, Sec. VIII, Para. I.

Cross references. — Generally, § 36-82-60 et seq.

Law reviews. — For article, “Discre-

tion in Georgia Local Government Law,” see 8 Ga. L. Rev. 614 (1974). For article discussing extraterritorial provision of utility services by municipality, see 12 Ga. L. Rev. 1 (1977).

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Revenue Certificate Law and Constitution part of every municipality’s charter. — When the Revenue Certificate Law of 1937, the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), and the Constitution of 1945 were adopted, provisions of each as to revenue certificates became a part of the charter of every municipality of this state. *Lipscomb v. Cumming*, 211 Ga. 55, 84 S.E.2d 3 (1954); *Carter v. State*, 93 Ga. App. 12, 90 S.E.2d 672 (1955).

Art. 3, Ch. 82, T. 36. — Any Acts of General Assembly tending to restrict power of a municipality to exercise rights granted under the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), are inoperative. *Carter v. State*, 93 Ga. App. 12, 90 S.E.2d 672 (1955).

This paragraph authorizes grant of broad powers to municipalities as are contained in the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), and by that courts are bound and have nothing to do with the reasonableness, wisdom, policy, or expediency of the law. *Lipscomb v. Cumming*, 211 Ga. 55, 84 S.E.2d 3 (1954) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Electric utilities can be regulated. — But neither alone, nor construed in conjunction with Ga. Const. 1976, Art. III, Sec. VIII, Para. IX (see Ga. Const. 1983, Art. III, Sec. VI, Para. V), does this provision prohibit General Assembly from regulating municipally owned or operated electric utilities. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759, 213 S.E.2d 596 (1975) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Local amendments. — A local amendment to Art. VII, Sec. IV, Para. II of the

1945 Georgia Constitution, authorizing a county to levy a tax for water and sewerage purposes, was valid despite any conflict with the general bond provision. *Copeland v. State*, 268 Ga. 375, 490 S.E.2d 68 (1997).

Local legislation no hindrance to municipality proceeding under Art. 3, Ch. 82, T. 36, and Constitution. — The General Assembly intended that every municipality in the state should have exactly the same power to do all of the acts authorized by the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), as adopted by this paragraph, and the constitutional provisions being a part of the charter of a municipality it necessarily follows that it has authority to proceed thereunder regardless of other and alternate, or even contradictory, plans which might have been contained in local legislation. *Carter v. State*, 93 Ga. App. 12, 90 S.E.2d 672 (1955) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Municipality not liable for indebtedness. — Liability against a municipality arising out of and by virtue of any contract made by such municipality with an engineering company, entered into pursuant to Ga. Const. 1976, Art. IX, Sec. VIII, Para. I (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I) and the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), is not an indebtedness of the municipality which can be paid and satisfied out of the general tax fund or other general funds of said municipality. *City of Royston v. Littrell Eng’g Co.*, 87 Ga. App. 903, 75 S.E.2d 678 (1953).

This paragraph enumerates projects or facilities which may be financed with funds derived from issuance and sale of revenue bonds. Smith

v. Hayes, 217 Ga. 94, 121 S.E.2d 113 (1961) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Combining sewer and water systems. — This paragraph confers upon municipalities express constitutional authority to combine sewer and waterworks systems for purpose of operating the two as one. Reed v. City of Smyrna, 201 Ga. 228, 39 S.E.2d 668 (1946) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Petition which sought to enjoin city from constructing a water line and furnishing water to customers because they were located outside the corporate limits of the city failed to state a cause of action. Lipscomb v. Cumming, 211 Ga. 55, 84 S.E.2d 3 (1954).

Disproportionate rates between resident and nonresident users not violative of federal and state Constitutions equal protection clause. — Where the city has the right under its charter to furnish water to resident and nonresident users, and to classify rates for such service, an ordinance, increasing rates and fixing rates for nonresident users higher than for resident users, is not violative of the due process and equal protection clauses of the federal and state Constitutions. Messenheimer v. Windt, 211 Ga. 575, 87 S.E.2d 402 (1955).

Nonresident users of city supplied water without standing. — Nonresident users of water supplied by a city are not in a position to challenge the validity of amendments to the charter of the city and an amendment to the Constitution of Georgia, authorizing the city to appropriate its surplus water funds to the support of its municipal hospital. Messenheimer v. Windt, 211 Ga. 575, 87 S.E.2d 402 (1955).

Procedure to extend existing system of municipal improvements. — Under the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), and the constitutional sanction of this paragraph, revenue anticipation certificates may be issued by a municipality to extend an existing system of municipal improvements by pledging the entire revenue of the whole system to the payment thereof, subject to rights of holders of prior issues, without prorating the values of the existing and the new facilities

and pledging only the revenue of such new facilities according to their proportion to the total value. Carter v. State, 93 Ga. App. 12, 90 S.E.2d 672 (1955) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Revenue anticipation certificates validly issued. — Where it appeared that revenue anticipation certificates were to be issued by the town for improvement of water works under the authority and in accordance with the method prescribed by the Constitution and the laws incorporated therein by reference thereto, the proposed issuance of revenue anticipation certificates, the proceeding for validation, and judgment of validation were not contrary to any of the provisions of the Constitution cited in the intervention. Thigpen v. Town of Davisboro, 81 Ga. App. 610, 59 S.E.2d 522 (1950).

This paragraph applies to counties, municipalities, or other political subdivisions of the state, and not to the state or state authorities. Daughtrey v. State, 226 Ga. 758, 177 S.E.2d 670 (1970) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

State authorities, lawfully created, are not subject to restrictions of Ga. Const. 1976, Art. IX, Sec. VII, Para. I (see Ga. Const. 1983, Art. IX, Sec. V, Para. I), and this paragraph. Thompson v. Municipal Elec. Auth., 238 Ga. 19, 231 S.E.2d 720 (1976) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Application of paragraph's limitation for purposes for issuance revenue certificates. — This paragraph limiting the purposes for which revenue certificates may be issued to those specifically authorized by the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), applies only to counties, municipalities, or other political subdivisions of the state, and not to the state or state authority such as here involved, or the state school building (now Georgia Education Authority (Schools)), bridge building (now Georgia Highway Authority), toll bridge (now State Tollway Authority), rural roads (Georgia Highway Authority), or hospital authorities. Sigman v. Brunswick Port Auth., 214 Ga. 332, 104 S.E.2d 467 (1958) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Effect of Ga. L. 1939, pp. 362 and 365 on municipalities use of revenue from existing and improved facilities.

— Georgia Laws 1939, pp. 362 and 365 set up a method whereby revenues from existing facilities could be eliminated, but instead of the provisions of Ga. L. 1939 being mandatory, it provided that it shall not be construed to restrict or limit the powers granted in paragraph (a)(5) of Ga. L. 1939, p. 362, § 2 (see now O.C.G.A. § 36-82-62). It is clear from this that if a municipality desires, it may still pledge the entire revenue of existing facilities, along with the revenues from improvements made thereon with funds secured by the issuance of revenue anticipation certificates, to the payment of these certificates and the interest thereon, or it may value the existing facilities, and by following the formula provided in Ga. L. 1939 eliminate from the revenue pledged for payment of the certificates that revenue derived from existing facilities on which improvements, etc., were made; and by express terms of this paragraph, the acts of a municipality under the above provisions of law are authorized and contravene no provisions of the Constitution. *Dade County v. State*, 77 Ga. App. 139, 48 S.E.2d 144 (1948) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

County not authorized to issue revenue certificates for acquisition or construction of general storage warehouses. — Under the restrictive provisions of this paragraph in the Constitution of 1945, that governmental subdivisions of the state shall issue revenue anticipation certificates only to provide funds for such facilities and undertakings as are “specifically authorized and enumerated” by the Acts of the General Assembly there referred to, a county is not authorized to issue such revenue certificates for the acquisition or construction and equipping of warehouses to be used in the conduct of a general storage warehouse business, which is ordinarily carried on by private enterprise, such an undertaking not being properly included within the definition of the word “terminal” as used in the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art.

3, Ch. 82, T. 36), and not being “specifically authorized and enumerated” therein. *Beazley v. De Kalb County*, 210 Ga. 41, 77 S.E.2d 740 (1953) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

County Building Authority Act a general law. — The County Building Authority Act, Ga. L. 1980, p. 4488, being applicable to all counties having a population of 550,000 or more according to the 1970 or any future U.S. census (and thereby being applicable only to Fulton County at the present time), was not a special law or population bill and was not unconstitutional under either the 1976 or 1983 Constitutions (see Ga. Const., 1983, Art. III, Sec. VI, Para. IV); therefore, the Fulton County Building Authority was authorized to issue bonds to finance the acquisition and construction of mental retardation training centers and to finance studies, services, and reports incidental to preparing plans for a county office building, because such projects were within the scope of the Act, which was a “general law,” as referred to in Ga. Const. 1983, Art. IX, Sec. VI, Para. I. *Building Auth. v. State*, 253 Ga. 242, 321 S.E.2d 97 (1984).

Development authority not required to own or operate project to issue bonds. — Proposed bond transaction did not violate Ga. Const. 1983, Art. IX, Sec. VI, Para. I and O.C.G.A. § 36-82-66 of the Revenue Bond Law merely because the development authority would not own or operate the proposed stadium; the development authority could use bond proceeds for paying all or part of the cost of any project (O.C.G.A. § 36-62-6(a)(13)), not only those projects the authority developed, and the authority could pay the costs of another government entity’s project pursuant to O.C.G.A. § 36-62-9. *Cottrell v. Atlanta Dev. Auth.*, 297 Ga. 1, 770 S.E.2d 616 (2015).

Cited in *Tippins v. Cobb County Parking Auth.*, 213 Ga. 685, 100 S.E.2d 893 (1957); *South Ga. Natural Gas Co. v. Georgia Pub. Serv. Comm’n*, 214 Ga. 174, 104 S.E.2d 97 (1958); *Johnson v. State*, 107 Ga. App. 16, 128 S.E.2d 651 (1962); *Johnston v. Clayton County Water Auth.*, 222 Ga. 39, 148 S.E.2d 417 (1966); *Smith v. State*, 222 Ga. 552, 150 S.E.2d 868 (1966);

Henderson v. Metropolitan Atlanta Rapid Transit Auth., 236 Ga. 849, 225 S.E.2d 424 (1976); Rich v. State, 237 Ga. 291, 227

S.E.2d 761 (1976); Frazer v. City of Albany, 245 Ga. 399, 265 S.E.2d 581 (1980).

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Revenue anticipation obligations are not subject to the debt limitation clause in Ga. Const. 1976, Art. IX, Sec. VII, Para. I (see Ga. Const. 1983, Art. IX, Sec. V, Para. I). 1967 Op. Att'y Gen. No. 67-54.

Payment of insurance premiums with state funds. — Use by a county of public funds for payment of group life and hospitalization insurance premiums of its employees violates Ga. Const. 1976, Art. IX, Sec. VII, Para. I (see Ga. Const. 1983, Art. IX, Sec. V, Para. I) and this paragraph. 1965-66 Op. Att'y Gen. No. 65-25 (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Principal on revenue anticipation bonds may not be paid out of a county's general revenues or with revenue sharing funds. 1975 Op. Att'y Gen. No. U75-98.

Paying operating expenses for county water system. — A county water system can, if proper ordinances are in effect, be operated using general revenues of the county and, at least in part, the operating expenses may be paid with federal revenue sharing funds. 1975 Op. Att'y Gen. No. U75-98.

Two distinct and separate conditions must exist before utility property owned by a municipality is taxable: first, the municipality must purchase, construct or operate the gas utility plant from the proceeds of revenue certificates; second, the municipality must extend its services beyond limits of county in which municipality is located; it is immaterial that gas lines outside county may have been constructed from funds other than proceeds of the revenue certificates provided the gas utility plant was constructed with proceeds from such certificates. 1971 Op. Att'y Gen. No. 71-46.

Mandatory use of funds for revenue-producing facility. — While an "undertaking" is said to include buildings constructed for educational purposes under paragraph (4) of Ga. L. 1953,

Jan.-Feb. sess., p. 489 (see now O.C.G.A. § 36-82-61), both this paragraph and Georgia law require that the funds must be for a revenue-producing facility and that the obligations be paid only from revenue produced by this revenue-producing facility. 1954-56 Op. Att'y Gen. p. 222 (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Publicly owned utilities subject to paragraph's regulations as would private utilities. — The manifest purpose of the language "as are privately owned and operated utilities" in this paragraph is that if private gas and electric utilities are ever subjected to regulation, publicly owned utilities operated under the prescribed conditions, shall likewise be subject to regulation in the same manner. 1954-56 Op. Att'y Gen. p. 500 (decided under former Code 1933, § 2-6005; see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

Art. 2, Ch. 4, T. 46. — Since Ga. L. 1956, p. 104 (see now O.C.G.A. Art. 2, Ch. 4, T. 46) requires gas utilities to obtain certificates of public convenience and necessity, and since this paragraph classifies publicly owned systems in foreign counties for regulatory purposes as privately owned and operated utilities, it follows that such publicly owned gas systems are subject to Ga. L. 1956, p. 104 with respect to all extensions beyond the limits of their home county and which are financed by revenue certificates. 1954-56 Op. Att'y Gen. p. 500 (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

If a city is located within a county, its gas facility located in the county is not subject to ad valorem taxation by the county. 1970 Op. Att'y Gen. No. 70-191.

Legislature not empowered to authorize municipal corporation to engage in ordinarily private enterprise. — In the absence of special circumstances, it is not within the constitutional power of a legislature to authorize a municipal corporation (county) to engage in a business

which can be and ordinarily is carried on by private enterprise for purpose of obtaining an income or deriving a profit therefrom, but it should be allowed to go into business only on theory that thereby the public welfare will be subserved. 1965-66 Op. Att'y Gen. No. 66-176.

County has no right, in the absence of special or local legislation granting such right, to operate an ambulance

service. 1965-66 Op. Att'y Gen. No. 66-176.

Paragraph not self-executing. — This provision authorizing municipalities to issue revenue certificates to buy, construct, extend, operate, and maintain gas and electric generating and distribution systems is not self-executing. 1945-47 Op. Att'y Gen. p. 416 (see Ga. Const. 1983, Art. IX, Sec. VI, Para. I).

RESEARCH REFERENCES

Am. Jur. 2d. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 574 et seq. 64 Am. Jur. 2d, Public Securities and Obligations, § 72 et seq.

C.J.S. — 64A C.J.S., Municipal Corporations, § 2130 et seq.

ALR. — Application to permanent improvements of constitutional or statutory provision against county or municipality exceeding current revenue, 41 ALR 790.

Referendum of general legislative act to people in absence of constitutional requirement in that regard, 76 ALR 1053.

Validity of municipal bond issue for purpose of paying employees, 96 ALR 1204.

Power of legislative body to amend, repeal, or abrogate initiative or referendum measure, or to enact measure defeated on referendum, 33 ALR2d 1118.

Paragraph II. Revenue bonds; special limitations.

Where revenue bonds are issued by any county, municipality, or other political subdivision of this state in order to buy, construct, extend, operate, or maintain gas or electric generating or distribution systems and necessary appurtenances thereof and the gas or electric generating or distribution system extends beyond the limits of the county in which the municipality or other political subdivision is located, then its services rendered and property located outside said county shall be subject to taxation and regulation in the same manner as are privately owned and operated utilities.

1976 Constitution. — Art. IX, Sec. VIII, Para. I.

JUDICIAL DECISIONS

Legislature can regulate utilities. — Neither alone, nor construed in conjunction with Ga. Const. 1976, Art. III, Sec. VIII, Para. IX (see Ga. Const. 1983, Art. III, Sec. VI, Para. V), does this provision prohibit the General Assembly from regulating municipally owned or operated electric utilities. *City of Calhoun v. North Ga. Elec. Membership Corp.*, 233 Ga. 759,

213 S.E.2d 596 (1975) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. II).

Applicability where revenue bonds issued prior to ratification of 1983 Constitution. — This Paragraph applied to a municipality's ownership interests in power plants and other facilities that were located outside of the surrounding county, even though the revenue bonds used to

purchase the facilities were issued before the ratification of the 1983 Constitution. *Collins v. City of Dalton ex rel. Bd. of Water, Light & Sinking Fund Comm'rs*, 261 Ga. 584, 408 S.E.2d 106 (1991) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. II).

Disproportionate rates between resident and nonresident water users constitutional. — Where the city has the right under its charter to furnish water to resident and nonresident users, and to classify rates for such service, an ordinance, increasing rates and fixing rates for nonresident users higher than for resident users, is not violative of the due process and equal protection clauses of the federal and state Constitutions. *Messenheimer v. Windt*, 211 Ga. 575, 87 S.E.2d 402 (1955).

Nonresident users of city supplied water without standing. — Nonresident users of water supplied by a city are not in a position to challenge the validity of amendments to the charter of the city

and an amendment to the Constitution of Georgia, authorizing the city to appropriate its surplus water funds to the support of its municipal hospital. *Messenheimer v. Windt*, 211 Ga. 575, 87 S.E.2d 402 (1955).

Procedure to extend existing system of municipal improvements. — Under the Revenue Bond Law, Ga. L. 1937, p. 761 (see now O.C.G.A. Art. 3, Ch. 82, T. 36), and the constitutional sanction of this paragraph, revenue anticipation certificates may be issued by a municipality to extend an existing system of municipal improvements by pledging the entire revenue of the whole system to the payment thereof, subject to rights of holders of prior issues, without prorating the values of the existing and the new facilities and pledging only the revenue of such new facilities according to their proportion to the total value. *Carter v. State*, 93 Ga. App. 12, 90 S.E.2d 672 (1955) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. II).

OPINIONS OF THE ATTORNEY GENERAL

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Art. 2, Ch. 4, T. 46. — Since Ga. L. 1956, p. 104 (see now O.C.G.A. Art. 2, Ch. 4, T. 46) requires gas utilities to obtain certificates of public convenience and necessity, and since this paragraph classifies publicly owned systems in foreign counties for regulatory purposes as privately owned and operated utilities, it follows that such publicly owned gas systems are subject to Ga. L. 1956, p. 104 with respect to all extensions beyond the limits of their home county and which are financed by revenue certificates. 1954-56 Op. Att'y

Gen. p. 500 (see Ga. Const. 1983, Art. IX, Sec. VI, Para. II).

If a city is located within a county, its gas facility located in the county is not subject to ad valorem taxation by the county. 1970 Op. Att'y Gen. No. 70-191.

Jurisdiction of Public Service Commission. — The Public Service Commission maintains its jurisdiction over the services and property of that portion of a municipally-owned, revenue bond-financed natural gas distribution system which has been extended beyond the boundaries of the county in which the municipality is located even if the revenue bonds have been paid off by the municipality. 1985 Op. Att'y Gen. No. 85-39.

The Public Service Commission has no jurisdiction over the services and property of a natural gas distribution system owned and operated by and within a municipality. 1985 Op. Att'y Gen. No. 85-39.

The Public Service Commission has no jurisdiction over master-metered customers so long as the activities of said customers do not constitute furnishing service to the public. 1985 Op. Att'y Gen. No. 85-39.

Paragraph III. Development authorities.

The development of trade, commerce, industry, and employment opportunities being a public purpose vital to the welfare of the people of this state, the General Assembly may create development authorities to promote and further such purposes or may authorize the creation of such an authority by any county or municipality or combination thereof under such uniform terms and conditions as it may deem necessary. The General Assembly may exempt from taxation development authority obligations, properties, activities, or income and may authorize the issuance of revenue bonds by such authorities which shall not constitute an indebtedness of the state within the meaning of Section V of this article.

1976 Constitution. — Art. IX, Sec. VIII, Para. II.

Law reviews. — For article discussing industrial development bond financing under Georgia development authority law, see 14 Ga. St. B.J. 10 (1977). For article surveying developments in Georgia local

government law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 187 (1981). For article discussing tax-exempt financing in Georgia, see 18 Ga. St. B.J. 20 (1981). For survey article on local government law, see 34 Mercer L. Rev. 225 (1982).

JUDICIAL DECISIONS

Health care need not be listed in the Constitution as a public purpose on its own for nursing homes to be a proper project under the development authorities law. *Development Auth. v. Beverly Enters.*, 247 Ga. 64, 274 S.E.2d 324 (1981).

Subparagraph (6)(K) of O.C.G.A. § 36-62-2 is not contrary on its face to this paragraph. *Development Auth. v. Beverly Enters.*, 247 Ga. 64, 274 S.E.2d 324 (1981) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. III).

Downtown Development Authorities Law, O.C.G.A. Ch. 42, T. 36, is solely based upon this paragraph and not Ga. Const. 1983, Art. IX, Sec. III, Para. I concerning intergovernmental contracts. *Odom v. Union City Downtown Dev. Auth.*, 251 Ga. 248, 305 S.E.2d 110 (1983) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. III).

Unconstitutional to finance street and building improvements based upon statute. — A municipality's at-

tempt to use the Downtown Development Authorities Law, O.C.G.A. Ch. 42, T. 36, to finance street improvements and construction and refurbishing of governmental buildings is unconstitutional. *Odom v. Union City Downtown Dev. Auth.*, 251 Ga. 248, 305 S.E.2d 110 (1983).

Unconstitutional to develop golf course. — A golf course proposed to be constructed by a development authority violated both this paragraph and the Development Authority Law, O.C.G.A. Ch. 42, T. 36, because it was neither a sports facility nor for the public purpose of developing trade, commerce, and industry. *Haney v. Development Auth.*, 271 Ga. 403, 519 S.E.2d 665 (1999) (see Ga. Const. 1983, Art. IX, Sec. VI, Para. III).

Cited in *Rich v. State*, 237 Ga. 291, 227 S.E.2d 761 (1976); *Day v. Development Auth.*, 248 Ga. 488, 284 S.E.2d 275 (1981); *Alexander v. Macon-Bibb County Urban Dev. Auth. & Urban Properties #47*, 257 Ga. 181, 357 S.E.2d 62 (1987); *AMBAC Indem. Corp. v. Akridge*, 262 Ga. 773, 425 S.E.2d 637 (1993).

OPINIONS OF THE ATTORNEY GENERAL

A development authority can issue a promissory note for an authorized purpose if the note is payable solely from

revenues pledged therein for such payment. 1974 Op. Att’y Gen. No. U74-112.

RESEARCH REFERENCES

Am. Jur. 2d. — 64 Am. Jur. 2d, Public Securities and Obligations, §§ 86 et seq., 101.

ALR. — Right of creditor of public body to full or pro rata payment when fund out

of which obligation is payable is insufficient to pay all like obligations of equal dignity, 90 ALR 717; 171 ALR 1033.

Validity of municipal bond issue for purpose of paying employees, 96 ALR 1204.

Paragraph IV. Validation.

The General Assembly shall provide for the validation of any revenue bonds authorized and shall provide that such validation shall thereafter be incontestable and conclusive.

1976 Constitution. — Art. IX, Sec. VIII, Para. II.

JUDICIAL DECISIONS

Action not barred as collateral attack. — Taxpayer’s petition seeking a declaration that the valuation method a county board of assessors and the development authority of the county used for leasehold estates arising from a local development authority sale-leaseback bond transaction was illegal was not barred for being a collateral attack on concluded bond validation proceedings because the challenge to the memoranda of agreement that set forth the tax assessment formula at issue would only constitute a prohibited collateral attack on a concluded bond validation proceeding if the memoranda were specifically adjudicated in the proceedings and held valid by the bond judgment, and the board and authority had to put forth evidence that the applicable bond validation orders did in fact expressly rule upon each memorandum of agreement; even if

the taxpayer was barred from challenging the tax agreements on concluded bond transactions, the taxpayer also sought an injunction to prohibit the use of the formula in future bond agreements. *Sherman v. Fulton County Bd. of Assessors*, 288 Ga. 88, 701 S.E.2d 472 (2010).

Use of local school taxes for redevelopment. — School system, development authority, and others were properly granted summary judgment in a suit challenging the allocation of school taxes because the 2008 amendments to Ga. Const. 1983, Art. IX, Sec. II, Para. VII(b) and O.C.G.A. § 36-44-9(g), governing tax allocation districts, changed the law and retroactively allowed use of local school taxes for general redevelopment purposes. *Sherman v. Atlanta Indep. Sch. Sys.*, 293 Ga. 268, 744 S.E.2d 26 (2013).

Cited in *Ferdinand v. City of Atlanta*, 285 Ga. 121, 674 S.E.2d 309 (2009).

Paragraph V. Validity of prior revenue bond issues.

All revenue bonds issued and validated prior to June 30, 1983, shall continue to be valid.

1976 Constitution. — There were no similar provisions in the 1976 Constitution.

SECTION VII.
COMMUNITY IMPROVEMENT DISTRICTS

Paragraph	Paragraph
I. Creation.	V. Cooperation with local governments.
II. Purposes.	VI. Regulation by general law.
III. Administration.	
IV. Debt.	

Editor’s notes. — The constitutional amendment (Ga. L. 1984, p. 1703, § 1) which added this Section was approved by a majority of the qualified voters voting at the general election held on November 6, 1984.

Law reviews. — For article, “Communi-

nity Improvement Districts As a Tool For Infrastructure Financing,” see 27 Ga. St. B.J. 203 (1991).

For note, “Enterprise Zones: Federal Proposal and Georgia Legislation,” see 2 Ga. St. U.L. Rev. 73 (1986).

Paragraph I. Creation.

The General Assembly may by local law create one or more community improvement districts for any county or municipality or provide for the creation of one or more community improvement districts by any county or municipality. (Ga. Const. 1983, Art. 9, § 7, Para. I, approved by Ga. L. 1984, p. 1703, § 1/HR 733.)

JUDICIAL DECISIONS

Unauthorized community improvement district invalid. — An agreement of a municipality, by itself, to create a community improvement district was, like an agreement to incur debt without a voter referendum, ultra vires, because under Ga. Const. 1983, Art. IX, Sec. VII, only the legislature may create such a district unless it delegates that power specifically to a local governing body. Circle H Dev., Inc. v. City of Woodstock, 206 Ga. App. 473, 425 S.E.2d 891 (1992).

Relationship to other sources of law. — Nothing in Ga. Const. 1983, Art. IX, Sec. VII, Para. I indicates that its provisions are exclusive or that its purpose is to limit the Home Rule section of the Georgia Constitution, Ga. Const. 1983, Art. IX, Sec. II, Para. III. McLeod v. Columbia County, 278 Ga. 242, 599 S.E.2d 152 (2004).

Paragraph II. Purposes.

The purpose of a community improvement district shall be the provision of any one or more of the following governmental services and facilities:

(1) Street and road construction and maintenance, including curbs, sidewalks, street lights, and devices to control the flow of traffic on streets and roads.

(2) Parks and recreational areas and facilities.

(3) Storm water and sewage collection and disposal systems.

(4) Development, storage, treatment, purification, and distribution of water.

(5) Public transportation.

(6) Terminal and dock facilities and parking facilities.

(7) Such other services and facilities as may be provided for by general law. (Ga. Const. 1983, Art. 9, § 7, Para. 2, approved by Ga. L. 1984, p. 1703, § 1/HR 733.)

Paragraph III. Administration.

(a) Any law creating or providing for the creation of a community improvement district shall designate the governing authority of the municipality or county for which the community improvement district is created as the administrative body or otherwise shall provide for the establishment and membership of an administrative body for the community improvement district. Any such law creating or providing for the creation of an administrative body for the community improvement district other than the municipal or county governing authority shall provide for representation of the governing authority of each county and municipality within which the community improvement district is wholly or partially located on the administrative body of the community improvement district.

(b) Any law creating or providing for the creation of a community improvement district shall provide that the creation of the community improvement district shall be conditioned upon:

(1) The adoption of a resolution consenting to the creation of the community improvement district by:

(A) The governing authority of the county if the community improvement district is located wholly within the unincorporated area of a county;

(B) The governing authority of the municipality if the community improvement district is located wholly within the incorporated area of a municipality; or

(C) The governing authorities of the county and the municipality if the community improvement district is located partially within

the unincorporated area of a county and partially within the incorporated area of a municipality; and

(2) Written consent to the creation of the community improvement district by:

(A) A majority of the owners of real property within the community improvement district which will be subject to taxes, fees, and assessments levied by the administrative body of the community improvement district; and

(B) The owners of real property within the community improvement district which constitutes at least 75 percent by value of all real property within the community improvement district which will be subject to taxes, fees, and assessments levied by the administrative body of the community improvement district; and for this purpose value shall be determined by the most recent approved county ad valorem tax digest.

(c) The administrative body of each community improvement district may be authorized to levy taxes, fees, and assessments within the community improvement district only on real property used nonresidentially, specifically excluding all property used for residential, agricultural, or forestry purposes and specifically excluding tangible personal property and intangible property. Any tax, fee, or assessment so levied shall not exceed 2 1/2 percent of the assessed value of the real property or such lower limit as may be established by law. The law creating or providing for the creation of a community improvement district shall provide that taxes, fees, and assessments levied by the administrative body of the community improvement district shall be equitably apportioned among the properties subject to such taxes, fees, and assessments according to the need for governmental services and facilities created by the degree of density of development of each such property. The law creating or providing for the creation of a community improvement district shall provide that the proceeds of taxes, fees, and assessments levied by the administrative body of the community improvement district shall be used only for the purpose of providing governmental services and facilities which are specially required by the degree of density of development within the community improvement district and not for the purpose of providing those governmental services and facilities provided to the county or municipality as a whole. Any tax, fee, or assessment so levied shall be collected by the county or municipality for which the community improvement district is created in the same manner as taxes, fees, and assessments levied by such county or municipality. The proceeds of taxes, fees, and assessments so levied, less such fee to cover the costs of collection as may be specified by law, shall be transmitted by the collecting county or municipality to the administrative body of the community improvement district and

shall be expended by the administrative body of the community improvement district only for the purposes authorized by this Section. (Ga. Const. 1983, Art. 9, § 7, Para. 3, approved by Ga. L. 1984, p. 1703, § 1/HR 733.)

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Cited in *McLeod v. Columbia County*,
278 Ga. 242, 599 S.E.2d 152 (2004).

Paragraph IV. Debt.

The administrative body of a community improvement district may incur debt, as authorized by law, without regard to the requirements of Section V of this Article, which debt shall be backed by the full faith, credit, and taxing power of the community improvement district but shall not be an obligation of the State of Georgia or any other unit of government of the State of Georgia other than the community improvement district. (Ga. Const. 1983, Art. 9, § 7, Para. 4, approved by Ga. L. 1984, p. 1703, § 1/HR 733.)

Paragraph V. Cooperation with local governments.

The services and facilities provided pursuant to this Section shall be provided for in a cooperation agreement executed jointly by the administrative body and the governing authority of the county or municipality for which the community improvement district is created. The provisions of this section shall in no way limit the authority of any county or municipality to provide services or facilities within any community improvement district; and any county or municipality shall retain full and complete authority and control over any of its facilities located within a community improvement district. Said control shall include but not be limited to the modification of, access to, and degree and type of services provided through or by facilities of the municipality or county. Nothing contained in this Section shall be construed to limit or preempt the application of any governmental laws, ordinances, resolutions, or regulations to any community improvement district or the services or facilities provided therein. (Ga. Const. 1983, Art. 9, § 7, Para. 5, approved by Ga. L. 1984, p. 1703, § 1/HR 733.)

Paragraph VI. Regulation by general law.

The General Assembly by general law may regulate, restrict, and limit the creation of community improvement districts and the exercise of the powers of administrative bodies of community improvement districts. (Ga. Const. 1983, Art. 9, § 7, Para. 6, approved by Ga. L. 1984, p. 1703, § 1/HR 733.)

ARTICLE X.

AMENDMENTS TO THE CONSTITUTION

Section

I. Constitution, How Amended.

SECTION I.

CONSTITUTION, HOW AMENDED

Paragraph	Paragraph
I. Proposals to amend the Constitution; new Constitution.	IV. Constitutional convention; how called.
II. Proposals by the General Assembly; submission to the people.	V. Veto not permitted.
III. Repeal or amendment of proposal.	VI. Effective date of amendments or of a new Constitution.

Editor’s notes. — The constitutional amendment (Ga. L. 1988, p. 2104, § 1) which would have added Paragraph VII was defeated at the general election on November 8, 1988. As added, this Paragraph would have created a commission and authorized it to renumber, redesignate, and rearrange articles, sections, Paragraphs, or provisions of the Constitution and to correct cross-references within the Constitution.

Law reviews. — For article, “An Overview of the New Georgia Constitution,” see 35 Mercer L. Rev. 1 (1983).

Paragraph I. Proposals to amend the Constitution; new Constitution.

Amendments to this Constitution or a new Constitution may be proposed by the General Assembly or by a constitutional convention, as provided in this article. Only amendments which are of general and uniform applicability throughout the state shall be proposed, passed, or submitted to the people.

1976 Constitution. — Art. XII, Sec. I, Para. I.

Editor’s notes. — For cases and opinions decided and rendered under Ga. Const. 1976, Art. XII, Sec. I, Para. I and antecedent provisions, see the annotations under Ga. Const. 1983, Art. X, Sec. I, Para. II.

Law reviews. — For article, “Researching Georgia Law,” see 34 Ga. St. U.L. Rev. 741 (2015).

OPINIONS OF THE ATTORNEY GENERAL

Local amendments. — The 1983 Georgia Constitution does not authorize a constitutional amendment which is limited in applicability to political subdivisions based on population. 1990 Op. Att’y Gen. No. U90-5.

There is no longer any authority for the amendments. 1990 Op. Att’y Gen. No. U90-5.
future passage of local constitutional

Paragraph II. Proposals by the General Assembly; submission to the people.

A proposal by the General Assembly to amend this Constitution or to provide for a new Constitution shall originate as a resolution in either the Senate or the House of Representatives and, if approved by two-thirds of the members to which each house is entitled in a roll-call vote entered on their respective journals, shall be submitted to the electors of the entire state at the next general election which is held in the even-numbered years. A summary of such proposal shall be prepared by the Attorney General, the Legislative Counsel, and the Secretary of State and shall be published in the official organ of each county and, if deemed advisable by the “Constitutional Amendments Publication Board,” in not more than 20 other newspapers in the state designated by such board which meet the qualifications for being selected as the official organ of a county. Said board shall be composed of the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives. Such summary shall be published once each week for three consecutive weeks immediately preceding the day of the general election at which such proposal is to be submitted. The language to be used in submitting a proposed amendment or a new Constitution shall be in such words as the General Assembly may provide in the resolution or, in the absence thereof, in such language as the Governor may prescribe. A copy of the entire proposed amendment or of a new Constitution shall be filed in the office of the judge of the probate court of each county and shall be available for public inspection; and the summary of the proposal shall so indicate. The General Assembly is hereby authorized to provide by law for additional matters relative to the publication and distribution of proposed amendments and summaries not in conflict with the provisions of this Paragraph.

If such proposal is ratified by a majority of the electors qualified to vote for members of the General Assembly voting thereon in such general election, such proposal shall become a part of this Constitution or shall become a new Constitution, as the case may be. Any proposal so approved shall take effect as provided in Paragraph VI of this article. When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately, provided that one or more new articles or related changes in one or more articles may be submitted as a single amendment.

1976 Constitution. — Art. XII, Sec. I, Para. I.

Editor’s notes. — The constitutional amendment (Ga. L. 1988, p. 2116, § 2)

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which would have revised this Paragraph to remove the Attorney General from the committee which prepares the official summary of all proposed constitutional amendments was defeated at the general election on November 8, 1988.

Law reviews. — For article discussing the amending process under the Georgia Constitution of 1945 as amended in 1952, see 18 Ga. B.J. 425 (1956). For article discussing venue problems in juvenile court practice and suggesting solutions, see 23 Mercer L. Rev. 341 (1972). For

article, "History of the Veto Power in Georgia," see 8 Ga. St. B.J. 513 (1972). For article discussing the structures placed on substantial governmental restructuring by the concurrent majority principle, and suggesting the unconstitutionality of same, see 10 Ga. L. Rev. 169 (1975). For article, "The Office of Legislative Counsel," see 23 Ga. St. B.J. 114 (1987). For article, "Local Government Tort Liability: The Summer of '92," see 9 Ga. St. U.L. Rev. 405 (1993).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PROVISION FOR NEW CONSTITUTION

PROVISION FOR AMENDING CONSTITUTION

- 1. IN GENERAL
- 2. GENERAL AMENDMENT
- 3. ADVERTISEMENT OF AMENDMENT
- 4. SUBMISSION TO VOTERS

General Consideration

Prerequisite to submission of constitutional change to voters. — No question concerning a change in the Constitution, or the creation of a new Constitution, shall ever be placed upon a ballot for submission to the people until the General Assembly has by a two-thirds vote authorized the placing of the proposition on the ballot. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Judiciary will not interfere during the formative stage of a constitutional amendment, from the time of the introduction of the proposing Act until the electors have acted. *Gaskins v. Dorsey*, 150 Ga. 638, 104 S.E. 433 (1920).

It is a judicial question whether the proposed amendment was properly adopted. *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479, 38 L.R.A. (n.s.) 77 (1911); *Houser v. Hartley*, 157 Ga. 137, 120 S.E. 622 (1923).

A proclamation by the Governor declaring that an amendment was adopted is not conclusive, and courts can inquire into this question. Where it appears that the amendment was not ratified in accordance with the provisions of

the Constitution, it must be judicially declared of no force and effect, in that it never became a part of the Constitution. *Towns v. Suttles*, 208 Ga. 838, 69 S.E.2d 742 (1952).

Interpreting ballot language of proposed amendment permits court to interject value judgment on voters. — Though ballot language is not a proper subject for more than minimal judicial review, to the extent to which the legislature describes proposed amendments in any way other than through the most objective and brief terms, or perhaps by number as is done in at least one other state, it exposes itself to the temptation to interject its own value judgments concerning the amendments into the ballot language and thus to propagandize the voters in the very voting booth in denigration of the integrity of the ballot. *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974).

Distribution of the house journals before election is not required. *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479, 38 L.R.A. (n.s.) 71 (1911).

Requirement of publication does not need to be strictly complied with. *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479, 38 L.R.A. (n.s.) 77 (1911).

General Consideration (Cont'd)

Acts need not specify the manner of submission of an amendment to voters. *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479, 38 L.R.A. (n.s.) 77 (1911); *Clements v. Powell*, 155 Ga. 278, 116 S.E. 624 (1923).

Necessary qualities for additional revenue amendment to comply with due process and equal protection. — A proposed amendment allowing a school district to receive additional revenues from municipalities for school purposes had to be drafted to include all areas within the county school districts and ratified by the voters of each school district therein on a consolidated basis in order to comply with the due process and equal protection of law requirements under the state and federal Constitutions. *City of Lithonia v. DeKalb County Bd. of Educ.*, 231 Ga. 150, 200 S.E.2d 698 (1973).

Same-sex unions. — Prohibition against recognizing same-sex unions as entitled to the benefits of marriage was not “dissimilar and discordant” to the objective of reserving the status of marriage and its attendant benefits exclusively to unions of man and woman; Ga. Const. 1983, Art. I, Sec. IV, Para. I did not violate the multiple-subject matter rule. *Perdue v. O’Kelley*, 280 Ga. 732, 632 S.E.2d 110 (2006).

Cited in *Madronah Sales Co. v. Wilburn*, 180 Ga. 837, 181 S.E. 173 (1935); *Brackett v. Etheridge*, 190 Ga. 216, 9 S.E.2d 275 (1940); *McKnight v. City of Decatur*, 200 Ga. 611, 37 S.E.2d 915 (1946); *Houlihan v. Atkinson*, 205 Ga. 720, 55 S.E.2d 233 (1949); *Smith v. Hayes*, 217 Ga. 94, 121 S.E.2d 113 (1961); *Seago v. Richmond County*, 218 Ga. 151, 126 S.E.2d 657 (1962); *Henson v. Georgia Indus. Realty Co.*, 220 Ga. 857, 142 S.E.2d 219 (1965); *Bedingfield v. Adams*, 221 Ga. 69, 142 S.E.2d 915 (1965); *Wilson v. Sanders*, 222 Ga. 681, 151 S.E.2d 703 (1966); *Richmond County v. Richmond County Bus. Ass’n*, 228 Ga. 281, 185 S.E.2d 399 (1971); *Camp v. Metropolitan Atlanta Rapid Transit Auth.*, 229 Ga. 35, 189 S.E.2d 56 (1972); *Sims v. Town of Baldwin*, 249 Ga. 293, 290 S.E.2d 433 (1982); *Goldrush II v. City of Marietta*, 267 Ga.

683, 482 S.E.2d 347 (1997).

Provision for New Constitution

Procedure validating new Constitution. — Where a new Constitution of the State of Georgia was passed by a two-thirds vote of each branch of the General Assembly, duly advertised and submitted to a vote of the people at a general election, ratified by a majority of the electors at the general election, and duly issued by the Governor in a proclamation, it is a valid and legal expression of the will of the people and has duly and legally been proclaimed the Constitution of Georgia. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Resolution not amendment but new Constitution. — Where first paragraph of a resolution of the General Assembly pursuant to this paragraph repeals in its entirety the old Constitution, and then proceeds to create a new Constitution, but the resolution refers to “one single amendment,” the resolution is not an amendment to the Constitution; but on the contrary it is a completely revised or new Constitution. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Provision for Amending Constitution**1. In General**

Constitutional amendment will supersede other inconsistent parts of that instrument. *McWilliams v. Smith*, 142 Ga. 209, 82 S.E. 569 (1914).

The two important, vital, elements in any constitutional amendment are: the assent of two-thirds of the legislature and a majority of the popular vote; beyond these, other provisions are mere machinery and forms, they may not be disregarded, because by them certainty as to the essentials is secured, but they are not themselves the essentials. *Mayer v. Adams*, 182 Ga. 524, 186 S.E. 420 (1936).

Since substance is more important than form, and the will of the legislature lawfully expressed in proposing an amendment, and the will of the people expressed at the proper time and in the proper manner at the ballot box in ratify-

ing such amendment, they ought not to be lightly disregarded and set at naught, even if an executive or ministerial officer should not strictly comply with the officer's duty in connection with matters of detail, regarding the publication or the like, and which do not appear to have substantially affected the result. *Mayer v. Adams*, 182 Ga. 524, 186 S.E. 420 (1936).

No limitations are placed by this paragraph on the power of the General Assembly to draft ballot language. *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974) (see Ga. Const. 1983, Art. X, Sec. I, Para. II).

Voter's must know what they are voting on. — Paragraph's operative limitation on legislature's control of ballot language is requirement that language be adequate to enable the voters to ascertain on which amendment they are voting. *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974); *Donaldson v. DOT*, 262 Ga. 49, 414 S.E.2d 638 (1992).

Entire amendment need not be printed on the ballot. *Goolsby v. Stephens*, 155 Ga. 529, 117 S.E. 439 (1923). See also *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479, 36 L.R.A. (n.s.) 77 (1911).

Reference to proposed amendment sufficient to inform voters. — A reference on the ballots to proposed amendment is to inform voters what they are voting for as an amendment to the Constitution; and such reference is sufficient when it contains enough to enable the voters to ascertain for what amendment they are voting. *Pye v. State Hwy. Dep't*, 226 Ga. 389, 175 S.E.2d 510, cert. denied and appeal dismissed, 400 U.S. 913, 91 S. Ct. 173, 27 L. Ed. 2d 152 (1970).

Amendment may contain legislative Acts previously held invalid. *Hammond v. Clark*, 136 Ga. 313, 71 S.E. 479, 38 L.R.A. (n.s.) 71 (1911).

Inoperative amendment. — Amendment to the Constitution of 1877, Ga. L. 1945, p. 101, which was ratified and proclaimed on the same dates as was the Constitution of 1945, never became operative either as an amendment to the Constitution of 1877 or as an amendment to the Constitution of 1945. *Fulton County v. Lockhart*, 202 Ga. 878, 45 S.E.2d 220 (1947).

2. General Amendment

Elections for members of Congress and presidential electors, required by law to be held on the Tuesday after the first Monday in November, is a general election within the meaning of this paragraph. *Moore v. Smith*, 140 Ga. 854, 79 S.E. 1116 (1913) (see Ga. Const. 1983, Art. X, Sec. I, Para. II).

State-wide general election for specified purposes established. — Proposed amendment to the Constitution as set forth in Ga. L. 1937, p. 13, authorizing the City of Atlanta to issue specified refunding bonds, which was submitted for ratification and duly ratified at a general election provided for in former Ga. L. 1937, p. 712, establishing a state-wide general election each June for specified purposes, including the ratification of constitutional amendments, became effective as part of the Constitution. *Aycock v. State ex rel. Boykin*, 184 Ga. 709, 193 S.E. 580 (1937).

Test determining violation of multiple subject matter rule. — The test of whether an Act or a constitutional amendment violates the multiple subject matter rule is whether all of the parts of the Act or of the constitutional amendment are germane to the accomplishment of a single objective; if so, it does not violate the rule; otherwise, it does. *Carter v. Burson*, 230 Ga. 511, 198 S.E.2d 151 (1973); *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974); *Goldrush II v. City of Marietta*, 267 Ga. 683, 482 S.E.2d 347 (1997), cert. denied, 522 U.S. 818, 118 S. Ct. 70, 139 L. Ed. 2d 31 (1997); *Perdue v. O'Kelley*, 280 Ga. 732, 632 S.E.2d 110 (2006).

Breakdown of amendment not required. — The legislature is not required to break each general objective down into the smallest component elements and submit each separately to the voters for their acceptance or rejection. Were this done, it would be almost impossible to change many constitutional provisions by a single amendment, and such an amendment could not be submitted as a whole, but would have to be broken up into fragments, and submitted in disjointed propositions. *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974).

Provision for Amending

Constitution (Cont'd)

2. General Amendment (Cont'd)

Amendment saved from unconstitutionality because germane to subject of Constitution being amended.

— A constitutional amendment, adopted by the voters in a general election, that deals with only one subject matter, the establishment of area schools, which under the amendment can be established only by contract between counties, or municipalities, or a county and a municipality, or combination thereof, is germane to the provisions of the Constitution, pertaining to the contractual powers of counties and municipalities, and does not violate the Constitution. *Cason v. State*, 217 Ga. 339, 122 S.E.2d 232 (1961).

Georgia Laws 1972, p. 1015, had but a single subject matter, governmental reorganization, and all its parts were germane to a single purpose and therefore not unconstitutional under this paragraph. *Carter v. Burson*, 230 Ga. 511, 198 S.E.2d 151 (1973) (see Ga. Const. 1983, Art. X, Sec. I, Para. II).

3. Advertisement of Amendment

Publication in newspapers. — Publication of proposed amendments in their entirety in designated newspapers of general circulation prior to election is method by which voters should inform themselves of the contents and merits of proposed amendments. *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974).

Duties of legislative branch. — The legislative branch of the government is charged with the duty of providing manner of holding elections and providing for the ballot, and what shall go on the ballot — of course subject to the limitations contained in the Constitution. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of a Constitution when it is attacked after its ratification by the people. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Liberal interpretation of advertising requirements applies rather to manner of compliance with constitutional requirements in regard to amendments than to a total omission or disregard of such a requirement. *Mayer v. Adams*, 182 Ga. 524, 186 S.E. 420 (1936).

Law imposes no duty upon the Secretary of State with regard to publication or advertisement of a proposed amendment to the Constitution. *Horrigan v. Rivers*, 183 Ga. 141, 187 S.E. 836 (1936).

This paragraph refers to the General Assembly as a whole; it has no reference to the Speaker of the House of Representatives or the President of the Senate in their individual capacities. *Horrigan v. Rivers*, 183 Ga. 141, 187 S.E. 836 (1936) (see Ga. Const. 1983, Art. X, Sec. I, Para. II).

Absence imposition of duty legislative officers not bound to submit amendment to voters. — Where it appears that no specific legislative action was taken by the General Assembly imposing a duty upon either the President of the Senate or Speaker of the House of Representatives to procure the proper submission to the people of a proposed constitutional amendment, there is no duty resting upon either of these officers to bring about such submission, and a writ of mandamus would not lie against them to compel action in the premises. *Horrigan v. Rivers*, 183 Ga. 141, 187 S.E. 836 (1936).

Distinguishing Constitution between legal and revolutionary one. — If a Constitution is to be a legal one, as distinguished from a revolutionary Constitution, it must be adopted by the people by compliance with the legal machinery in operation at the time of its adoption in order to obtain a legal expression of the will of the people. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

Brief and concise summary of amendment need not be published. — An amendment to the Constitution of this state, duly proposed by the General Assembly and published for 60 days before the election in one or more papers in each

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congressional district, will not be declared by the courts to have been illegally submitted to the people because a brief and concise summary thereof was not published in a newspaper carrying the sheriff's advertisements in a certain county. *Cartledge v. City Council*, 189 Ga. 267, 5 S.E.2d 661 (1939).

Failure of three counties out of 159 to open polls on day when a constitutional amendment is being voted upon would not affect the validity of its submission to the people or of the election itself. *Cartledge v. City Council*, 189 Ga. 267, 5 S.E.2d 661 (1939).

Substantial compliance sufficient to uphold validity of amendment. — Where there is substantial compliance with this paragraph, and the irregularities complained of were not such as could be said to affect the result, the validity of the ratification of a proposed amendment must be upheld. *Mayer v. Adams*, 182 Ga. 524, 186 S.E. 420 (1936) (see Ga. Const. 1983, Art. X, Sec. I, Para. II).

4. Submission to Voters

Amendment becomes a part of the Constitution when ratified by a ma-

jority of the electors qualified to vote for members of the General Assembly voting thereon. *McCullers v. Williamson*, 221 Ga. 358, 144 S.E.2d 911 (1965).

An amendment can by its own terms defer its "effective" or "operative" date to a time subsequent to the date when it becomes a part of the Constitution and this is not altered by the fact that the Constitution provides that an amendment becomes a part of the Constitution when it is ratified. *McCullers v. Williamson*, 221 Ga. 358, 144 S.E.2d 911 (1965).

1990 amendment upheld. — The ratification of the 1990 amendment to Ga. Const. 1983, Art. I, Sec. II, Para. IX was not invalid on the grounds that the ballot language was inaccurate, affirmatively misleading, not complete enough, or did not include enough of the history of the amendment. *Donaldson v. DOT*, 262 Ga. 49, 414 S.E.2d 638 (1992).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

GENERAL CONSIDERATION

PROVISION FOR AMENDMENT

- 1. **ADVERTISEMENT OF AMENDMENT**
- 2. **SUBMISSION TO VOTERS**

General Consideration

Establishment of Constitutional Amendments Publication Board. — This paragraph does not establish the Constitutional Amendments Publication Board; however, the General Assembly was authorized to establish the board since this paragraph states that amendments shall be published "as provided by law." 1974 Op. Att'y Gen. No. 74-127 (see Ga. Const. 1983, Art. X, Sec. I, Para. II).

Executive and legislative branch members eligible for service on board. — Contracting for publication of proposed amendments is not an executive function, since no existing law is being executed by the Governor or other execu-

tive officers but rather an amendment to the fundamental legislation, the Constitution, is being proposed to the people; therefore, the presence of the Speaker of the House on the Constitutional Amendments Publication Board does not conflict with the separation of powers requirement of the Constitution of Georgia because the unique and sole function of the Constitutional Amendments Publication Board is to submit constitutional amendments to the people, by proper publication; and, furthermore, members of both the executive and legislative branches may serve on the board. 1974 Op. Att'y Gen. No. 74-127.

It would require the vote of 137 of the 205 members of the House (House

General Consideration (Cont'd)

now consists of 180 members) to pass a constitutional amendment, notwithstanding that there exist vacancies in the House, in that the reference to the two-thirds of the members elected would obviously refer to two-thirds of the total membership of the House; the existence of a vacancy for whatever reason would not be the basis for the reduction of the requisite number of votes of the total membership of the House to adopt a constitutional amendment. 1962 Op. Att'y Gen. p. 259.

Provision for Amendment**1. Advertisement of Amendment**

County newspaper may be selected by Constitutional Amendments Publication Board, so long as this newspaper is designated as "official organ of that County," for the publishing of general constitutional amendments as provided in this paragraph. 1976 Op. Att'y Gen. No. 76-71 (see Ga. Const. 1983, Art. X, Sec. I, Para. II).

Phrase "newspaper of general circulation" has unanimously been interpreted to refer to the character of the newspaper and of its circulation rather than to the mere number of its readers. 1976 Op. Att'y Gen. No. 76-71.

Two criteria for general circulation are: (1) publication of news of general interest, such as national, state, and local news; and (2) circulation among the general public either by subscription or from newsstands. 1974 Op. Att'y Gen. No. 74-127.

"One" must be construed to mean "only one" and the Constitutional

Amendments Publication Board is therefore authorized to place advertisements for general amendments in only one newspaper in each congressional district; the newspaper chosen must be published, as well as circulated, within the congressional district; one newspaper of general circulation should be selected in each congressional district for publication of general amendments. 1974 Op. Att'y Gen. No. 74-127.

Constitutional Amendments Publication Board in its discretion may contract to pay rates in excess of rate authorized by former Code 1933, § 39-1105 (see now O.C.G.A. § 9-13-143) where reasonably necessary to provide notice to the people of the proposed amendments. 1974 Op. Att'y Gen. No. 74-127.

Minimum advertising time. — Any constitutional amendment must be passed and submitted by General Assembly in sufficient time prior to general election to be advertised once a week for three weeks prior thereto. 1962 Op. Att'y Gen. p. 258.

Method of advertisement legally permissible. — General Assembly could legally convene and submit to electorate proposed constitutional amendments after democratic primary but in sufficient time prior to general election to be properly advertised. 1962 Op. Att'y Gen. p. 258.

2. Submission to Voters

Majority vote sufficient to pass a constitutional amendment is a majority of votes cast and need not be a majority of the total electors entitled to vote. 1962 Op. Att'y Gen. p. 197.

RESEARCH REFERENCES

Am. Jur. 2d. — 16 Am. Jur. 2d, Constitutional Law, §§ 13 et seq., 19 et seq., 107 et seq.

C.J.S. — 16 C.J.S., Constitutional Law, §§ 20 et seq., 34, 37, 48, 52 et seq.

ALR. — Construction of requirement that proposed constitutional amendment be entered in journals, 6 ALR 1227; 41 ALR 640.

Repeal of constitutional provision or amendment, 36 ALR 1456.

Construction of requirement that proposed constitutional amendment be entered in journals, 41 ALR 640.

Applicability of constitutional requirements as to legislation or constitutional amendments, to statutes or constitutional amendments under provision conferring

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initiative or referendum powers, 62 ALR 1349.

Construction and application of constitutional or statutory provisions expressly excepting certain laws from referendum, 146 ALR 284; 100 ALR2d 314.

Effect of modification or repeal of constitutional or statutory provision adopted by reference in another provision, 168 ALR 627.

Removal or suspension of constitutional limitation as affecting statute previously enacted, 171 ALR 1070.

Construction and application of constitutional or statutory provisions expressly excepting certain laws from referendum, 100 ALR2d 314.

Capacity of taxpayers to maintain suit to enjoin submission of initiative, referendum, or recall measure to voters, 6 ALR2d 557.

Injunctive relief against submission of constitutional amendment, statute, municipal charter, or municipal ordinance, on ground that proposed action would be unconstitutional, 19 ALR2d 519.

Validity of legislation relating to publication of legal notices, 26 ALR2d 655.

Power of legislative body to amend, repeal, or abrogate initiative or referendum measure, or to enact measure defeated on referendum, 33 ALR2d 1118.

Paragraph III. Repeal or amendment of proposal.

Any proposal by the General Assembly to amend this Constitution or for a new Constitution may be amended or repealed by the same General Assembly which adopted such proposal by the affirmative vote of two-thirds of the members to which each house is entitled in a roll-call vote entered on their respective journals, if such action is taken at least two months prior to the date of the election at which such proposal is to be submitted to the people.

1976 Constitution. — Art. XII, Sec. I, Para. I.

Paragraph IV. Constitutional convention; how called.

No convention of the people shall be called by the General Assembly to amend this Constitution or to propose a new Constitution, unless by the concurrence of two-thirds of the members to which each house of the General Assembly is entitled. The representation in said convention shall be based on population as near as practicable. A proposal by the convention to amend this Constitution or for a new Constitution shall be advertised, submitted to, and ratified by the people in the same manner provided for advertisement, submission, and ratification of proposals to amend the Constitution by the General Assembly. The General Assembly is hereby authorized to provide the procedure by which a convention is to be called and under which such convention shall operate and for other matters relative to such constitutional convention.

1976 Constitution. — Art. XII, Sec. I, Para. II.

Law reviews. — For article, "History of the Veto Power in Georgia," see 8 Ga. St.

B.J. 513 (1972). For article, "The Office of Legislative Counsel," see 23 Ga. St. B.J. 114 (1987).

JUDICIAL DECISIONS

Effect of paragraph. — This paragraph purports to do nothing more than place limitations upon the legislative branch of government as to the manner in which a convention can be called by this branch of the government. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946) (see Ga. Const. 1983, Art. X, Sec. I, Para. IV).

Effect of adopting new Constitution

by convention only. — To say that the sovereign people can adopt a new Constitution by convention method only would by implication be writing into the Constitution a limitation on the sovereign power of the people, which would be an unauthorized exercise of sovereign power by the Supreme Court. *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946).

OPINIONS OF THE ATTORNEY GENERAL

Legislature is proper body to call a constitutional convention and to prescribe time and place it is to be held as well as the manner in which the delegates shall be elected by the people. 1967 Op. Att'y Gen. No. 67-269.

Vote of the people essential. — With respect to ratification of the Constitution proposed by the convention, a vote of the people approving revision is essential. 1967 Op. Att'y Gen. No. 67-269.

Election of delegates to a constitutional convention by the people rather than any other body is a prerequisite to a legal or constitutional as opposed to irregular, extra-legal, or revolutionary convention. 1967 Op. Att'y Gen. No. 67-269.

Product of an illegally called or

conducted convention may ultimately become valid as fundamental law through adoption by the electoral body, according to forms of existing laws or even by acquiescence of the sovereign society. 1967 Op. Att'y Gen. No. 67-269.

Approval by people ultimate test for Constitution. — While many practical obstacles exist where a Constitution is drafted by an irregular, extra-legal or revolutionary convention, in the event an irregularly drafted Constitution did manage to see itself placed on the ballot and ratified by the people, it would be valid whether or not the procedures set forth in the prior Constitution were followed; the ultimate test is whether the proposed Constitution is approved by the people as sovereign. 1967 Op. Att'y Gen. No. 67-269.

RESEARCH REFERENCES

Am. Jur. 2d. — 16 Am. Jur. 2d, Constitutional Law, § 95 et seq.

C.J.S. — 16 C.J.S., Constitutional Law, § 43 et seq.

ALR. — Applicability of constitutional requirements as to legislation or constitutional amendments, to statutes or constitutional amendments under provision conferring initiative or referendum powers, 62 ALR 1349.

Capacity of taxpayers to maintain suit to enjoin submission of initiative, referen-

dum, or recall measure to voters, 6 ALR2d 557.

Injunctive relief against submission of constitutional amendment, statute, municipal charter, or municipal ordinance, on ground that proposed action would be unconstitutional, 19 ALR2d 519.

Power of legislative body to amend, repeal, or abrogate initiative or referendum measure, or to enact measure defeated on referendum, 33 ALR2d 1118.

Art. 10, § 1, ¶ 5 AMENDMENTS TO CONSTITUTION Art. 10, § 1, ¶ 6

Paragraph V. Veto not permitted.

The Governor shall not have the right to veto any proposal by the General Assembly or by a convention to amend this Constitution or to provide a new Constitution.

1976 Constitution. — Art. XII, Sec. I, of the Veto Power in Georgia,” see 8 Ga. St. B.J. 513 (1972).
Para. III.

Law reviews. — For article, “History

Paragraph VI. Effective date of amendments or of a new Constitution.

Unless the amendment or the new Constitution itself or the resolution proposing the amendment or the new Constitution shall provide otherwise, an amendment to this Constitution or a new Constitution shall become effective on the first day of January following its ratification.

1976 Constitution. — Art. XII, Sec. I, of the Veto Power in Georgia,” see 8 Ga. St. B.J. 513 (1972).
Para. IV.

Law reviews. — For article, “History

JUDICIAL DECISIONS

Cited in J.W.A. v. State, 233 Ga. 683, R.A.S., 249 Ga. 236, 290 S.E.2d 34 (1982);
212 S.E.2d 849 (1982); In re C.R., 160 Ga. Sherman v. Atlanta Indep. Sch. Sys., 293
App. 873, 288 S.E.2d 589 (1982); In re Ga. 268, 744 S.E.2d 26 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Vested contractual obligations not altered by Constitution. — Georgia Const. 1976, Art. X, Sec. II, Para. III (see Ga. Const. 1983, Art. XI, Sec. I, Para. I) which changes conditions, limits, and interest rates of medical scholarship loans awarded by State Medical Education Board, does not alter vested contractual obligations under scholarship agreements entered into prior to the effective date of the amendment. 1976 Op. Att’y Gen. No. 76-127.

ARTICLE XI.
MISCELLANEOUS PROVISIONS

Section

I. Miscellaneous Provisions.

SECTION I.

MISCELLANEOUS PROVISIONS

Paragraph

- I. Continuation of officers, boards, commissions, and authorities.
- II. Preservation of existing laws; judicial review.
- III. Proceedings of courts and administrative tribunals confirmed.

Paragraph

- IV. Continuation of certain constitutional amendments for a period of four years.
- V. Special commission created.
- VI. Effective date.

Paragraph I. Continuation of officers, boards, commissions, and authorities.

(a) Except as otherwise provided in this Constitution, the officers of the state and all political subdivisions thereof in office on June 30, 1983, shall continue in the exercise of their functions and duties, subject to the provisions of laws applicable thereto and subject to the provisions of this Constitution.

(b) All boards, commissions, and authorities specifically named in the Constitution of 1976 which are not specifically named in this Constitution shall remain as statutory boards, commissions, and authorities; and all constitutional and statutory provisions relating thereto in force and effect on June 30, 1983, shall remain in force and effect as statutory law unless and until changed by the General Assembly.

1976 Constitution. — Art. IV, Sec. III, Para. I; Art. IV, Sec. VII, Para. I; Art. X, Sec. II, Paras. III-V; Art. XIII, Sec. I, Para. I.

Cross references. — Board of Corrections generally, Ch. 2, T. 42. Board of Industry and Trade generally, § 50-7-3 et seq.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the provisions, decisions under former Ga. Const. 1976, Art. X, Sec. II, Para. III and antecedent provisions, which provided for the creation and powers of the State Medical Education Board,

are included in the annotations for this paragraph.

Decision of the State Medical Education Board to cancel a loan pursuant to this paragraph is not within regulatory scope of Ga. L. 1964, p. 338

(see now O.C.G.A. Ch. 13, T. 50). Williams v. State Medical Educ. Bd., 149 Ga. App. 444, 254 S.E.2d 450, rev'd on other grounds, 244 Ga. 401, 260 S.E.2d 304 (1979).

Allowing doctor to establish practice in area other than as specified defeats purpose of scholarship loan program. — Purpose of the medical scholarship loan program is to enable deserving students to obtain state financial assistance to permit them to attend medical school and become doctors by agreeing to provide medical services in sparsely populated areas where such services are needed; to allow such a doctor to set up practice outside a city which city does not meet the requirements of the law and claim that the doctor is in a rural community defeats the purpose of the statute creating scholarship loans. State Medical Educ. Bd. v. Williams, 244 Ga. 401, 260 S.E.2d 304 (1979).

Summary judgment for board not justified. — Where loan issued pursuant

to this paragraph provided that one-fifth of the total scholarship together with the interest thereon would be credited to the applicant for each year of practice when the applicant had practiced the profession for three years in a community of 15,000 or less according to the United States 1960 (1970) census, the board had authority to cancel this contract at any time upon cause deemed sufficient by the board; and where the board exercised its power to cancel the loan and accelerate the indebtedness following the board's refusal to approve Smyrna, Georgia, as an area qualifying for the service/repayment provision of the loan contract due to the proximity of Smyrna to Atlanta, these facts and the evidence as developed on trial justified summary judgment for the board. Williams v. State Medical Educ. Bd., 244 Ga. 401, 260 S.E.2d 304, rev'g 149 Ga. App. 444, 254 S.E.2d 450 (1979) (see Ga. Const. 1983, Art. XI, Sec. I, Para. I).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

- GENERAL CONSIDERATION
- CITIZENSHIP REQUIREMENT
- QUALIFIED SCHOOL
- COMMUNITY SIZE
- CHARGEABLE INTEREST

General Consideration

Editor's notes. — In light of the similarity of the provisions, opinions under for Ga. Const. 1976, Art. X, Sec. II, Para. III and antecedent provisions, relating to the creation and powers of the State Medical Education Board, are included in the annotations for this paragraph.

State Medical Education Board may legally grant scholarships to qualified applicants in the field of osteopathy. 1970 Op. Att'y Gen. No. 70-121.

Permissible to charge communities participating in medical fair registration fee. — The concept of a "Medical Fair," the purpose of which is to introduce scholarship recipients to community representatives who are actively seeking physicians for their communities, is consis-

tent with the basic purposes of the financial assistance program; therefore, the State Medical Education Board may properly charge a registration fee to communities desiring to participate in this fair. 1979 Op. Att'y Gen. No. 79-28.

Raise of loan ceiling permitted by agreement between parties. — If both the student recipient and the State Medical Education Board agree to do so, an existing medical scholarship agreement may be amended so as to increase the maximum grant available to \$15,000. 1976 Op. Att'y Gen. No. 76-127.

Payment of scholarships to recipients. — There is no indication as to time and manner in which scholarships granted under this paragraph are to be paid to the recipients except that the board has the authority to make such a

General Consideration (Cont'd)

determination; based on this language, the board can provide for payments for any sum and at any interval it deems proper so long as the total does not exceed \$15,000. 1971 Op. Att'y Gen. No. 71-129 (see Ga. Const. 1983, Art. XI, Sec. I, Para. I).

Exemption applicable to students not physicians. — The exemption which the Constitution gives to the board from its debt or gratuity proscriptions is by its express terms limited to students and, consequently, the State Medical Education Board would not be authorized to make cash grants to physicians in exchange for their agreement to practice in specified localities. 1978 Op. Att'y Gen. No. 78-31.

Constable may not continue to serve if the constable does not meet eligibility requirements under the Magistrate Act. 1983 Op. Att'y Gen. No. 83-59.

Uncertified justice of peace did not become magistrate. — A justice of the peace in office on June 30, 1983, who was not certified under the former Georgia Justice Courts Training Council Act as of that date, did not become a magistrate of the successor court on July 1, 1983. 1983 Op. Att'y Gen. No. 83-53.

Citizenship Requirement

Applicant must be a citizen of the United States in order to qualify for a medical education scholarship loan under this paragraph. 1972 Op. Att'y Gen. No. 72-68 (see Ga. Const. 1983, Art. XI, Sec. I, Para. I).

Specifically, an applicant must be a citizen of the United States at the time the applicant submits an application to the Medical Education Board. 1972 Op. Att'y Gen. No. 72-68.

Qualified School

Required length of attendance is not determinative. — Provisions of this paragraph that applicant must attend a four-year medical college does not set forth number of years over which the applicant is to receive scholarship pay-

ments; this is simply a limiting factor as to the qualifications of the school that the recipient attends; the instigation of a three-year accelerated program does not alter the four-year status of a medical college. 1971 Op. Att'y Gen. No. 71-129 (see Ga. Const. 1983, Art. XI, Sec. I, Para. I).

Community Size

Defining community. — The meaning of the term "community" of 15,000 population or less is determined first by its identification as a community by the census. In the absence of such census identification, the board has some discretion in defining the boundaries of a "community," giving due consideration to the location of political boundary lines, demographic patterns, and the like. Once a geographic area is defined by any of the foregoing means, and provided that its population is 15,000 or less, the board has the further discretion of determining, on a reasonable factual basis and in a nonarbitrary manner, which of those geographic areas of 15,000 population or less it will "approve." 1979 Op. Att'y Gen. No. 79-30.

Community size tied into census. — The size of the communities within which a physician may repay a State Medical Education Board loan or scholarship by practicing the physician's profession is tied to the 1970 or any "subsequent" decennial census; a community cannot be treated as being eligible under the 15,000 cut-off based upon any census earlier than 1970. 1979 Op. Att'y Gen. No. 79-47.

Practice in community of less than specified size possible. — If both student recipient and the State Medical Education Board agree to do so, an existing medical scholarship agreement may be amended so as to permit the recipient's repayment obligation to be satisfied by practicing in a community having a population of 15,000 or less rather than 10,000 or less. 1976 Op. Att'y Gen. No. 76-127.

Designation of eligible community by board not forever binding. — Although it is not proper for the State Medical Education Board of Georgia to approve an eligible community for one doctor and disapprove the same community for another doctor on an arbitrary basis, this

does not mean that an approval of an eligible community, having once been made, is binding forever. 1979 Op. Att’y Gen. No. 79-30.

Regarding credit claims against outstanding scholarship loans, this paragraph does not cover a situation where a doctor serves patients from communities of a specified population who must still journey to the doctor’s office in another city or community of population greater than that specified. 1970 Op. Att’y Gen. No. 70-75 (see Ga. Const. 1983, Art. XI, Sec. I, Para. I).

Chargeable Interest

Vested contractual obligations not altered. — This paragraph which changes conditions, limits, and interest rates of medical scholarship loans awarded by the State Medical Education Board does not alter vested contractual obligations under scholarship agreements

entered into prior to the effective date of the amendment. 1976 Op. Att’y Gen. No. 76-127 (see Ga. Const. 1983, Art. XI, Sec. I, Para. I).

Constitutional amendment increasing loan interest not applicable to previously disbursed and contractually disbursed loans. — Unless both parties to an existing medical scholarship agreement agree to amend the agreement so as to increase the interest obligation of the recipient from four percent per annum, the obligations and rights which became vested under the existing agreement with respect to interest would continue notwithstanding the constitutional amendment; this would apply to both those scholarship funds which have already been disbursed and to those funds which while not yet disbursed are contractually obligated by the existing medical scholarship agreements. 1976 Op. Att’y Gen. No. 76-127.

Paragraph II. Preservation of existing laws; judicial review.

All laws in force and effect on June 30, 1983, not inconsistent with this Constitution shall remain in force and effect; but such laws may be amended or repealed and shall be subject to judicial decision as to their validity when passed and to any limitations imposed by their own terms.

1976 Constitution. — Art. XI, Sec. I, Para. III.

Cross references. — Force and effect of laws of other states, § 1-3-9. Scope of jurisdiction of Georgia laws, § 50-2-21.

Law reviews. — For note discussing

adoption of law on malicious use of civil process from English Common Law, see 13 Mercer L. Rev. 396 (1962).

For comment, “The English Common Law: Its History and Application in Georgia,” see 15 J. of Pub. L. 378 (1966).

JUDICIAL DECISIONS

Effect of paragraph. — This paragraph renders of force the principles and doctrines of the common law unless expressly repealed by statute. Head v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943) (see Ga. Const. 1983, Art. XI, Sec. I, Para. II).

Common and statute law of England, of force in this state on May 14, 1776, remains of force, so far as it is not incompatible with the federal or state Constitution or has not been modified by statute. Grimmett v. Barnwell,

184 Ga. 461, 192 S.E. 191 (1937); Trustees of Jesse Parker Williams Hosp. v. Nisbet, 189 Ga. 807, 7 S.E.2d 737 (1940); Brooks v. Ready Mix Concrete Co., 94 Ga. App. 791, 96 S.E.2d 213 (1956); Dooley v. Berkner, 113 Ga. App. 162, 147 S.E.2d 685 (1966), overruled on other grounds, Holmes v. Worthey, 159 Ga. App. 262, 282 S.E.2d 919 (1981).

Common law recognition of specialty bond still in force. — The rule of the common law, recognizing as a spe-

cialty a bond or like instrument accompanied by a seal and formal delivery, and therefore dispensing with the necessity for any consideration, not having been varied by statute or by construction in any contrary decision, remains in force. *Trustees of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 7 S.E.2d 737 (1940).

Constitutional provisions evidence no intent for repeal of statutory requirements on qualifications of board members. — Construing Ga. Const. 1976, Art. VIII, Sec. V, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II) and this paragraph, together, it must be held that there is no evident intent that the statutory requirements as to qualifications of members of county boards of education be repealed by the Constitution. *McCollum v. Bass*, 201 Ga. 537, 40 S.E.2d 650 (1946) (see Ga. Const. 1983, Art. XI, Sec. I, Para. II).

Use of affidavits in habeas corpus proceedings not sanctioned. — The court is not required by common law, by decisions of other jurisdictions, by textbooks, or by Georgia statute to sanction use of affidavits in habeas corpus proceedings. *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

Affidavits use excluded upon adoption of common law. — In view of the caution taken in the Constitution to preserve liberty by setting standards for trials openly and fairly, if necessary the court would hold that this paragraph, adopting the common law, excluded the

portion permitting such ex parte affidavits by adopting only such of the common law as was practicable and suitable to a growing republic. *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957) (see Ga. Const. 1983, Art. XI, Sec. I, Para. II).

Section 20-2-52 superseded by Ga. Const. 1976, Art. VIII, Sec. V, Para. II (see Ga. Const. 1983, Art. VIII, Sec. V, Para. II), before amendment of 1965. — The provision of former Code 1933, § 32-903 (see now O.C.G.A. § 20-2-52), that no two members of a county board of education could be selected from the same militia district, was entirely consistent with the provisions found in the Constitution, and it could not be held that the people in the adoption of the Constitution intended to repeal statutory requirements as to the qualifications of the members of such boards. *McCollum v. Bass*, 201 Ga. 537, 40 S.E.2d 650 (1946).

Cited in *York v. State*, 172 Ga. 483, 158 S.E. 53 (1931); *Board of Pub. Educ. & Orphanage v. State Bd. of Educ.*, 190 Ga. 581, 10 S.E.2d 365 (1940); *Collins v. Sam R. Greenberg & Co.*, 73 Ga. App. 377, 36 S.E.2d 484 (1945); *Wheeler v. Board of Trustees*, 200 Ga. 323, 37 S.E.2d 322 (1946); *Tripp v. Martin*, 210 Ga. 284, 79 S.E.2d 521 (1954); *Sizemore v. Coker*, 220 Ga. 773, 141 S.E.2d 891 (1965); *Douglas County v. Abercrombie*, 226 Ga. 39, 172 S.E.2d 419 (1970); *Thigpen v. State*, 229 Ga. 820, 194 S.E.2d 423 (1972); *Azizi v. Board of Regents*, 132 Ga. App. 384, 208 S.E.2d 153 (1974).

RESEARCH REFERENCES

ALR. — What law governs validity, effect, and construction of separation or property settlement agreements, 18 ALR2d 760.

Successive judgments by confession on cognovit note or similar instrument, 80 ALR2d 1380.

Conflict of laws as to right of action between husband and wife or parent and child, 96 ALR2d 973.

Validity and construction of statute or ordinance prohibiting commercial exhibition of malformed or disfigured persons, 62 ALR3d 1237.

Paragraph III. Proceedings of courts and administrative tribunals confirmed.

All judgments, decrees, orders, and other proceedings of the several courts and administrative tribunals of this state, heretofore made within the limits of their several jurisdictions, are hereby ratified and

affirmed, subject only to reversal or modification in the manner provided by law.

1976 Constitution. — Art. XI, Sec. I, Para. V.

JUDICIAL DECISIONS

Purpose of paragraph. — The purpose of this paragraph was to protect rights acquired pursuant to prior decisions of a court under the Constitution of 1877. *Wright v. Lester*, 218 Ga. 31, 126 S.E.2d 419 (1962) (see Ga. Const. 1983, Art. XI, Sec. I, Para. III).

Approval of prior court decisions. — This provision of the Constitution approved prior court decisions and gave them the force of law in this state, whatever the rule in Blackstone's day might have been. *Wright v. Lester*, 218 Ga. 31, 126 S.E.2d 419 (1962) (see Ga. Const. 1983, Art. XI, Sec. I, Para. III).

"Freezing" judicial decisions adopted prior to Constitution. — This paragraph cannot properly be construed to "freeze" decisions by the Court of Appeals and the Georgia Supreme Court decided prior to adoption of the Constitution. *Wright v. Lester*, 218 Ga. 31, 126 S.E.2d 419 (1962) (see Ga. Const. 1983, Art. XI, Sec. I, Para. III).

Collateral attack on city charter not allowed. — Where municipality's charter application was sworn to and the charter issued under the authority of the Superior Court of DeKalb County on January 15, 1924, and, on its face, this court proceeding showed that North Atlanta was properly incorporated in accordance with the law authorizing its creation, any attempt to go behind this charter as to alleged discrepancies in dates and the failure to meet conditions precedent to the issuance of the charter could not be considered at this late date, and no collateral attack would be allowed. *MacDonell v. Village of N. Atlanta*, 216 Ga. 559, 118 S.E.2d 460 (1961).

Cited in *Macon Busses, Inc. v. Dashiell*, 73 Ga. App. 108, 35 S.E.2d 666 (1945); *Wright v. Lester*, 105 Ga. App. 107, 123 S.E.2d 672 (1961); *City of Chamblee v. Village of N. Atlanta*, 217 Ga. 517, 123 S.E.2d 663 (1962).

RESEARCH REFERENCES

ALR. — Law governing assignment of wages or salary, 1 ALR3d 927.

Paragraph IV. Continuation of certain constitutional amendments for a period of four years.

(a) The following amendments to the Constitutions of 1877, 1945, and 1976 shall continue in force and effect as part of this Constitution until July 1, 1987, at which time said amendments shall be repealed and shall be deleted as a part of this Constitution unless any such amendment shall be specifically continued in force and effect without amendment either by a local law enacted prior to July 1, 1987, with or without a referendum as provided by law, or by an ordinance or resolution duly adopted prior to July 1, 1987, by the local governing authority in the manner provided for the adoption of home rule amendments to its charter or local Act: (1) amendments to the Constitution of 1877 and the Constitution of 1945 which were continued in

force and effect as a part of the Constitution of 1976 pursuant to the provisions of Article XIII, Section I, Paragraph II of the Constitution of 1976 which are in force and effect on the effective date of this Constitution; (2) amendments to the Constitution of 1976 which were ratified as general amendments but which by their terms applied principally to a particular political subdivision or subdivisions which are in force and effect on the effective date of this Constitution; (3) amendments to the Constitution of 1976 which were ratified not as general amendments which are in force and effect on the effective date of this Constitution; and (4) amendments to the Constitution of 1976 of the type provided for in the immediately preceding two subparagraphs (2) and (3) of this Paragraph which were ratified at the same time this Constitution was ratified.

(b) Any amendment which is continued in force and effect after July 1, 1987, pursuant to the provisions of subparagraph (a) of this Paragraph shall be continued in force and effect as a part of this Constitution, except that such amendment may thereafter be repealed but may not be amended. The repeal of any such amendment shall be accomplished by local Act of the General Assembly, the effectiveness of which shall be conditioned on its approval by a majority of the qualified voters voting thereon in each of the particular political subdivisions affected by the amendment.

(c) All laws enacted pursuant to those amendments to the Constitution which are not continued in force and effect pursuant to subparagraph (a) of this Paragraph shall be repealed on July 1, 1987. All laws validly enacted on, before, or after July 1, 1987, and pursuant to the specific authorization of an amendment continued in force and effect pursuant to the provisions of subparagraph (a) of this Paragraph shall be legal, valid, and constitutional under this Constitution. Nothing in this subparagraph (c) shall be construed to revive any law not in force and effect on June 30, 1987.

(d) Notwithstanding the provisions of subparagraphs (a) and (b), the following amendments to the Constitutions of 1877 and 1945 shall be continued in force as a part of this Constitution: amendments to the Constitution of 1877 and the Constitution of 1945 which created or authorized the creation of metropolitan rapid transit authorities, port authorities, and industrial areas and which were continued in force as a part of the Constitution of 1976 pursuant to the provisions of Article XIII, Section I, Paragraph II of the Constitution of 1976 and which are in force on the effective date of this Constitution.

(e) Any person owning property in an industrial area described in subparagraph (d) of this Paragraph may voluntarily remove the property from the industrial area by filing a certificate to that effect with the clerk of the superior court for the county in which the property is

located. Once the certificate is filed, the property described in the certificate, together with all public streets and public rights of way within the property, abutting the property, or connecting the property to property outside the industrial area, shall no longer be in the industrial area and shall upon the filing of the certificate be annexed to the city which provides water service to the property, or if no city provides water service shall be annexed to the city providing fire service as provided under the constitutional amendments that created such industrial areas described in subparagraph (d) of this Paragraph. The filing of a certificate shall be irrevocable and shall bind the owners, their heirs, and their assigns. The term “owner” includes anyone with a legal or equitable ownership in property but does not include a beneficiary of any trust or a partner in any partnership owning an interest in the property or anyone owning an easement right in the property. (Ga. Const. 1983, Art. 11, § 1, Para. 4; Ga. L. 1991, p. 2031, § 1/HR 16; Ga. L. 1992, p. 3335, § 1/HR 997; Ga. L. 1996, p. 1667, § 1/SR 228; Ga. L. 2010, p. 1259, § 1/HR 136.)

1976 Constitution. — Art. IX, Sec. VIII, Para. I; Art. XIII, Sec. I, Para. II.

Editor’s notes. — The constitutional amendment (Ga. L. 1988, p. 2112, § 1) which would have added a subparagraph allowing owners of real property located in an industrial area on an island by virtue of this Paragraph to irrevocably remove such property and adjacent public rights of way from the industrial area was defeated at the general election on November 8, 1988.

The constitutional amendment (Ga. L. 1990, p. 2429, § 1) which would have authorized the General Assembly to provide that a political subdivision whose ad valorem taxing powers are restricted by constitutional amendment may impose a local sales and use tax without a corresponding limitation of its ad valorem taxing powers was defeated at the general election on November 6, 1990.

The constitutional amendment (Ga. L. 1991, p. 2031, § 1) as amended by (Ga. L. 1992, p. 3335, § 1) which revised Paragraph IV to provide that the General Assembly may by local Act repeal certain constitutional amendments, which local Acts must be approved by a majority of the qualified voters voting thereon in the particular political subdivision(s) affected by the amendment was approved by a majority of the qualified voters voting at

the general election held on November 3, 1992.

The constitutional amendment (Ga. L. 1996, p. 1667, § 1) which added subparagraph (e) was approved by a majority of the qualified voters voting at the general election held on November 5, 1996.

The constitutional amendment (Ga. L. 2010, p. 1259, § 1), which, in subparagraph (e), in the first sentence, inserted “of this Paragraph” near the middle, and deleted “, but only if the property is located on an island” from the end; in the second sentence, substituted “, shall no longer be in the industrial area and shall upon the filing of the certificate be annexed to the city which provides water service to the property, or if no city provides water service shall be annexed to the city providing fire service as provided under the constitutional amendments that created such industrial areas described in subparagraph (d) of this Paragraph” for “will no longer be in the industrial area and may be annexed by an adjacent city”; and, in the third sentence, substituted “shall” for “will” twice, was ratified at the general election held on November 2, 2010.

Law reviews. — For note, “Lapse or Continuation of Local Constitutional Amendments Under the Constitution of 1983,” see 21 Ga. St. B.J. 78 (1984).

JUDICIAL DECISIONS

Application of subsection (a). — A local amendment to Art. VII, Sec. IV, Para. II of the 1945 Georgia Constitution, authorizing a county to levy a tax for water and sewerage purposes, was carried forward pursuant to subsection (a) of Ga. Const. 1983, Art. XI, Sec. I, Para. IV. *Copeland v. State*, 268 Ga. 375, 490 S.E.2d 68 (1997).

Inoperative amendment. — Amendment to the Constitution of 1877, Ga. L. 1945, p. 101, which was ratified and proclaimed on the same dates as was the Constitution of 1945, never became operative either as an amendment to the Constitution of 1877 or as an amendment to the Constitution of 1945. *Fulton County v. Lockhart*, 202 Ga. 878, 45 S.E.2d 220 (1947).

Effect of population bill carried forward from 1945 constitution. — A 1952 amendment to the 1945 constitution, allowing the establishment of a joint board of tax assessors in a population category applying only to Fulton County and the City of Atlanta, was carried forward in the present constitution, and neither the amendment nor a 1952 implementing statute was unconstitutional. However, subsequent amendments which attempted to establish by local act any ap-

peal system other than that specified in the 1952 amendment, and other amendments that attempted to change the population category affected by the 1952 amendment, were unconstitutional and void. *Lomax v. Lee*, 261 Ga. 575, 408 S.E.2d 788 (1991).

Effect of amendment creating special taxing districts. — A local amendment to Art. VII, Sec. IV, Para. IV of the 1945 Georgia Constitution, authorizing a county to levy a tax for water and sewerage purposes, was not repealed by ratification of a later amendment giving counties direct authority to create special taxing districts for water and sewerage services and to tax for those services only within the special district. *Copeland v. State*, 268 Ga. 375, 490 S.E.2d 68 (1997).

City Court of Atlanta. — The fact that the City Court of Atlanta remained a city court under Ga. L. 1996, p. 627 refuted the defendant's contention that it was outside the constitutional confines of the Georgia Constitution and the 1967 and 1986 constitutional amendments under which the City Court existed prior to 1996. *Wickham v. State*, 273 Ga. 563, 544 S.E.2d 439 (2001).

Cited in *Tucker v. Board of Comm'rs*, 255 Ga. 472, 339 S.E.2d 714 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Local amendments no longer authorized. — There is no longer any authority for the future passage of local constitutional amendments. 1990 Op. Att'y Gen. No. U90-5.

Reenactment of amendments creating county school district. — The constitutional amendments creating the Clarke County School District and Board of Education will be automatically repealed unless they are reenacted by local Act prior to July 1, 1987. 1984 Op. Att'y Gen. No. U84-4.

Reenactment of constitutional amend-

ments creating the Clarke County School District and Board of Education can be accomplished by an Act which references the constitutional amendments so long as those references are sufficient to inform interested parties as to the subject matter of the Act. 1984 Op. Att'y Gen. No. U84-4.

Any change in constitutional amendments creating the Clarke County School District and Board of Education would prevent their reenactment by local law and would require approval by the Justice Department. 1984 Op. Att'y Gen. No. U84-4.

Paragraph V. Special commission created.

Amendments to the Constitution of 1976 which were determined to be general and which were submitted to and ratified by the people of the entire state at the same time this Constitution was ratified shall be incorporated and made a part of this Constitution as provided in this Paragraph. There is hereby created a commission to be composed of the Governor, the President of the Senate, the Speaker of the House of Representatives, the Attorney General, and the Legislative Counsel, which is hereby authorized and directed to incorporate such amendments into this Constitution at the places deemed most appropriate to the commission. The commission shall make only such changes in the language of this Constitution and of such amendments as are necessary to incorporate properly such amendments into this Constitution and shall complete its duties prior to July 1, 1983. The commission shall deliver to the Secretary of State this Constitution with those amendments incorporated therein, and such document shall be the Constitution of the State of Georgia. In order that the commission may perform its duties, this Paragraph shall become effective as soon as it has been officially determined that this Constitution has been ratified. The commission shall stand abolished upon the completion of its duties.

1976 Constitution. — Art. XIII, Sec. I, Para. III.

JUDICIAL DECISIONS

<p>Sovereign immunity amendment properly substituted. — The sovereign immunity amendment to the 1976 Constitution, Ga. L. 1982, p. 2546, was properly</p>	<p>substituted as Art. I, Sec. II, Para. IX in the 1983 Constitution. <i>Pollard v. Board of Regents</i>, 260 Ga. 885, 401 S.E.2d 272 (1991).</p>
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Paragraph VI. Effective date.

Except as provided in Paragraph V of this section, this Constitution shall become effective on July 1, 1983; and, except as otherwise provided in this Constitution, all previous Constitutions and all amendments thereto shall thereupon stand repealed.

1976 Constitution. — Art. XIII, Sec. I, Para. IV.

APPENDIX ONE

1976 CONSTITUTION OF GEORGIA — AMENDMENTS OF LOCAL APPLICATION

This appendix lists those locally applicable amendments to the Constitution of Georgia of 1976 which are continued in force and effect by Article XI, Section I, Paragraph IV of the Constitution of Georgia of 1983. Except as otherwise provided in subsection (d) of that Paragraph, each of the following locally applicable amendments will stand repealed on July 1, 1987, unless specifically continued in force and effect by local law, ordinance, or resolution. As these local laws, ordinances, and resolutions are enacted and promulgated, they will be indexed by locality and by Constitution in the annual pocket part supplements to Volume 42, the Index to Local and Special Laws and General Laws of Local Application.

Art. I, Sec. II, Para. VII

Floyd County. — Juvenile court judge appointment, election. Ga. L. 1980, p. 2200.

Art. VI, Sec. I

Henry County. — Ordinances and regulations, adoption. Ga. L. 1980, p. 2303.

Art. VI, Sec. VI, Para. II

Camden County. — Jurisdiction of probate court. Ga. L. 1981, p. 1909.

Art. VI, Sec. VII, Para. II

Banks County. — Justice of the peace jurisdiction increased. Ga. L. 1980, p. 2159.

Barrow County. — Justice of the peace jurisdiction increased. Ga. L. 1979, p. 1805.

Bartow County. — Justice of the peace jurisdiction increased. Ga. L. 1980, p. 2184.

Brooks County. — Justice of the peace jurisdiction increased. Ga. L. 1977, p. 1581.

Charlton County. — Justice of the peace jurisdiction increased. Ga. L. 1977, p. 1616; Ga. L. 1978, p. 2329.

Cherokee County. — Justice of the peace jurisdiction increased. Ga. L. 1978, p. 2472.

Clinch County. — Justice of the peace jurisdiction increased. Ga. L. 1977, p. 1619.

Cobb County. — Justice of the peace jurisdiction increased. Ga. L. 1977, p. 1585.

Columbia County. — Jurisdiction of justices of the peace. Ga. L. 1982, p. 2575.

Crisp County. — Justice of the peace jurisdiction increased. Ga. L. 1979, p. 1801.

DeKalb County. — Justice of the peace jurisdiction increased. Ga. L. 1978, p. 2380.

Dooly County. — Justice of the peace jurisdiction increased. Ga. L. 1979, p. 1796.

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Floyd County. — Justice of the peace jurisdiction increased. Ga. L. 1980, p. 2176.

Gwinnett County. — Justice of the peace jurisdiction increased. Ga. L. 1978, p. 2362.

Jackson County. — Justice of the peace jurisdiction increased. Ga. L. 1978, p. 2471.

Lowndes County. — Jurisdiction of justices of the peace. Ga. L. 1982, p. 2592.

Meriwether County. — Jurisdiction of justices of the peace. Ga. L. 1982, p. 2582.

Murray County. — Justice of the peace jurisdiction increased. Ga. L. 1980, p. 2173.

Schley County. — Jurisdiction of justices of the peace. Ga. L. 1982, p. 2598.

Spalding County. — Jurisdiction of justices of the peace. Ga. L. 1981, p. 1933.

Upson County. — Justice of the peace jurisdiction increased. Ga. L. 1979, p. 1839.

Ware County. — Justice of the peace jurisdiction increased. Ga. L. 1977, p. 1618.

Wayne County. — Justice of the peace jurisdiction increased. Ga. L. 1978, p. 2434.

Art. VI, Sec. VII, Para. III

Cobb County. — Vacancies in the office of justice of the peace. Ga. L. 1982, p. 2615.

DeKalb County. — Authority to abolish justice of the peace courts and offices of justice of the peace and constable. Ga. L. 1982, p. 2573.

Art. VI, Sec. IX

Chatham County. — Recorder's court, pleas of guilty and nolo contendere. Ga. L. 1980, p. 2209.

Art. VII

Savannah, City of. — Bond issue without referendum. Ga. L. 1977, p. 1583.

Art. VII, Sec. I, Para. II

Fulton County. — Retirement system benefits increase. Ga. L. 1978, p. 2383.

Houston County. — Ad valorem tax for educational purposes. Ga. L. 1982, p. 2601.

Richmond County. — Taxing power of local taxing jurisdictions limited. Ga. L. 1980, p. 2177.

Art. VII, Sec. I, Para. III

Atlanta, City of. — Exemption of real property located in urban enterprise zones from ad valorem taxes. Ga. L. 1982, p. 2647.

Columbus, Georgia. — Valuation of homestead property. Ga. L. 1981, p. 1926. (Resolution specifically applies to Muscogee County; but see Ga. L. 1971, Ex. Sess., p. 2007 for consolidation of City of Columbus and Muscogee County into single political entity known as "Columbus, Georgia.")

Decatur, City of. — Deferment for aged for portion of taxes due on homestead. Ga. L. 1980, p. 2196.

Fulton County. — Industrial district established. Ga. L. 1977, p. 1569.

APPENDIX ONE

Exemption of real property located in urban enterprise zones from ad valorem taxes. Ga. L. 1982, p. 2647.

Art. VII, Sec. I, Para. IV

Appling County. — Homestead exemption increased. Ga. L. 1980, p. 2111.

Ashburn, City of. — Homestead exemption for aged or disabled. Ga. L. 1980, p. 2266.

Atkinson County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2292.

Atlanta, City of. — Homestead exemption for aged. Ga. L. 1977, p. 1587.

Urban enterprise zones — Exemption of inventories of certain goods from ad valorem taxes. Ga. L. 1982, p. 2645.

Augusta, City of. — Homestead exemption for aged, other residents. Ga. L. 1980, p. 2211.

Exemption of capital improvements of commercial and business establishments from ad valorem taxes. Ga. L. 1982, p. 2616.

Austell, City of. — Tax discount. Ga. L. 1977, p. 1609.

Homestead exemption for aged. Ga. L. 1977, p. 1610 (Act states it is amending “Art. VII, Sec. I, Para. 17”).

Banks County. — Homestead exemption for aged. Ga. L. 1978, p. 2438.

Bartow County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2185.

Baxley, City of. — Homestead exemption. Ga. L. 1982, p. 2653.

Ben Hill County. — Homestead exemption increased. Ga. L. 1980, p. 2219.

Bibb County. — Homestead exemption for nonprofit cooperative housing. Ga. L. 1978, p. 2360.

Homestead exemption increased. Ga. L. 1980, p. 2133.

Bowdon, City of. — Homestead exemption. Ga. L. 1977, p. 1602.

Butts County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1978, p. 2401.

Homestead exemption for aged redefined. Ga. L. 1980, p. 2333.

Cabbagetown Historic District. — Exemption of certain improved property from taxation. Ga. L. 1982, p. 2509.

Calhoun, City of. — Homestead exemption for aged from taxation for educational purposes, income defined. Ga. L. 1980, p. 2250.

Camden County. — Homestead exemption. Ga. L. 1982, p. 2586.

Carrollton, City of. — Homestead exemption. Ga. L. 1977, p. 1596.

Chamblee, City of. — Homestead exemptions. Ga. L. 1982, p. 2542.

Charlton County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2297.

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Chatham County. — Homestead exemption for aged or disabled. Ga. L. 1978, p. 2373.

Homestead exemption for aged from taxation for educational purposes. Ga. L. 1978, p. 2448.

Homestead exemption for aged from taxation for educational purposes. Ga. L. 1981, p. 1917.

Cherokee County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1979, p. 1852.

Clarkesville, City of. — Homestead exemption for aged. Ga. L. 1978, p. 2354.

Clayton County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1979, p. 1812.

Homestead exemption for aged, other residents. Ga. L. 1980, p. 2310.

Clinch County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2295.

Cobb County. — Homestead exemption for aged. Ga. L. 1978, p. 2364.

Homestead exemption for disabled. Ga. L. 1980, p. 2098.

College Park, City of. — Homestead exemption for aged or disabled, other residents. Ga. L. 1980, p. 2144.

Homestead exemptions for persons under 65 and aged or disabled persons. Ga. L. 1982, p. 2605.

Columbia County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1979, p. 1815.

Crisp County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1982, p. 2564.

Dalton, City of. — Homestead exemption for aged or disabled. Ga. L. 1980, p. 2223.

Danville, City of. — Homestead exemption for aged. Ga. L. 1980, p. 2169.

Decatur, City of. — Homestead exemption. Ga. L. 1981, p. 1914.

DeKalb County. — Homestead exemption for nonprofit cooperative housing. Ga. L. 1978, p. 2349.

Tax exemption for improvements to real property. Ga. L. 1978, p. 2378.

Homestead exemption for aged or disabled from taxation for educational purposes. Ga. L. 1978, p. 2389.

Homestead exemption increased. Ga. L. 1978, p. 2519.

Homestead exemption. Ga. L. 1982, p. 2657.

Homestead exemption for aged or disabled from taxation for educational purposes. Ga. L. 1982, p. 2659.

Doraville, City of. — Homestead exemption. Ga. L. 1980, p. 2102.

Homestead exemption. Ga. L. 1982, p. 2610.

Douglas County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1979, p. 1808.

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Douglasville, City of. — Homestead exemption for aged. Ga. L. 1978, p. 2320.

Effingham County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1982, p. 2634.

Floyd County. — Homestead exemption for aged, requirements. Ga. L. 1979, p. 1819.

Homestead exemption for aged from taxation for educational purposes. Ga. L. 1979, p. 1822.

Fulton County. — Homestead exemption for aged or disabled. Ga. L. 1977, p. 1574; Ga. L. 1978, p. 2367.

Urban enterprise zones — Exemption of inventories of certain goods from ad valorem taxes. Ga. L. 1982, p. 2645.

Glascok County. — Tax exemption for manufacturing establishments. Ga. L. 1977, p. 1622.

Glynn County. — Homestead exemption for aged or disabled. Ga. L. 1979, p. 1849.

Gordon County. — Homestead exemption for aged from taxation for educational purposes, income defined. Ga. L. 1980, p. 2247.

Gwinnett County. — Homestead exemption for aged. Ga. L. 1981, p. 1921.

Habersham County. — Homestead exemption for aged. Ga. L. 1978, p. 2444.

Homestead exemption for aged or disabled from taxation for educational purposes. Ga. L. 1980, p. 2283.

Henry County. — Homestead exemption for aged from taxation for educational purposes increased. Ga. L. 1980, p. 2257.

Homestead exemption for aged increased. Ga. L. 1980, p. 2285.

Homestead exemption for aged or disabled from taxation for educational purposes. Ga. L. 1982, p. 2515.

Homestead exemption. Ga. L. 1982, p. 2517.

Exemption of capital improvements of manufacturing establishments from ad valorem taxes. Ga. L. 1982, p. 2609.

Jefferson County. — Discount for early payment of ad valorem taxes. Ga. L. 1982, p. 2588.

Jeffersonville, City of. — Homestead exemption for aged. Ga. L. 1980, p. 2194.

Lithonia, City of. — Homestead exemption for aged or disabled, other residents. Ga. L. 1978, p. 2375.

Lowndes County. — Homestead exemption for aged, other residents. Ga. L. 1980, p. 2207.

Macon, City of. — Homestead exemption for aged. Ga. L. 1978, p. 2357.

Tax preferences for improved residential property. Ga. L. 1980, p. 2092.

Marietta, City of. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2123.

Marion County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2338.

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Monroe County. — Homestead exemption for aged, other residents. Ga. L. 1980, p. 2216.

Morrow, City of. — Homestead exemption for aged or disabled. Ga. L. 1977, p. 1614.

Murray County. — Homestead exemption for aged increased. Ga. L. 1980, p. 2050.

Muscogee County. — Homestead exemption adjustment. Ga. L. 1980, p. 2009.

Newton County. — Homestead exemption. Ga. L. 1980, p. 2171.

Homestead exemption for aged or disabled. Ga. L. 1980, p. 2187.

Palmetto, City of. — Homestead exemption for aged. Ga. L. 1981, p. 1928.

Paulding County. — Homestead exemption for disabled. Ga. L. 1980, p. 2312.

Homestead exemption for aged from taxation for educational purposes. Ga. L. 1982, p. 2511.

Perry, City of. — Homestead exemption for aged or disabled. Ga. L. 1980, p. 2151.

Pierce County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1982, p. 2584.

Pine Lake, City of. — Homestead exemption. Ga. L. 1982, p. 2590.

Richmond County. — Discounts by local taxing jurisdictions for early payment of taxes. Ga. L. 1980, p. 2162.

Homestead exemption for aged or disabled, other residents. Ga. L. 1980, p. 2190.

Rockdale County. — Homestead exemption for aged or disabled from taxation for educational purposes. Ga. L. 1980, p. 2215.

Rockmart, City of. — Homestead exemption for aged. Ga. L. 1979, p. 1792.

Rome, City of. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1979, p. 1825.

Roopville, Town of. — Homestead exemption. Ga. L. 1977, p. 1604.

Roswell, City of. — Homestead exemption for aged. Ga. L. 1978, p. 2430.

Savannah, City of. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1981, p. 1917.

Screven County. — Exemption of capital improvements of new manufacturing establishments from ad valorem taxes. Ga. L. 1982, p. 2635.

Smyrna, City of. — Homestead exemption for aged. Ga. L. 1979, p. 1844.

Spalding County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1979, p. 1793.

Stephens County. — Homestead exemption for aged. Ga. L. 1978, p. 2440.

St. Mary's, City of. — Homestead exemption for aged. Ga. L. 1980, p. 2260.

Sylvester, City of. — Homestead exemption for aged or disabled. Ga. L. 1980, p. 2268.

Taylor County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2205.

Temple, City of. — Homestead exemption. Ga. L. 1977, p. 1598.

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Trion, Town of. — Homestead exemption for aged. Ga. L. 1980, p. 2198.

Turner County. — Homestead exemption for aged or disabled. Ga. L. 1980, p. 2307.

Twiggs County. — Homestead exemption for aged, other residents. Ga. L. 1980, p. 2180.

Union City, City of. — Homestead exemption for aged. Ga. L. 1977, p. 1572.

Homestead exemption for disabled. Ga. L. 1980, p. 2271.

Homestead exemption for aged. Ga. L. 1982, p. 2597.

Upson County. — Homestead exemption for aged from taxation for educational purposes, income limits changed. Ga. L. 1979, p. 1854.

Valdosta, City of. — Homestead exemption for aged, other residents. Ga. L. 1980, p. 2273.

Villa Rica, City of. — Homestead exemption. Ga. L. 1977, p. 1600.

Ware County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2299.

Waycross, City of. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1980, p. 2301.

Wayne County. — Homestead exemption increased. Ga. L. 1980, p. 2109.

White County. — Homestead exemption for aged increased. Ga. L. 1980, p. 2252.

Whitesburg, City of. — Homestead exemption. Ga. L. 1977, p. 1594.

Whitfield County. — Homestead exemption. Ga. L. 1982, p. 2576.

Art. VIII, Sec. V, Para. I

Griffin, City of. — Election of Griffin-Spalding County board of education. Ga. L. 1982, p. 2680.

Spalding County. — Election of Griffin-Spalding County board of education. Ga. L. 1982, p. 2680.

Art. VIII, Sec. V, Para. II

Bleckley County. — Election of board of education. Ga. L. 1982, p. 2669.

Chatham County. — Compensation of Board of Public Education. Ga. L. 1981, p. 1920.

DeKalb County. — Board of education recall provisions. Ga. L. 1978, p. 2524.

Houston County. — Board of education election. Ga. L. 1977, p. 1591.

Jackson County. — Board of education election, school superintendent appointment. Ga. L. 1980, p. 2276.

Pulaski County. — Election of board of education. Ga. L. 1982, p. 2664.

Savannah, City of. — Compensation of Board of Public Education. Ga. L. 1981, p. 1920.

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Art. VIII, Sec. V, Para. VII

Chatham County. — Chatham County and City of Savannah School System, constitutional exemption. Ga. L. 1978, p. 2351.

Savannah, City of. — Chatham County and City of Savannah School System, constitutional exemption. Ga. L. 1978, p. 2351.

Art. VIII, Sec. VII, Para. I

Chattooga County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2675.

Habersham County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2566.

Mitchell County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2643.

Newton County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2640.

Pelham, City of. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2643.

Rabun County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2522.

Towns County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2540.

Trion, City of. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2675.

Union County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2507.

Art. IX

DeKalb County. — Recorder's court jurisdiction over animal offenses. Ga. L. 1980, p. 2125.

Art. IX, Sec. I, Para. I

Lowndes County. — Road, street improvement authorized. Ga. L. 1978, p. 2446.

Art. IX, Sec. I, Para. V

Fulton County. — Branch offices for county business authorized. Ga. L. 1978, p. 2426.

Art. IX, Sec. VI, Para. I

Hall County. — Board of elections established. Ga. L. 1980, p. 2227.

Monroe County. — Grand jury arbitration powers. Ga. L. 1978, p. 2345.

Pike County. — Tax returns to board of tax assessors. Ga. L. 1978, p. 2405.

Ware County. — County manager authorized. Ga. L. 1982, p. 2563.

Art. IX, Sec. I, Para. VII

DeKalb County. — Medical examiner authorized. Ga. L. 1980, p. 2106.

Art. IX, Sec. I, Para. VIII

Floyd County. — Commissioners' terms. Ga. L. 1980, p. 2202.

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Art. IX, Sec. II

DeKalb County. — Government, General Assembly powers relative to. Ga. L. 1978, p. 2370.

Art. IX, Sec. II, Para. I

Glynn County. — Authority to enact ordinances. Ga. L. 1982, p. 2637.

Spalding County. — Ordinances and regulations, power to adopt, enforce. Ga. L. 1978, p. 2315.

Art. IX, Sec. IV, Para. I

Tift County. — Charter commission to study consolidation of governments of City of Tifton and Tift County. Ga. L. 1982, p. 2557.

Tifton, City of. — Charter commission to study consolidation of governments of City of Tifton and Tift County. Ga. L. 1982, p. 2557.

Art. IX, Sec. IV, Para. II

Bulloch County. — Tax on real property within special services fire districts. Ga. L. 1981, p. 1916.

College Park, City of. — College Park Business and Industrial Development Authority established. Ga. L. 1980, p. 2071.

Columbus, Georgia. — Charter review commission, establishment. Ga. L. 1980, p. 2045.

Conyers, City of. — Downtown Conyers Development Authority authorized. Ga. L. 1978, p. 2476.

DeKalb County. — Municipalities designated special services tax districts. Ga. L. 1978, p. 2468.

Fulton County. — Industrial district established. Ga. L. 1979, p. 1797.

Tax for educational purposes restricted. Ga. L. 1979, p. 1797.

Planning commission appointment. Ga. L. 1978, p. 2411.

Public safety services, General Assembly powers relative to. Ga. L. 1980, p. 2048.

Hapeville, City of. — Hapeville Development Authority established. Ga. L. 1982, p. 2524.

Hapeville Development Authority established. Ga. L. 1982, p. 2618.

Art. IX, Sec. IV, Para. III

Barnesville, City of. — City of Barnesville and County of Lamar Development Authority, property conveyance. Ga. L. 1977, p. 1565.

Bibb County. — Macon-Bibb County Urban Development Authority bonds. Ga. L. 1980, p. 2128.

Bulloch County. — Allocation and reduction of local sales and use tax for educational purposes. Ga. L. 1981, p. 1931.

Houston County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2600.

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Lamar County. — City of Barnesville and County of Lamar Development Authority, property conveyance. Ga. L. 1977, p. 1565.

Liberty County. — Liberty County Industrial Authority membership. Ga. L. 1980, p. 2221.

Macon, City of. — Macon-Bibb County Urban Development Authority bonds. Ga. L. 1980, p. 2128.

Art. IX, Sec. V, Para. I

Banks County. — Business licensing taxation. Ga. L. 1979, p. 1843.

Carroll County. — Civil service system authorized. Ga. L. 1978, p. 2343.

Fulton County. — Grants to municipalities for recreational programs. Ga. L. 1982, p. 2504.

Lowndes County. — Business license fees and taxes. Ga. L. 1982, p. 2593.

Paulding County. — Civil service system authorized. Ga. L. 1976, p. 2431.

Walton County. — Business license fees and taxes. Ga. L. 1982, p. 2655.

Art. IX, Sec. V, Para. II

Burke County. — Tax millage rates. Ga. L. 1979, p. 1846.

Clarke County. — Employee merit system authorized. Ga. L. 1980, p. 2305.

DeKalb County. — Educational tax restriction. Ga. L. 1977, p. 1606.

Tax millage rates. Ga. L. 1978, p. 2474.

Fulton County. — Pension increase regulations authorized. Ga. L. 1980, p. 2053.

Habersham County. — Alcoholic beverage taxation, proceeds for educational purposes. Ga. L. 1980, p. 2280.

Richmond County. — Merit system for employees of sheriff. Ga. L. 1982, p. 2639.

Spalding County. — Sales and use tax for financing public facilities. Ga. L. 1981, p. 1934.

Sales and use tax to finance public facilities. Ga. L. 1982, p. 2677.

Whitfield County. — Merit system of personnel administration. Ga. L. 1982, p. 2595.

Art. IX, Sec. VII, Para. I

Griffin, City of. — Griffin Development Authority established. Ga. L. 1980, p. 2315.

Statesboro, City of. — Downtown Statesboro Development Authority authorized. Ga. L. 1979, p. 1841.

Art. IX, Sec. VIII

Pike County. — Pike County Retirement Home Authority established. Ga. L. 1979, p. 1832.

Art. IX, Sec. VIII, Para. I

Atlanta, City of. — Parking facilities bonds. Ga. L. 1980, p. 2112.

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Bibb County. — Macon-Bibb County Urban Development Authority bonds. Ga. L. 1980, p. 2128.

Gainesville, City of. — Gainesville Redevelopment Authority authorized. Ga. L. 1980, p. 2024.

Macon, City of. — Macon-Bibb County Urban Development Authority bonds. Ga. L. 1980, p. 2128.

Newnan, City of. — Water, sewerage and light commissioners, powers. Ga. L. 1978, p. 2347.

Richmond County. — Garbage disposal facilities authorized. Ga. L. 1978, p. 1255.

Art. IX, Sec. VIII, Para. II

Acworth, City of. — Acworth Downtown Development Authority established. Ga. L. 1980, p. 2134.

Bainbridge, City of. — Downtown Bainbridge Development Authority authorized. Ga. L. 1979, p. 1806.

Dalton, City of. — Downtown Dalton Development Authority authorized. Ga. L. 1980, p. 2119.

Powder Springs, City of. — Powder Springs Downtown Development Authority established. Ga. L. 1980, p. 2035.

Powder Springs Downtown Development Authority — Modification of authority. Ga. L. 1982, p. 2505.

West Point, City of. — Downtown West Point Development Authority authorized. Ga. L. 1978, p. 2331.

Art. X, Sec. I, Para. V

Fulton County. — Educational retirement system benefits increase. Ga. L. 1977, p. 1562; 1978, p. 2312.

Macon, City of. — Firemen and police pension increase. Ga. L. 1977, p. 1612; 1978, p. 2311.

Increase in pensions of firemen and policemen. Ga. L. 1982, p. 2549.

Art. XI

Lowndes County. — Itinerant business regulation. Ga. L. 1978, p. 2333.

APPENDIX TWO

1945 CONSTITUTION OF GEORGIA — AMENDMENTS OF LOCAL APPLICATION

This appendix lists those locally applicable amendments to the Constitution of Georgia of 1945 which are continued in force and effect by Article XI, Section I, Paragraph IV of the Constitution of Georgia of 1983. Except as otherwise provided in subsection (d) of that Paragraph, each of the following locally applicable amendments will stand repealed on July 1, 1987, unless specifically continued in force and effect by local law, ordinance, or resolution. As these local laws, ordinances, and resolutions are enacted and promulgated, they will be indexed by locality and by Constitution in the annual pocket part supplements to Volume 42, the Index to Local and Special Laws and General Laws of Local Application.

Art. I, Sec. I

Jackson County. — Law enforcement powers of certain state agencies relative to felonies. Ga. L. 1974, p. 1689.

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Bibb County. — Laws, validation. Ga. L. 1950, p. 434.

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Macon-Bibb County Urban Development Authority, leases, contracts, bonds. Ga. L. 1976, p. 1827.

Brooks County. — Brooks County Development Authority established. Ga. L. 1966, p. 870.

Bulloch County. — Statesboro and Bulloch County Development Authority established. Ga. L. 1966, p. 1002.

Burke County. — Burke County Development Authority established. Ga. L. 1962, p. 910.

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Chattooga County. — Chattooga County Development Authority established. Ga. L. 1966, p. 804.

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Gordon County. — Appropriation to Hand Up, Inc. Ga. L. 1973, p. 1504.

Hall County. — Gainesville and Hall County Development Authority established. Ga. L. 1961, p. 600; Ga. L. 1964, p. 866.

Harris County. — Board of education tax equalization and reappraisal program, use of funds authorized. Ga. L. 1962, p. 1190.

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LaGrange, City of. — LaGrange Development Authority established. Ga. L. 1964, p. 779.

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Liberty County. — Liberty County Industrial Authority established. Ga. L. 1958, p. 472.

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Macon-Bibb County Board of Health established, powers, duties. Ga. L. 1953, Nov.-Dec. Sess., p. 256.

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Dougherty County. — Registrars, joint board for Dougherty County and City of Albany authorized. Ga. L. 1970, p. 1126.

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Douglas County. — Business regulatory, licensing, taxation powers of governing authority. Ga. L. 1962, p. 969.

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Taxation, joint tax collection with Bibb County authorized. Ga. L. 1964, p. 1067.

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Upson County. — Tax assessors, consolidation with Board of Tax Assessors of City of Thomaston. Ga. L. 1970, p. 1036.

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Chatham County. — County-wide government with City of Savannah authorized. Ga. L. 1972, p. 1466; Ga. L. 1980, p. 2158.

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Eatonton, City of. — Charter commission for consolidation with Putnam County authorized. Ga. L. 1972, p. 1504.

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Muscogee County. — Government, consolidation of departments and functions with municipalities authorized. Ga. L. 1966, p. 817.

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Putnam County. — Charter commission for consolidation with City of Eatonton authorized. Ga. L. 1972, p. 1504.

Richmond County. — Local Act powers of General Assembly regarding county, municipalities. Ga. L. 1968, p. 1787.

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Savannah, City of. — County-wide government with Chatham County authorized. Ga. L. 1972, p. 1466; Ga. L. 1980, p. 2158.

Ware County. — Government modification or consolidation with City of Waycross authorized. Ga. L. 1968, p. 1846.

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Office of coroner abolished. Ga. L. 1964, p. 1070.

Fulton County. — Tax commissioner selection, deputy appointment. Ga. L. 1952, p. 514.

Gwinnett County. — Superior court clerk authorized to issue criminal warrants. Ga. L. 1966, p. 1062.

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Douglasville, City of. — Douglasville-Douglas County Stadium Authority established. Ga. L. 1974, p. 1781.

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Transportation, metropolitan area system authorized. Ga. L. 1964, p. 1008.

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Gwinnett County. — Transportation, metropolitan area system authorized. Ga. L. 1964, p. 1008.

APPENDIX THREE

1877 CONSTITUTION OF GEORGIA — AMENDMENTS OF LOCAL APPLICATION

This appendix lists those locally applicable amendments to the Constitution of Georgia of 1877 which are continued in force and effect by Article XI, Section I, Paragraph IV of the Constitution of Georgia of 1983. Except as otherwise provided in subsection (d) of that Paragraph, each of the following locally applicable amendments will stand repealed on July 1, 1987, unless specifically continued in force and effect by local law, ordinance, or resolution. As these local laws, ordinances, and resolutions are enacted and promulgated, they will be indexed by locality and by Constitution in the annual pocket part supplements to Volume 42, the Index to Local and Special Laws and General Laws of Local Application.

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Glynn County. — Zoning and planning laws. Ga. L. 1937, p. 24.

McRae, City of. — Zoning and planning laws. Ga. L. 1937, p. 1132.

Milledgeville, City of. — Zoning and planning laws. Ga. L. 1937, p. 1132.

Moultrie, City of. — Zoning and planning laws. Ga. L. 1935, p. 1234.

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Municipalities, more than 20,000 (1910 census). — Ga. L. 1912, p. 30.

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Counties with city of more than 20,000 (1920 census). — Ga. L. 1927, p. 117 (no census).

Glynn County. — Justice court abolishments, transfer of functions. Ga. L. 1943, p. 33.

Savannah, City of. — Justice courts, offices, abolishment. Ga. L. 1914, p. 39.

Art. VI, Sec. XIII

Brunswick Judicial Circuit. — Judge's compensation. Ga. L. 1945, p. 102.

Art. VI, Sec. XIII, Para. I

Atlanta Judicial Circuit. — Judge's compensation. Ga. L. 1910, p. 42; 1917, p. 36; 1918, p. 94; 1920, p. 20.

Augusta Judicial Circuit. — Judge's compensation. Ga. L. 1910, p. 42; 1917, p. 36; 1920, p. 20; 1922, p. 26.

Chattahoochee Judicial Circuit. — Judge's compensation. Ga. L. 1916, p. 22; 1917, p. 36; 1922, p. 24; 1925, p. 70.

Eastern Judicial Circuit. — Judge's compensation. Ga. L. 1910, p. 42; 1918, p. 94; 1920, p. 20; 1927, p. 111.

Judicial circuits with city of 75,000 or more (1900 census). — Ga. L. 1910, p. 42.

Macon Judicial Circuit. — Judge's compensation. Ga. L. 1913, p. 30; 1917, p. 36; 1920, p. 20.

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Rome Judicial Circuit. — Judge's compensation. Ga. L. 1916, p. 22; 1917, p. 36; 1920, p. 20.

Southwestern Judicial Circuit. — Judge's compensation. Ga. L. 1916, p. 22; 1917, p. 36; 1920, p. 20.

Stone Mountain Judicial Circuit. — Judge's compensation. Ga. L. 1910, p. 42; 1917, p. 36; 1920, p. 20; 1939, p. 79.

Western Judicial Circuit. — Judge's compensation. Ga. L. 1916, p. 22; 1917, p. 36; 1920, p. 20.

Art. VII, Sec. II, Para. I

Macon, City of. — Property tax variation for subsequently acquired territory. Ga. L. 1941, p. 127.

Art. VII, Sec. II, Para. II

Macon, City of. — Tax exemption for new buildings, equipment, additions, limitation. Ga. L. 1941, p. 124.

Art. VII, Sec. II, Para. VII

Irwin County. — Tax levy for educational purposes, homestead exemption inapplicable. Ga. L. 1945, p. 95.

Art. VII, Sec. VI, Para. I

Atlanta, City of. — Industry, commerce, agriculture, tax to promote. Ga. L. 1943, p. 24.

Fitzgerald, City of. — Industry, tax to promote. Ga. L. 1939, p. 31.

Fulton County. — Industry, commerce, agriculture, tax to promote. Ga. L. 1943, p. 24.

Savannah, City of. — Payment of wharf construction costs to National Gypsum Company. Ga. L. 1941, p. 160.

Waycross, City of. — Industry, tax to promote. Ga. L. 1937, p. 1131.

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Chatham County. — Retirement system for officers and employees. Ga. L. 1937, p. 16.

Counties with city of 200,000 or more (1920 census). — Ga. L. 1926, Ex. Sess., p. 20 (no census).

Counties with all or part of city of 200,000 or more (1930 census). — Ga. L. 1937, p. 18 (no census).

DeKalb County. — Tax for educational purposes. Ga. L. 1943, p. 20.

Fulton County. — Civil service commission. Ga. L. 1939, p. 36.

Retirement system for officers and employees. Ga. L. 1939, p. 39; 1945, p. 108.

Richmond County. — Retirement system for employees. Ga. L. 1943, p. 48.

Ware County. — Industry, tax to promote. Ga. L. 1937, p. 1129.

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Art. VII, Sec. VII, Para. I

Abbeville, City of. — Refunding bonds. Ga. L. 1941, p. 11.

Abbeville Consolidated School District. — Bond issue. Ga. L. 1941, p. 9.

Adel, City of. — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 7.

Adrian (1st) Consolidated School District. — Refunding bonds. Ga. L. 1941, p. 13.

Albany, City of. — Waterworks system. Ga. L. 1937, p. 7.

Atlanta, City of. — Contracts with DeKalb and Fulton counties for hospitalization services. Ga. L. 1943, p. 18.

Refunding bonds. Ga. L. 1937, p. 13.

School bonds. Ga. L. 1945, p. 105.

Waterworks system, sanitation department bonds. Ga. L. 1939, p. 8.

Augusta, City of. — Flood protection, bonded indebtedness increase authorized. Ga. L. 1909, p. 77.

Temporary loans. Ga. L. 1939, p. 11.

Bacon County. — Refunding bonds. Ga. L. 1939, p. 14.

Baker County. — Refunding bonds. Ga. L. 1941, p. 17.

Baxley, City of. — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 10.

Beaverdam School District. — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 12.

Bibb County. — Debt certificate, temporary loan issuance authorized. Ga. L. 1941, p. 21.

Blackshear, City of. — Refunding bonds. Ga. L. 1939, p. 16.

Blue Ridge, City of. — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 15.

Bowden, City of. — Refunding bonds. Ga. L. 1939, p. 18.

Brunswick, City of. — Port facilities, indebtedness to acquire, operate. Ga. L. 1924, p. 33.

Calhoun County. — Refunding bonds. Ga. L. 1941, p. 24.

Carrollton, City of. — Refunding bonds. Ga. L. 1939, p. 21.

Catoosa County. — Refunding bonds. Ga. L. 1941, p. 29.

Chatham County. — Bonds for paving of road to Tybee authorized. Ga. L. 1926, Ex. Sess., p. 22.

Temporary loans. Ga. L. 1927, p. 122.

Chattooga County. — Refunding bonds. Ga. L. 1941, p. 35.

Claxton, City of. — Refunding bonds. Ga. L. 1941, p. 41.

Claxton School District. — Refunding bonds. Ga. L. 1941, p. 39.

Coastal Highway District. — Continuance, bonds. Ga. L. 1924, p. 35; Ga. L. 1939, p. 23.

Cobb County. — Refunding bonds. Ga. L. 1941, p. 43; Ga. L. 1943, p. 11.

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- Cochran, City of.** — Refunding bonds. Ga. L. 1941, p. 48.
- College Park, City of.** — Education, debt, assumption by Fulton County Board of Education. Ga. L. 1939, p. 28.
- Columbus, City of.** — Street improvement bonds. Ga. L. 1927, p. 109.
- Cook County.** — Refunding bonds. Ga. L. 1941, pp. 52, 54.
- Cordele, City of.** — Refunding bonds. Ga. L. 1941, p. 58.
- Cornelia, City of.** — Waterworks system, bonded indebtedness increase authorized. Ga. L. 1929, p. 121.
- Crawford, City of.** — Refunding bonds. Ga. L. 1941, p. 60.
- Crawford School District.** — Refunding bonds. Ga. L. 1941, p. 62.
- Crisp County.** — Water power, electric current bonds authorized. Ga. L. 1925, p. 72.
- Dade County.** — Refunding bonds. Ga. L. 1941, p. 65.
- Davisboro Consolidated School District.** — Refunding bonds. Ga. L. 1941, p. 67.
- DeKalb County.** — Board of education, temporary loans authorized. Ga. L. 1939, p. 83.
- Contracts with City of Atlanta and Fulton County for hospitalization services. Ga. L. 1943, p. 18.
- Dodge County.** — Refunding bonds. Ga. L. 1941, p. 70.
- Doerun, City of.** — Refunding bonds. Ga. L. 1941, p. 73.
- Dublin, City of.** — Refunding bonds. Ga. L. 1937, p. 22; 1937-38, Ex. Sess., p. 22.
- Eastman, City of.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 24.
- East Point, City of.** — Education debt, assumption by Fulton County Board of Education. Ga. L. 1939, p. 28.
- Effingham County.** — Refunding bonds. Ga. L. 1941, p. 75.
- Elberton, City of.** — Electric system bonded increase authorized. Ga. L. 1929, p. 125.
- Evans County.** — Refunding bonds. Ga. L. 1941, p. 78.
- Excelsior Consolidated School District.** — Refunding bonds. Ga. L. 1941, p. 82.
- Fannin County.** — Temporary loans. Ga. L. 1937-38, Ex. Sess., p. 26.
- Floyd County.** — Board of education, temporary loans. Ga. L. 1939, p. 83.
- Fulton County.** — Temporary loans. Ga. L. 1927, p. 122; Ga. L. 1943, p. 26.
- Board of education, temporary loans. Ga. L. 1939, p. 83.
- Contracts with City of Atlanta and Fulton County for hospitalization services. Ga. L. 1943, p. 18.
- Gainesville, City of.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 33; Ga. L. 1941, p. 88.
- Glenwood, Town of.** — Refunding bonds. Ga. L. 1943, p. 31.
- Grady County.** — Refunding bonds. Ga. L. 1939, p. 41.

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- Greenville, City of.** — Refunding bonds. Ga. L. 1939, p. 45.
- Hart County.** — Refunding bonds. Ga. L. 1941, p. 94.
- Hazlehurst, City of.** — Refunding bonds. Ga. L. 1941, p. 98.
- Homerville, City of.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., pp. 35, 37.
- Irwin County.** — Refunding bonds. Ga. L. 1941, pp. 100, 104.
- Jeff Davis County.** — Refunding bonds. Ga. L. 1941, p. 108.
- Jefferson, City of.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 41.
- Jefferson County.** — School District No. 1 refunding bonds. Ga. L. 1941, p. 112.
School District No. 10 refunding bonds. Ga. L. 1941, p. 115.
- Jeffersonville Consolidated School District.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 43.
- Johnson Corner School District.** — Refunding bonds. Ga. L. 1941, p. 117.
- Kite Consolidated School District.** — Refunding bonds. Ga. L. 1939, p. 50.
- LaGrange, City of.** — Waterworks system bonded indebtedness increase authorized. Ga. L. 1927, p. 113.
- Lakeland, City of.** — Lakeland Railway, bonds for acquisition. Ga. L. 1929, p. 130.
- Lexington, City of.** — Refunding bonds. Ga. L. 1941, p. 121.
- Lowndes County.** — Bonds for establishment of educational institution of college rank. Ga. L. 1926, Ex. Sess., p. 25.
- Macon, City of.** — Temporary loans. Ga. L. 1937-38, Ex. Sess., p. 45.
Notes, debt certificates. Ga. L. 1939, p. 52.
Defense certificates. Ga. L. 1941, p. 129.
- McIntosh County.** — Bonds for educational purposes. Ga. L. 1926, Ex. Sess., p. 28.
- Miller County.** — Refunding bonds. Ga. L. 1941, pp. 131, 136.
- Mitchell County.** — Board of education temporary loans. Ga. L. 1941, p. 141.
- Municipalities, 150,000 or more (1910 census).** — Ga. L. 1918, p. 915 (no census); Ga. L. 1920, p. 25 (no census).
- Nashville, City of.** — Refunding bonds. Ga. L. 1939, p. 54.
- Ocilla, City of.** — Refunding bonds. Ga. L. 1939, pp. 56, 58.
- Ogelthorpe County.** — Refunding bonds. Ga. L. 1941, p. 143.
- Paulding County.** — Refunding bonds. Ga. L. 1941, p. 147.
- Pineview-Jamestown Consolidated School District.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 49.
- Quitman, City of.** — Notes, debt certificates. Ga. L. 1939, p. 62.
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- Quitman County.** — Refunding bonds. Ga. L. 1941, p. 151.
- Ray City, City of.** — Refunding bonds. Ga. L. 1939, p. 67; Ga. L. 1943, p. 41.

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- Reidsville, City of.** — Refunding bonds. Ga. L. 1941, p. 155.
- Reidsville School District.** — Refunding bonds. Ga. L. 1939, p. 70.
- Richmond County.** — Temporary loans. Ga. L. 1927, p. 122; Ga. L. 1937, p. 26.
- Sandy Cross Consolidated School District.** — Refunding bonds. Ga. L. 1941, p. 158.
- Savannah, City of.** — Port facility bonds. Ga. L. 1923, p. 45.
Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 51.
Water supply plant, bonds for construction. Ga. L. 1939, p. 72.
Bonds for land acquisition for national defense purposes. Ga. L. 1939, p. 75.
- Spalding County.** — Temporary loans. Ga. L. 1933, p. 29.
- Sparks-Adel Consolidated School District.** — Refunding bonds. Ga. L. 1941, p. 163.
- Sparks, Town of.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 55.
- Stephens County.** — Hospital bonds. Ga. L. 1929, p. 142.
- Stone Mountain, City of.** — Refunding bonds. Ga. L. 1941, p. 166.
- Summerville, City of (Chattooga County).** — Tax for educational purposes. Ga. L. 1943, p. 57.
- Sunny Hill Consolidated School District.** — Refunding bonds. Ga. L. 1941, p. 168.
- Swainsboro, City of.** — Refunding bonds. Ga. L. 1937, p. 34.
- Sylvania, City of.** — Refunding bonds. Ga. L. 1939, p. 81.
- Tift County.** — Hospital, bonds for construction, equipping authorized. Ga. L. 1939, p. 85.
- Toombs County.** — Refunding bonds. Ga. L. 1941, p. 170.
- Unadilla, City of.** — Refunding bonds. Ga. L. 1941, p. 174.
- Valdosta, City of.** — Bonds for establishment of educational institution of college rank authorized. Ga. L. 1926, Ex. Sess., p. 25.
- Vidalia, City of.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 57; Ga. L. 1941, p. 176.
- Walker County.** — Refunding bonds. Ga. L. 1941, p. 178.
- Ware County.** — Bonded indebtedness increase for hospital construction. Ga. L. 1927, p. 124.
- Washington, City of.** — Refunding bonds. Ga. L. 1941, p. 182.
- Washington County.** — Temporary loans. Ga. L. 1929, p. 147.
- Waycross, City of.** — Indebtedness for waterworks system. Ga. L. 1941, p. 184.
- West Point, City of.** — Flood protection bond increase. Ga. L. 1920, p. 29.
- Wilcox County.** — Refunding bonds. Ga. L. 1941, pp. 187, 189.
- Willacoochee, Town of.** — Refunding bonds. Ga. L. 1937-38, Ex. Sess., p. 59.

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Willie Consolidated School District. — Refunding bonds. Ga. L. 1939, p. 88.

Wrightsville Consolidated School District. — Refunding bonds. Ga. L. 1941, p. 193.

Art. VII, Sec. XVIII, Para. I

Hancock County. — Refunding bonds. Ga. L. 1941, p. 93.

Art. VIII, Sec. IV, Para. I

Brantley County. — Tax levy for educational purposes. Ga. L. 1937-38, Ex. Sess., p. 17.

Chatham County. — Tax levy for educational purposes. Ga. L. 1941, p. 33; Ga. L. 1945, p. 99.

Floyd County. — Tax levy for educational purposes. Ga. L. 1937-38, Ex. Sess., p. 30.

Fulton County. — Tax levy for educational purposes. Ga. L. 1945, p. 97.

Pierce County. — Tax levy for educational purposes. Ga. L. 1929, p. 139.

Art. XI, Sec. I

Bibb County. — Public service districts established. Ga. L. 1943, p. 8.

Cobb County. — Fire prevention district authorized, taxation. Ga. L. 1937-38, Ex. Sess., p. 20.

DeKalb County. — Fire prevention, sanitation, water districts authorized, taxation. Ga. L. 1937, p. 20.

Sewerage, water, fire prevention systems, park, hospital establishment authorized. Ga. L. 1941, p. 69.

Floyd County. — Water and sewerage systems authorized, taxation. Ga. L. 1945, p. 110.

Fulton County. — Parks, establishment and maintenance. Ga. L. 1929, p. 135.

Sewerage, water, fire prevention systems, parks authorized. Ga. L. 1929, p. 135.

Glynn County. — Sanitation, fire prevention, police protection, road districts authorized. Ga. L. 1929, p. 137.

McIntosh County. — Sanitation, fire prevention, police protection, road districts authorized. Ga. L. 1929, p. 137.

Art. XI, Sec. I, Para. II

Atkinson County. — Created. Ga. L. 1917, p. 41; Ga. L. 1918, p. 106.

Bacon County. — Created. Ga. L. 1914, p. 23; Ga. L. 1916, p. 17.

Barrow County. — Created. Ga. L. 1914, p. 27.

Ben Hill County. — Created. Ga. L. 1906, p. 28.

Bleckley County. — Created. Ga. L. 1912, p. 38.

Brantley County. — Created. Ga. L. 1920, p. 34.

Candler County. — Created. Ga. L. 1914, p. 29.

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Cook County. — Created. Ga. L. 1918, p. 102.

Evans County. — Created. Ga. L. 1914, p. 33.

Lamar County. — Created. Ga. L. 1920, p. 38.

Lanier County. — Created. Ga. L. 1919, p. 68; Ga. L. 1920, pp. 19, 45.

Long County. — Created. Ga. L. 1920, p. 48.

Peach County. — Created. Ga. L. 1924, p. 39.

Seminole County. — Created. Ga. L. 1920, p. 52.

Treutlen County. — Created. Ga. L. 1917, p. 44.

Wheeler County. — Created. Ga. L. 1912, p. 41.

Art. XI, Sec. I, Para. IIA

Counties with city of more than 52,900 (1920 census). — Ga. L. 1924, p. 811.

Municipalities more than 52,900 (1920 census). — Ga. L. 1924, p. 811.

Art. XI, Sec. III

Fulton County. — Chief clerk, assistant or deputy for certain officers authorized.
Ga. L. 1939, p. 33.

APPENDIX FOUR

CONTINUATION OF CONSTITUTIONAL AMENDMENTS OF LOCAL APPLICATION

This appendix lists those locally applicable amendments to the Constitution of Georgia which have been specifically continued by local law, ordinance, or resolution pursuant to Article XI, Section I, Paragraph IV of the Constitution of Georgia of 1983. Each continued amendment is listed by year of Constitution (1976, 1945, or 1877), by constitutional citation, and alphabetically by locality. The parentheses indicate the Georgia Laws citation of the local law, ordinance, or resolution which continues the local amendment appearing before the parenthetical citation. In those cases where an Act specifically continues not only a local amendment but also an Act based upon the local amendment, both the continued local amendment and the continued Act are listed. (See subsection (c) of Ga. Const. 1983, Art. XI, Sec. I, Para. IV for provisions regarding laws enacted pursuant to local constitutional amendments.) A complete listing of those local constitutional amendments which were continued by the 1983 Constitution may be found in Appendices One, Two, and Three in this volume. Except as otherwise provided in subsection (d) of Ga. Const. 1983, Art. XI, Sec. I, Para. IV, all local amendments will stand repealed on July 1, 1987, unless specifically continued by local law, ordinance, or resolution.

1976 CONSTITUTION

Art. I, Sec. II, Para. VII

Floyd County. — Juvenile court judge appointment, election. Ga. L. 1980, p. 2200. (Ga. L. 1987, p. 3520.)

Art. VI, Sec. IX

Chatham County. — Recorder's court, pleas of guilty and nolo contendere. Ga. L. 1980, p. 2209. (Ga. L. 1985, p. 4150.)

Art. VII

Savannah, City of. — Bond issue without referendum. Ga. L. 1977, p. 1583. (Ga. L. 1986, p. 4199.)

Art. VII, Sec. I, Para. II

Fulton County. — Retirement system benefits increase. Ga. L. 1978, p. 2383. (Ga. L. 1986, p. 4041.)

Houston County. — Ad valorem tax for educational purposes. Ga. L. 1982, p. 2601. (Ga. L. 1986, p. 4209.)

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Richmond County. — Taxing power of local taxing jurisdictions limited. Ga. L. 1980, p. 2177. (Ga. L. 1983, p. 3870.)

Art. VII, Sec. I, Para. III

Atlanta, City of. — Exemption of real property located in urban enterprise zones from ad valorem taxes. Ga. L. 1982, p. 2647. (Ga. L. 1986, p. 4424.)

Columbus, Georgia. — Valuation of homestead property. Ga. L. 1981, p. 1926. (Resolution specifically applies to Muscogee County; but see Ga. L. 1971, Ex. Sess., p. 2007 for consolidation of City of Columbus and Muscogee County into single political entity known as "Columbus, Georgia. ") (Ga. L. 1986, p. 3800.)

Fulton County. — Exemption of real property located in urban enterprise zones from ad valorem taxes. Ga. L. 1982, p. 2647. (Ga. L. 1986, p. 4424.)

Art. VII, Sec. I, Para. IV

Atlanta, City of. — Urban enterprise zones — Exemption of inventories of certain goods from ad valorem taxes. Ga. L. 1982, p. 2645. (Ga. L. 1986, p. 4426.)

Augusta, City of. — Exemption of capital improvements of commercial and business establishments from ad valorem taxes. Ga. L. 1982, p. 2616. (Ga. L. 1983, p. 4108.)

Austell, City of. — Tax discount. Ga. L. 1977, p. 1609. (Ga. L. 1986, p. 4389.)

Homestead exemption. Ga. L. 1980, p. 2121. (Ga. L. 1986, pp. 4384, 4414.)

Homestead exemption for aged. Ga. L. 1977, p. 1610 (Act states it is amending "Art. VII, Sec. I, Para. 17 "). (Ga. L. 1986, p. 4391.)

Bowdon, City of. — Homestead exemption. Ga. L. 1977, p. 1602. (Ga. L. 1985, p. 4814.)

Cabbagetown Historic District. — Exemption of certain improved property from taxation. Ga. L. 1982, p. 2509. (Ga. L. 1984, p. 4595.)

Carrollton, City of. — Homestead exemption. Ga. L. 1977, p. 1596. (Ga. L. 1987, p. 5154.)

Chatham County. — Homestead exemption for aged or disabled. Ga. L. 1978, p. 2373. (Ga. L. 1986, p. 4219.)

Homestead exemption for aged from taxation for educational purposes. Ga. L. 1981, p. 1917. (Ga. L. 1986, p. 4354.)

Clarkesville, City of. — Homestead exemption for aged. Ga. L. 1978, p. 2354. (Ga. L. 1985, p. 4208.)

Dalton, City of. — Homestead exemption for aged or disabled. Ga. L. 1980, p. 2223. (Ga. L. 1987, p. 3709.)

DeKalb County. — Tax exemption for improvements to real property. Ga. L. 1978, p. 2378. (Ga. L. 1987, p. 3792.)

Fulton County. — Homestead exemption for aged or disabled. Ga. L. 1977, p. 1574; Ga. L. 1978, p. 2367. (Ga. L. 1986, p. 4434.)

Glynn County. — Homestead exemption for aged or disabled. Ga. L. 1979, p. 1849. (Ga. L. 1987, p. 3728.)

Habersham County. — Homestead exemption for aged or disabled from taxation for educational purposes. Ga. L. 1980, p. 2283. (Ga. L. 1986, p. 3807.)

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Henry County. — Exemption of capital improvements of manufacturing establishments from ad valorem taxes. Ga. L. 1982, p. 2609. (Ga. L. 1985, p. 5171.)

Jefferson County. — Discount for early payment of ad valorem taxes. Ga. L. 1982, p. 2588. (Ga. L. 1986, p. 4404.)

Lowndes County. — Homestead exemption for aged, other residents. Ga. L. 1980, p. 2207. (Ga. L. 1985, p. 3655.)

Macon, City of. — Tax preferences for improved residential property. Ga. L. 1980, p. 2092. (Ga. L. 1986, p. 5002.)

Monroe County. — Homestead exemption for aged, other residents. Ga. L. 1980, p. 2216. (Ga. L. 1987, p. 3823.)

Muscogee County. — Homestead exemption adjustment. Ga. L. 1980, p. 2009. (Ga. L. 1986, p. 3798.)

Richmond County. — Discounts by local taxing jurisdictions for early payment of taxes. Ga. L. 1980, p. 2162. (Ga. L. 1987, p. 3788.)

Screven County. — Exemption of capital improvements of new manufacturing establishments from ad valorem taxes. Ga. L. 1982, p. 2635. (Ga. L. 1986, p. 5697.)

Smyrna, City of. — Homestead exemption for aged. Ga. L. 1979, p. 1844. (Ga. L. 1986, p. 5525.)

Trion, Town of. — Homestead exemption for aged. Ga. L. 1980, p. 2198. (Ga. L. 1985, p. 4967.)

Valdosta, City of. — Homestead exemption for aged, other residents. Ga. L. 1980, p. 2273. (Ga. L. 1985, p. 3653.)

Whitfield County. — Homestead exemption. Ga. L. 1982, p. 2576. (Ga. L. 1987, p. 3711.)

Art. VII, Sec. II, Para. IV

Bibb County. — Homestead exemption for nonprofit cooperative housing. Ga. L. 1978, p. 2360. (Ga. L. 1988, p. 5094.)

Art. VIII, Sec. V, Para. I

Spalding County. — Election of Griffin-Spalding County board of education. Ga. L. 1982, p. 2680. (Ga. L. 1987, p. 3545.)

Art. VIII, Sec. V, Para. II

Jackson County. — Board of education election, school superintendent appointment. Ga. L. 1980, p. 2276. (Ga. L. 1986, p. 5061.)

Pulaski County. — Election of board of education. Ga. L. 1982, p. 2664; Ga. L. 1987, p. 4241. (Ga. L. 1987, pp. 3618, 4241.)

Art. VIII, Sec. V, Para. VII

Chatham County. — Chatham County and City of Savannah School System, constitutional exemption. Ga. L. 1978, p. 2351. (Ga. L. 1987, p. 4607.)

Savannah, City of. — Chatham County and City of Savannah School System, constitutional exemption. Ga. L. 1978, p. 2351. (Ga. L. 1987, p. 4607.)

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Art. VIII, Sec. VII, Para. I

Chattooga County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2675. (Ga. L. 1985, p. 4447.)

Habersham County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2566. (Ga. L. 1984, p. 4123.)

Mitchell County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2643. (Ga. L. 1985, p. 3719.)

Rabun County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2522. (Ga. L. 1984, p. 3866.)

Towns County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2540. (Ga. L. 1984, p. 3793.)

Trion, City of. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2675. (Ga. L. 1985, p. 4447.)

Art. IX

DeKalb County. — Recorder's court jurisdiction over animal offenses. Ga. L. 1980, p. 2125. (Ga. L. 1985, p. 4277.)

Art. IX, Sec. I, Para. I

Lowndes County. — Road, street improvement authorized. Ga. L. 1978, p. 2446. (Ga. L. 1985, p. 3657.)

Art. IX, Sec. I, Para. V

Fulton County. — Branch offices for county business authorized. Ga. L. 1978, p. 2426. (Ga. L. 1986, p. 4043.)

Art. IX, Sec. I, Para. VI

Monroe County. — Grand jury arbitration powers. Ga. L. 1978, p. 2345. (Ga. L. 1986, p. 4150.)

Pike County. — Tax returns to board of tax assessors. Ga. L. 1987, p. 2405. (Ga. L. 1987, p. 4829.)

Ware County. — County manager authorized. Ga. L. 1982, p. 2563. (Ga. L. 1986, p. 3679.)

Art. IX, Sec. I, Para. VII

DeKalb County. — Medical examiner authorized. Ga. L. 1980, p. 2106. (Ga. L. 1985, p. 3800.)

Art. IX, Sec. II

DeKalb County. — Government, General Assembly powers relative to. Ga. L. 1978, p. 2370. (Ga. L. 1987, p. 4817.)

Art. IX, Sec. II, Para. I

Spalding County. — Ordinances and regulations, power to adopt, enforce. Ga. L. 1978, p. 2315. (Ga. L. 1987, p. 3689.)

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Art. IX, Sec. IV, Para. II

College Park, City of. — College Park Business and Industrial Development Authority established. Ga. L. 1980, p. 2071. (Ga. L. 1985, p. 5311.)

Columbus, Georgia. — Charter review commission, establishment. Ga. L. 1980, p. 2045. (Ga. L. 1986, p. 3805.)

Counties of 550,000 or more (1980 census). — Countywide public library service or system. Ga. L. 1982, p. 2547. (Ga. L. 1986, p. 4832.)

DeKalb County. — Municipalities designated special services tax districts. Ga. L. 1978, p. 2468. (Ga. L. 1986, p. 4615.)

Fulton County. — Industrial district established. Ga. L. 1979, p. 1797. (Ga. L. 1983, p. 4077; Ga. L. 1986, p. 4438.)

Tax for educational purposes restricted. Ga. L. 1979, p. 1797. (Ga. L. 1986, p. 4438.)

Hapeville, City of. — Hapeville Development Authority established. Ga. L. 1982, p. 2524. (Ga. L. 1987, p. 4961.)

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Barnesville, City of. — City of Barnesville and County of Lamar Development Authority, property conveyance. Ga. L. 1977, p. 1565. (Ga. L. 1987, p. 3730.)

Bibb County. — Macon-Bibb County Urban Development Authority bonds. Ga. L. 1980, p. 2128. (Ga. L. 1985, p. 5269; Ga. L. 1986, p. 4698.)

Bulloch County. — Allocation and reduction of local sales and use tax for educational purposes. Ga. L. 1981, p. 1931. (Ga. L. 1984, p. 4013.)

Colquitt County. — Allocation of tax revenues to school systems. Ga. L. 1980, p. 2127. (Declared ratified by superior court decree. Continued by Ga. L. 1983, p. 3753.)

Houston County. — Sales and use tax for educational purposes. Ga. L. 1982, p. 2600. (Ga. L. 1986, p. 4715.)

Lamar County. — City of Barnesville and County of Lamar Development Authority, property conveyance. Ga. L. 1977, p. 1565. (Ga. L. 1987, p. 3730.)

Liberty County. — Liberty County Industrial Authority membership. Ga. L. 1980, p. 2221. (Ga. L. 1984, p. 3873.)

Macon, City of. — Macon-Bibb County Urban Development Authority bonds. Ga. L. 1980, p. 2128. (Ga. L. 1985, p. 5269; Ga. L. 1986, p. 4698.)

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Banks County. — Business licensing taxation. Ga. L. 1979, p. 1843. (Ga. L. 1986, p. 5365.)

Fulton County. — Grants to municipalities for recreational programs. Ga. L. 1982, p. 2504. (Ga. L. 1986, p. 4436.)

Lowndes County. — Business license fees and taxes. Ga. L. 1982, p. 2593. (Ga. L. 1985, p. 3651.)

Paulding County. — Civil service system authorized. Ga. L. 1976, p. 2431. (Ga. L. 1987, p. 3578.)

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Clarke County. — Employee merit system authorized. Ga. L. 1980, p. 2305. (Ga. L. 1987, p. 3633.)

DeKalb County. — Educational tax restriction. Ga. L. 1977, p. 1606. (Ga. L. 1985, p. 4080.)

Habersham County. — Alcoholic beverage taxation, proceeds for educational purposes. Ga. L. 1980, p. 2280. (Ga. L. 1984, p. 4173.)

Spalding County. — Sales and use tax to finance public facilities. Ga. L. 1982, p. 2677. (Ga. L. 1987, p. 3696.)

Whitfield County. — Employment and personnel administration merit system. Ga. L. 1982, p. 2595. (Ga. L. 1988, p. 5066.)

Art. IX, Sec. VII, Para. I

Griffin, City of. — Griffin Development Authority established. Ga. L. 1980, p. 2315. (Ga. L. 1986, p. 3915.)

Statesboro, City of. — Downtown Statesboro Development Authority authorized. Ga. L. 1979, p. 1841. (Ga. L. 1986, p. 4655.)

Art. IX, Sec. VIII, Para. I

Atlanta, City of. — Parking facilities bonds. Ga. L. 1980, p. 2112. (Ga. L. 1986, p. 4830.)

Bibb County. — Macon-Bibb County Urban Development Authority bonds. Ga. L. 1980, p. 2128. (Ga. L. 1985, p. 5269; Ga. L. 1986, p. 4698.)

Gainesville, City of. — Gainesville Redevelopment Authority authorized. Ga. L. 1980, p. 2024. (Ga. L. 1987, p. 3637.)

Macon, City of. — Macon-Bibb County Urban Development Authority bonds. Ga. L. 1980, p. 2128. (Ga. L. 1985, p. 5269; Ga. L. 1986, p. 4698.)

Richmond County. — Garbage disposal facilities authorized. Ga. L. 1978, p. 2355. (Ga. L. 1986, p. 4483.)

Art. IX, Sec. VIII, Para. II

Acworth, City of. — Acworth Downtown Development Authority established. Ga. L. 1980, p. 2134. (Ga. L. 1986, p. 4386.)

Bainbridge, City of. — Downtown Bainbridge Development Authority authorized. Ga. L. 1979, p. 1806. (Ga. L. 1985, p. 3930.)

Dalton, City of. — Downtown Dalton Development Authority authorized. Ga. L. 1980, p. 2119. (Ga. L. 1986, p. 3881.)

Powder Springs, City of. — Powder Springs Downtown Development Authority established. Ga. L. 1980, p. 2035. (Ga. L. 1986, p. 4513; Ga. L. 1987, p. 4199.)

Powder Springs Downtown Development Authority — Modification of authority. Ga. L. 1982, p. 2505. (Ga. L. 1987, p. 4199.)

West Point, City of. — Downtown West Point Development Authority authorized. Ga. L. 1978, p. 2331. (Ga. L. 1987, p. 3592.)

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Art. XI

Lowndes County. — Itinerant business regulation. Ga. L. 1978, p. 2333. (Ga. L. 1985, p. 3659.)

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Art. I, Sec. I

Jackson County. — Law enforcement powers of certain state agencies relative to felonies. Ga. L. 1974, p. 1689. (Ga. L. 1986, p. 4704.)

Art. I, Sec. IV, Para. I

Bibb County. — Acts subsequent to 1940 census validated. Ga. L. 1950, p. 434. (Ga. L. 1988, p. 5108.)

Art. II, Sec. I, Para. VI

Fulton County. — Medical examiner's office established. Ga. L. 1964, p. 872. (Ga. L. 1986, p. 4031.)

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Carrollton, City of. — Carrollton Payroll Development Authority established. Ga. L. 1962, p. 1135. (Ga. L. 1985, p. 3987.)

Ware County. — Waycross and Ware County Development Authority established. Ga. L. 1953, Nov.-Dec. Sess., p. 266. (Ga. L. 1986, p. 4379.)

Waycross, City of. — Waycross and Ware County Development Authority established. Ga. L. 1953, Nov.-Dec. Sess., p. 266. (Ga. L. 1986, p. 4379.)

Art. V, Sec. VI, Para. I

Columbus, Georgia. — Columbus Airport Commission established. Ga. L. 1968, p. 1655. (Ga. L. 1986, p. 3776.)

Muscogee County. — Muscogee County Airport Commission established. Ga. L. 1968, p. 1655. (Ga. L. 1986, p. 3776.)

Savannah, City of. — Airport commission established. Ga. L. 1950, p. 439. (Ga. L. 1986, p. 4203.)

Art. V, Sec. IX

Americus, City of. — Americus-Sumter Payroll Development Authority established. Ga. L. 1962, p. 933. (Ga. L. 1987, pp. 3550, 5506, 5575.)

Bacon County. — Bacon Industrial Building Authority established. Ga. L. 1962, p. 849. (Ga. L. 1987, p. 3815.)

Banks County. — Banks County Industrial Building Authority established. Ga. L. 1962, p. 939. (Ga. L. 1987, p. 5277.)

Barrow County. — Winder-Barrow Industrial Building Authority established. Ga. L. 1962, p. 1027; Ga. L. 1964, Ex. Sess., p. 376. (Ga. L. 1987, p. 3525.)

Berrien County. — Berrien County Industrial Building Authority established. Ga. L. 1962, p. 819. (Ga. L. 1986, p. 3877.)

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Bleckley County. — Bleckley-Cochran Industrial Development Authority established. Ga. L. 1966, p. 1042. (Ga. L. 1987, p. 3558.)

Candler County. — Candler County Industrial Authority established. Ga. L. 1962, p. 922. (Ga. L. 1987, p. 3734.)

Cochran, City of. — Bleckley-Cochran Industrial Development Authority established. Ga. L. 1966, p. 1042. (Ga. L. 1987, p. 3558.)

Dawson County. — Dawson County Industrial Building Authority established. Ga. L. 1962, p. 1143. (Ga. L. 1985, p. 4117.)

Franklin County. — Franklin County Industrial Building Authority established. Ga. L. 1962, p. 1103. (Ga. L. 1985, p. 5186; Ga. L. 1987, p. 3582.)

Greene County. — Greene County Development Authority established. Ga. L. 1962, p. 985. (Ga. L. 1985, p. 4246.)

Griffin, City of. — Griffin Industrial Building Authority established. Ga. L. 1962, p. 945; Ga. L. 1978, p. 4151; Ga. L. 1981, p. 4875; Ga. L. 1983, p. 3834. (Ga. L. 1985, p. 3845.)

Gwinnett County. — Gwinnett Industrial Building Authority established. Ga. L. 1962, p. 927. (Ga. L. 1986, p. 4549.)

Hart County. — Hart County Industrial Building Authority established. Ga. L. 1963, p. 697. (Ga. L. 1985, p. 4453.)

Houston County. — Houston County Development Authority established. Ga. L. 1964, p. 1055. (Ga. L. 1985, p. 4873.)

Jasper County. — Jasper County Industrial Development Authority established. Ga. L. 1968, p. 1550. (Ga. L. 1986, p. 4155.)

Macon County. — Macon County Industrial Building Authority established. Ga. L. 1962, p. 770. (Ga. L. 1985, p. 3843.)

Monroe County. — Monroe County Industrial Development Authority established. Ga. L. 1966, p. 755. (Ga. L. 1986, p. 4584.)

Oconee County. — Oconee County Industrial Development Authority established. Ga. L. 1962, p. 871; Ga. L. 1977, p. 1582. (P.L. 1987, pp. 3562, 5501.)

Paulding County. — Paulding County Industrial Building Authority established. Ga. L. 1962, p. 1176. (Ga. L. 1986, p. 5690; Ga. L. 1987, p. 3576.)

Perry, City of. — City of Perry Industrial Building Authority established. Ga. L. 1962, p. 1082. (Ga. L. 1986, p. 4194.)

Randolph County. — Randolph County Development Authority established. Ga. L. 1962, p. 834. (Ga. L. 1986, p. 3855.)

Sumter County. — Americus-Sumter Payroll Development Authority established. Ga. L. 1962, p. 933. (Ga. L. 1987, pp. 3550, 5506, 5575.)

Walton County. — Walton Industrial Building Authority established. Ga. L. 1962, p. 904. (Ga. L. 1986, p. 4730.)

Washington, City of. — Washington Wilkes Payroll Development Authority established. Ga. L. 1962, p. 847. (Ga. L. 1987, p. 3606.)

Wayne County. — Wayne County Industrial Development Authority established. Ga. L. 1964, p. 1002. (Ga. L. 1987, p. 3805.)

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Wilkes County. — Washington Wilkes Payroll Development Authority established. Ga. L. 1962, p. 847. (Ga. L. 1987, p. 3606.)

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Albany, City of. — Albany Dougherty Payroll Development Authority established. Ga. L. 1958, p. 444. (Ga. L. 1985, p. 3904.)

Brunswick, City of. — Brunswick and Glynn County Development Authority established. Ga. L. 1962, p. 810. (Ga. L. 1987, p. 3659.)

Cedartown, City of. — Cedartown Development Authority established. Ga. L. 1962, p. 888. (Ga. L. 1985, p. 5341; Ga. L. 1986, p. 5070.)

Clarkesville, City of. — Clarkesville Industrial Building Authority established. Ga. L. 1962, p. 898. (Ga. L. 1985, p. 4212.)

Dougherty County. — Albany Dougherty Payroll Development Authority established. Ga. L. 1958, p. 444. (Ga. L. 1985, p. 3904.)

Evans County. — Evans County Industrial Development Authority established. Ga. L. 1968, p. 1556. (Ga. L. 1985, p. 4232.)

Glynn County. — Brunswick and Glynn County Development Authority established. Ga. L. 1962, p. 810. (Ga. L. 1987, p. 3659.)

Habersham County. — Habersham County Industrial Development Authority established. Ga. L. 1964, p. 876. (Ga. L. 1985, p. 4207.)

Henry County. — Henry County Development Authority established. Ga. L. 1966, p. 853. (Ga. L. 1985, p. 3831.)

Rockmart, City of. — Rockmart Development Authority established. Ga. L. 1963, p. 676. (Ga. L. 1986, p. 5488.)

White County. — White County Industrial Building Authority established. Ga. L. 1962, p. 1046. (Ga. L. 1985, p. 4565.)

Art. VI, Sec. I

Chatham County. — Ordinances, regulations, licensing; recorder's court. Ga. L. 1952, p. 617. (Ga. L. 1986, p. 4560.)

Clayton County. — Ordinance and regulation powers. Ga. L. 1963, p. 683. (Ga. L. 1986, p. 5011.)

DeKalb County. — Ordinances, regulations, business licenses, recorder's court authorized. Ga. L. 1958, p. 582. (Ga. L. 1985, p. 4279.)

Buses, licensing and taxation of businesses operating. Ga. L. 1962, p. 1133. (Ga. L. 1985, p. 4279.)

Fulton County. — Ordinances, regulations for unincorporated areas. Ga. L. 1976, p. 1880. (Ga. L. 1986, p. 4027.)

Glynn County. — Business licensing and regulation. Ga. L. 1971, p. 975. (Ga. L. 1987, p. 3612.)

Gwinnett County. — Business regulation, franchising of certain services. Ga. L. 1974, p. 1807. (Ga. L. 1986, p. 4624.)

Regulation of roads, streets. Ga. L. 1974, p. 1803. (Ga. L. 1986, p. 5359.)

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Art. VI, Sec. I, Para. III

Municipalities, more than 300,000 (1960 census). — Ga. L. 1967, p. 963. (Ga. L. 1986, p. 4820.)

Art. VI, Sec. V, Para. I

Eastern Judicial Circuit. — Judge pro hac vice authorized. Ga. L. 1950, p. 451. (Ga. L. 1986, p. 4357.)

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Echols County. — Probate court judge designated county court judge. Ga. L. 1976, p. 1821. (Ga. L. 1987, p. 3829.)

Art. VI, Sec. IX

Chatham County. — Recorder's court abolished, succeeded by Recorder's Court of City of Savannah, to be known as Recorder's Court of Chatham County. Ga. L. 1972, p. 1493. (Ga. L. 1985, p. 4658.)

Art. VI, Sec. IX, Para. I

Houston County. — Special court authorized. Ga. L. 1968, p. 1805. (Ga. L. 1985, p. 4871.)

Art. VI, Sec. XVII, Para. I

Bibb County. — Building codes and permits. Ga. L. 1953, Nov.-Dec. Sess., p. 491. (Ga. L. 1988, p. 5112.)

Legislative powers over traffic and police powers. Ga. L. 1953, Nov.-Dec. Sess., p. 526. (Ga. L. 1988, p. 5117.)

Catoosa County. — Tax administrators board established. Ga. L. 1958, p. 592. (Ga. L. 1987, p. 3796.)

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Atlanta, City of. — Debt limitation increased. Ga. L. 1956, p. 360. (Ga. L. 1986, p. 4816.)

School bond issue without referendum. Ga. L. 1968, pp. 1582, 1589. (Ga. L. 1986, pp. 4564, 4822.)

Bond issue for other than school purposes without referendum, limitation. Ga. L. 1968, p. 1586. (Ga. L. 1986, p. 4824.)

Tax levy for payment of certain bonds. Ga. L. 1976, p. 1869. (Ga. L. 1986, p. 4828.)

Fulton County. — General Assembly tax administration powers. Ga. L. 1951, p. 874. (Ga. L. 1986, p. 4432.)

Hall County. — General Assembly powers relative to tax system. Ga. L. 1974, p. 1735. (Ga. L. 1986, p. 4321.)

Newton County. — General Assembly powers relative to tax system. Ga. L. 1975, p. 1684. (Ga. L. 1986, p. 4568.)

Savannah, City of. — Street and drainage improvement, bond issue without referendum. Ga. L. 1972, p. 1521. (Ga. L. 1986, p. 4837.)

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DeKalb County. — Payment of claims against county. Ga. L. 1976, p. 1825. (Ga. L. 1985, p. 5006.)

Art. VII, Sec. I, Para. III

Athens, City of. — Taxation other than property tax authorized. Ga. L. 1968, p. 1822. (Ga. L. 1987, p. 3631.)

Bibb County. — Regulatory, licensing, and taxation powers of governing authority. Ga. L. 1961, p. 611. (Ga. L. 1988, p. 5129.)

Chatham County. — Tax returns. Ga. L. 1971, p. 964. (Ga. L. 1986, p. 4217.)

Clarke County. — Taxation other than property tax authorized. Ga. L. 1968, p. 1822. (Ga. L. 1987, p. 3631.)

Art. VII, Sec. I, Para. IV

Auburn, Town of. — Homestead exemption. Ga. L. 1975, p. 1680. (Ga. L. 1987, p. 5263.)

Bibb County. — Ad valorem tax exemption for certain harvested agricultural products. Ga. L. 1974, p. 1706. (Ga. L. 1988, p. 5149.)

Cartersville, City of. — Homestead exemption for aged or disabled. Ga. L. 1971, p. 952. (Ga. L. 1988, p. 5365.)

Columbus, Georgia. — Tax exemption for development incentive. Ga. L. 1975, p. 1724. (Ga. L. 1986, p. 3803.)

Coweta County. — Tax exemption for development incentive. Ga. L. 1975, p. 1700. (Ga. L. 1985, p. 3921.)

Fulton County. — Homestead exemption for nonprofit cooperative housing corporations. Ga. L. 1976, p. 1864. (Ga. L. 1986, p. 4448.)

Glynn County. — Homestead exemption from taxation for educational purposes. Ga. L. 1956, p. 253. (Ga. L. 1987, p. 3610.)

Tax exemption for certain in-transit or stored property. Ga. L. 1976, p. 1890. (Ga. L. 1987, p. 3614.)

Henry County. — Tax exemption for certain in-transit or stored property. Ga. L. 1976, p. 1900. (Ga. L. 1985, p. 3938; Ga. L. 1985, p. 5178.)

Jeff Davis County. — Tax exemptions for new industry, business. Ga. L. 1963, p. 674. (Ga. L. 1987, p. 5265.)

Lowndes County. — Tax exemption for historical property owned by nonprofit organizations. Ga. L. 1975, p. 1702. (Ga. L. 1985, p. 3661.)

Muscogee County. — Homestead exemption for aged from taxation for educational purposes. Ga. L. 1974, p. 1676. (Ga. L. 1986, p. 3794.)

Homestead exemption for aged, other residents. Ga. L. 1976, p. 1913. (Ga. L. 1986, p. 3796.)

Norcross, City of. — Homestead exemption for aged. Ga. L. 1974, p. 1691. (Ga. L. 1987, p. 3641.)

Richmond County. — Tax exemption for capital improvements of new manufacturing establishments. Ga. L. 1974, p. 1709. (Ga. L. 1983, p. 4143.)

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Smyrna, City of. — Homestead exemption for disabled. Ga. L. 1976, p. 1929. (Ga. L. 1986, p. 5523.)

Sugar Hill, City of. — Homestead exemption for aged or disabled. Ga. L. 1974, p. 1722. (Ga. L. 1977, p. 5279.)

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Chatham County. — General Hospital Authority of West Chatham County established. Ga. L. 1974, p. 1772. (Ga. L. 1986, p. 4532.)

Forsyth County. — Civil service system authorized. Ga. L. 1976, p. 1796. (Ga. L. 1986, p. 4573.)

Art. VII, Sec. IV, Para. I

Bacon County. — Industry, tax to promote. Ga. L. 1953, Jan.-Feb. Sess., p. 409. (Ga. L. 1987, p. 3813.)

Bibb County. — Civil service system established. Ga. L. 1955, p. 682. (Ga. L. 1988, p. 5122.)

Employee life and health insurance. Ga. L. 1966, p. 835. (Ga. L. 1988, p. 5139.)

Street and road construction and maintenance authorized. Ga. L. 1962, p. 1112. (Ga. L. 1988, p. 5135.)

Chattahoochee County. — Business regulation, licensing. Ga. L. 1966, p. 1063. (Ga. L. 1986, p. 4315.)

Clayton County. — Civil service system authorized. Ga. L. 1963, p. 681. (Ga. L. 1986, p. 5573.)

Cobb County. — Civil service system authorized. Ga. L. 1963, p. 685. (Ga. L. 1986, p. 4505.)

Business regulation, licensing. Ga. L. 1964, p. 1024. (Ga. L. 1986, p. 5450.)

Colquitt County. — Business regulation, licensing. Ga. L. 1958, p. 567. (Ga. L. 1985, p. 4433.)

DeKalb County. — Civil service system and merit system. Ga. L. 1949, p. 2137. (Ga. L. 1985, p. 3771.)

Sanitation districts, service charges for garbage disposal facilities. Ga. L. 1966, p. 828. (Ga. L. 1985, p. 3712.)

Dodge County. — Dodge County-Eastman Development Authority established. Ga. L. 1968, p. 1693. (Ga. L. 1986, p. 4534.)

Dougherty County. — Garbage collection, exclusive franchises authorized. Ga. L. 1974, p. 1770. (Ga. L. 1987, p. 3833.)

Eastman, City of. — Dodge County-Eastman Development Authority established. Ga. L. 1968, p. 1693. (Ga. L. 1986, p. 4534.)

Fulton County. — Retirement system for officers and employees. Ga. L. 1947, p. 1749. (Ga. L. 1986, p. 4039.)

Garbage disposal system established, tax assessment. Ga. L. 1947, p. 1757. (Ga. L. 1986, p. 4454.)

Civil service system extension. Ga. L. 1947, p. 1776. (Ga. L. 1986, p. 4452.)

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Gwinnett County. — Garbage disposal system authorized. Ga. L. 1972, p. 1435. (Ga. L. 1986, p. 4547.)

Hall County. — Fire prevention districts established, tax levy authorized. Ga. L. 1960, p. 1303. (Ga. L. 1987, p. 3661.)

Civil service system authorized. Ga. L. 1967, p. 968. (Ga. L. 1986, p. 4324.)

Business regulation, taxation, licensing. Ga. L. 1970, p. 1032. (Ga. L. 1986, p. 5344.)

Lee County. — Business regulation, licensing. Ga. L. 1972, p. 1560. (Ga. L. 1987, p. 3698.)

Morgan County. — Industry, commerce, tax to promote. Ga. L. 1960, p. 1217. (Ga. L. 1987, p. 3560.)

Muscogee County. — Industry, agriculture, historic and recreational facilities, tax to promote. Ga. L. 1962, p. 840. (Ga. L. 1986, p. 3788.)

Richmond County. — Business licensing, taxation. Ga. L. 1970, p. 1099. (Ga. L. 1985, p. 4138.)

Spalding County. — Water districts authorized outside municipalities. Ga. L. 1960, p. 1390. (Ga. L. 1987, p. 3541.)

Business regulation, licensing. Ga. L. 1976, pp. 1771, 1810. (Ga. L. 1987, p. 3693.)

Stewart County. — Electrical power system authorized. Ga. L. 1960, p. 1249. (Ga. L. 1986, p. 3861.)

Bridge across Chattahoochee River, authority to construct. Ga. L. 1960, p. 1251. (Ga. L. 1986, p. 3863.)

Natural gas system authorized. Ga. L. 1962, p. 864. (Ga. L. 1986, p. 3865.)

Tift County. — Taxation for development authority fund. Ga. L. 1965, p. 736. (Ga. L. 1987, p. 3535.)

Troup County. — Business licensing authorized. Ga. L. 1972, p. 1367. (Ga. L. 1987, p. 3782.)

Wayne County. — Industrial development tax authorized. Ga. L. 1976, p. 1892. (Ga. L. 1985, p. 4589.)

Art. VII, Sec. IV, Para. II

Chatham County. — Street, sidewalk, curbing construction. Ga. L. 1955, p. 665. (Ga. L. 1986, p. 4214.)

Chattahoochee County. — Sheriff, fee system abolished, salary provided. Ga. L. 1972, p. 1372. (Ga. L. 1986, p. 4319.)

Cherokee County. — Fire protection and sewerage districts authorized. Ga. L. 1968, p. 1743. (Ga. L. 1987, p. 3568.)

DeKalb County. — Street improvement, assessment. Ga. L. 1949, p. 2121. (Ga. L. 1985, p. 3728.)

Gwinnett County. — Fire protection, sewerage districts authorized. Ga. L. 1966, p. 856. (Ga. L. 1986, p. 4554.)

Merit system established. Ga. L. 1968, p. 1884. (Ga. L. 1986, p. 4621.)

Henry County. — Water and sewerage taxation. Ga. L. 1968, p. 1739. (Ga. L. 1985, p. 3940; Ga. L. 1985, p. 5159.)

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Art. VII, Sec. IV, Para. III

Fulton County. — Service districts authorized. Ga. L. 1972, p. 1481. (Ga. L. 1986, p. 4430.)

Jackson County. — West Jackson Fire District established. Ga. L. 1970, p. 1104; Ga. L. 1972, p. 1510. (Ga. L. 1986, p. 4661.)

Newton County. — Sewerage, water, sanitation, garbage collection, landfill, fire protection districts authorized. Ga. L. 1971, p. 942. (Ga. L. 1986, p. 4571.)

Paulding County. — Fire protection districts authorized. Ga. L. 1972, p. 1442. (Ga. L. 1987, p. 3724.)

Spalding County. — Fire protection districts authorized. Ga. L. 1968, p. 1704. (Ga. L. 1987, p. 3691.)

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Adairsville, City of. — Adairsville Development Authority established. Ga. L. 1966, p. 912. (Ga. L. 1986, p. 4696.)

Ashburn, City of. — Industrial promotion tax authorized. Ga. L. 1955, p. 721. (Ga. L. 1985, p. 4148.)

Athens, City of. — Athens-Clarke County Industrial Development Authority established. Ga. L. 1960, p. 1379. (Ga. L. 1985, p. 4134.)

Barnesville, City of. — City of Barnesville and County of Lamar Development Authority established. Ga. L. 1964, Ex. Sess., p. 224. (Ga. L. 1987, p. 3730.)

Ben Hill County. — Fitzgerald and Ben Hill County Development Authority established. Ga. L. 1962, p. 1011; Ga. L. 1963, p. 2003; Ga. L. 1981, p. 3957. (Ga. L. 1985, p. 5190; Ga. L. 1985, p. 5326; Ga. L. 1987, p. 3529.)

Bibb County. — Macon-Bibb County Industrial Authority establishment Act ratified. Ga. L. 1962, p. 885. (Ga. L. 1985, p. 5168; Ga. L. 1985, p. 5274; Ga. L. 1986, p. 4685.)

Macon-Bibb County Urban Development Authority establishment ratified, appropriation, powers. Ga. L. 1974, p. 1754. (Ga. L. 1985, p. 5269; Ga. L. 1986, p. 4698.)

Macon-Bibb County Urban Development Authority, leases, contracts, bonds. Ga. L. 1976, p. 1827. (Ga. L. 1985, p. 5269; Ga. L. 1986, p. 4698.)

Brooks County. — Brooks County Development Authority established. Ga. L. 1966, p. 870. (Ga. L. 1986, p. 4739.)

Calhoun, City of. — Appropriation to Hand Up, Inc. Ga. L. 1973, p. 1505. (Ga. L. 1987, p. 3590.)

Camden County. — Board of education election. Ga. L. 1961, p. 597. (Ga. L. 1986, p. 4363.) Repealed (Ga. L. 1987, p. 4943.)

Cartersville, City of. — Cartersville Development Authority established. Ga. L. 1962, p. 1021. (Ga. L. 1986, p. 4694.)

Catoosa County. — Catoosa County Development Authority established. Ga. L. 1966, p. 781. (Ga. L. 1987, p. 4546.)

Charlton County. — Charlton Development Authority established. Ga. L. 1964, Ex. Sess., p. 363. (Ga. L. 1987, p. 4530.)

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Chattooga County. — Chattooga County Development Authority established. Ga. L. 1966, p. 804. (Ga. L. 1986, p. 4556.)

Cherokee County. — Cherokee County Development Authority established. Ga. L. 1966, p. 938. (Ga. L. 1987, p. 3566.)

Cherokee County Airport Authority established. Ga. L. 1968, p. 1545. (Ga. L. 1987, p. 3570.)

Clinch County. — Clinch County Development Authority established. Ga. L. 1964, p. 913. (Ga. L. 1987, p. 4534.)

Coffee County. — Douglas-Coffee County Industrial Authority established. Ga. L. 1957, p. 568. (Ga. L. 1987, p. 3554.)

Douglas-Coffee County Industrial Authority established. Ga. L. 1957, p. 568. (NOTE: Ga. L. 1985, p. 5300 extended only an amendatory Act — Ga. L. 1959, p. 2801.)

Colquitt County. — Moultrie-Colquitt County Development Authority established. Ga. L. 1960, p. 1402. (Ga. L. 1985, p. 4745.)

Moultrie-Colquitt County Development Authority powers, bonds. Ga. L. 1964, Ex. Sess., p. 403; Ga. L. 1976, p. 1773. (Ga. L. 1985, p. 4745.)

Coweta County. — Coweta County Development Authority established. Ga. L. 1966, p. 1101. (Ga. L. 1985, p. 4173.)

Douglas, City of. — Douglas-Coffee County Industrial Authority established. Ga. L. 1957, p. 568; Ga. L. 1959, p. 2801. (Ga. L. 1985, p. 5300; Ga. L. 1987, p. 3553.)

Dublin, City of. — City of Dublin and County of Laurens Development Authority established. Ga. L. 1962, p. 1160. (Ga. L. 1987, p. 4525.)

Dudley, Town of. — Industry, tax to promote. Ga. L. 1956, p. 410. (Ga. L. 1987, p. 4517.)

Echols County. — Echols County Development Authority established. Ga. L. 1965, p. 710. (Ga. L. 1987, p. 3827.)

Emanuel County. — Emanuel County Development Authority established. Ga. L. 1962, p. 758. (Ga. L. 1986, p. 4741.)

Fitzgerald, City of. — Fitzgerald and Ben Hill County Development Authority established. Ga. L. 1962, p. 1011; Ga. L. 1963, p. 2003; Ga. L. 1981, p. 3957. (Ga. L. 1985, p. 5190; Ga. L. 1985, p. 5326; Ga. L. 1987, p. 3529.)

Fort Gaines, City of. — Industrial promotion tax, advisory board authorized. Ga. L. 1957, p. 545. (Ga. L. 1987, p. 5288.)

Fulton County. — Funds for support of state institutions within county. Ga. L. 1950, p. 453. (Ga. L. 1986, p. 4450.)

Indemnification of tax commissioner for returned checks for automobile license fees. Ga. L. 1968, p. 1571. (Ga. L. 1986, p. 4049.)

Gainesville, City of. — Gainesville and Hall County Development Authority established. Ga. L. 1961, p. 600; Ga. L. 1964, p. 866. (Ga. L. 1986, p. 4328.)

Hall County. — Gainesville and Hall County Development Authority established. Ga. L. 1961, p. 600; Ga. L. 1964, p. 866. (Ga. L. 1986, p. 4328.)

Hogansville, City of. — Hogansville Development Authority established. Ga. L. 1964, p. 794. (Ga. L. 1987, p. 3602.)

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Irwin County. — Ocilla-Irwin County Industrial Development Authority established. Ga. L. 1964, Ex. Sess., p. 356. (Ga. L. 1987, p. 3817.)

Jenkins County. — Jenkins County Development Authority established. Ga. L. 1962, p. 1109. (Ga. L. 1987, p. 3798.)

Kingsland, City of. — Kingsland Development Authority established. Ga. L. 1962, p. 813. (Ga. L. 1986, p. 4365.)

LaGrange, City of. — LaGrange Development Authority established. Ga. L. 1964, p. 779. (Ga. L. 1987, p. 3512.)

Lamar County. — City of Barnesville and County of Lamar Development Authority established. Ga. L. 1964, Ex. Sess., p. 224. (Ga. L. 1987, p. 3730.)

Laurens County. — City of Dublin and County of Laurens Development Authority established. Ga. L. 1962, p. 1160. (Ga. L. 1987, p. 4525.)

Liberty County. — Liberty County Industrial Authority established. Ga. L. 1958, p. 472. (Ga. L. 1984, p. 3873.)

Liberty County Industrial Authority membership changed. Ga. L. 1976, pp. 1781, 1823. (Ga. L. 1984, p. 3873.)

Lowndes County. — Valdosta-Lowndes County Industrial Authority established. Ga. L. 1960, p. 1359. (Ga. L. 1985, p. 3710.)

Lyons, City of. — Lyons Development Authority established. Ga. L. 1957, p. 181. (Ga. L. 1985, p. 4501.)

Macon, City of. — Macon-Bibb County Industrial Authority, establishment Act ratified. Ga. L. 1962, p. 885. (Ga. L. 1985, p. 5168; Ga. L. 1985, p. 5274.)

Macon-Bibb County Urban Development Authority establishment ratified, appropriation, powers. Ga. L. 1974, p. 1754. (Ga. L. 1985, p. 5269; Ga. L. 1986, p. 4698.)

Macon-Bibb County Urban Development Authority, leases, contracts, bonds. Ga. L. 1976, p. 1827. (Ga. L. 1985, p. 5269; Ga. L. 1986, p. 4698.)

Madison County. — Madison County Industrial Development and Building Authority established. Ga. L. 1965, p. 718. (Ga. L. 1985, p. 4832.)

Meriwether County. — Meriwether County Industrial Development Authority established. Ga. L. 1967, p. 901. (Ga. L. 1986, p. 3840.)

Mitchell County. — Mitchell County Development Authority established. Ga. L. 1962, p. 761. (Ga. L. 1985, p. 3890.)

Montgomery County. — Montgomery County Development Authority established. Ga. L. 1966, p. 899. (Ga. L. 1985, p. 3964.)

Morgan County. — Morgan County Development Authority established. Ga. L. 1962, p. 1182. (Ga. L. 1987, p. 3705.)

Moultrie, City of. — Moultrie-Colquitt County Development Authority established. Ga. L. 1960, p. 1402. (Ga. L. 1985, p. 4745.)

Moultrie-Colquitt County Development Authority powers, bonds. Ga. L. 1964, Ex. Sess., p. 403; Ga. L. 1976, p. 1773. (Ga. L. 1985, p. 4745.)

Murray County. — Murray County Industrial Development Authority established. Ga. L. 1966, p. 963. (Ga. L. 1985, p. 3792.)

Muscogee County. — Muscogee County Industrial Development Authority established. Ga. L. 1967, p. 947. (Ga. L. 1986, p. 3782.)

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Newton County. — Newton County Industrial Development Authority established. Ga. L. 1964, p. 825. (Ga. L. 1985, p. 4932.)

Ocilla, City of. — Ocilla-Irwin County Industrial Development Authority established. Ga. L. 1964, Ex. Sess., p. 356. (Ga. L. 1987, p. 3817.)

Oglethorpe County. — Oglethorpe Development Authority established. Ga. L. 1962, p. 1188. (Ga. L. 1986, p. 3852.)

Pierce County. — Pierce County Industrial Development and Building Authority established. Ga. L. 1965, p. 683. (Ga. L. 1987, p. 3786.)

Putnam County. — Putnam Development Authority established. Ga. L. 1968, p. 1860. (Ga. L. 1985, p. 3955.)

Richmond County. — Industry, commerce, etc., advertisement and promotion. Ga. L. 1974, p. 1698. (Ga. L. 1986, p. 4480.)

Screven County. — Screven County Development Authority established. Ga. L. 1962, p. 1079. (Ga. L. 1986, p. 5694.)

Tallapoosa, City of. — Tallapoosa Development Authority established. Ga. L. 1964, p. 923. (Ga. L. 1986, p. 4688.)

Tattnall County. — Tattnall County Industrial Development Authority established. Ga. L. 1968, p. 1662. (Ga. L. 1985, p. 4754.)

Thomaston, City of. — Thomaston-Upson County Industrial Development established. Ga. L. 1964, p. 817. (Ga. L. 1985, p. 3737.)

Thomasville, City of. — Thomasville Payroll Development Authority established. Ga. L. 1960, p. 1329. (Ga. L. 1985, p. 4552.)

Tift County. — Tift County Development Authority established. Ga. L. 1960, p. 1240. (Ga. L. 1987, p. 3533.)

Toombs County. — Toombs County Development Authority established. (Ga. L. 1966, p. 787. (Ga. L. 1985, p. 3962.)

Treutlen County. — Treutlen County Development Authority established. Ga. L. 1966, p. 838. (Ga. L. 1985, p. 3983.)

Troup County. — Troup County Development Authority established. Ga. L. 1964, p. 786. (Ga. L. 1987, p. 3595.)

Turner County. — Turner County Development Authority established. Ga. L. 1961, p. 624. (Ga. L. 1986, p. 4708, purporting to continue Turner County Development Authority but citing Ga. L. 1962, p. 624 as establishing Act; Ga. L. 1987, p. 5007.)

Upson County. — Thomaston-Upson County Industrial Development Authority established. Ga. L. 1964, p. 817. (Ga. L. 1985, p. 3737.)

Valdosta, City of. — Valdosta-Lowndes County Industrial Authority established. Ga. L. 1960, p. 1359. (Ga. L. 1985, p. 3710.)

Vidalia, City of. — Vidalia Development Authority established. Ga. L. 1956, p. 426. (Ga. L. 1985, p. 3957.)

Waco, Town of. — Waco Development Authority established. Ga. L. 1964, p. 860. (Ga. L. 1986, p. 4692.)

Walker County. — Walker County Development Authority established. Ga. L. 1962, p. 912. (Ga. L. 1985, p. 4169.)

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West Point, City of. — West Point Development Authority established. Ga. L. 1964, p. 801. (Ga. L. 1987, p. 3598.)

Worth County. — Worth County Industrial Development Authority established. Ga. L. 1966, p. 860. (Ga. L. 1987, p. 3800.)

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Columbus, Georgia. — Columbus Building Authority. Ga. L. 1966, p. 946. (Ga. L. 1986, p. 3778.)

Cordele, City of. — Cordele Office Building Authority established. Ga. L. 1968, p. 1715. (Ga. L. 1987, p. 4532.)

Dalton, City of. — City of Dalton Building Authority established. Ga. L. 1968, p. 1466. (Ga. L. 1986, p. 5547.)

Haralson County. — Contracts, financing for courthouse, related facilities. Ga. L. 1972, p. 1429. (Ga. L. 1986, p. 4690.)

Paulding County. — Contracts for lease, purchase, acquisition of courthouse, related facilities. Ga. L. 1976, p. 1817. (Ga. L. 1987, p. 3722.)

Thomaston, City of. — Thomaston-Upson County Office Building Authority established. Ga. L. 1964, Ex. Sess., p. 338. (Ga. L. 1985, p. 3735.)

Waycross, City of. — Industry, tax to promote. Ga. L. 1962, p. 1158. (Ga. L. 1987, p. 3639.)

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Fulton County. — Bond issue without referendum. Ga. L. 1969, p. 1154. (Ga. L. 1986, p. 4444.)

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Albany, City of. — Sewerage system bonds, taxation, contracts with Dougherty County authorized. Ga. L. 1956, pp. 424, 467. (Ga. L. 1987, pp. 3839, 3841.)

Athens, City of. — Downtown Athens Development Authority authorized. Ga. L. 1975, p. 1698. (Ga. L. 1987, p. 3825.)

Downtown Athens Development Authority taxation, eminent domain. Ga. L. 1976, p. 1912. (Ga. L. 1987, p. 3825.)

Atlanta, City of. — Waterworks system, sanitary department bonds authorized. Ga. L. 1947, p. 664; Ga. L. 1956, p. 257; Ga. L. 1962, p. 1002. (Ga. L. 1986, p. 4818.)

Fulton County School District, annexation of property, assumption of obligations. Ga. L. 1951, p. 881; Ga. L. 1960, p. 1441. (Ga. L. 1986, p. 4814.)

Camilla, City of. — Downtown Camilla Development Authority established. Ga. L. 1976, p. 1812. (Ga. L. 1985, p. 4936.)

Chatham County. — Educational retirement benefit increase authorized. Ga. L. 1974, p. 1692. (Ga. L. 1987, p. 4515.)

Clayton County. — Waterworks and sewerage systems bonds, taxation authorized. Ga. L. 1953, Nov.-Dec. Sess., p. 227. (Ga. L. 1986, p. 5009.)

Coweta County. — Board of education contracts, leases authorized. Ga. L. 1975, p. 1692. (Ga. L. 1985, p. 4177.)

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DeKalb County. — Junior college establishment, financing and operating authorized. Ga. L. 1962, p. 982. (Ga. L. 1986, p. 4333.)

Dougherty County. — Sewerage system bonds, taxation, contracts with City of Albany. Ga. L. 1956, pp. 424, 467. (Ga. L. 1987, pp. 3839, 3841.)

Douglas County. — Water, sanitation, sewerage, fire protection districts authorized. Ga. L. 1968, p. 1791. (Ga. L. 1987, p. 3651.)

Floyd County. — Bonds for establishing schools beyond twelfth grade. Ga. L. 1964, p. 1063. (Ga. L. 1987, p. 3516.)

Fort Gaines, City of. — Municipal port and terminal facilities authorized. Ga. L. 1959, p. 457. (Ga. L. 1987, p. 5284.)

Fulton County. — School district indebtedness assumed by City of Atlanta. Ga. L. 1951, p. 881. (Ga. L. 1986, p. 4814.)

Habersham County. — Board of education, borrowing of funds authorized. Ga. L. 1966, p. 927. (Ga. L. 1985, p. 4205; Ga. L. 1986, p. 3827.)

Henry County. — Water and sewerage bond issue, taxation authorized. Ga. L. 1968, p. 1774. (Ga. L. 1985, p. 3936.)

LaGrange, City of. — Downtown LaGrange Development Authority authorized. Ga. L. 1974, p. 1681. (Ga. L. 1987, p. 3596.)

Laurens County. — Educational facilities, bonds authorized. Ga. L. 1972, p. 1432. (Ga. L. 1987, p. 4523.)

Marietta, City of. — Bond issue for educational purposes. Ga. L. 1965, p. 680. (Ga. L. 1986, p. 4406.)

Downtown Marietta Development Authority authorized. Ga. L. 1970, p. 1109. (Ga. L. 1986, p. 4503.)

Peach County. — Educational funds, borrowing, pledge. Ga. L. 1962, p. 825. (Ga. L. 1987, p. 3663.)

Savannah, City of. — Educational retirement benefit increase authorized. Ga. L. 1974, p. 1692. (Ga. L. 1987, p. 4515.)

Smyrna, City of. — Downtown Smyrna Development Authority authorized. Ga. L. 1970, p. 1117. (Ga. L. 1986, p. 3957.)

Spalding County. — Bond issue, taxation for certain educational purposes. Ga. L. 1964, Ex. Sess., p. 411. (Ga. L. 1987, p. 3537.)

Valdosta, City of. — Central Valdosta Development Authority established. Ga. L. 1974, p. 1711. (Ga. L. 1985, p. 3871.)

Waycross, City of. — Downtown Waycross Development Authority authorized. Ga. L. 1974, p. 1764. (Ga. L. 1986, p. 3906.)

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Atlanta, City of. — Stadium bonds. Ga. L. 1947, p. 1759. (Ga. L. 1986, p. 4786.)

Austell, City of. — Gas generating and distributing systems, bonds for construction. Ga. L. 1964, p. 1061. (Ga. L. 1984, p. 3836.)

Bainbridge, City of. — Decatur County-Bainbridge Industrial Development Authority established. Ga. L. 1968, p. 1780. (Ga. L. 1985, p. 3928.)

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Brantley County. — Brantley County Development Authority established. Ga. L. 1968, p. 1731. (Ga. L. 1987, p. 5103.)

Brunswick, City of. — Downtown Brunswick district and area established, property tax authorized. Ga. L. 1966, p. 929. (Ga. L. 1987, p. 3719.)

Butts County. — Butts County Industrial Development Authority established. Ga. L. 1968, p. 1614. (Ga. L. 1986, p. 3848.)

Cairo, City of. — City of Cairo Development Authority established. Ga. L. 1962, p. 1200. (Ga. L. 1985, p. 3780.)

City of Cairo Development Authority bonds. Ga. L. 1970, p. 1106. (Ga. L. 1985, p. 3780.)

Chattahoochee County. — Chattahoochee County Industrial Development Authority established. Ga. L. 1968, p. 1640. (Ga. L. 1986, p. 4317.)

Clarkesville, City of. — Bonds for nonprofit housing for elderly. Ga. L. 1962, p. 1149. (Ga. L. 1985, p. 4210.)

Clay County. — Clay County Industrial Development Authority established. Ga. L. 1968, p. 1634. (Ga. L. 1987, p. 5286.)

Cobb County. — Garbage and refuse facilities, acquisition, maintenance, bonds. Ga. L. 1964, p. 936. (Ga. L. 1986, p. 4408.)

Columbus, City of. — Columbus-Muscogee County Port Development Commission authorized. Ga. L. 1965, p. 702. (Ga. L. 1986, p. 3780.)

Cordele, City of. — Crisp County-Cordele Industrial Development Authority established. Ga. L. 1968, p. 1757. (Ga. L. 1987, p. 3548.)

Crisp County-Cordele Industrial Development Authority membership increased. Ga. L. 1982, p. 2570. (Ga. L. 1987, p. 3548.)

Covington, City of. — City of Covington Parking Authority established. Ga. L. 1973, p. 1506. (Ga. L. 1986, p. 3871.)

Crisp County. — Crisp County-Cordele Industrial Development Authority established. Ga. L. 1968, p. 1757. (Ga. L. 1987, p. 3548.)

Electric systems, bond issue without referendum. Ga. L. 1975, p. 1693. (Ga. L. 1985, p. 3810.)

Crisp County-Cordele Industrial Development Authority membership increased. Ga. L. 1982, p. 2570. (Ga. L. 1987, p. 3548.)

Dade County. — Dade County Industrial Development Authority. Ga. L. 1967, p. 907. (Ga. L. 1988, p. 5062.)

Dallas, City of. — City of Dallas Parking Authority established. Ga. L. 1972, p. 1413. (Ga. L. 1987, p. 3726.)

Decatur, City of. — Parking facility construction and maintenance. Ga. L. 1968, p. 1515. (Ga. L. 1987, p. 3790.)

Decatur County. — Decatur County-Bainbridge Industrial Development Authority established. Ga. L. 1968, p. 1780. (Ga. L. 1985, p. 3928.)

DeKalb County. — Stadium bonds. Ga. L. 1947, p. 1759. (Ga. L. 1986, p. 4786.)

Dooly County. — Dooly County Industrial Development Authority established. Ga. L. 1968, p. 1768. (Ga. L. 1987, p. 3514.)

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Early County. — Early County Industrial Development Authority established. Ga. L. 1968, p. 1608. (Ga. L. 1986, p. 4618.)

Effingham County. — Effingham County Industrial Development Authority established. Ga. L. 1968, p. 1733. (Ga. L. 1986, p. 3886.)

Floyd County. — Rome-Floyd County Development Authority established. Ga. L. 1962, p. 1067. (Ga. L. 1985, p. 4877.)

Fulton County. — Stadium bonds. Ga. L. 1947, p. 1759. (Ga. L. 1986, p. 4786.)

Glascok County. — Glascok County Industrial Development Authority established. Ga. L. 1968, p. 1866. (Ga. L. 1987, p. 3809.)

Jackson County. — Jackson County Industrial Development Authority established. Ga. L. 1968, p. 1800. (Ga. L. 1986, p. 4702.)

Jasper, City of. — City of Jasper Industrial Development Authority established. Ga. L. 1966, p. 1086. (Ga. L. 1987, p. 3564.)

Marietta, City of. — Merger of water, sewerage, electric systems into single utility. Ga. L. 1958, p. 425. (Ga. L. 1986, pp. 4059, 5509.)

McIntosh County. — McIntosh County Industrial Development Authority established. Ga. L. 1968, p. 1834. (Ga. L. 1985, p. 3501.)

Muscogee County. — Industry, agriculture, commerce, bonds to promote. Ga. L. 1962, p. 999. (Ga. L. 1986, p. 3790.)

Columbus-Muscogee County Port Development Commission authorized. Ga. L. 1965, p. 702. (Ga. L. 1986, p. 3780.)

Newnan, City of. — Water, sewerage, electric systems, combination authorized. Ga. L. 1972, p. 1410. (Ga. L. 1985, p. 4258.)

Water, sewerage and light commission designated sole authority for utilities. Ga. L. 1974, p. 1700. (Ga. L. 1985, p. 4260.)

Peach County. — Peach County Industrial Development Authority tax. Ga. L. 1970, p. 992. (Ga. L. 1987, p. 3667.)

Quitman County. — Quitman County Industrial Development Authority established. Ga. L. 1968, p. 1620. (Ga. L. 1986, p. 3857.)

Rome, City of. — Rome-Floyd County Development Authority established. Ga. L. 1962, p. 1067. (Ga. L. 1985, p. 4877.)

Savannah, City of. — Downtown Savannah Authority established. Ga. L. 1974, p. 1738. (Ga. L. 1986, p. 4201.)

Stewart County. — Stewart County Industrial Development Authority established. Ga. L. 1968, p. 1647. (Ga. L. 1986, p. 3867.)

Thomaston, City of. — Water, sewerage, electric systems combined into single utility. Ga. L. 1964, p. 897. (Ga. L. 1985, p. 3739.)

Webster County. — Webster County Industrial Development Authority established. Ga. L. 1968, p. 1748. (Ga. L. 1986, p. 4619.)

Art. VIII, Sec. V, Para. I

Albany, City of. — Merger of school system with Dougherty County School District. Ga. L. 1950, p. 465. (Ga. L. 1987, p. 3831.)

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Appling County. — Board of education election. Ga. L. 1952, p. 570. (Ga. L. 1987, p. 3738.)

Atlanta, City of. — Annexed territory incorporated into school system. Ga. L. 1950, p. 458. (Ga. L. 1986, p. 4812.)

Barrow County. — School system established by merger with City of Winder School System. Ga. L. 1970, p. 1059. (Ga. L. 1987, p. 3523.)

Bartow County. — Board of education election, school superintendent appointment. Ga. L. 1953, Nov.-Dec. Sess., p. 540. (Ga. L. 1987, p. 4466.)

School superintendent election. Ga. L. 1958, p. 495. (Ga. L. 1987, p. 4466.)

Bleckley County. — Merger of school district with City of Cochran School System. Ga. L. 1952, p. 548. (Ga. L. 1987, p. 3556.)

Brooks County. — Merger of school system with City of Quitman School System. Ga. L. 1962, p. 827. (Ga. L. 1987, p. 4544.)

Calhoun County. — Board of education election, prior board abolished. Ga. L. 1955, p. 470. (Ga. L. 1986, p. 3940.)

Canton, City of. — Merger of school system with Cherokee County School System. Ga. L. 1956, p. 133. (Ga. L. 1987, p. 3821.)

Chattahoochee County. — Board of education established, prior board abolished. Ga. L. 1958, p. 603. (Ga. L. 1986, p. 4311.)

Chattooga County. — Board of education election. Ga. L. 1959, p. 453; Ga. L. 1968, p. 1764. (Ga. L. 1987, p. 3821.)

Cherokee County. — Merger of school system with City of Canton School System. Ga. L. 1956, p. 133. (Ga. L. 1987, p. 3572.)

Clayton County. — Board of education election, school superintendent appointment. Ga. L. 1953, Nov.-Dec. Sess., p. 506. (Ga. L. 1986, p. 5013.)

School superintendent election. Ga. L. 1958, p. 3. (Ga. L. 1986, p. 5013.)

Clinch County. — Board of education election, school superintendent appointment. Ga. L. 1970, p. 1111. (Ga. L. 1987, p. 4536.)

Cobb County. — Board of education, election, vacancies, school superintendent appointment. Ga. L. 1962, p. 971. (Ga. L. 1986, pp. 4055, 4511.)

Composition of Education District No. 2. Ga. L. 1968, p. 1529. (Ga. L. 1986, p. 4511.)

Colquitt County. — Board of education election, school superintendent appointment. Ga. L. 1964, p. 893. (Ga. L. 1985, p. 4747.)

Cordele, City of. — Merger with Crisp County School District. Ga. L. 1956, p. 111. (Ga. L. 1987, p. 3522.)

Coweta County. — School system established by merger with City of Newnan School System. Ga. L. 1968, p. 1452. (Ga. L. 1985, p. 4171.)

Crisp County. — Merger of school district with City of Cordele School System. Ga. L. 1956, p. 111. (Ga. L. 1987, p. 3552.)

DeKalb County. — Board of education, election procedure clarified. Ga. L. 1947, p. 1753; Ga. L. 1962, p. 998. (Ga. L. 1985, p. 4078.)

Dodge County. — Board of education election. Ga. L. 1976, p. 1776. (Ga. L. 1986, p. 4536.)

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Dougherty County. — Merger of school district with City of Albany School System. Ga. L. 1950, p. 465. (Ga. L. 1987, p. 3831.)

Douglas County. — Board of education election. Ga. L. 1955, p. 463. (Ga. L. 1987, p. 3645.)

Fayette County. — Board of education election. Ga. L. 1962, p. 795; Ga. L. 1970, p. 979. (Ga. L. 1987, p. 3736.)

Floyd County. — Board of education election. Ga. L. 1952, p. 605; Ga. L. 1968, p. 1798. (Ga. L. 1987, p. 3518.)

Forsyth County. — Board of education election. Ga. L. 1964, p. 975. (Ga. L. 1985, p. 3704.)

Fulton County. — Annexed territory incorporated into Atlanta school system. Ga. L. 1950, p. 458. (Ga. L. 1986, p. 4812.)

Glascocock County. — Board of education election. Ga. L. 1960, p. 1439. (Ga. L. 1987, p. 3807.)

Greene County. — Board of education election. Ga. L. 1964, p. 969. (Ga. L. 1985, p. 4248.)

Griffin, City of. — Griffin-Spalding County School System established. Ga. L. 1952, p. 554. (Ga. L. 1987, p. 3545.)

Gwinnett County. — Board of education election, school superintendent appointment. Ga. L. 1956, p. 810; Ga. L. 1960, p. 1433; Ga. L. 1968, p. 1887. (Ga. L. 1986, p. 4626.)

Hall County. — Board of education election. Ga. L. 1960, p. 1199; Ga. L. 1972, p. 1379. (Ga. L. 1986, p. 4330.)

Board of education, staggered terms. Ga. L. 1964, p. 845; Ga. L. 1976, p. 1910. (Ga. L. 1986, p. 4330.)

Hancock County. — Board of education election. Ga. L. 1950, p. 460. (Ga. L. 1987, p. 3732.)

Henry County. — Board of education election. Ga. L. 1958, p. 436; Ga. L. 1966, p. 919. (Ga. L. 1985, p. 3932.)

Laurens County. — Board of education election, compensation, terms. Ga. L. 1962, p. 1168. (Ga. L. 1987, p. 4521.)

Board of education terms. Ga. L. 1964, p. 941. (Ga. L. 1987, p. 4521.)

Lowndes County. — Board of education election, school superintendent appointment. Ga. L. 1958, p. 448. (Ga. L. 1985, p. 4132.)

Macon County. — Board of education election, school superintendent appointment. Ga. L. 1962, p. 1194. (Ga. L. 1984, p. 3858.)

Madison County. — Board of education election. Ga. L. 1964, p. 885. (Ga. L. 1985, p. 4834.)

McDuffie County. — Board of education election, school superintendent appointment. Ga. L. 1955, p. 668. (Ga. L. 1987, p. 3604.)

Meriwether County. — Board of education election, school superintendent appointment. Ga. L. 1950, p. 469. (Ga. L. 1986, p. 3838.)

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- Preference, GA Const Art IV §III Par II.

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In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

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CONSTITUTION OF THE STATE OF GEORGIA

Article

III. Legislative Branch.

VI. Judicial Branch.

ARTICLE I. BILL OF RIGHTS

SECTION I. RIGHTS OF PERSONS

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1139, § 1/SR 146, if ratified, would add Paragraph XXX, to read as follows: **“Rights of certain individuals.** (a) For the purpose of this Paragraph, a victim shall be considered an individual against whom a crime has allegedly been perpetrated, including crimes alleged as delinquent acts. Such victims shall be accorded the utmost dignity and respect and shall be treated fairly by the criminal justice system of this state and all agencies and departments that serve such system. When the crime is one against or involving the person of the victim or is a felony property crime, such victim shall be afforded the following specific rights:

“(1) The right upon request to reasonable, accurate, and timely notice of any scheduled court proceedings involving the alleged act or changes to the scheduling of such proceedings;

“(2) The right upon request to reasonable, accurate, and timely notice of the arrest, release, or escape of the accused;

“(3) The right not to be excluded from any scheduled court proceedings involving the alleged act;

“(4) The right upon request to be heard at any scheduled court proceedings involving the release, plea, or sentencing of the accused; and

“(5) The right to be informed of his or her rights.

“(b) A victim described in subparagraph (a) of this Paragraph shall have the right to assert the rights enumerated in subparagraph (a) of this Paragraph. The General Assembly shall provide by general law the process whereby such victim may assert the rights provided by subparagraph (a) of this Paragraph by motion within the same criminal or delinquency proceeding giving rise to such rights. At the hearing on such motion, such victim may be represented by an attorney, but neither the state nor any of its political subdivisions shall be obligated to appoint an attorney to represent him or her. The General Assembly shall provide by general law the process whereby a family member, guardian, or legal custodian of a victim when he or she is a minor, legally incapacitated, or deceased may assert the rights of such victim.

“(c) This Paragraph shall not:

“(1) Create any cause of action against the State of Georgia; any political subdivision of the State of Georgia; any officer, employee, or agent of the State of Georgia or of any of its political subdivisions; or any officer or employee of the court;

“(2) Confer upon any victim the right to:

“(A) Appeal any decision made in a criminal or delinquency proceeding;

“(B) Challenge any verdict or sentence entered in a criminal or delinquency proceeding; or

“(C) Standing to participate as a party in a criminal or delinquency proceeding

other than to file a motion as provided in subparagraph (b) of this Paragraph;

“(3) Restrict the authority of the General Assembly, by general law, to further define or expand upon the rights provided

in this Paragraph or to regulate the reasonable exercise thereof; or

“(4) Restrict the inherent authority of the courts to maintain order in the courtroom.”

Paragraph I. Life, liberty, and property.

Law reviews. — For article, “Exploring the Right to Die in the U.S.,” see 33 Ga. St. U.L. Rev. 1021 (2017). For article, “Unbefriended and Unrepresented: Better Medical Decision Making for Incapacitated Patients Without Healthcare Surrogates,” see 33 Ga. St. U.L. Rev. 923 (2017). For article, “Ending-Life Decisions: Some Disability Perspectives,” see 33 Ga. St. U.L. Rev. 893 (2017). For article, “Distinc-

tive Factors Affecting the Legal Context of End-Of-Life Medical Care for Older Persons,” see 33 Ga. St. U.L. Rev. 869 (2017). For article, “Untangling the Market and the State,” see 67 Emory L.J. 243 (2017).

For note, “Workin’ 9:00-5:00 for Nine Months: Assessing Pregnancy Discrimination Laws in Georgia,” see 33 Ga. St. U.L. Rev. 771 (2017).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- POLICE POWER — PROPERTY
2. TAKING PROPERTY FOR PUBLIC USE
4. ZONING

General Consideration

Due process clause does not expressly or by implication afford right of action against government. — Suit by physicians against state officials alleging that O.C.G.A. § 31-9B-1 et seq., regulating abortions, violated the state constitution, was barred by sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX, because there was no consent to such a suit. The Due Process Clause, Ga. Const. 1983, Art. I, Sec. I, Para. I, did not provide a private remedy for its enforcement, and the Judicial Review Clause, Ga. Const. 1983, Art. I, Sec. II, Para. V, did not conflict with sovereign immunity. *Lathrop v. Deal*, 301 Ga. 408, 801 S.E.2d 867 (2017).

Police Power — Property

2. Taking Property for Public Use

Insufficient compliance with O.C.G.A. § 22-1-9. — In a condemnation action, the court vacated the trial court’s order adopting the special master’s return as to the property value because none of

the city’s offers prior to 2014 satisfied the dictates of O.C.G.A. § 22-1-9(3) and the city took several years to comply with § 22-1-9(3). Because the city failed to comply with O.C.G.A. 22-1-9(3), and the owner did not acquiesce in or waive strict compliance with the statute, the city acted outside its authority by condemning the property, and its condemnation petition was dismissed. There is no need for the question of bad faith and to the extent that the Court of Appeals directed the trial court to do so on remand, the judgment is reversed. *City of Marietta v. Summerour*, 302 Ga. 645, 807 S.E.2d 324 (2017).

4. Zoning

Adequate state remedy for procedural irregularities in adoption of new zoning ordinance. — Trial court did not err in granting the city’s motion for judgment on the pleadings on the plaintiffs’ procedural due process claims as Georgia’s Zoning Procedures Law (ZPL) provided the plaintiffs with an adequate state remedy for alleged procedural irreg-

ularities committed by the city in the adoption of a new zoning ordinance because the ZPL required local governments to provide property owners with a meaningful opportunity to be heard before enacting a zoning ordinance, not simply mere notice of a hearing, as the ZPL required that a local government conduct

a public hearing on a proposed zoning ordinance before its adoption; and, if no public hearing was held, aggrieved property owners could sue to have the ordinance declared invalid. *Schumacher v. City of Roswell*, 344 Ga. App. 135, 809 S.E.2d 262 (2017).

RESEARCH REFERENCES

ALR. — Witness's identification of criminal defendant, as person in photograph shown by police, as resulting from impermissibly suggestive circumstances, as matter of federal constitutional law, where police showed single witness fewer than six photographs in one session, 1 A.L.R.7th 6.

Clothing worn by criminal defendant in photograph in array shown by police to witness as factor in determination of whether circumstances of witness's identification of defendant, as person in photograph, were impermissibly suggestive as matter of federal constitutional law, 2 A.L.R.7th 2.

Distinctive quality of criminal defendant's photograph in array shown by police to witness as factor in determination of whether circumstances of witness's identification of defendant, as person in photograph, were impermissibly suggestive as matter of federal constitutional law, 3 A.L.R.7th 5.

Criminal defendant's hair color or style as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 5 A.L.R.7th 5.

Criminal defendant's race or skin color as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 6 A.L.R.7th 5.

Criminal defendant's facial hair as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 7 A.L.R.7th 4.

Manner in which photographic array shown by police to witness is displayed, or police officer's alleged nonverbal cues, as factor in determination of whether circumstances of witness's identification of criminal defendant, as person in photograph within array, were impermissibly suggestive as matter of federal constitutional law, 8 A.L.R.7th 5.

Police statement, other than one that photographic array shown to witness contained or might contain criminal suspect or known criminal, as factor in determination of whether circumstances of witness's identification of criminal defendant, as person in photograph within array, were impermissibly suggestive as matter of federal constitutional law, 9 A.L.R.7th 3.

Witness's identification of criminal defendant, as person in photograph shown by police, as resulting from impermissibly suggestive circumstances, as matter of federal constitutional law, where police showed single witness photographs on more than one occasion, 10 A.L.R.7th 5.

Witness's identification of criminal defendant, as person in photograph shown by police, as resulting from impermissibly suggestive circumstances, as matter of federal constitutional law, where police showed photographs to multiple witnesses, 11 A.L.R.7th 3.

Police statement that photographic array shown to witness contained or might contain criminal suspect or known criminal as factor in determination of whether circumstances of witness's identification of criminal defendant, as person in photograph within array, were impermissibly suggestive as matter of federal constitutional law, 12 A.L.R.7th 3.

Witness's identification of criminal defendant in photographic array shown by

police, as resulting from impermissibly suggestive circumstances, as matter of federal constitutional law, where police showed two or more photographs of defendant in same array, 15 A.L.R.7th 4.

Mug shot characteristics of criminal defendant’s photograph as factor in determination of whether circumstances of witness’s identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 16 A.L.R.7th 3.

Restrictions on ownership, possession, or sale of weapons as infringing federal constitutional right to travel, 3 A.L.R. Fed. 3d 8

Paragraph II. Protection to person and property; equal protection.

Law reviews. — For note, “Workin’ 9:00-5:00 for Nine Months: Assessing

Pregnancy Discrimination Laws in Georgia,” see 33 Ga. St. U.L. Rev. 771 (2017).

Paragraph III. Freedom of conscience.

RESEARCH REFERENCES

ALR. — Constitutional claims of persons placed on federal government’s no-fly list or other terrorist watch lists, 5 A.L.R. Fed. 3d 5.

Application of federal constitutional guarantees or federal statutory provisions to discipline or punishment of students with disabilities, 12 A.L.R. Fed. 3d 1.

Paragraph IV. Religious opinions; freedom of religion.

RESEARCH REFERENCES

ALR. — Comment note: ineffective assistance of counsel in removal proceedings — particular acts, 59 A.L.R. Fed. 2d 151.

Validity, application, and construction of religion-based challenges to health insurance contraceptive coverage mandated by Patient Protection and Affordable Care Act preventive services requirement, 42 U.S.C.A § 300gg-13(a)(4), and its regulations, 82 A.L.R. Fed. 2d 585.

Prisoner beard regulations as religious discrimination under First Amendment or Religious Land Use and Institutionalized Persons Act, 93 A.L.R. Fed. 2d 439.

Constitutional claims of persons placed on federal government’s no-fly list or other terrorist watch lists, 5 A.L.R. Fed. 3d 5.

Application of federal constitutional guarantees or federal statutory provisions to discipline or punishment of students with disabilities, 12 A.L.R. Fed. 3d 1.

Paragraph V. Freedom of speech and of the press guaranteed.

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Cited in State of Ga. v. International Keystone Knights of the Ku Klux Klan, Inc., 299 Ga. 392, 788 S.E.2d 455 (2016).

RESEARCH REFERENCES

ALR. — When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 A.L.R.6th 93.

Construction and application of Supreme Court's holding in *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 175 L. Ed. 2d 753, 187 L.R.R.M. (BNA) 2961, 159 Lab. Cas. (CCH) P 10166 (2010), that government may not prohibit independent and indirect corporate expenditures on political speech, 65 A.L.R.6th 503.

Constitutionality of Restricting public speech in street, sidewalk, park, or other public forum — characteristics of forum, 70 A.L.R.6th 513.

Constitutionality of restricting public speech in street, sidewalk, park, or other public forum — manner of restriction, 71 A.L.R.6th 471.

Constitutional challenges to compelled speech — general principles, 72 A.L.R.6th 513.

Constitutional challenges to compelled speech — particular situations or circumstances, 73 A.L.R.6th 281.

Expectation of privacy in and discovery of social networking web site postings and communications, 88 A.L.R.6th 319.

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Invasion of privacy by use of plaintiff's name or likeness in advertising — First Amendment cases, 15 A.L.R.7th 6.

Application of First Amendment in school context — Supreme Court cases, 57 A.L.R. Fed. 2d 1.

First Amendment protection for school principals subjected to demotion, transfer, or reassignment because of speech, 4 A.L.R. Fed. 3d 5.

Constitutional claims of persons placed on federal government's no-fly list or other terrorist watch lists, 5 A.L.R. Fed. 3d 5.

Application of federal constitutional guarantees or federal statutory provisions to discipline or punishment of students with disabilities, 12 A.L.R. Fed. 3d 1.

University code or policy forbidding speech or conduct that is offensive, degrading, or the like as violative of First Amendment Rights, 13 A.L.R. Fed. 3d 2.

Paragraph VIII. Arms, right to keep and bear.

Cross references. — Firearms industry nondiscrimination, T. 10, C. 1, A. 15, P. 7.

RESEARCH REFERENCES

ALR. — Construction and application of United States Supreme Court holdings in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) and *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) respecting Second Amendment

right to keep and bear arms, to state or local laws regulating firearms or other weapons, 64 A.L.R. 6th 131.

Validity of state gun control legislation under state constitutional provisions securing right to bear arms — convicted felons, 85 A.L.R. 6th 641.

Paragraph IX. Right to assemble and petition.

RESEARCH REFERENCES

ALR. — When does use of pepper spray, mace, or other similar chemical irritants

constitute violation of constitutional rights, 65 A.L.R.6th 93.

Paragraph X. Bill of attainder; ex post facto laws; and retroactive laws.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Expert affidavit requirement in medical malpractice cases did not extend special privileges and immunities. — O.C.G.A. § 24-7-702(c)(2)(A), governing expert qualifications in medical malpractice cases, was not unconstitutionally vague, did not violate equal protection, separation of powers, or the right to jury trial, did not make irrevocable grants of special privileges and immunities, and was not a special law; however, the trial court erred in rejecting an expert simply because the expert had not performed the specific procedure at issue. The proper consideration was the expert’s

level of knowledge. *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 788 S.E.2d 405 (2016).

County’s resolution deciding not to commercialize airport was not state legislative action. — Contractor who argued that a county violated the Contracts Clause of the federal and state constitutions when the county passed a resolution withdrawing the county’s consent to an FAA application to expand the county’s airport failed to allege any state legislative action and, thus, there could be no violation of the Contracts Clause. *Avery v. Paulding County Airport Auth.*, 343 Ga. App. 832, 808 S.E.2d 15 (2017).

RESEARCH REFERENCES

ALR. — Construction and application of U.S. Const. Art. I, § 9, cl. 3, proscribing federal bills of attainder, 62 A.L.R. 6th 517.

Construction and application of U.S. Const. Art. I, § 10, cl. 1, and state constitutional provisions proscribing state bills of attainder, 63 A.L.R. 6th 1.

Paragraph XI. Right to trial by jury; number of jurors; selection and compensation of jurors.

JUDICIAL DECISIONS

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- RIGHT TO TRIAL BY JURY
2. CIVIL CASES

3. CRIMINAL CASES
- PUBLIC TRIAL BY IMPARTIAL JURY
1. PUBLIC TRIAL

3. SPEEDY TRIAL

Right to Trial by Jury

2. Civil Cases

Expert affidavit requirement in medical malpractice cases did not violate jury trial right. — O.C.G.A. § 24-7-702(c)(2)(A), governing expert

qualifications in medical malpractice cases, was not unconstitutionally vague, did not violate equal protection, separation of powers, or the right to jury trial, did not make irrevocable grants of special privileges and immunities, and was not a special law; however, the trial court erred

in rejecting an expert simply because the expert had not performed the specific procedure at issue. The proper consideration was the expert's level of knowledge. *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 788 S.E.2d 405 (2016).

3. Criminal Cases

Notice of indictment. — For purposes of a speedy trial claim, because there were no charges pending at the time of the defendant's departure from the United States, the defendant was under no obligation to apprise the court of a change of address; thus, the 2009 notice sent to a prior address of the defendant was not proof that the defendant had notice of the indictment, and the remaining evidence supported the trial court's conclusion that the defendant was first apprised of the pending charges in 2013. *State v. Wood*, 338 Ga. App. 181, 790 S.E.2d 84 (2016).

Assertion of speedy trial right. — Defendant was not precluded from even asserting a constitutional speedy trial right on the basis of being out of the reach of the court system by being in another country because the federal case law on that issue was only persuasive, and not binding, authority; and it was dicta. *State v. Wood*, 338 Ga. App. 181, 790 S.E.2d 84 (2016).

Public Trial by Impartial Jury

1. Public Trial

Closure of court room while victim testified. — Despite sufficient evidence supporting the defendant's convictions for incest, statutory rape, and other crimes committed against the defendant's step-daughter, a new trial was ordered because the trial court erred by closing the courtroom when the step-daughter testified without making findings adequate to support the closure, including a consideration of reasonable alternatives, and the only remedy was a new trial. *Jackson v. State*, 339 Ga. App. 313, 793 S.E.2d 201 (2016).

3. Speedy Trial

Statute regarded as aid and implementation of constitutional right.

Defendant's motion to dismiss the indictment on constitutional speedy trial grounds was improperly granted as the trial court erred when the court concluded that there was no evidence of efforts to extradite the defendant and in failing to assign any weight to the trial delay caused by the defendant's actions in challenging extradition because, in the motion to dismiss, the defendant specifically acknowledged that the United States government executed an extradition request to Finland; the defendant's admission was binding for purposes of resolving the defendant's motion to dismiss; and, had the trial court correctly considered the evidence before the court, it was possible that the court would have weighed the reason for delay factor differently. *State v. Wood*, 338 Ga. App. 181, 790 S.E.2d 84 (2016).

Speedy trial rights violated.

Defendant's motion for discharge and acquittal for a violation of the defendant's constitutional right to a speedy trial was properly granted because the two-and-a-half year delay from the date of indictment was presumptively prejudicial; although the pretrial delay was partially attributable to the defendant, in light of the defendant's efforts to secure a better plea agreement and defense attorney's unavailability during some of the plea negotiations, a large part of the delay was attributable to the government as the state offered no explanation for the delay between the indictment or the arraignment; and the death of a potentially critical witness prejudiced the defendant as the deceased witness took sole responsibility for the crime. *State v. Bonawitz*, 339 Ga. App. 299, 793 S.E.2d 191 (2016).

Speedy trial rights not violated.

Trial court did not abuse the court's discretion in concluding that the speedy trial factors weighed against the defendant and in denying the defendant's motion to dismiss based on constitutional speedy trial grounds because, although the 16-month delay was presumptively prejudicial, and the cause of delay factor

Public Trial by Impartial Jury (Cont'd)

3. Speedy Trial (Cont'd)

weighed in the defendant’s favor, the defendant had no articulable reason for the 16-month delay in asserting the defendant’s right to a speedy trial; and the defendant presented no evidence that the defendant suffered anxiety or concern, and the defendant made no showing that the delay affected the defendant’s ability to present a defense. *McDougler v. State*, 339 Ga. App. 225, 793 S.E.2d 511 (2016).

Defendant’s motion for discharge and acquittal based on a violation of the defendant’s constitutional right to a speedy trial was properly denied because, although the delay of approximately two and a half years was presumptively prejudicial, the reasons for delay factor weighed heavily against the defendant as the defendant filed numerous motions that were time-consuming and hampered the readiness of the case to move forward to trial; and the trial court weighed the

prejudice to the defendant factor heavily against the defendant as the defendant failed to present specific evidence of how the delay impaired the defendant’s ability to defend. *Wimbush v. State*, 345 Ga. App. 54, No. A17A2056, 2018 Ga. App. LEXIS 174 (2018).

Prejudice from delay must be shown.

Defendant’s right to a speedy trial was not violated as the trial court did not abuse the court’s discretion in weighing the prejudice factor in the state’s favor because, while the defendant’s pre-trial incarceration was excessive, the defendant was also being held on other, unrelated charges during the same time period; and the defendant never testified about the defendant’s speedy trial claim, never offered any evidence regarding the defendant’s level of anxiety or concern, and never presented any evidence that the defense of the defendant had been impaired by the delay. *Epperson v. State*, 340 Ga. App. 25, 796 S.E.2d 1 (2016).

RESEARCH REFERENCES

ALR. — Due process afforded in drug court proceedings, 78 A.L.R.6th 1.
Construction and application of Sixth

Amendment right to speedy trial — Supreme Court cases, LL.M., 17 A.L.R. Fed. 3d 4.

Paragraph XII. Right to the courts.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RIGHT TO BE PRESENT

General Consideration

Right to be present not violated. — Defendant’s right to be present was not violated because the short portion of the trial in which the defendant was not present was not a critical phase of the proceedings as the only issue discussed was a procedural question about a witness that the court never had to rule on because it was resolved by the parties once the defendant was present. *Pitt v. State*, 337 Ga. App. 436, 787 S.E.2d 782 (2016), cert.

denied, No. S16C1778, 2017 Ga. LEXIS 118 (Ga. 2017).

Right to be Present

No right to be present when trial court addressed summoned prospective jurors. — Defendant did not have a right to be present when the trial court addressed summoned prospective jurors before the trial started. *Neale v. State*, 344 Ga. App. 448, 810 S.E.2d 621 (2018).

Right to be present during juror questioning on illness. — Defendant was entitled to a new trial because the defendant’s right to be present was violated when the trial court discussed with counsel about excusing a juror who was in

pain following surgery and eventually released the juror from returning to court as the trial court conducted a portion of the jury selection outside the defendant’s presence. *Burch v. State*, 343 Ga. App. 474, 806 S.E.2d 863 (2017).

RESEARCH REFERENCES

ALR. — Due process afforded in drug court proceedings, 78 A.L.R.6th 1.
Construction and application of booking

question exception to *Miranda*, 81 A.L.R.6th 505.

Paragraph XIII. Searches, seizures, and warrants.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
FOURTH AMENDMENT RIGHTS
SEARCHES AND SEIZURES

- 2. SEARCHES
- 3. CONSENT SEARCHES
 - a. IN GENERAL
 - b. CONSENT SEARCHES OF PEOPLE

SEARCH WARRANTS

- 4. EXCEPTIONS TO WARRANT REQUIREMENT
 - b. APPLIED TO PEOPLE

EVIDENCE

General Consideration

Excessive force claim.

Deputy used excessive force when the deputy tased the plaintiff, in violation of the plaintiff’s rights, because the plaintiff was not suspected of any crime when the deputy deployed the taser, the plaintiff did not pose any immediate threat to the deputies’ safety, and the plaintiff was not trying to escape—the plaintiff had not even been told the plaintiff was under arrest. *Brand v. Casal*, 877 F.3d 1253 (11th Cir. 2017).

Fourth Amendment Rights

Basic field sobriety test. — Although it is a close question, the Georgia Supreme Court concludes that a basic field sobriety test is not a search implicating Fourth Amendment, U.S. Const., amend. IV, protections. *Mitchell v. State*, 301 Ga. 563, 802 S.E.2d 217 (2017).

Entry based on arrest warrant. —

Deputy was justified in entering the plaintiff’s home on the basis of an arrest warrant because pursuant to *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371 (1980), there was no constitutional violation; the deputy reasonably believed the residence was the dwelling for the person sought in an arrest warrant and facts also supported the reasonable belief that the person sought was in the house when the deputy entered. Because the entry did not violate the Fourth Amendment, the parallel state-law claim also failed. *Brand v. Casal*, 877 F.3d 1253 (11th Cir. 2017).

Searches and Seizures

2. Searches

Breath test admissible in DUI.

Defendant’s motion in limine excluding the results of the defendant’s breath test was improperly granted because the evidence, including the videotape of the stop,

Searches and Seizures (Cont'd)**2. Searches (Cont'd)**

did not show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain the defendant's consent to the test; the defendant's intoxication, youth, lack of education, or low intelligence did not somehow negate the voluntariness of the defendant's consent; the implied consent notice read to the defendant informed the defendant of the choice of either agreeing or refusing to submit to chemical testing, and the possible consequences for each choice; and the defendant immediately agreed to submit to the breath test. *State v. Young*, 339 Ga. App. 306, 793 S.E.2d 186 (2016).

Breath test as search incident to arrest. — Implied consent statute was not unconstitutional under the Fourth Amendment or Ga. Const. 1983, Art. I, Sec. I, Para. XIII because, even if the statute were coercive, police could obtain a breath test without a warrant as a search incident to arrest. *Fazio v. State*, 302 Ga. 295, 806 S.E.2d 544 (2017).

3. Consent Searches**a. In General**

Videotape demonstrated consent to search given. — Trial court did not err by denying the defendant's motions to suppress because the court properly determined that the search was consensual as the videotape of the traffic stop showed that the defendant was not in handcuffs prior to the search, there was no evidence that the defendant was being threatened in any way, misled, or subject to a lengthy detention before giving consent, and the defendant never withdrew the consent given. *Batten v. State*, 341 Ga. App. 332, 801 S.E.2d 57 (2017).

b. Consent Searches of People

Suppression of breath tests. — Trial court erroneously suppressed the breath-test evidence obtained when the defendant was arrested for, inter alia, driving under the influence of alcohol because there was no evidence that the

officer used fear, intimidation, threat of physical punishment, or a lengthy detention to obtain the defendant's consent to the breath test; there was no evidence that the defendant's age, intelligence, or level of education hindered the defendant's ability to understand the implied-consent notice; the notice, as read to the defendant, made it clear that the defendant had the right to refuse testing; and the defendant was advised of the various consequences of the defendant's refusal to consent to any testing. *State v. Jacobs*, 342 Ga. App. 476, 804 S.E.2d 132 (2017).

Blood test results.

In a case charging the defendant with driving under the influence (DUI) to the extent it was less safe for the defendant to drive and DUI per se, the motion to suppress the results of the state-administered test of the defendant's breath was properly granted as the defendant lacked the capacity to consent to the breath test based upon the defendant's confusion and high level of intoxication; the state was only able to show that the defendant acquiesced to the officer's request that the defendant submit to a breath test but was unable to show actual consent; and the trial court was not expressly required to address in its order each relevant factor in determining if the defendant's consent was voluntary. *State v. Jung*, 337 Ga. App. 799, 788 S.E.2d 884 (2016).

Blood test results inadmissible when actual consent not obtained. — On remand from the Supreme Court, the defendant's motion to suppress the state-administered blood test, taken without a search warrant, was properly granted as the state was able to show that the defendant acquiesced to the officer's request that the defendant submit to the state-administered blood and urine tests but was unable to show actual consent because the trial court found that the defendant's communications with the officer during the field sobriety evaluations indicated that the defendant was confused, and that evidence brought the defendant's mental capacity into question and showed that the defendant appeared highly intoxicated; and, at the hospital, the defendant had to lean on the officer for

support. *State v. Williams*, 337 Ga. App. 791, 788 S.E.2d 860 (2016).

Search Warrants

4. Exceptions to Warrant Requirement

b. Applied to People

Breath test was search incident to arrest. — In the defendant’s DUI trial, O.C.G.A. § 40-6-391(a)(1), because a breath test was permitted as a search incident to the defendant’s DUI arrest, the defendant’s refusal to take the breath test was not the exercise of the constitutional right against unreasonable searches and seizures, and evidence of the defendant’s refusal was properly admitted under O.C.G.A. § 40-5-67.1(b). *Cherry v. State*, No. A17A2085, 2018 Ga. App. LEXIS 116 (Feb. 21, 2018).

Breath test authorized as search incident to arrest. — Warrantless test of the defendant’s breath was authorized by the search-incident-to-arrest exception to the warrant requirement under both the Fourth Amendment and Ga. Const. 1983, Art. I, Sec. I, Para. XIII, irrespective of whether the defendant’s consent was freely and voluntarily obtained for the breath test. *MacMaster v. State*, 344 Ga.

App. 222, No. A17A2083, 2018 Ga. App. LEXIS 7 (2018).

Search of probationer’s residence. — Trial court properly denied the defendant’s motion to suppress because the court did not err in determining that the law-enforcement officers who searched the defendant’s home had reasonable suspicion to suspect criminal activity or violations of probation based on the probation officer’s concerns that the defendant was using drugs and attempting to avoid detection; thus, the search was conducted for probationary purposes, rather than for law-enforcement purposes. *Whitfield v. State*, 337 Ga. App. 167, 786 S.E.2d 547 (2016).

Evidence

Blood test results admissible.

In a DUI per se case, the trial court did not err in denying the defendant’s motion to suppress the results of a chemical testing of the defendant’s blood because the defendant freely and voluntarily consented to the test as the defendant gave an affirmative response to the officer’s question pursuant to the implied consent notice; the officer did not employ shows of force; and, at the fire station, the defendant reaffirmed the defendant’s assent before the medic drew the defendant’s blood. *Jacobs v. State*, 338 Ga. App. 743, 791 S.E.2d 844 (2016).

RESEARCH REFERENCES

ALR. — Construction and application of Supreme Court’s holding in *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 47 A.L.R. Fed. 2d 657 (2009), that police may search vehicle incident to recent occupant’s arrest only if arrestee is within reaching distance of passenger compartment at time of search or it is reasonable to believe vehicle contains evidence of offense — pretextual traffic offenses and other criminal investigations, 56 A.L.R.6th 1.

Necessity of rendering medical assistance as circumstance permitting warrantless entry or search of building or premises, 58 A.L.R.6th 499.

Propriety of execution of no-knock search warrant, 59 A.L.R.6th 311.

Validity of search of wireless communication devices, 62 A.L.R.6th 161.

Search and seizure: reasonable expectation of privacy in backyards, 62 A.L.R.6th 413.

Search and seizure: reasonable expectation of privacy in outbuildings, 67 A.L.R.6th 531.

Search and seizure: reasonable expectation of privacy in side yards, 69 A.L.R.6th 275.

Adequacy of defense counsel’s representation of criminal client regarding search and seizure issues — pretrial motions — suppression motions where no warrant involved, 71 A.L.R.6th 1.

Adequacy of defense counsel’s representation of criminal client regarding search

and seizure issues — pretrial motions — suppression motions where warrant was involved, 72 A.L.R.6th 1.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — underlying homicide and assault offenses, 72 A.L.R.6th 437.

Adequacy of defense counsel's representation of criminal client regarding search and seizure issues — pretrial motions — motions other than for suppression, 73 A.L.R.6th 1.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — underlying drug offenses, 73 A.L.R.6th 49.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — underlying sexual offenses, 74 A.L.R.6th 69.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — underlying weapons offenses, 75 A.L.R.6th 443.

Construction and application of *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), governing validity of police roadblock, checkpoint, or other detention of vehicle for gathering of information, 78 A.L.R.6th 213.

Construction and application by state courts of protective sweep doctrine recognized in *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) — warrantless search of house for dangerous persons, 78 A.L.R.6th 297.

Permissibility under Fourth Amendment of Terry stop to investigate completed misdemeanor, 78 A.L.R.6th 599.

Construction and application by state courts of protective sweep doctrine recognized in *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) — warrantless search of apartment or other non-house dwelling for dangerous persons, 79 A.L.R.6th 1.

Reverse-franks claims, where police ar-

guably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — underlying vehicular offenses, 79 A.L.R.6th 325.

Validity of “reach-in” searches, 79 A.L.R.6th 631.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant theft and burglary offenses, 80 A.L.R.6th 239.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — underlying miscellaneous offenses, 81 A.L.R.6th 257.

Permissibility under Fourth Amendment of investigatory traffic stop based solely on anonymous tip reporting drunk driving, 84 A.L.R.6th 293.

Expectation of privacy in and discovery of social networking web site postings and communications, 88 A.L.R.6th 319.

Admissibility, in state probation revocation proceedings, of evidence obtained through illegal search and seizure, 92 A.L.R.6th 1.

Construction and application by state courts of federal and state constitutional standards governing police orders to passengers in car lawfully pulled over for traffic stop, 92 A.L.R.6th 171.

Sufficiency of search warrant for DNA sample, 93 A.L.R.6th 275.

Validity of search of digital camera and associated memory cards, 94 A.L.R.6th 525.

Search and seizure: what constitutes abandonment of real property within rule that search and seizure of abandoned property is not unreasonable, 99 A.L.R.6th 397.

Application of collective knowledge doctrine or fellow officers' rule under Fourth Amendment in prosecution for prostitution, pornography, or other sexually based offense — state cases, 101 A.L.R.6th 299.

Application of collective knowledge doctrine or fellow officers' rule under Fourth Amendment in murder, homicide or manslaughter prosecution — state cases, 101 A.L.R.6th 331.

Application of collective knowledge doctrine or fellow officers' rule under Fourth

Amendment in prosecution for robbery, burglary, larceny, or other theft offense — state cases, 103 A.L.R.6th 347.

Whether police scan of magnetic strip on credit or debit card violates reasonable expectation of privacy under fourth amendment, 5 A.L.R.7th 1.

Construction and application of supreme court’s holding in *Florida v. Jardines*, that canine sniff on front porch of home constitutes “search” for purposes of Fourth Amendment in subsequent similar factual circumstances, 15 A.L.R.7th 3.

Validity of search and seizure warrant, and execution thereof, to disclose records and electronic communications relating to specific e-mail address, 15 A.L.R.7th 5.

Construction and application by federal courts of protective sweep doctrine recognized in *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) — warrantless search of house for dangerous persons, 67 A.L.R. Fed. 2d 159.

Construction and application of Fourth Amendment exclusionary rule — Supreme Court cases, 68 A.L.R. Fed. 2d 303.

Construction and application by federal courts of protective sweep doctrine recognized in *Maryland v. Buie*, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) — warrantless search of apartment or other nonhouse dwelling for dangerous persons, 69 A.L.R. Fed. 2d 241.

Racial profiling by law enforcement officers in connection with traffic stops as infringement of federal constitutional rights or federal civil rights statutes, 91 A.L.R. Fed. 2d 1.

Validity of use of cellular telephone or tower to track prospective, real time, or historical position of possessor of phone under Fourth Amendment, 92 A.L.R. Fed. 2d 1.

Application of Fourth Amendment to evidence seized in foreign jurisdiction, 3 A.L.R. Fed. 3d 4.

Paragraph XIV. Benefit of counsel; accusation; list of witnesses; compulsory process.

JUDICIAL DECISIONS

ANALYSIS

BENEFIT OF COUNSEL

- 4. RIGHT TO BENEFIT OF COUNSEL
- 7. WAIVER

RIGHT TO CONFRONTATION

- 1. IN GENERAL

Benefit of Counsel

4. Right to Benefit of Counsel

Conflict of interest not proven.

Defendant did not establish a successful ineffective assistance of counsel claim based on a conflict of interest because the fact that attorneys from one public defender’s office were representing the defendant and the accomplice was not sufficient, standing alone, to show an impermissible conflict of interest; nothing in the record indicated that counsel bypassed any meritorious defenses, that the accomplice’s plea bargain was negotiated at the expense of the defendant, or that counsel’s ability to cross-examine the accomplice was constrained; and there was

no evidence that the defendant’s counsel shared any privileged or confidential information with or obtained such information from the attorney representing the accomplice. *Williams v. State*, 302 Ga. 404, 807 S.E.2d 418 (2017).

7. Waiver

Effective waiver of counsel.

Defendant’s motion for new trial, arguing the defendant’s waiver of counsel was erroneously accepted, was properly denied because the trial court conducted a detailed colloquy with the defendant; the defendant knowingly, voluntarily, and intelligently waived the right to counsel; pretermittting whether the trial court’s statement that once the trial began the

Benefit of Counsel (Cont'd)**7. Waiver (Cont'd)**

defendant could not change the defendant's mind and decide that the defendant wanted to be represented by a lawyer was erroneous or misleading, the defendant waived appellate review by failing to object to the statement; and the defendant never asked to be represented by counsel during the course of the trial or re-visited the issue regarding the trial court's statement. *Kelly v. State*, 344 Ga. App. 433, 810 S.E.2d 197 (2018).

Right to Confrontation**1. In General****No violation of right to confrontation.**

Because the informant's recorded statements provided context for the defendant's portion of the telephone conversation, the informant's statements were not hearsay as the statements entailed admissions of a party opponent, and the Confrontation Clause did not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted, the trial court did not err in admitting the recording. *Jones v. State*, 339 Ga. App. 95, 791 S.E.2d 625 (2016).

Audiotape of 9-1-1 calls non-testimonial.

Victim's statements during the 9-1-1 call did not violate the defendant's constitutional right to confront the defendant's accusers because the victim's statements in the 9-1-1 call were non-testimonial as the statements were made while the family violence battery incident was ongoing and the statements were made for the primary purpose of preventing the continuation of the domestic violence that was apparently occurring at that time, not for the purpose of establishing a past fact; and because the statements were admissible under the present sense impression exception to the hearsay rule. *Legree v. State*, 344 Ga. App. 793, No. A17A1782, 2018 Ga. App. LEXIS 139 (2018).

Confrontation rights were violated.

Although the admission of the 9-1-1 recording into evidence and the police officer's testimony concerning the injuries the officer observed on the victim at the scene was sufficient to support the defendant's conviction, the appellate court could not definitively say that the error in admitting the victim's and minor child's out-of-court statements to the police officer during the officer's investigation of the incident was harmless as the trial court specifically relied on the victim's and the minor child's out-of-court statements to the police officer in rendering the court's judgment of conviction. *Legree v. State*, 344 Ga. App. 793, No. A17A1782, 2018 Ga. App. LEXIS 139 (2018).

Defendant's constitutional right to confront the defendant's accusers was violated because the state failed to show that the victim and the minor child were unavailable to testify at trial; and because the victim's and minor child's out-of-court statements to the police officer at the scene were testimonial in nature as, during the time the victim and minor child were being questioned by the police officer, the defendant remained at the residence at the officer's request and posed no apparent threat to anyone; and the victim and the minor child made statements to the officer under circumstances which objectively indicated that the primary purpose of the interrogation was to establish the facts necessary for criminal prosecution. *Legree v. State*, 344 Ga. App. 793, No. A17A1782, 2018 Ga. App. LEXIS 139 (2018).

Limit to cross-examination.

Trial court did not err in disallowing cross-examination of a witness about the witness's immigration status as the notion that the witness was influenced in any way as to testimony by immigration status was speculative, such evidence had little probative value, and the defendant was not prohibited from cross-examining the witness about the witness's bias or partiality toward the prosecution. *Lucas v. State*, 810 S.E.2d 491, No. S17A1911, 2018 Ga. LEXIS 100 (2018).

RESEARCH REFERENCES

ALR. — What constitutes “custodial interrogation” by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — in nonpolice vehicle for traffic stop, 56 A.L.R.6th 323.

What constitutes “custodial interrogation” by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at nonpolice vehicle for other than traffic stop, 57 A.L.R.6th 83.

What constitutes “custodial interrogation” by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — where unspecified as to precise location of roadside questioning by law enforcement officers, 58 A.L.R.6th 215.

What constitutes “custodial interrogation” within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at suspect’s place of employment or business, 58 A.L.R.6th 439.

What constitutes “custodial interrogation” within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at school, 59 A.L.R.6th 393.

What constitutes “custodial interrogation” within rule of requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — at border or functional equivalent of border, 68 A.L.R.6th 607.

Criminal defendant’s right to electronic recordation of interrogations and confessions, 69 A.L.R.6th 579.

Adequacy of defense counsel’s representation of criminal client regarding search and seizure issues — pretrial motions — suppression motions where no warrant involved, 71 A.L.R.6th 1.

Propriety and prejudicial effect of requiring defendant to wear stun belt or shock belt during course of state criminal trial, 71 A.L.R.6th 625.

Adequacy of defense counsel’s represen-

tation of criminal client regarding search and seizure issues — pretrial motions — suppression motions where warrant was involved, 72 A.L.R.6th 1.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — underlying homicide and assault offenses, 72 A.L.R.6th 437.

Adequacy of defense counsel’s representation of criminal client regarding search and seizure issues — pretrial motions — motions other than for suppression, 73 A.L.R.6th 1.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — underlying drug offenses, 73 A.L.R.6th 49.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — underlying sexual offenses, 74 A.L.R.6th 69.

Construction and application by state courts of supreme court’s ruling in *Padilla v. Kentucky*, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), That defense counsel has obligation to advise defendant that entering guilty plea could result in deportation, 74 A.L.R.6th 373.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — underlying weapons offenses, 75 A.L.R.6th 443.

Due process afforded in drug court proceedings, 78 A.L.R.6th 1.

Construction and application of *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), governing validity of police roadblock, checkpoint, or other detention of vehicle for gathering of information, 78 A.L.R.6th 213.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for truth — underlying vehicular offenses, 79 A.L.R.6th 325.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant theft and burglary offenses, 80 A.L.R.6th 239.

Reverse-franks claims, where police arguably omit facts from search or arrest warrant affidavit material to finding of probable cause with reckless disregard for the truth — underlying miscellaneous offenses, 81 A.L.R.6th 257.

Construction and application of booking question exception to Miranda, 81 A.L.R.6th 505.

Necessity or propriety of court's provision of cocounsel to criminal defendant who is already represented by counsel — state prosecutions, 83 A.L.R.6th 465.

Construction and application by state courts of federal and state constitutional standards governing police orders to passengers in car lawfully pulled over for traffic stop, 92 A.L.R.6th 171.

Propriety and prejudicial effect of compelling accused to wear prison clothing at jury trial — state cases, 99 A.L.R.6th 295.

Criminal defendant's age or height as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 102 A.L.R.6th 365.

Adequacy, under Strickland standard, of defense counsel's representation of client in sentencing phase of state court death penalty case — investigation of, and presentation of evidence regarding, client's brain damage or abnormality, 102 A.L.R.6th 417.

Adequacy of defense counsel's representation of criminal client — Daubert or Frye challenge to expert witness or testimony, 103 A.L.R.6th 247.

Witness's identification of criminal defendant, as person in photograph shown by police, as resulting from impermissibly suggestive circumstances, as matter of federal constitutional law, where police showed single witness fewer than six photographs in one session, 1 A.L.R.7th 6.

Adequacy, under Strickland standard, of defense counsel's representation of client in sentencing phase of state court death penalty case — allegedly deficient preparation of witness or presentation of

evidence regarding client's mental illness or dysfunction, 2 A.L.R.7th 1.

Clothing worn by criminal defendant in photograph in array shown by police to witness as factor in determination of whether circumstances of witness's identification of defendant, as person in photograph, were impermissibly suggestive as matter of federal constitutional law, 2 A.L.R.7th 2.

Application of Crawford Confrontation Clause rule to alcohol and drug forensic analysis and related documents, 3 A.L.R.7th 4.

Distinctive quality of criminal defendant's photograph in array shown by police to witness as factor in determination of whether circumstances of witness's identification of defendant, as person in photograph, were impermissibly suggestive as matter of federal constitutional law, 3 A.L.R.7th 5.

Criminal defendant's hair color or style as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 5 A.L.R.7th 5.

Adequacy under Strickland standard of defense counsel's representation of client in sentencing phase of state court death penalty case — investigation of, and presentation of evidence regarding client's low intelligence or mental retardation, 5 A.L.R.7th 6.

Adequacy, under Strickland standard, of defense counsel's representation of client in sentencing phase of state court death penalty case — counsel's purported complete failure to investigate client's mental illness or dysfunction, 6 A.L.R.7th 3.

Criminal defendant's race or skin color as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 6 A.L.R.7th 5.

Adequacy, under Strickland standard, of defense counsel's representation of client in sentencing phase of state court death penalty case — failure to present evidence regarding client's mental illness

or dysfunction, other than as result of lack of investigation, 7 A.L.R.7th 3.

Criminal defendant's facial hair as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 7 A.L.R.7th 4.

Manner in which photographic array shown by police to witness is displayed, or police officer's alleged nonverbal cues, as factor in determination of whether circumstances of witness's identification of criminal defendant, as person in photograph within array, were impermissibly suggestive as matter of federal constitutional law, 8 A.L.R.7th 5.

Police statement, other than one that photographic array shown to witness contained or might contain criminal suspect or known criminal, as factor in determination of whether circumstances of witness's identification of criminal defendant, as person in photograph within array, were impermissibly suggestive as matter of federal constitutional law, 9 A.L.R.7th 3.

Adequacy, under Strickland standard, of defense counsel's representation of client in sentencing phase of state court death penalty case — allegedly deficient investigation of, other than counsel's purported complete failure to investigate, client's mental illness or dysfunction, 9 A.L.R.7th 4.

Witness's identification of criminal defendant, as person in photograph shown by police, as resulting from impermissibly suggestive circumstances, as matter of federal constitutional law, where police showed single witness photographs on more than one occasion, 10 A.L.R.7th 5.

Witness's identification of criminal defendant, as person in photograph shown by police, as resulting from impermissibly

suggestive circumstances, as matter of federal constitutional law, where police showed photographs to multiple witnesses, 11 A.L.R.7th 3.

Adequacy, under Strickland standard, of defense counsel's representation of client in sentencing phase of state court death penalty case — deficient presentation of evidence, or failure to present evidence, regarding client's drug or alcohol use, other than as result of lack of investigation, 11 A.L.R.7th 4.

Police statement that photographic array shown to witness contained or might contain criminal suspect or known criminal as factor in determination of whether circumstances of witness's identification of criminal defendant, as person in photograph within array, were impermissibly suggestive as matter of federal constitutional law, 12 A.L.R.7th 3.

Witness's identification of criminal defendant in photographic array shown by police, as resulting from impermissibly suggestive circumstances, as matter of federal constitutional law, where police showed two or more photographs of defendant in same array, 15 A.L.R.7th 4.

Mug shot characteristics of criminal defendant's photograph as factor in determination of whether circumstances of witness's identification of defendant in photographic array shown by police to witness were impermissibly suggestive as matter of federal constitutional law, 16 A.L.R.7th 3.

Ineffective assistance of counsel in removal proceedings — legal bases of entitlement to representation and requisites to establish prima facie case of ineffectiveness, 58 A.L.R. Fed. 2d 363.

Ineffective assistance of counsel in removal proceedings — particular omissions or failures, 60 A.L.R. Fed. 2d 59.

Construction and application of Sixth Amendment confrontation clause — Supreme Court cases, 83 A.L.R. Fed. 2d 385.

Paragraph XV. Habeas corpus.

JUDICIAL DECISIONS

Cited in *Anglin v. State*, 302 Ga. 333, 806 S.E.2d 573 (2017).

Paragraph XVI. Self-incrimination.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

RIGHT AGAINST SELF-INCRIMINATION

General Consideration

Constitutionality of implied consent notice. — Ga. Const. 1983, Art. I, Sec. I, Para. XVI was held to protect against compelled breath tests and affords individuals a constitutional right to refuse testing. Submitting to a breath test implicates a person's right against compelled self-incrimination and prior decisions holding otherwise are overruled. *Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (2017).

No violation as defendant consented to breath test. — Because the defendant freely and voluntarily consented to the state-administered breath test and was not compelled to undergo that test, the defendant's right against self-incrimination was not violated. *MacMaster v. State*, 344 Ga. App. 222, No. A17A2083, 2018 Ga. App. LEXIS 7 (2018).

Cited in *Latta v. State*, 341 Ga. App. 696, 802 S.E.2d 264 (2017).

Right Against Self-Incrimination

Breath test. — Defendant's motion in limine to suppress the results of a breath test obtained after the defendant's arrest for driving under the influence (DUI) was improperly granted as the administration of the breath test did not violate the defendant's constitutional right against self-incrimination because the defendant was not compelled to perform the breath

test as the DUI officer did not make any promises in exchange for the defendant's agreement to submit to a breath test; and, although the DUI officer did not allow the defendant to make any phone calls until they were finished with the breath tests, there was no evidence that the defendant was forced to take the breath tests against the defendant's will in order to make the phone calls. *State v. Council*, 343 Ga. App. 583, 807 S.E.2d 504 (2017).

Boat operator's self incrimination rights not violated. — Department of Natural Resources officer who observed the defendant's boat operating with its docking lights improperly illuminated, O.C.G.A. § 52-7-11(b)(2), had the authority to detain the defendant and make a brief safety inspection under O.C.G.A. § 52-7-25(b)(4); the defendant was not in custody during the stop and Miranda warnings were not required prior to field sobriety tests. *Pedersen v. State*, 337 Ga. App. 159, 786 S.E.2d 535 (2016), cert. denied, No. S16C1641, 2016 Ga. LEXIS 828 (Ga. 2016).

Measurement of blood alcohol content is incriminating. — Measurement of blood alcohol content based on a breath test requires the cooperation of the person being tested and compelling a defendant to perform an act that is incriminating in nature is precisely what Ga. Const. 1983, Art. I, Sec. I, Para. XVI prohibits. *Olevik v. State*, 302 Ga. 228, 806 S.E.2d 505 (2017).

RESEARCH REFERENCES

ALR. — What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of his or her federal constitutional rights before custodial interrogation — in nonpolice vehicle for traffic stop, 56 A.L.R.6th 323.

What constitutes "custodial interrogation" by police officer within rule of

Miranda v. Arizona requiring that suspect be informed of federal constitutional rights before custodial interrogation — at nonpolice vehicle for other than traffic stop, 57 A.L.R.6th 83.

What constitutes "custodial interrogation" by police officer within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional

rights before custodial interrogation — where unspecified as to precise location of roadside questioning by law enforcement officers, 58 A.L.R.6th 215.

What constitutes “custodial interrogation” within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at suspect’s place of employment or business, 58 A.L.R.6th 439.

What constitutes “custodial interrogation” within rule of *Miranda v. Arizona* requiring that suspect be informed of federal constitutional rights before custodial interrogation — at school, 59 A.L.R.6th 393.

Construction and application of booking question exception to *Miranda*, 81 A.L.R.6th 505.

Fifth Amendment privilege against self-incrimination as applied to compelled disclosure of password or production of otherwise encrypted electronically stored data, 84 A.L.R.6th 251.

Propriety of using otherwise inadmissible statement, taken in violation of *Miranda* Rule, to impeach criminal defendant’s credibility — federal cases, 85 A.L.R. Fed. 2d 77.

Paragraph XVII. Bail; fines; punishment; arrest, abuse of prisoners.

Law reviews. — For note, “Three Strikes and You’re Still In? Interpreting the Three-Strike Provision of the Prison

Litigation Reform Act in the Eleventh Circuit,” see 68 Mercer L. Rev. 1161 (2017).

RESEARCH REFERENCES

ALR. — When does use of pepper spray, mace, or other similar chemical irritants constitute violation of constitutional rights, 65 A.L.R.6th 93.

Prison inmate’s Eighth Amendment rights to treatment for sleep disorders, 68 A.L.R.6th 389.

Due process afforded in drug court proceedings, 78 A.L.R.6th 1.

Propriety of holding prisoner in isolation, 96 A.L.R.6th 269.

Retroactive application, in postconviction proceedings, of constitutional rule of *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), that mandatory life sentence without parole for those under age of 18 at time of their homicide crimes violates Eighth Amendment’s prohibition of cruel and unusual punishments, 102 A.L.R.6th 637.

Prison inmate’s or pretrial detainee’s eighth amendment rights, or rights re-

lated to claims of “deliberate indifference,” with respect to pregnancy, 5 A.L.R.7th 7.

Adequacy, under *Strickland* standard, of defense counsel’s representation of client in sentencing phase of state court death penalty case — investigation of client’s drug or alcohol use, 10 A.L.R.7th 3.

Construction and application of rule announced in *Miller v. Alabama* that sentences of life without parole for persons under 18 at time of committing homicide offense violate Eighth Amendment if mandatory and imposed without considering youth-related factors. 16 A.L.R.7th 4.

Construction and application of Eighth Amendment’s prohibition of cruel and unusual punishment — U.S. Supreme Court cases, 78 A.L.R. Fed. 2d 1.

Comment note: propriety of holding prisoner in isolation — federal cases, 82 A.L.R. Fed. 2d 315.

Paragraph XVIII. Jeopardy of life or liberty more than once forbidden.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DOUBLE JEOPARDY

1. IN GENERAL

JEOPARDY AND TRIAL PROCEDURE

1. IN GENERAL

2. MISTRIALS

General Consideration

Obtaining controlled substance by theft and theft by taking. — After the defendant’s obtaining a controlled substance by theft conviction was reversed, the defendant’s plea in bar to the state’s subsequent indictment of the defendant for obtaining a controlled substance by theft was improperly denied because, although constitutional jeopardy did not attach to the obtaining a controlled substance by theft count in the former prosecution as that offense was not within the jurisdiction of the trial court as a result of the state’s failure to indict it, constitutional jeopardy did attach to the misdemeanor theft by taking count, and thus double jeopardy prevented a subsequent prosecution of offenses arising from the same transaction, including the obtaining a controlled substance by theft count. *Goodwin v. State*, 341 Ga. App. 530, 802 S.E.2d 3 (2017).

Double Jeopardy

1. In General

Subsequent prosecution not barred since prosecutor had no earlier knowledge.

Trial court erred in dismissing the defendant’s charge for DUI, O.C.G.A. § 40-6-391(k), on double jeopardy grounds under O.C.G.A. § 16-1-7(b) based on the prior disposal online of a separate seat belt citation; there was no showing that the solicitor had actual knowledge of the DUI charge at the time the seat belt

charge was handled. *State v. Garlepp*, 338 Ga. App. 788, 790 S.E.2d 839 (2016).

Jeopardy and Trial Procedure

1. In General

No prior prosecution when defendants entered pretrial intervention program. — Prosecution of the defendants for theft by taking and criminal trespass in Calhoun County, O.C.G.A. §§ 16-7-21(b) and 16-8-2, was not prohibited by double jeopardy based on their prior entry into a pretrial intervention program under O.C.G.A. § 15-18-80(b) following charges of theft by receiving stolen property, O.C.G.A. § 16-8-7(a), in Irwin County because there was no prosecution in Irwin County within the meaning of O.C.G.A. §§ 16-1-3(14) and 16-1-8(a)(1)-(2). *Palmer v. State*, 341 Ga. App. 433, 801 S.E.2d 300 (2017).

2. Mistrials

No double jeopardy when mistrial proper.

There was no double jeopardy violation, as the trial court’s decision to grant a mistrial was authorized, even if the mistrial was not strictly necessary, because under the totality of the attendant circumstances, reasonable judges could differ as to the type of disposition required to protect the fair trial rights of the parties after the case went longer than expected, requiring either a mistrial or a three-week continuance, which upset many jurors, who would likely have blamed one of the parties. *Laguerre v. State*, 301 Ga. 122, 799 S.E.2d 736 (2017).

RESEARCH REFERENCES

ALR. — What constitutes accused’s consent to court’s discharge of jury or to grant of motion for mistrial which will constitute waiver of former jeopardy plea — silence or failure to object or protest, 103 A.L.R.6th 137.

Double jeopardy considerations in state criminal cases — Supreme Court cases, 77 A.L.R. Fed. 2d 477.

Paragraph XXII. Involuntary servitude.

RESEARCH REFERENCES

ALR. — Application of Section 1 of 13th Amendment to United States Constitution, U.S. Const. Amend. XIII, § 1, prohibiting slavery and involuntary servitude — labor required as punishment for crime, 87 A.L.R.6th 109.

Application of Section 1 of 13th Amendment to United States Constitution, U.S. Const. Amend. XIII, § 1, prohibiting slavery and involuntary servitude — labor required by law or force not as punishment for crime, 88 A.L.R.6th 203.

SECTION II.

ORIGIN AND STRUCTURE OF GOVERNMENT

Paragraph III. Separation of legislative, judicial, and executive powers.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
LEGISLATIVE POWERS

General Consideration

Habeas court violated separation of powers by revoking sentence while petitioner in custody of parole board. — Habeas court erred by revoking the petitioner’s remaining portion of the original sentence while the petitioner was in the legal custody of the Georgia Board of Pardons and Paroles as such action was in violation of the separation of powers provision of Ga. Const. 1983, Art. I, Sec. II, Para. III. *Hayward v. Danforth*, 299 Ga. 261, 787 S.E.2d 709 (2016).

Challenge to statute governing sealing of court records not viable. — Because an appeal of the denial of a motion to seal a criminal record under O.C.G.A. § 35-3-37(m) failed to present a viable challenge to the statute’s constitutionality, Ga. Const. 1983, Art. VI, Sec. VI,

Para. II(1), because the challenge (a separation of powers argument, Ga. Const. 1983, Art. I, Sec. II, Para. III, based on the Supreme Court’s record-keeping authority under Ga. Const. 1983, Art. VI, Sec. IX, Para. I, and Ga. Unif. Super. Ct. R. 21.4) was not raised below, jurisdiction was properly before the Court of Appeals, pursuant to O.C.G.A. § 5-6-34(a)(12). *Doe v. State*, No. S17A1694, 2018 Ga. LEXIS 126 (Mar. 5, 2018).

Service Delivery Strategy Act did not violate separation of powers. — In a dispute regarding the provision of services between a county and city, the trial court erred in granting relief pursuant to O.C.G.A. § 36-70-25.1 beyond the scope of that Code section, including improperly directing or enjoining particular funding for services; the dispute resolution process

General Consideration (Cont'd)

did not violate the separation of powers clause, Ga. Const. 1983, Art. I, Sec. II, Para. III. *City of Union Point v. Greene County*, No. S17X1879, 2018 Ga. LEXIS 178 (Mar. 15, 2018).

Termination of administrative procedure did not violate separation of powers. — O.C.G.A. § 48-5-311(g)(2), requiring a county board of tax assessors to schedule a settlement conference within 45 days of the taxpayer's notice of appeal, and providing that the taxpayer's stated value be adopted if the board elected not to schedule a conference, did not usurp the superior court's jurisdiction or violate the separation of powers clause, Ga. Const. 1983, Art. I, Sec. II, Para. III. *Hall County Bd. of Tax Assessors v. Westrec Props.*, 303 Ga. 69, 809 S.E.2d 780 (2018).

Cited in *City of Union Point v. Greene County*, No. S17X1879, 2018 Ga. LEXIS 185 (Mar. 15, 2018).

Legislative Powers

Creation of private right of action from criminal statute. — Trial court erred in awarding civil damages to a girlfriend under O.C.G.A. § 16-11-90, which criminalized the transmission of photography or video depicting nudity or sexually explicit conduct of an adult without his or her consent, because it was a criminal statute that did not provide for a private right of action; further, creation of such a right from the statute would violate the separation of powers clause, Ga. Const. 1983, Art. I, Sec. II, Para. III, and also O.C.G.A. § 9-2-8(a). *Somerville v. White*, 337 Ga. App. 414, 787 S.E.2d 350 (2016).

Paragraph V. What acts void.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DETERMINATION OF CONSTITUTIONALITY

1. IN GENERAL

General Consideration

Clause did not grant action against state officials otherwise immune. — Suit by physicians against state officials alleging that O.C.G.A. § 31-9B-1 et seq., regulating abortions, violated the state constitution, was barred by sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX, because there was no consent to such a suit. The Due Process Clause, Ga. Const. 1983, Art. I, Sec. I, Para. I, did not provide a private remedy for its enforcement, and the Judicial Review Clause, Ga. Const. 1983, Art. I, Sec. II, Para. V, did not conflict with sovereign immunity. *Lathrop v. Deal*, 301 Ga. 408,

801 S.E.2d 867 (2017).

Determination of Constitutionality

1. In General

O.C.G.A. § 16-5-9 violated confrontation right. — O.C.G.A. § 16-15-9 was declared unconstitutional on the statute's face under the Sixth Amendment's confrontation clause to the extent that the statute authorized the admission of the convictions of non-testifying non-parties as evidence of a criminal street gang; the exclusion of other alleged gang members' convictions in the defendant's trial was upheld. *State v. Jefferson*, 302 Ga. 435, 807 S.E.2d 387 (2017).

Paragraph IX. Sovereign immunity and waiver thereof; claims against the state and its departments, agencies, officers, and employees.

Law reviews. — For note, “Publicly Funded Private Security: A Critical Examination of Georgia Law Pertaining to

the Private Employment of Off-Duty Police Officers,” see 51 Ga. L. Rev. 879 (2017).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATIONS
- WAIVER
- APPLICATION OF TORT CLAIMS ACT
- OFFICIALS AND THEIR FUNCTIONS
- APPLICATION

General Considerations

Suit challenging carrying weapon in school safety zone properly dismissed. — Trial court properly dismissed the plaintiff’s suit challenging the enforcement of O.C.G.A. § 16-11-127.1(b)(1), making it a crime to carry a firearm in a school safety zone, by the school that the plaintiff’s child attended because the school had sovereign immunity against state law claims and the threat of arrest if the plaintiff brought a weapon in the school safety zone did not constitute a Fourth Amendment violation to be remedied by the suit. *Evans v. Gwinnett County Public Schools*, 337 Ga. App. 690, 788 S.E.2d 577 (2016).

Immunity of government officials. — Government officials were not entitled to immunity from claims brought against the officials by a former government employee because the employee sufficiently alleged that the defendants acted with actual malice by conspiring to have the employee’s employment terminated by undermining the employee’s dignity and professional reputation with false, sexually charged ridicule to the employer and others, and by threatening the employer with withdrawal of financial support if the employee’s employment was not terminated. *Lee v. Christian*, 98 F. Supp. 3d 11265 (S.D. Ga. Mar. 30, 2015).

Immunity does not extend to counties. — Both the county and the county’s sheriff were entitled to sovereign immu-

nity against the state-law tort of conversion because the plaintiffs could not show that sovereign immunity had been waived. The sovereign immunity waiver provision of the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., does not extend to a county. *Carter v. Butts Cnty.*, 821 F.3d 1310 (11th Cir. 2016).

Consent to suit required for constitutional questions on abortion statute. — Suit by physicians against state officials alleging that O.C.G.A. § 31-9B-1 et seq., regulating abortions, violated the state constitution in several respects, was barred by sovereign immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX, because there was no consent to such a suit in any statute or in the state constitution. *Lathrop v. Deal*, 301 Ga. 408, 801 S.E.2d 867 (2017).

Scope of trial court’s authority under Service Delivery Strategy Act. — Trial court’s ruling that sovereign immunity did not bar claims under the Service Delivery Strategy Act, O.C.G.A. § 36-70-20 et seq., specifically O.C.G.A. § 36-70-25.1(d)(2), was affirmed because sovereign immunity was waived only to the extent of the statute, which extends no further than the remedies specifically authorized by the Act and the trial court could not exceed the scope of § 36-70-25.1(d)(2) by granting relief not provided therein for claims brought under the Act. *City of Union Point v. Greene County*, No. S17X1879, 2018 Ga. LEXIS 185 (Mar. 15, 2018).

General Considerations (Cont'd)

County's sovereignty for tax refund claims was waived only for three-year window. — Because O.C.G.A. § 48-5-380(b) limited taxpayer recovery to overpayments made within three years of a written claim for refund, the county's sovereign immunity was waived only for the improper payments made within that three-year window. In a class action, the class members' three-year window was determined as of the date of filing the action. Mandamus and equity were unavailable to circumvent this limitation. *Coleman v. Glynn County*, 344 Ga. App. 545, 809 S.E.2d 383 (2018).

Waiver**Waiver via contract.**

To the extent that *Handex of Florida, Inc. v. Chatham County*, 268 Ga. App. 285, 602 S.E.2d 660 (2004) can be interpreted as creating a waiver of sovereign immunity for a breach of contract claim solely as a result of the parties' course of conduct, that case is disapproved. *Georgia Department of Labor v. RTT Associates, Inc.*, 299 Ga. 78, 786 S.E.2d 840 (2016).

To the extent *DOT v. Dalton Paving & Construction, Inc.*, 227 Ga. App. 207, 489 S.E.2d 329 (1997) can be interpreted as creating a waiver of sovereign immunity for a breach of contract claim as a result of the parties' course of conduct, that case is disapproved. *Georgia Department of Labor v. RTT Associates, Inc.*, 299 Ga. 78, 786 S.E.2d 840 (2016).

No waiver without written contract. — In *Board of Regents v. Tyson*, 261 Ga. 368, 404 S.E.2d 557 (1991), the Georgia Supreme Court held that even if a contract with a state agency is formed by the parties' conduct, if it is not a written contract the state's sovereign immunity is not waived. *Georgia Department of Labor v. RTT Associates, Inc.*, 299 Ga. 78, 786 S.E.2d 840 (2016).

Application of Tort Claims Act

Use of PIT maneuver by officers. — When the plaintiff alleged that an officer negligently implemented a Georgia De-

partment of Public Safety (DPS) policy, and performed an unjustified PIT maneuver by using a patrol vehicle to intentionally strike the plaintiff's vehicle, causing the plaintiff to lose control, strike a tree, and suffer injuries, the trial court abused the court's discretion by deferring until a trial on the merits the determination of the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., exception to the waiver of sovereign immunity for losses resulting from an assault or battery as the factors controlling the court's exercise of discretion were clearly balanced in favor of a prompt pre-trial determination of the DPS's motion to dismiss for lack of subject matter jurisdiction. *Dep't of Public Safety v. Johnson*, 343 Ga. App. 22, 806 S.E.2d 195 (2017).

Officials and Their Functions

Action against officer or agent of state permitted. — Trial court erred by dismissing the plaintiff's complaint for failure to state a claim against the school superintendent because the plaintiff sufficiently pled facts invoking the limited exception to qualified immunity based on allegations that the superintendent maliciously and intentionally injured the plaintiff by firing the plaintiff after seeing the superintendent and another engage in illegal activities. *Everson v. DeKalb County Sch. Dist.*, 344 Ga. App. 665, No. A17A1430, 2018 Ga. App. LEXIS 40 (2018).

Violation of police manual did not make decision ministerial act.

District court erred when the court denied the police officers' motion to dismiss claims a demonstrator filed against the officers pursuant to 42 U.S.C. § 1983 and state law, which alleged that the officers violated the demonstrator's rights under the First and Fourth Amendments to the U.S. Constitution and Georgia law when the officers arrested the defendant for violating Georgia's mask statute, O.C.G.A. § 16-11-38, during a demonstration in Atlanta in 2014; the officers had qualified immunity from liability on the demonstrator's claims under federal law because the officers had probable cause to arrest the demonstrator when the officers saw the demonstrator wearing a "V for

Vendetta” mask after the police directed demonstrators to remove masks the demonstrators were wearing, and official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX. *Gates v. Khokhar*, 884 F.3d 1290 (11th Cir. 2018).

Negligent performance of ministerial duty.

In a detainee’s suit against a sheriff, county, and city arising out of the detainee’s improper detention, the defendants’ motion to dismiss was denied as to the sheriff’s individual liability for violations of federal law, and for failure to update the detainee’s criminal record as required by O.C.G.A. § 42-4-7 and bring the detainee before a judicial officer; however, claims against the city and county were dismissed based on immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) and Ga. Const. 1983, Art. IX, Sec. II, Para. IX. *Purvis v. City of Atlanta*, 142 F. Supp. 3d 1337 (N.D. Ga. 2015).

Unclear if discretionary function applied to child services worker failing to investigate abuse allegations.

— In a suit against the state arising out of the death of an infant at the hands of the infant’s drug-addicted parents, dismissal of claims for battery on the child was proper under the assault and battery exception to the state’s waiver of sovereign immunity, O.C.G.A. § 50-21-24(7); however, more information was needed to determine if the discretionary function exception, § 50-21-24(2), applied. *Cowart v. Ga. Dep’t of Human Servs.*, 340 Ga. App. 183, 796 S.E.2d 903 (2017).

Application

Sovereign immunity applied to city.

In a wrongful death action against the Georgia Department of Public Safety in which the decedent died from injuries sustained in a high-speed chase with the Georgia State Patrol officers, the Department’s motion to dismiss for want of subject matter jurisdiction was properly granted based on sovereign immunity because the officer’s actions during the pursuit were objectively reasonable and in compliance with the Department’s pursuit policy, and the execution of the Precision Immobilization Technique was done in compliance with the policy; the officer con-

sidered the factors set forth in the policy in deciding to continue the pursuit; and none of the circumstances that would have prohibited a pursuit under the policy existed. *James v. Ga. Dep’t of Pub. Safety*, 337 Ga. App. 864, 789 S.E.2d 236 (2016).

DOT duty to monitor for hazardous conditions. — In a wrongful death action, the trial court properly granted the motion to dismiss based on sovereign immunity filed by the Georgia Department of Transportation (GDOT) because it was clear from a review of the agency agreement and the GDOT Policy that the plaintiff’s claims for failing to monitor I-16 for hazardous conditions were barred since neither policy imposed any duty on the GDOT to monitor roadways for hazardous conditions. *Grant v. Ga. Forestry Comm’n*, 338 Ga. App. 146, 789 S.E.2d 343 (2016), cert. denied, No. S17C0003, 017 Ga. LEXIS 127 (Ga. 2017); cert. denied, No. S17C0037, 2017 Ga. LEXIS 153 (Ga. 2017).

High-speed pursuit. — After the plaintiffs were injured when a speeding car driven by a suspect who was fleeing law enforcement crashed into the plaintiffs’ car, the trial court properly granted summary judgment to the Lamar Sheriff as the plaintiffs’ claims against the Lamar Sheriff were barred as a matter of law by sovereign immunity because, by the time the plaintiffs were injured by the fleeing driver, the Lamar deputy’s patrol car was immobile and inoperative on the side of the road approximately 20 miles away as the result of a blown tire; thus, the plaintiffs’ injuries did not arise out of the “use” of the patrol car, and the sovereign immunity of the Lamar Sheriff was not waived. *Wingler v. White*, 344 Ga. App. 94, 808 S.E.2d 901 (2017).

Sheriff’s department.

Deputy and sheriff were entitled to official immunity because there was no evidence that they acted with actual malice or intent to injure in obtaining arrest warrants. Plaintiff did not allege, and there was no evidence to show, that the deputy and the sheriff were motivated by a “personal animus” toward the plaintiff or that they manufactured evidence or knowingly presented perjured testimony to obtain the arrest warrants. *Taylor v.*

Application (Cont'd)

Taylor, 649 F.3d 737 (11th Cir. May 3, 2016) (Unpublished).

School superintendent. — Trial court erred by dismissing the plaintiff's complaint for failure to state a claim against the school superintendent because the plaintiff sufficiently pled facts invoking the limited exception to qualified immunity based on allegations that the superintendent maliciously and intentionally injured the plaintiff by firing the plaintiff after seeing the superintendent and another engage in illegal activities. *Everson v. DeKalb County Sch. Dist.*, 344 Ga. App. 665, No. A17A1430, 2018 Ga. App. LEXIS 40 (2018).

Immunity extends to school district employees.

In a suit by a deceased high school student's parents against the teacher for leaving the classroom unsupervised, the teacher's act was a discretionary act entitled to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d), although an unambiguous school policy prohibited leaving students unsupervised; the teacher asked a teacher in an adjoining classroom to listen out for the students, demonstrating some discretion. *Barnett v. Atlanta Independent School System*, 339 Ga. App. 533, 792 S.E.2d 474 (2016), *aff'd* in part and vacated in part, 302 Ga. 845, 809 S.E.2d 813 (2018).

Teacher was entitled to official immunity because the parents could not show that the school's policy stating that students were never to be left in the classroom unsupervised was so clear, definite, and certain in directing the teacher's actions that the policy established a ministerial duty requiring no exercise of discretion whatsoever, particularly given the principal's testimony that teachers could leave a classroom unsupervised in an emergency or to run to the restroom or

something. *Barnett v. Caldwell*, 302 Ga. 845, 809 S.E.2d 813 (2018).

Georgia Forestry Commission. — In a wrongful death action, the trial court erred in finding that the Georgia Forestry Commission (GFC) was not negligent in carrying out the Commission's duty to advise Georgia State Patrol (GSP) of a fire and that the Commission was entitled to sovereign immunity on that ground because the record showed that an agency agreement imposed a separate and independent duty on GFC, regardless of visibility conditions, to advise GSP of the existence of any large controlled burns or wildfires in the vicinity of state roadways. *Grant v. Ga. Forestry Comm'n*, 338 Ga. App. 146, 789 S.E.2d 343 (2016), cert. denied, No. S17C0003, 017 Ga. LEXIS 127 (Ga. 2017); cert. denied, No. S17C0037, 2017 Ga. LEXIS 153 (Ga. 2017).

No waiver without written contract. — Developer failed to meet the developer's burden of showing waiver of sovereign immunity because even if the parties' conduct after the expiration of the contract could be found to demonstrate that the developer was to continue to perform under the original contract, as a matter of law, neither that conduct nor the internal documents created by a state agency after the contract expired established a written contract to do so and without a written contract, the state's sovereign immunity was not waived. *Georgia Department of Labor v. RTT Associates, Inc.*, 299 Ga. 78, 786 S.E.2d 840 (2016).

Actual malice not shown.

Officer was entitled to official immunity under Georgia law because no evidence in the record suggested that the officer intended to cause the harm suffered by the appellant when the officer threw a "flashbang" into a dark room occupied by two sleeping individuals, without first inspecting the room. *Dukes v. Deaton*, 852 F.3d 1035 (11th Cir. 2017).

SECTION III.

GENERAL PROVISIONS

Paragraph I. Eminent domain.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

WHAT IS COMPENSABLE

- 3. COMMERCIAL LOSSES
- 4. INTERFERENCE WITH RIGHT OF INGRESS AND EGRESS
- 6. INTERFERENCE WITH RIGHTS OF LESSORS AND LESSEES
- 12. EFFECT OF ZONING AND LAND USE REGULATIONS

General Consideration

Cited in *Lathrop v. Deal*, 301 Ga. 408, 801 S.E.2d 867 (2017).

What is Compensable

3. Commercial Losses

No inverse condemnation shown as to taxi cab certificates of public necessity. — Dismissal of the city taxi cab drivers’ complaint for failure to state a cause of action that the 2015 amendment of O.C.G.A. § 36-60-25(a) resulted in an unconstitutional taking and inverse condemnation was affirmed because no law prohibited the city from increasing the Certificates of Public Necessity and Convenience (CPNC) limit and no property interest the drivers may have in their respective CPNCs extended to exclusivity or a limited supply of CPNCs. *Abramyan v. State of Ga.*, 301 Ga. 308, 800 S.E.2d 366 (2017).

Taxicabs have been the subject of frequent and intensive regulation in the State of Georgia, and O.C.G.A. § 36-60-25(a) does not take business property for a public use, the statute merely requires an already regulated business to adjust its property to the new law. *Abramyan v. State of Ga.*, 301 Ga. 308, 800 S.E.2d 366 (2017).

4. Interference with Right of Ingress and Egress

Impact of interference considered. — In a condemnation case, the jury in-

structions as a whole were correct in informing the jury that where the owner’s access to a public road was taken, the deprivation should be compensated, but the jury could consider whether the owner had any alternative access when determining the amount of damages due to the deprivation of access. *Curry v. DOT*, 341 Ga. App. 482, 801 S.E.2d 95 (2017).

6. Interference with Rights of Lessors and Lessees

Holder of rent contract has compensable interest.

Courts of Georgia have drawn distinctions between the rights of a holder of a usufruct and those of a title holder. A usufruct is not subject to ad valorem taxation pursuant to O.C.G.A. § 48-5-3, and the usufruct interest does not authorize the tenant to seek an easement by necessity, pursuant to O.C.G.A. § 44-9-40(b). However, the usufruct holder’s possessory rights may constitute a property interest for which just compensation is payable under Ga. Const. 1983, Art. I, Sec. III, Para. I(a). *The Stuttering Foundation, Inc. v. Glynn County*, 301 Ga. 492, 801 S.E.2d 793 (2017).

12. Effect of Zoning and Land Use Regulations

Justification required for zoning classification.

Zoning classification that substantially burdens a property owner may be justified if the classification bears a substantial

What is Compensable (Cont'd)
12. Effect of Zoning and Land Use
Regulations (Cont'd)

relation to the public health, safety, morality, or general welfare. Lacking that kind of justification, the zoning may be set

aside as arbitrary or capricious. If a land-use regulation is arbitrary and capricious then the regulation cannot stand. *Diversified Holdings, LLP v. City of Suwanee*, 302 Ga. 597, 807 S.E.2d 876 (2017).

RESEARCH REFERENCES

ALR. — Loss or impairment of landowner’s access to existing controlled-access road or highway as compensable taking absent government condemnation or occupation of landowner’s realty, 93 A.L.R.6th 363.

Determination whether exaction for property development constitutes compensable taking, 8 A.L.R.7th 7.

ARTICLE II.
VOTING AND ELECTIONS

SECTION I.

METHOD OF VOTING; RIGHT TO REGISTER AND VOTE

Paragraph I. Method of voting.

Law reviews. — For article, “Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks,” see 67 *Emory L.J.* 545 (2018).

SECTION II.

GENERAL PROVISIONS

Paragraph V. Vacancies created by elected officials qualifying for other office.

(Ga. Const. 1983, Art. 2, § 2, Para. 5, approved by Ga. L. 1983, p. 972, § 1/HR 30)

ARTICLE III.
LEGISLATIVE BRANCH

Section
IX. Appropriations.

SECTION I.

LEGISLATIVE POWER

Paragraph I. Power vested in General Assembly.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Delegation of powers. — Delegation of the power to tax, and the laying of a tax, are two things. The constitutional provision requiring revenue bills to originate in

the House applies to an Act which lays a tax, and does not apply to an Act which merely delegates the power to tax. *Harper v. Commonwealth of the Town of Elberton*, 23 Ga. 566 (1857).

SECTION V.

ENACTMENT OF LAWS

Paragraph II. Bills for revenue.

JUDICIAL DECISIONS

Delegation of powers. — Delegation of the power to tax, and the laying of a tax, are two things. The constitutional provision requiring revenue bills to originate in the House applies to an Act which lays a

tax, and does not apply to an Act which merely delegates the power to tax. *Harper v. Commonwealth of the Town of Elberton*, 23 Ga. 566 (1857).

SECTION VI.

EXERCISE OF POWERS

Paragraph IV. Limitations on special legislation.

Law reviews. — For annual survey on local government law, see 68 Mercer L. Rev. 199 (2016).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

SPECIAL LAWS

General Consideration

Statutory interpretation of salary statute as to cost-of-living adjust-

ments. — According to the plain language of O.C.G.A. § 15-6-88, the 2007 Local Act does not establish \$56,000 as the salary for the clerk. It simply states that the

General Consideration (Cont'd)

clerk's salary may not be less than \$56,000; consequently, it is not inconsistent on its face with the terms of the general statute requiring a clerk to be paid no less than the amount set by the county population schedule set forth in the statute, and is not unconstitutional. *Chatham County v. Massey*, 299 Ga. 595, 791 S.E.2d 85 (2016).

Cited in *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 788 S.E.2d 405 (2016).

Special Laws

Payment of clerk's salary based on local act versus general statute. — 2007 Local Act was not unconstitutional based on the fact that subsection (a) of the 2007 Local Act authorized the superior court clerk to be paid less than what was required by O.C.G.A. § 15-6-88 because,

according to the statute's plain language, the 2007 Local Act did not establish \$56,000 as the salary for the clerk as the statute simply stated that the clerk's salary could not be less than \$56,000; thus, it was not inconsistent on the statute's face with the terms of the statute requiring a clerk to be paid no less than the amount set by the county population schedule set forth in § 15-6-88. *Chatham County v. Massey*, 299 Ga. 595, 791 S.E.2d 85 (2016).

Annexations properly invalidated. — Judgment invalidating the City of Atlanta's attempted annexation of five areas was affirmed because the trial court correctly held that the annexations were invalid since at the time the annexations would have become effective, the areas in question were already part of the newly incorporated City of South Fulton and thus ineligible for annexation by Atlanta. *City of Atlanta v. Mays*, 301 Ga. 367, 801 S.E.2d 1 (2017).

Paragraph V. Specific limitations.

JUDICIAL DECISIONS

ANALYSIS

- CONTRACTS TO DEFEAT COMPETITION
2. COVENANTS NOT TO COMPETE
- B. ANCILLARY TO CONTRACT OF EMPLOYMENT

Contracts to Defeat Competition

2. Covenants Not to Compete

B. Ancillary to Contract of Employment

Non-solicitation of patients clause unenforceable. — Non-solicitation covenant in physicians' pre-2011 employment

contracts would prevent the physicians from having any communication with the employer's patients, even if those patients sought out the physicians, which was unreasonable and unenforceable, but geographic limitations were not unreasonable and were enforceable. *Burson v. Milton Hall Surgical Associates, LLC*, 343 Ga. App. 159, 806 S.E.2d 239 (2017).

Paragraph VI. Gratuities.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in *Smith v. Northside Hosp., Inc.*,
302 Ga. 517, 807 S.E.2d 909 (2017).

SECTION VIII.**INSURANCE REGULATION****Paragraph I. Regulation of insurance.****JUDICIAL DECISIONS**

Cited in *Women's Surgical Ctr., LLC v. Berry*, 302 Ga. 349, 806 S.E.2d 606 (2017).

SECTION IX.**APPROPRIATIONS**

Paragraph

VI. Appropriations to be for specific sums.

Paragraph VI. Appropriations to be for specific sums.

(a) Except as hereinafter provided, the appropriation for each department, officer, bureau, board, commission, agency, or institution for which appropriation is made shall be for a specific sum of money; and no appropriation shall allocate to any object the proceeds of any particular tax or fund or a part or percentage thereof.

(b) An amount equal to all money derived from motor fuel taxes received by the state in each of the immediately preceding fiscal years, less the amount of refunds, rebates, and collection costs authorized by law, is hereby appropriated for the fiscal year beginning July 1, of each year following, for all activities incident to providing and maintaining an adequate system of public roads and bridges in this state, as authorized by laws enacted by the General Assembly of Georgia, and for grants to counties by law authorizing road construction and maintenance, as provided by law authorizing such grants. Said sum is hereby appropriated for, and shall be available for, the aforesaid purposes regardless of whether the General Assembly enacts a general appropriations Act; and said sum need not be specifically stated in any general appropriations Act passed by the General Assembly in order to be available for such purposes. However, this shall not preclude the General Assembly from appropriating for such purposes an amount greater than the sum specified above for such purposes. The expenditure of such funds shall be subject to all the rules, regulations, and restrictions imposed on the expenditure of appropriations by provisions

of the Constitution and laws of this state, unless such provisions are in conflict with the provisions of this paragraph. And provided, however, that the proceeds of the tax hereby appropriated shall not be subject to budgetary reduction. In the event of invasion of this state by land, sea, or air or in case of a major catastrophe so proclaimed by the Governor, said funds may be utilized for defense or relief purposes on the executive order of the Governor.

(c) A trust fund for use in the reimbursement of a portion of an employer's workers' compensation expenses resulting to an employee from the combination of a previous disability with subsequent injury incurred in employment may be provided for by law. As authorized by law, revenues raised for purposes of the fund may be paid into and disbursed from the trust without being subject to the limitations of subparagraph (a) of this Paragraph or of Article VII, Section III, Paragraph II.

(d) As provided by law, additional penalties may be assessed in any case in which any court in this state imposes a fine or orders the forfeiture of any bond in the nature of the penalty for all offenses against the criminal and traffic laws of this state or of the political subdivisions of this state. The proceeds derived from such additional penalty assessments may be allocated for the specific purpose of meeting any and all costs, or any portion of the cost, of providing training to law enforcement officers and to prosecuting officials.

(e) The General Assembly may by general law approved by a three-fifths' vote of both houses designate any part or all of the proceeds of any state tax now or hereafter levied and collected on alcoholic beverages to be used for prevention, education, and treatment relating to alcohol and drug abuse.

(f) The General Assembly is authorized to provide by law for the creation of a State Children's Trust Fund from which funds shall be disbursed for child abuse and neglect prevention programs. The General Assembly is authorized to appropriate moneys to such fund and such moneys paid into the fund shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c), relative to the lapsing of funds.

(g) The General Assembly is authorized to provide by law for the creation of a Seed-Capital Fund from which funds shall be disbursed at the direction of the Advanced Technology Development Center of the University System of Georgia to provide equity and other capital to small, young, entrepreneurial firms engaged in innovative work in the areas of technology, manufacturing, or agriculture. Funds shall be disbursed in the form of loans or investments which shall provide for repayment, rents, dividends, royalties, or other forms of return on investments as provided by law. Moneys received from returns on loans

or investments shall be deposited in the Seed-Capital Fund for further disbursement. The General Assembly is authorized to appropriate moneys to such fund and such moneys paid into the fund shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c) relative to the lapsing of funds. The General Assembly shall be authorized to provide by law for any matters relating to the purpose or provisions of this subparagraph.

(h) The General Assembly is authorized to provide by general law for additional penalties or fees in any case in any court in this state in which a person is adjudged guilty of an offense against the criminal or traffic laws of this state or an ordinance of a political subdivision of this state. The General Assembly is authorized to provide by general law for the allocation of such additional penalties or fees for the construction, operation, and staffing of jails, correctional institutions, and detention facilities by counties.

(i) The General Assembly is authorized to provide by general law for the creation of an Indigent Care Trust Fund. Any hospital, hospital authority, county, or municipality is authorized to contribute or transfer moneys to the fund and any other person or entity specified by the General Assembly may also contribute to the fund. The General Assembly may provide by general law for the dedication and deposit of revenues raised from specified sources for the purposes of the fund into the fund. Moneys in the fund shall be exclusively used for primary health care programs for medically indigent citizens and children of this state, for expansion of Medicaid eligibility and services, or for programs to support rural and other health care providers, primarily hospitals, who disproportionately serve the medically indigent. Any other appropriation from the Indigent Care Trust Fund shall be void. Contributions and revenues deposited to the fund shall not lapse and shall not be subject to the limitations of subparagraph (a) of this Paragraph or of Article VII, Section III, Paragraph II. Contributions in the fund which are not appropriated as required by this subparagraph shall be refunded pro rata to the contributors thereof, as provided by the General Assembly.

(j) The General Assembly is authorized to provide by general law for the creation of an emerging crops fund from which to pay interest on loans made to farmers to enable such farmers to produce certain crops on Georgia farms and thereby promote economic development. The General Assembly is authorized to appropriate moneys to such fund and moneys so appropriated shall not be subject to the provisions of Article III, Section IX, Paragraph IV(c), relative to the lapsing of appropriated funds. Interest on loans made to farmers shall be paid from such fund pursuant to such terms, conditions, and requirements as the General Assembly shall provide by general law. The General

Assembly may provide by general law for the administration of such fund by such state agency or public authority as the General Assembly shall determine.

(k) The General Assembly is authorized to provide by general law for additional penalties or fees in any case in any court in this state in which a person is adjudged guilty of an offense involving driving under the influence of alcohol or drugs or reckless driving. The General Assembly is authorized to provide by general law for the allocation of such additional penalties or fees to the Brain and Spinal Injury Trust Fund, as provided by law, for the specified purpose of meeting any and all costs, or any portion of the costs, of providing care and rehabilitative services to citizens of the state who have survived neurotrauma with head or spinal cord injuries. Moneys appropriated for such purposes shall not lapse. The General Assembly may provide by general law for the administration of such fund by such authority as the General Assembly shall determine.

(l) The General Assembly is authorized to provide by general law for the creation of a roadside enhancement and beautification fund from which funds shall be disbursed for enhancement and beautification of public rights of way; for allocation and dedication of revenue from tree and other vegetation trimming or removal permit fees, other related assessments, and special and distinctive wildflower motor vehicle license plate fees to such fund; that moneys paid into the fund shall not lapse, the provisions of Article III, Section IX, Paragraph IV(c) notwithstanding; and for any matters relating to the purpose or provisions of this subparagraph. An Act creating such fund and making such provisions effective January 1, 1999, or later may originate or have originated in the Senate or the House of Representatives.

(m) There shall be within the Department of Agriculture a dog and cat reproductive sterilization support program to control dog and cat overpopulation and thereby reduce the number of animals housed and killed in animal shelters, which program shall be administered by the Commissioner of Agriculture. In order to fund the program, there shall be issued beginning in 2003 specially designed license plates promoting the program. The General Assembly shall provide by law for the issuance of such license plates and for the dedication of certain revenue derived from fees for such plates to the support of the program. All such dedicated revenue derived from special license plate fees, any funds appropriated to the department for such purposes, and any voluntary contributions or other funds made available to the department for such purposes and all interest thereon shall be deposited in a special fund for support of the program, shall not be used for any purpose other than support of the program, and shall not lapse. The General Assembly may provide by law for all matters necessary or appropriate to the implementation of this paragraph.

(n) The General Assembly may provide by law for the issuance and renewal of special motor vehicle license plates that motor vehicle owners may optionally purchase and renew for additional fees. The General Assembly may provide for all or a portion of the net revenue, as defined by the General Assembly, derived from the additional fees charged for any such special license plate to be dedicated to an agency, fund, or nonprofit corporation to implement or support programs related to the nature of the special license plate, as intended by the authorizing statute. Any dedication of funds enacted pursuant to the authority of this subparagraph may be in whole or in part for the ultimate use of a nonprofit corporation, without limitation by Article III, Section VI, Paragraph VI, if the General Assembly determines that the license plate program and such appropriation will benefit both the state and the nonprofit corporation. Any law enacted pursuant to the authority of this subparagraph may provide that funds dedicated pursuant to such law shall not lapse as otherwise required by Article III, Section IX, Paragraph IV(c). Any law enacted pursuant to the authority of this subparagraph shall be required to receive a two thirds' majority vote in both the Senate and the House of Representatives.

(o) The General Assembly may provide by general law for additional penalties in any case in any court in this state in which a person is adjudged guilty of keeping a place of prostitution, pimping, pandering, pandering by compulsion, solicitation of sodomy, masturbation for hire, trafficking of persons for sexual servitude, or sexual exploitation of children and may impose assessments on adult entertainment establishments as defined by law; and such appropriated amount shall not lapse as required by Article III, Section IX, Paragraph IV(c) and shall not be subject to the limitations of subparagraph (a) of this Paragraph, Article III, Section V, Paragraph II, Article VII, Section III, Paragraph II(a), or Article VII, Section III, Paragraph IV. The General Assembly may provide by general law for the allocation of such assessments and additional penalties to the Safe Harbor for Sexually Exploited Children Fund for the specified purpose of meeting any and all costs, or any portion of the costs, of providing care and rehabilitative and social services to individuals in this state who have been or may be sexually exploited. The General Assembly may provide by general law for the administration of such fund by such authority as the General Assembly shall determine.

(o) The proceeds of any excise tax imposed by general law on the sale of fireworks or consumer fireworks in this state shall be dedicated to the provision of trauma care, fire services, and local public safety purposes in Georgia. The General Assembly shall provide by general law for the use, dedication, and deposit of revenues raised from any such excise tax on fireworks or consumer fireworks. Contributions and revenues deposited for such purposes shall not lapse and shall not be subject to the

limitations of subparagraph (a) of this Paragraph or of Article VII, Section III, Paragraph II. (Ga. Const. 1983, Art. 3, § 9, Para. 6; Ga. L. 1986, p. 1631, § 1/SR 330; Ga. L. 1988, p. 2106, § 1/HR 552; Ga. L. 1988, p. 2125, § 1/SR 347; Ga. L. 1988, p. 2126, § 1/SR 350; Ga. L. 1990, p. 2441, § 1/HR 796; Ga. L. 1992, p. 3333, § 1/HR 840; Ga. L. 1998, p. 1683/SR 144; Ga. L. 1998, p. 1688/SR 559; Ga. L. 2002, p. 1503, § 1/HR 264; Ga. L. 2006, p. 1112, § 1/HR 1564; Ga. L. 2014, p. 887, § 1/HR 1183; Ga. L. 2015, p. 1497, § 1/SR 7; Ga. L. 2016, p. 877, § 1/SR 558.)

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1138, § 1/HR 238, if ratified, would add a new subparagraph to read as follows: “(p) The General Assembly is authorized to provide by general law that up to 80 percent of all moneys received by the state from the levy of a tax on the sale and use of goods and services, as defined by general law, collected by establishments classified under the 2007 North American Industry Classification Code 451110, sporting goods stores, in the immediately preceding fiscal year will be paid into and dedicated to the Georgia Outdoor Stewardship Trust Fund for the purpose of protecting and preserving conservation land, as more specifically provided for by general law. Any general law adopted pursuant to this Paragraph shall provide for automatic repeal not more

than ten years after its effective date, provided that such repeal date may be extended for a maximum of ten additional years. The revenues dedicated pursuant to this subparagraph shall not lapse, the provisions of Article III, Section IX, Paragraph IV(c) to the contrary notwithstanding, and such revenues shall not be subject to the limitations of subparagraph (a) of this Paragraph or Article VII, Section III, Paragraph II(a).”

Editor’s notes. — The constitutional amendment (Ga. L. 2015, p. 1497, § 1/SR 7) which added the first subparagraph (o) was ratified at the general election held on November 8, 2016.

The constitutional amendment (Ga. L. 2016, p. 877, § 1/SR 558) which added the second subparagraph (o) was ratified at the general election held on November 8, 2016.

JUDICIAL DECISIONS

Mandamus relief improperly denied. — Plaintiffs’ mandamus claims were improperly denied as the plaintiffs did not have an adequate legal remedy to challenge the constitutionality of Ga. L. 2015, pp. 236, 241-264, §§ 5-8 (HB 170) by pursuing a refund action because the plaintiffs did not argue that H.B. 170 illegally assessed taxes against the plaintiffs, but, rather, the plaintiffs argued that it violated the state constitution by allowing revenues from taxes on motor fuels to be apportioned for purposes other than on roads and bridges; thus, the relief the plaintiffs sought was broader than the relief provided by the statute, O.C.G.A. § 48-9-3, which was limited to a refund of the assessed taxes plus interest, and the trial court erred in concluding that the

refund statute was an adequate legal remedy for the plaintiffs’ claims. *Ga. Motor Trucking Ass’n v. Georgia Dep’t of Revenue*, 301 Ga. 354, 801 S.E.2d 9 (2017).

Local sales and use taxes not appropriate for public roads and bridges. — Trial court did not err in dismissing the plaintiffs’ complaint that local sales and use taxes on motor fuels were not allocated to the maintenance and construction of public roads and bridges as the Motor Fuel Provision revealed that motor fuel taxes were limited to per-gallon taxes on distributors of motor fuel, and did not include sales and use taxes imposed on retail sales of motor fuels because the local sales and use taxes authorized by Ga. L. 2015, pp. 236, 241-264, §§ 5-8 (HB 170) were separate and distinct from the

taxes on distributors and were not “motor fuel taxes” as that term was used in the Motor Fuel Provision; and, as a result, the defendants had no duty to appropriate for public roads an amount of revenue equal

to the proceeds from local sales and use taxes. Ga. Motor Trucking Ass’n v. Georgia Dep’t of Revenue, 301 Ga. 354, 801 S.E.2d 9 (2017).

ARTICLE IV.

CONSTITUTIONAL BOARDS AND COMMISSIONS

SECTION II.

STATE BOARD OF PARDONS AND PAROLES

Paragraph II. Powers and authority.

JUDICIAL DECISIONS

Habeas court violated separation of powers by revoking sentence while petitioner in custody of parole board. — Habeas court erred by revoking the petitioner’s remaining portion of the original sentence while the petitioner was in

the legal custody of the Georgia Board of Pardons and Paroles as such action was in violation of the separation of powers provision of Ga. Const. 1983, Art. I, Sec. II, Para. III. *Hayward v. Danforth*, 299 Ga. 261, 787 S.E.2d 709 (2016).

RESEARCH REFERENCES

ALR. — Judicial investigation of pardon by governor, 101 A.L.R.6th 431.

ARTICLE V.

EXECUTIVE BRANCH

SECTION I.

ELECTION OF GOVERNOR AND LIEUTENANT GOVERNOR

Paragraph II. Election for Governor.

JUDICIAL DECISIONS

Authority of Attorney General. — The Attorney General has the authority under state law to appeal a court decision invalidating a state redistricting statute despite the Governor’s order to dismiss the appeal. Because there is constitutional authority for the General Assembly to vest the Attorney General with specific duties and a state statute vested the At-

torney General with the authority to litigate in the voting rights action, the Attorney General had the power to seek a final determination on the validity of the State Senate redistricting statute under the federal Voting Rights Act (now 52 U.S.C. § 10301). *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003).

SECTION II.

DUTIES AND POWERS OF GOVERNOR

JUDICIAL DECISIONS

Authority of Attorney General. — The Attorney General has the authority under state law to appeal a court decision invalidating a state redistricting statute despite the Governor’s order to dismiss the appeal. Because there is constitutional authority for the General Assembly to vest the Attorney General with specific duties and a state statute vested the At-

torney General with the authority to litigate in the voting rights action, the Attorney General had the power to seek a final determination on the validity of the State Senate redistricting statute under the federal Voting Rights Act (now 52 U.S.C. § 10301). *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003).

Paragraph IV. Veto power.

RESEARCH REFERENCES

ALR. — Disapproval by governor of bill in part or approval with modifications, 87 A.L.R.6th 633.

SECTION III.

OTHER ELECTED EXECUTIVE OFFICERS

Paragraph IV. Attorney General; duties.

JUDICIAL DECISIONS

Authority of Attorney General. — The Attorney General has the authority under state law to appeal a court decision invalidating a state redistricting statute despite the Governor’s order to dismiss the appeal. Because there is constitutional authority for the General Assembly to vest the Attorney General with specific duties and a state statute vested the At-

torney General with the authority to litigate in the voting rights action, the Attorney General had the power to seek a final determination on the validity of the State Senate redistricting statute under the federal Voting Rights Act (now 52 U.S.C. § 10301). *Perdue v. Baker*, 277 Ga. 1, 586 S.E.2d 606 (2003).

ARTICLE VI.

JUDICIAL BRANCH

Section
VII. Selection, Term, Compensation, and Discipline of Judges.

SECTION I.

JUDICIAL POWER

Paragraph I. Judicial power of the state.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would add “state-wide business court,” following “superior courts,” in the first sentence, and would add a new sec-

ond sentence which would read: “Nothing in this paragraph shall preclude a superior court from creating a business court division for its circuit in a manner provided by law.”

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Judicial Qualifications Commission was not authorized to pronounce the law in unsettled areas; therefore, the Commission’s formal advisory opinion regarding the unsettled areas regarding whether the right of public access to the courts extended to children, or whether

inquiries by security personnel amounted to a closure of the courts, exceeded the Commission’s authority. The Commission was not vested with judicial power; rather, such power was vested in the state courts. In re Judicial Qualifications Comm’n Formal Advisory Opinion No. 239, 300 Ga. 291, 794 S.E.2d 631 (2016).

Paragraph IV. Exercise of judicial power.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would add “and state-wide busi-

ness court” following “appellate courts” in the first sentence, and would add “and the state-wide business court” following “courts of record” in the second sentence.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Constitutionality of Service Delivery Strategy Act. — Trial court erred by finding that the Service Delivery Strategy Act, O.C.G.A. § 36-70-20 et seq., specifically O.C.G.A. § 36-70-25.1(d)(2), was unconstitutional because it did not permit

the trial court to direct that the parties enter into a particular agreement and, therefore, did not invade the province of the legislative branch by imposing a tax or allocating the proceeds of that tax. *City of Union Point v. Greene County*, No. S17X1879, 2018 Ga. LEXIS 185 (Mar. 15, 2018).

Paragraph V. Uniformity of jurisdiction, powers, etc.

Proposed amendment. — Amendment of the Georgia Constitution pro-

posed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would rewrite the second sen-

tence of this paragraph to read: “The provisions of this Paragraph, as related to the

state-wide business court, shall be effective as provided by law.”

Paragraph VI. Judicial circuits; courts in each county; court sessions.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would substitute “a state court,

a juvenile court, and a business court division of superior court” for “a state court and a juvenile court” at the end of the second sentence.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in *City of Union Point v. Greene County*, No. S17X1879, 2018 Ga. LEXIS 178 (Mar. 15, 2018).

Paragraph IX. Rules of evidence; law prescribed.

JUDICIAL DECISIONS

Application to O.C.G.A. § 24-7-702. — O.C.G.A. § 24-7-702(c)(2)(A), governing expert qualifications in medical malpractice cases, was not unconstitutionally vague, did not violate equal protection, separation of powers, or the right to jury trial, did not make irrevocable grants of special privileges and immunities, and was not a special law; however, the trial

court erred in rejecting an expert simply because the expert had not performed the specific procedure at issue. The proper consideration was the expert’s level of knowledge. *Zarate-Martinez v. Echemendia*, 299 Ga. 301, 788 S.E.2d 405 (2016).

Cited in *Mitchell v. State*, 301 Ga. 563, 802 S.E.2d 217 (2017).

SECTION II.

VENUE

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would add Paragraph IX, to read as follows: “**Venue of state-wide business court.** All cases before the state-wide business court may conduct pretrial proceedings in any county as pro-

vided by law. Any trial of a case that is before the state-wide business court shall take place in the county as is otherwise prescribed by this section.”

Law reviews. — For note, “*Tennessee v. FCC* and the Clear Statement Rule,” see 51 Ga. L. 947 (2017).

Paragraph IV. Suits against joint obligors, copartners, or joint trespassers.

JUDICIAL DECISIONS

ANALYSIS

VENUE

- 1. IN GENERAL
- 2. JOINT TORTFEASORS

Venue

1. In General

Dismissal on venue proper. — In suits by classes of former and current members of distribution electric membership corporations (EMCs) seeking to recover millions of dollars in patronage capital from two wholesale EMCs, in which the members lacked privity with the wholesale EMCs which were the only defendants as to whom venue was proper, dismissal of the distribution EMCs was proper. *Walker v. Oglethorpe Power Corp.*, 341 Ga. App. 647, 802 S.E.2d 643 (2017).

2. Joint Tortfeasors

Suit against joint wrongdoers together and in county of either per-

missible.

In an automobile collision case, the trial court properly denied the known defendant’s motion to transfer venue to the known defendant’s home county because the John Doe defendant was alleged to have played a vital role in causing the plaintiffs’ alleged injuries; and, in a tort action, if venue in a particular county was proper as to one joint tort-feasor, it was proper as to the other joint tort-feasor as well; thus, because venue was proper in Bibb County as to the John Doe defendant, it was likewise proper as to the known defendant in that county. *Carpenter v. McMann*, 341 Ga. App. 791, 802 S.E.2d 74 (2017).

Paragraph VI. All other cases.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DETERMINING VENUE

- 1. IN GENERAL
- 3. CRIMINAL ACTIONS

General Consideration

O.C.G.A. § 16-9-121 is unconstitutional insofar as it allows jurisdiction in the county in which the victim resides in all cases. — *State v. Mayze*, which is cited in the casenote under this catchline in the bound volume, has been vacated, with different results reached on reconsideration by *State v. Mayze*, 280 Ga. 5, 622 S.E.2d 836 (2005).

Dismissal of modification complaint. — Trial court did not err in declining to dismiss the mother’s modification complaint pursuant to O.C.G.A. § 19-9-24(b) because the mother filed the motion as a separate action in the father’s county of residence. *Dallow v. Dallow*, 299 Ga. 762, 791 S.E.2d 20 (2016).

Abandonment of issue on appeal. — In a breach of contract action, because the company failed to set forth any argument

General Consideration (Cont'd)

in the company's appellate brief that the trial court erred in failing to transfer the case because it was not jointly liable with the resident co-defendants, either as joint tortfeasors or as joint obligors, the appellate court deemed the issue of venue abandoned on appeal. *Liberty Capital, LLC v. First Chatham Bank*, 338 Ga. App. 48, 789 S.E.2d 303 (2016).

Determining Venue**1. In General**

Discretion of trial court on venue. — When a plaintiff brings suit in the same county on two claims arising from the same transaction and the Georgia Constitution designates that county as the venue for one of those claims, the trial court has the discretion to entertain both claims. *Liberty Capital, LLC v. First Chatham Bank*, 338 Ga. App. 48, 789 S.E.2d 303 (2016).

3. Criminal Actions

Venue not relevant to motion to suppress. — Grant of the defendant's motion to suppress on the basis of venue was reversed because the state did not need to establish venue at the pretrial hearing on the defendant's motion to suppress as it was not relevant to the issues raised in the motion, which challenged the reasonable basis for the traffic stop or whether the resulting search of the defendant and the defendant's vehicle were supported by probable cause. *State v. Wallace*, 338 Ga. App. 611, 791 S.E.2d 187 (2016).

Proof of venue.

Sufficient evidence supported that venue was properly established in Bibb County, Georgia, with regard to the defendant's aggravated assault, kidnapping, and rape convictions because although the two women were not sure where the defendant had driven them, the testimony of the camper whom one victim had found upon escaping established venue in Bibb County and the second area where the other victim was raped was only three minutes from the first. *Howard v. State*, 340 Ga. App. 133, 796 S.E.2d 757 (2017).

Venue in the county was established beyond a reasonable doubt under O.C.G.A. § 17-2-2(c) because both victims suffered gunshot wounds and died at an address located in the county. *Jones v. State*, 301 Ga. 1, 799 S.E.2d 196 (2017).

Evidence of venue in fleeing and eluding case. — In a fleeing and eluding case under O.C.G.A. § 40-6-395, the evidence was sufficient to establish venue as required by Ga. Const. 1983, Art. VI, Sec. II, Para. VI and O.C.G.A. § 17-2-2(a), based on evidence that the chase originated in the county and continued there, including an eyewitness's testimony, dash cam footage, and a map. *Payne v. State*, 338 Ga. App. 677, 791 S.E.2d 451 (2016).

Adequate evidence of proper venue.

Evidence established beyond a reasonable doubt that venue was properly in Houston County because the state presented testimony at trial establishing that the crimes against the victim culminating in the victim's murder were committed in Houston County as the place where the victim was severely beaten was in Houston County, the place where the victim was strangled to death was in Houston County, and the place where the victim's body was discovered was in Houston County; thus, the failure to prove venue was not a meritorious basis for granting directed verdicts of acquittal. *Pike v. State*, 302 Ga. 795, 809 S.E.2d 756 (2018).

Evidence was sufficient to convict the defendant of rape and false imprisonment because venue in Fulton County was proper as the night club and the house the victim ran to after the rape were located there; the victim accepted a ride from two men who, against the victim's will, drove the victim to a nearby field and then, forcibly and against the victim's will, had sex with the victim; a sexual assault exam was performed, DNA samples were collected from the victim, and the rape kit was sent to the GBI crime lab; and, about 20 years later, the crime lab generated a profile of the male DNA which matched known DNA profiles of the defendant contained in an existing DNA database and in buccal swabs obtained from the defendant by search warrant. *Walker v. State*, 341 Ga. App. 742, 801 S.E.2d 621 (2017).

Jury instruction on venue in homicide cases. — Jury instruction in a murder case under O.C.G.A. § 17-2-2(c), that, if it could not be determined where the cause of death was inflicted, it “shall be considered” that it was inflicted in the county where the body was discovered, did not impermissibly shift the burden of proof to the defendant. As a result, the

following cases are disapproved: *Napier v. State*, 276 Ga. 769(2), 583 S.E.2d 825 (2003), *Owens v. State*, 286 Ga. 821, 827(3), 693 S.E.2d 490 (2010), and *Owens v. McLaughlin*, 733 F.3d 320, 327 (11th Cir. 2013). *Shelton v. Lee*, 299 Ga. 350, 788 S.E.2d 369 (2016), cert. denied, 137 S. Ct. 1066, 197 L. Ed. 2d 187 (U.S. 2017).

SECTION III.

CLASSES OF COURTS OF LIMITED JURISDICTION

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would add Paragraph II, to read

as follows: “**Jurisdiction of state-wide business court.** The state-wide business court shall have state-wide jurisdiction as provided by law.”

SECTION IV.

SUPERIOR COURTS

Paragraph I. Jurisdiction of superior courts.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would rewrite this paragraph to read: “The superior courts shall have jurisdiction in all cases, except as otherwise provided in this Constitution. They shall have exclusive jurisdiction over trials in felony cases, except in the case of juvenile offenders as provided by law; in cases

respecting title to land; and in divorce cases. They shall have concurrent jurisdiction with the state-wide business court in equity cases. A superior court by agreement of the parties may order removal of a case to the state-wide business court as provided by law. The superior courts shall have such appellate jurisdiction, either alone or by circuit or district, as may be provided by law.”

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in *Cook Pecan Company, Inc. v. McDaniel*, 337 Ga. App. 186, 786 S.E.2d 852 (2016).

SECTION V.

COURT OF APPEALS

Paragraph I. Composition of Court of Appeals; Chief Judge.

JUDICIAL DECISIONS

Cited in Georgia Department of Labor v. RTT Associates, Inc., 299 Ga. 78, 786 S.E.2d 840 (2016).

Paragraph III. Jurisdiction of Court of Appeals; decisions binding.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Blackwell v. State, 299 Ga. 122, 786 S.E.2d 669 (2016); In the Interest

of J. F., 338 Ga. App. 15, 789 S.E.2d 274 (2016).

Paragraph IV. Certification of question to Supreme Court.

JUDICIAL DECISIONS

Certification of question of law. — Because two conflicting decisions that governed a case regarding interpretation of O.C.G.A. § 15-11-521(b) were before the Supreme Court of Georgia on certiorari review, the court certified resolution of the case to the Supreme Court via a

certified question under Ga. Const. 1983, Art. VI, Sec. V, Para. IV. To await the Supreme Court’s decision would run afoul of the two-term rule, Ga. Const. 1983, Art. VI, Sec. IX, Para. II. In the Interest of J. F., 338 Ga. App. 15, 789 S.E.2d 274 (2016).

SECTION VI.

SUPREME COURT

Paragraph II. Exclusive appellate jurisdiction of Supreme Court.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Federal preemption. — The preemption doctrine is a product of the Supremacy Clause, U.S. Const., Art. VI, Cl. 2, which invalidates state laws that interfere with, or are contrary to, federal law. The preemption argument invokes the Supreme Court of Georgia’s constitutional question jurisdiction under Ga. Const. 1983, Art. VI, Sec. VI, Para. II (1). *RES-GA McDonough, LLC v. Taylor English Duma LLP*, 302 Ga. 444, 807 S.E.2d 381 (2017).

Question of federal preemption. — Supreme Court of Georgia properly has jurisdiction of an appeal that presents a question about the constitutionality of a statute, Ga. Const. 1983, Art. VI, Sec. VI, Para. II (1), namely, whether a Georgia statute is preempted by federal law. *Cnty. & S. Bank v. Lovell*, 302 Ga. 375, 807 S.E.2d 444 (2017).

Constitutional challenge not viable due to failure to raise in trial court. — Because an appeal of the denial of a motion to seal a criminal record under O.C.G.A. § 35-3-37(m) failed to present a viable challenge to the statute’s constitutionality, Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1), because the challenge (a separation of powers argument, Ga. Const. 1983, Art. I, Sec. II, Para. III, based on the

Supreme Court’s record-keeping authority under Ga. Const. 1983, Art. VI, Sec. IX, Para. I, and Ga. Unif. Super. Ct. R. 21.4) was not raised below, jurisdiction was properly before the Court of Appeals, pursuant to O.C.G.A. § 5-6-34(a)(12). *Doe v. State*, No. S17A1694, 2018 Ga. LEXIS 126 (Mar. 5, 2018).

No preemption found by federal law. — Grant of summary judgment to a railroad was reversed as to the property owner’s claim for inverse condemnation for the property located to the east of the railroad tracks because it could not be said that the claim would unreasonably interfere with or otherwise burden rail transportation, thus, the trial court erred when the court found that this claim was preempted by the Interstate Commerce Commission Termination Act of 1996, 49 U.S.C. § 10501 et seq. *Fox v. Norfolk S. Corp.*, 342 Ga. App. 38, 802 S.E.2d 319 (2017).

Cited in *State of Ga. v. International Keystone Knights of the Ku Klux Klan, Inc.*, 299 Ga. 392, 788 S.E.2d 455 (2016); *Merch. Law Firm, P.C. v. Emerson*, 301 Ga. 609, 800 S.E.2d 557 (2017); *City of Atlanta v. Mays*, 301 Ga. 367, 801 S.E.2d 1 (2017); *Bruno v. Light*, 344 Ga. App. 799, No. A17A1967, 2018 Ga. App. LEXIS 143 (2018).

Paragraph III. General appellate jurisdiction of Supreme Court.

Law reviews. — For article, “Annual Survey of Georgia Law: June 1, 2015 — May 31, 2016: Special Contribution: Open Chambers Revisited: Demystifying the In-

ner Workings and Culture of the Georgia Court of Appeals,” see 68 Mercer L. Rev. 1 (2016).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CRIMINAL CASES

General Consideration

Certification of question of law. — Because two conflicting decisions that governed a case regarding interpretation of O.C.G.A. § 15-11-521(b) were before

the Supreme Court of Georgia on certiorari review, the court certified resolution of the case to the Supreme Court via a certified question under Ga. Const. 1983, Art. VI, Sec. V, Para. IV. To await the Supreme Court’s decision would run afoul

General Consideration (Cont'd)

of the two-term rule, Ga. Const. 1983, Art. VI, Sec. IX, Para. II. In the Interest of J. F., 338 Ga. App. 15, 789 S.E.2d 274 (2016).
Cited in Wallace v. Wallace, 301 Ga. 195, 800 S.E.2d 303 (2017); Merch. Law Firm, P.C. v. Emerson, 301 Ga. 609, 800 S.E.2d 557 (2017); Peterson v. Peterson, No. S17A1488, 2018 Ga. LEXIS 150 (Mar. 5, 2018).

Criminal Cases

Supreme Court had jurisdiction over post conviction motion seeking

transcript in murder case. — The Supreme Court of Georgia had jurisdiction over an appeal from a post-conviction motion seeking a transcript from a defendant’s original murder case under Ga. Const. 1983, Art. VI, Sec. VI, Para. III(8), and the motion was not a motion in the nature of mandamus subject to the Court of Appeals’ jurisdiction under O.C.G.A. § 15-3-3.1. Henderson v. State, No. S17A1785, 2018 Ga. LEXIS 145 (Mar. 5, 2018).

Paragraph V. Review of cases in Court of Appeals.

JUDICIAL DECISIONS

Certification of question of law. — Because two conflicting decisions that governed a case regarding interpretation of O.C.G.A. § 15-11-521(b) were before the Supreme Court of Georgia on certiorari review, the court certified resolution of the case to the Supreme Court via a

certified question under Ga. Const. 1983, Art. VI, Sec. V, Para. IV. To await the Supreme Court’s decision would run afoul of the two-term rule, Ga. Const. 1983, Art. VI, Sec. IX, Para. II. In the Interest of J. F., 338 Ga. App. 15, 789 S.E.2d 274 (2016).

Paragraph VI. Decisions of Supreme Court binding.

JUDICIAL DECISIONS

Cited in In the Interest of J. F., 338 Ga. App. 15, 789 S.E.2d 274 (2016).

SECTION VII.

SELECTION, TERM, COMPENSATION, AND DISCIPLINE OF JUDGES

Paragraph	Paragraph
VI. Judicial Qualifications Commission; power; composition.	VII. Discipline, removal, and involuntary retirement of judges.

Paragraph I. Election; term of office.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would rewrite this paragraph to read: **“Selection; term of office.** (a) All superior court and state court judges shall be elected on a nonpartisan basis for a term of four years. All Justices of the Supreme Court and the Judges of the Court of Appeals shall be elected on a nonpartisan basis for a term of six years. The terms of all judges thus elected shall

begin the next January 1 after their election. All other judges shall continue to be selected in the manner and for the term they were selected on June 30, 1983, until otherwise provided by local law.

“(b) All state-wide business court judges shall serve a term of five years; provided, however, that the initial term of such judges shall be as provided by law. Such judges shall be appointed by the Governor, subject to approval by a majority vote of the Senate Judiciary Committee and a majority vote of the House Committee on

Judiciary. Such judges may be reappointed for any number of consecutive terms as long as he or she meets the qualifications of appointment at the time of each appointment and is approved as required by this subparagraph. The state-wide business court shall consist of the number of judges as provided for by law. For purposes of qualifications, state-wide business court judges shall be deemed to serve the geographical area of this state.”

Paragraph II. Qualifications.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would substitute “Appellate, superior, and state-wide business court”

for “Appellate and superior court” in subparagraph (a), and would add subparagraph (b.1) to read: “State-wide business court judges shall have such qualifications as provided by law.”

Paragraph III. Vacancies.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1130, § 1/HR 993, if ratified, would add a second sentence to read: “Vacancies in the state-wide busi-

ness court shall be filled by appointment of the Governor, subject to approval as specified in subparagraph (b) of Paragraph (I) of this section.”

Paragraph V. Compensation and allowances of judges.

JUDICIAL DECISIONS

Failure to pay supplement that had been paid to predecessor. — In a dispute between a county and a county state court judge over a supplement to the judge’s salary, summary judgment for the judge was proper on the county’s claim for reimbursement of the judge’s salary supplement because the county failed to show that the supplement was paid with the

total absence or want of power. Even if the supplement was paid in violation of the Open Meetings Act, O.C.G.A. § 50-14-1 et seq., the county’s counterclaim was filed well outside the 90-day limitation period in O.C.G.A. § 50-14-1(b)(2). *Heiskell v. Roberts*, 342 Ga. App. 109, 802 S.E.2d 385 (2017).

Paragraph VI. Judicial Qualifications Commission; power; composition.

(a) The General Assembly shall by general law create and provide for the composition, manner of appointment, and governance of a Judicial Qualifications Commission, with such commission having the power to discipline, remove, and cause involuntary retirement of judges as provided by this Article. Appointments to the Judicial Qualifications

Commission shall be subject to confirmation by the Senate as provided for by general law.

(b) The procedures of the Judicial Qualifications Commission shall comport with due process. Such procedures and advisory opinions issued by the Judicial Qualifications Commission shall be subject to review by the Supreme Court.

(c) The Judicial Qualifications Commission which existed on June 30, 2017, is hereby abolished. (Ga. Const. 1983, Art. 6, § 7, Para. 6; Ga. L. 2016, p. 878, § 1/HR 1113.)

Editor's notes. — The constitutional amendment (Ga. L. 2016, p. 878, § 1/HR 1113), which abolished the existing Judicial Qualifications Commission and cre-

ated a new Judicial Qualifications Commission, was ratified at the general election held on November 8, 2016.

JUDICIAL DECISIONS

Commission was not authorized to regulate judicial organizations. — Judicial Qualifications Commission's authority was limited to disciplining individual judges. Ga. Const. 1983, Art. VI, Sec. VII, Para. VI and VII, and did not extend to dictating whether the Georgia Council of State Court Judges could file an amicus brief in pending litigation; the Council was permitted to file such briefs pursuant to its duties and authority under Ga. Const. 1983, Art. VI, Sec. IX, Para. I, and O.C.G.A. § 15-7-26(b), although individual judges generally could not. In re Judicial Qualifications Comm'n Formal Advi-

sory Opinion No. 241, 301 Ga. 54, 799 S.E.2d 781 (2017).

Judicial Qualifications Commission was not authorized to pronounce the law in unsettled areas; therefore, its formal advisory opinion regarding the unsettled areas regarding whether the right of public access to the courts extended to children, or whether inquiries by security personnel amounted to a closure of the courts, exceeded its authority. In re Judicial Qualifications Comm'n Formal Advisory Opinion No. 239, 300 Ga. 291, 794 S.E.2d 631 (2016).

Paragraph VII. Discipline, removal, and involuntary retirement of judges.

(a) Any judge may be removed, suspended, or otherwise disciplined for willful misconduct in office, or for willful and persistent failure to perform the duties of office, or for habitual intemperance, or for conviction of a crime involving moral turpitude, or for conduct prejudicial to the administration of justice which brings the judicial office into disrepute. Any judge may be retired for disability which constitutes a serious and likely permanent interference with the performance of the duties of office. The Supreme Court shall adopt rules of implementation.

(b)(1) Upon indictment for a felony by a grand jury of this state or by a grand jury of the United States of any judge, the Attorney General or district attorney shall transmit a certified copy of the indictment to the Judicial Qualifications Commission. The commission shall, sub-

ject to subparagraph (b)(2) of this Paragraph, review the indictment, and, if it determines that the indictment relates to and adversely affects the administration of the office of the indicted judge and that the rights and interests of the public are adversely affected thereby, the commission shall suspend the judge immediately and without further action pending the final disposition of the case or until the expiration of the judge's term of office, whichever occurs first. During the term of office to which such judge was elected and in which the indictment occurred, if a nolle prosequi is entered, if the public official is acquitted, or if after conviction the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the judge shall be immediately reinstated to the office from which he was suspended. While a judge is suspended under this subparagraph and until initial conviction by the trial court, the judge shall continue to receive the compensation from his office. After initial conviction by the trial court, the judge shall not be entitled to receive the compensation from his office. If the judge is reinstated to office, he shall be entitled to receive any compensation withheld under the provisions of this subparagraph. For the duration of any suspension under this subparagraph, the Governor shall appoint a replacement judge. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof.

(2) The commission shall not review the indictment for a period of 14 days from the day the indictment is received. This period of time may be extended by the commission. During this period of time, the indicted judge may, in writing, authorize the commission to suspend him from office. Any such voluntary suspension shall be subject to the same conditions for review, reinstatement, or declaration of vacancy as are provided in this subparagraph for a nonvoluntary suspension.

(3) After any suspension is imposed under this subparagraph, the suspended judge may petition the commission for a review. If the commission determines that the judge should no longer be suspended, he shall immediately be reinstated to office.

(4)(A) The findings and records of the commission and the fact that the public official has or has not been suspended shall not be admissible in evidence in any court for any purpose.

(B) The findings and records of the commission shall not be open to the public except as provided by the General Assembly by general law.

(5) The provisions of this subparagraph shall not apply to any indictment handed down prior to January 1, 1985.

(6) If a judge who is suspended from office under the provisions of this subparagraph is not first tried at the next regular or special term following the indictment, the suspension shall be terminated and the judge shall be reinstated to office. The judge shall not be reinstated under this provision if he is not so tried based on a continuance granted upon a motion made only by the defendant.

(c) Upon initial conviction of any judge for any felony in a trial court of this state or the United States, regardless of whether the judge has been suspended previously under subparagraph (b) of this Paragraph, such judge shall be immediately and without further action suspended from office. While a judge is suspended from office under this subparagraph, he shall not be entitled to receive the compensation from his office. If the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the judge shall be immediately reinstated to the office from which he was suspended and shall be entitled to receive any compensation withheld under the provisions of this subparagraph. For the duration of any suspension under this subparagraph, the Governor shall appoint a replacement judge. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof. The provisions of this subparagraph shall not apply to any conviction rendered prior to January 1, 1987. (Ga. Const. 1983, Art. 6, § 7, Para. 7; Ga. L. 1984, p. 1722, § 1/SR 267; Ga. L. 1986, p. 1619, §§ 1, 2/HR 506; Ga. L. 2016, p. 896, § 2/HR 1113.)

Editor's notes. — The constitutional amendment (Ga. L. 2016, p. 896, § 2/HR 1113), which revised subparagraph (4) of subparagraph (b) by designating the first sentence as subparagraph (A), and designating the second sentence as subparagraph (B) and adding “except as provided by the General Assembly by general law” at the end, was ratified at the general election held on November 8, 2016.

nating the second sentence as subparagraph (B) and adding “except as provided by the General Assembly by general law” at the end, was ratified at the general election held on November 8, 2016.

JUDICIAL DECISIONS

Commission was not authorized to regulate judicial organizations. — Judicial Qualifications Commission's authority was limited to disciplining individual judges. Ga. Const. 1983, Art. VI, Sec. VII, Para. VI and VII, and did not extend to dictating whether the Georgia Council of State Court Judges could file an amicus brief in pending litigation; the Council was permitted to file such briefs pursuant to its duties and authority under Ga. Const. 1983, Art. VI, Sec. IX, Para. I, and O.C.G.A. § 15-7-26(b), although individual judges generally could not. In re Judicial Qualifications Comm'n Formal Advisory Opinion No. 241, 301 Ga. 54, 799 S.E.2d 781 (2017).

sory Opinion No. 241, 301 Ga. 54, 799 S.E.2d 781 (2017).

Supreme Court had authority to review Judicial Qualifications Commission's advisory opinions. — Although a petition filed by a council of state court judges seeking review of the Judicial Qualifications Commission's (JQC) formal advisory opinion regarding public access to courtrooms presented no justiciable controversy, the court had authority to review the opinion; Ga. Const. 1983, Art. VI, Sec. VII, Para. VII(a), vested the court with the authority to adopt rules for the JQC, and JQC Rule 22(b) required the

JQC to reconsider its formal advisory opinions at the court’s request. In re Judicial Qualifications Comm’n Formal Advisory Opinion No. 239, 300 Ga. 291, 794 S.E.2d 631 (2016).

Paragraph VIII. Due process; review by Supreme Court.

JUDICIAL DECISIONS

Cited in In re Judicial Qualifications Comm’n Formal Advisory Opinion No. 239, 300 Ga. 291, 794 S.E.2d 631 (2016).

SECTION IX.

GENERAL PROVISIONS

Paragraph I. Administration of the judicial system; uniform court rules; advice and consent of councils.

JUDICIAL DECISIONS

Commission was not authorized to regulate judicial council. — udicial Qualifications Commission’s authority was limited to disciplining individual judges. Ga. Const. 1983, Art. VI, Sec. VII, Para. VI and VII, and did not extend to dictating whether the Georgia Council of State Court Judges could file an amicus brief in pending litigation; the Council was permitted to file such briefs pursuant to its duties and authority under Ga. Const. 1983, Art. VI, Sec. IX, Para. I, and O.C.G.A. § 15-7-26(b), although individual judges generally could not. In re Judicial Qualifications Comm’n Formal Advisory Opinion No. 241, 301 Ga. 54, 799 S.E.2d 781 (2017).

Separation of powers challenge to

statute governing sealing of court records not viable. — Because an appeal of the denial of a motion to seal a criminal record under O.C.G.A. § 35-3-37(m) failed to present a viable challenge to the statute’s constitutionality, Ga. Const. 1983, Art. VI, Sec. VI, Para. II(1), because the challenge (a separation of powers argument, Ga. Const. 1983, Art. I, Sec. II, Para III, based on the Supreme Court’s record-keeping authority under Ga. Const. 1983, Art. VI, Sec. IX, Para. I, and Ga. Unif. Super. Ct. R. 21.4) was not raised below, jurisdiction was properly before the Court of Appeals, pursuant to O.C.G.A. § 5-6-34(a)(12). Doe v. State, No. S17A1694, 2018 Ga. LEXIS 126 (Mar. 5, 2018).

Paragraph II. Disposition of cases.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Certification of question of law. — Because two conflicting decisions that governed a case regarding interpretation

of O.C.G.A. § 15-11-521(b) were before the Supreme Court of Georgia on certiorari review, the court certified resolution of the case to the Supreme Court via a certified question under Ga. Const. 1983,

General Consideration (Cont'd)

Art. VI, Sec. V, Para. IV. To await the Supreme Court’s decision would run afoul of the two-term rule, Ga. Const. 1983, Art.

VI, Sec. IX, Para. II. In the Interest of J. F., 338 Ga. App. 15, 789 S.E.2d 274 (2016).
Cited in Bridges v. Collins-Hooten, 339 Ga. App. 756, 792 S.E.2d 721 (2016).

ARTICLE VII.

TAXATION AND FINANCE

SECTION I.

POWER OF TAXATION

Paragraph I. Taxation; limitations on grants of tax powers.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Delegation of powers. — Delegation of the power to tax, and the laying of a tax, are two things. The constitutional provision requiring revenue bills to originate in

the House applies to an Act which lays a tax, and does not apply to an Act which merely delegates the power to tax. Harper v. Commonwealth of the Town of Elberton, 23 Ga. 566 (1857).

Paragraph III. Uniformity; classification of property; assessment of agricultural land; utilities.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2018, p. 1127, § 1/HR 51, if ratified, would rewrite subparagraph (f) to read: “(f)(1) The General Assembly shall provide by general law for the definition, methods of assessment, and taxation, such methods to include a formula based on current use, annual productivity, and real property sales data, of ‘forest land conservation use property’ to include only forest land of at least 200 acres in aggregate which lies within one or more counties, provided that such forest land is in parcels of at least 100 acres within any given county.

“(2)(A) Any individual or individuals or any entity registered to do business in this state desiring the benefit of such methods of assessment and taxation for forest land conservation use property shall be required to enter into a covenant to continue the property in forest land use.

“(B) All contiguous forest land conservation use property of an owner within a county for which forest land conservation use assessment is sought under this subparagraph shall be in a single covenant.

“(C) A breach of such covenant within ten years shall result in a recapture of the tax savings resulting from such methods of assessment and taxation and may result in other appropriate penalties.

“(D) The General Assembly may provide by general law for a limited exception to the 200 acre requirement in the case of a transfer of ownership of all or a part of the forest land conservation use property during a covenant period to another owner qualified to enter into an original forest land conservation use covenant if the original covenant is continued by both such acquiring owner and the transferor for the remainder of the term, in which event no breach of the covenant shall be deemed to have occurred even if the total size of a

tract from which the transfer was made is reduced below 200 acres.

“(3) No portion of an otherwise eligible tract of forest land conservation use property shall be entitled to receive simultaneously special assessment and taxation under this subparagraph and either subparagraph (c) or (e) of this Paragraph.

“(4)(A) The General Assembly shall appropriate an amount for assistance grants to counties, municipalities, and county and independent school districts to offset revenue loss attributable to the implementation of this subparagraph. Such grants shall be made in such manner and shall be subject to such procedures as may be specified by general law. For the years 2019, 2020, 2021, 2022, and 2023, the value of the assistance grants may be increased by general law beyond the amounts prescribed by this subparagraph.

“(B)(i) If the forest land conservation use property is located in a county, municipality, or county or independent school district where forest land conservation use value causes an ad valorem tax revenue reduction of 3 percent or less due to the implementation of this subparagraph, in each taxable year in which such reduction occurs, the assistance grants to the county, each municipality located therein, and the county or independent school districts located therein shall be in an amount equal to 50 percent of the amount of such reduction.

“(ii) If the forest land conservation use property is located in a county, municipality, or county or independent school district where forest land conservation use value causes an ad valorem tax revenue reduction of more than 3 percent due to the implementation of this subparagraph, in each taxable year in which such reduction occurs, the assistance grants to the county, each municipality located therein, and the county or independent school districts located therein shall be for the first 3 percent of such reduction amount, in an amount equal to 50 percent of the amount of such reduction and, for the remainder of such reduction amount, in an amount equal to 100 percent of the amount of such remaining reduction amount.

“(C)(i) Such revenue reduction shall be

determined by subtracting the aggregate forest land conservation use value of qualified properties from the aggregate forest land fair market value of qualified properties for the applicable tax year and the resulting amount shall be multiplied by the millage rate of the county, municipality, or county or independent school district.

“(ii) For purposes of this subparagraph, the forest land conservation use value shall not include the value of the standing timber located on forest land conservation use property.

“(iii) For the purposes of this subparagraph, forest land fair market value means the fair market value of the forest land as determined in 2016, provided that such value shall change in 2019 and every three years thereafter to the fair market value of forest land as determined in such year.

“(D) Notwithstanding subparagraph (a) of Paragraph VI of Section IX of Article III of this Constitution, the General Assembly may provide by general law for a fee, not to exceed 5 percent, to be deducted from such assistance grants and retained by the state revenue commissioner to provide for the costs to the state of administering the provisions of subparagraph (f.1) of this Paragraph.”; and would add subparagraph (f.1), to read: “(f.1)(1)(A) The General Assembly shall be authorized by general law to establish a separate class of property for ad valorem taxation purposes that includes only tangible real property that has as its primary use the production of trees for the primary purpose of producing timber for commercial uses and that meets such further requirements as may be prescribed by general law. Such property shall be known as ‘qualified timberland property.’

“(B) The value of qualified timberland property shall be at least 175 percent of such property’s forest land conservation use value as determined pursuant to subparagraph (f) of this Paragraph.

“(2) The only two purposes authorized by the subclassification of qualified timberland property as provided by this subparagraph shall be to allow the General Assembly by general law to:

“(A) Provide that the Department of

Revenue shall appraise qualified timberland property at its fair market value using any combination of appraisal methodologies otherwise provided by general law for establishing the fair market value of real property, provided that such methodology is not subject to an exception authorized by subparagraph (b), (c), (d), (e), (f), or (g) of this Paragraph; and

“(B) Authorize the General Assembly to provide for a separate system by which to appeal appraisals of and determinations made related to qualified timberland property.”

Law reviews. — For annual survey on local government law, see 69 Mercer L. Rev. 205 (2017).

JUDICIAL DECISIONS

ANALYSIS

UNIFORMITY OF TAXATION

Uniformity of Taxation

Property valuation by method other than standard method.

Inasmuch as O.C.G.A. § 48-5-2(3)(B.1) exempted the low-income housing tax credits from consideration in determining the fair market value of the properties, the statute granted preferential treat-

ment for ad valorem taxation purposes and created a subclass of tangible property other than as permitted by the State Constitution, Ga. Const. 1983, Art. VII, Sec. I, Para. III (b), which ran afoul of the taxation uniformity provision. *Heron Lake II Apts., L. P. v. Lowndes County Bd. of Tax Assessors*, 299 Ga. 598, 791 S.E.2d 77 (2016).

OPINIONS OF THE ATTORNEY GENERAL

Administrative caps on assistance grants prohibited. — Because neither Ga. Const. 1983, Art. VII, Sec. I, Para. III nor the Forest Land Protection Act, O.C.G.A. § 48-5-7.7, authorize or contemplate a cap on assistance grants based on the total exemption value of forest land

conservation use property, the Department of Revenue would not be authorized to impose an administrative cap on assistance grants issued pursuant to the Forest Land Protection Act of 2008 in the manner proposed. 2016 Op. Att’y Gen. No. 16-5.

ARTICLE VIII.
EDUCATION

SECTION V.

LOCAL SCHOOL SYSTEMS

Editor’s notes. — The constitutional amendment proposed in Ga. L. 2015, p. 1498, § 1/SR 287, which would have added a new Paragraph VIII, relating to

the creation of an Opportunity School District, was defeated in the general election held on November 8, 2016.

Paragraph I. School systems continued; consolidation of school systems authorized; new independent school systems prohibited.

JUDICIAL DECISIONS

Suit challenging carrying weapon in school safety zone properly dismissed. — Trial court properly dismissed the plaintiff's suit challenging the enforcement of O.C.G.A. § 16-11-127.1(b)(1), making it a crime to carry a firearm in a school safety zone, by the school that the plaintiff's child attended because the

school had sovereign immunity against state law claims and the threat of arrest if the plaintiff brought a weapon in the school safety zone did not constitute a Fourth Amendment violation to be remedied by the suit. *Evans v. Gwinnett County Public Schools*, 337 Ga. App. 690, 788 S.E.2d 577 (2016).

SECTION VI.

LOCAL TAXATION FOR EDUCATION

Paragraph IV. Sales tax for educational purposes.

Proposed amendment. — Amendment of the Georgia Constitution proposed by Ga. L. 2017, p. 857, § 1/SR 95, if ratified, would amend subsections (a) and (g) to read as follows: “(a) The board of education of each school district in a county in which no independent school district is located may by resolution and the board of education of each county school district and the board of education of each independent school district located within such county may by concurrent resolutions impose, levy, and collect a sales and use tax for educational purposes of such school districts conditioned upon approval by a majority of the qualified voters residing within the limits of the local taxing jurisdiction voting in a referendum thereon. In addition, when a county school district has one or more independent school districts located within such county, the school district or combination of school districts that has a majority of the students enrolled within the county, based on the latest full time equivalent count, shall be authorized to call for a referendum to impose, levy, and collect a sales and use tax for educational purposes of such school districts conditioned upon approval by a majority of the qualified voters residing within the limits of the county voting in a referendum thereon. This tax shall be at the rate of 1

percent and shall be imposed for a period of time not to exceed five years, but in all other respects, except as otherwise provided in this Paragraph, shall correspond to and be levied in the same manner as the tax provided for by Article 3 of Chapter 8 of Title 48 of the Official Code of Georgia Annotated, relating to the special county 1 percent sales and use tax, as now or hereafter amended. Proceedings for the reimposition of such tax shall be in the same manner as proceedings for the initial imposition of the tax, but the newly authorized tax shall not be imposed until the expiration of the tax then in effect.

“(g) The net proceeds of the tax shall be distributed between the county school district and the independent school districts, or portion thereof, located in such county according to an agreement between the county school system and the independent school district or districts or, if no agreement can be reached, according to the ratio the student enrollment in each school district, or portion thereof, bears to the total student enrollment of all school districts in the county or upon such other formula for distribution as may be authorized by local law. For purposes of this subparagraph, student enrollment shall be based on the latest full-time equivalent count prior to the referendum on imposing the tax.”

ARTICLE IX.
COUNTIES AND MUNICIPAL CORPORATIONS

SECTION I.
COUNTIES

Paragraph III. County officers; election; term; compensation.

JUDICIAL DECISIONS

ANALYSIS

COUNTY OFFICERS

1. IN GENERAL

County Officers

1. In General

Sovereign immunity to deputy. — Deputy sheriff in the deputy’s official capacity was entitled to sovereign immunity

with respect to a former inmate’s claims arising from denial of a dietary request; the sheriff’s powers were derived from the state, and provision of food to county jail inmates was a state function. *Lake v. Skelton*, 840 F.3d 1334 (11th Cir. 2016).

SECTION II.

HOME RULE FOR COUNTIES AND MUNICIPALITIES

Paragraph I. Home rule for counties.

JUDICIAL DECISIONS

ANALYSIS

EXCEPTIONS TO COUNTY POWERS

Exceptions to County Powers

Sovereign immunity of deputy sheriff. — Deputy sheriff in the deputy’s official capacity was entitled to sovereign immunity with respect to a former in-

mate’s claims arising from denial of a dietary request; the sheriff’s powers were derived from the state, and provision of food to county jail inmates was a state function. *Lake v. Skelton*, 840 F.3d 1334 (11th Cir. 2016).

Paragraph III. Supplementary powers.

Law reviews. — For article, “The Municipalization of Urban Counties in Georgia,” see 23 Ga. Bar. J. 18 (Dec. 2017).

Paragraph VIII. Limitation on the taxing power and contributions of counties, municipalities, and political subdivisions.

Law reviews. — For annual survey on local government law, see 68 Mercer L. Rev. 199 (2016).

Paragraph IX. Immunity of counties, municipalities, and school districts.

JUDICIAL DECISIONS

Application to counties.

In a detainee’s suit against a sheriff, county, and city arising out of the detainee’s improper detention, the defendants’ motion to dismiss was denied as to the sheriff’s individual liability for violations of federal law, and for failure to update the detainee’s criminal record as required by O.C.G.A. § 42-4-7 and bring the detainee before a judicial officer; however, claims against the city and county were dismissed based on immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) and Ga. Const. 1983, Art. IX, Sec. II, Para. IX. *Purvis v. City of Atlanta*, 142 F. Supp. 3d 1337 (N.D. Ga. 2015).

Application to city.

In a wrongful death case, the trial court properly denied a city summary judgment on the plaintiffs’ negligence and nuisance

claims based on the obstruction in the line of sight caused by a tree as a jury had to determine whether the tree located on the city’s right of way obstructed the view of oncoming traffic such that the tree was a defect within the meaning of O.C.G.A. § 32-4-93. *Mayor & Aldermen of Savannah v. Herrera*, 343 Ga. App. 424, 808 S.E.2d 416 (2017).

Nuisance exception. — Trial court properly denied a city’s motion to dismiss based on sovereign immunity because the landowners asserted that the damage from the city’s drainage system amounted to an unlawful taking of their property for which sovereign immunity has been waived. *City of Greensboro v. Rowland*, 334 Ga. App. 148, 778 S.E.2d 409 (2015), cert. denied, No. S16C0305, 2016 Ga. LEXIS 154 (Ga. 2016).

SECTION VI.

REVENUE BONDS

Paragraph IV. Validation.

JUDICIAL DECISIONS

Validation not conclusive on issue of exemption from property tax. —

Two bond validation orders pertaining to a hospital authority’s establishment of a continuing care retirement center did not conclusively determine, for purposes of O.C.G.A. § 48-5-41(a)(1)(A), that the

property was public property exempt from ad valorem taxation; remand was required for the trial court to address taxability. *Columbus Board of Tax Assessors v. Medical Ctr. Hosp. Auth.*, 302 Ga. 358, 806 S.E.2d 525 (2017).

ARTICLE X.
AMENDMENTS TO THE CONSTITUTION

SECTION I.
CONSTITUTION, HOW AMENDED

Paragraph I. Proposals to amend the Constitution; new Constitution.

JUDICIAL DECISIONS

Cited in *Fulton County v. City of Atlanta*, 299 Ga. 676, 791 S.E.2d 821 (2016).

ARTICLE XI.
MISCELLANEOUS PROVISIONS

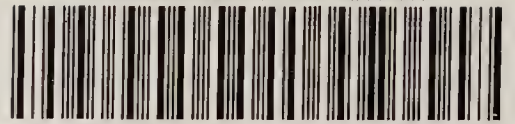
SECTION I.
MISCELLANEOUS PROVISIONS

Paragraph IV. Continuation of certain constitutional amendments for a period of four years.

JUDICIAL DECISIONS

Cited in *Fulton County v. City of Atlanta*, 299 Ga. 676, 791 S.E.2d 821 (2016).

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